NELSON MANDELA UNIVERSITY

THE USE OF POLICE FORCE IN CROWD MANAGEMENT

ANDREW PAUL MOSES

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NELSON MANDELA UNIVERSITY

THE USE OF POLICE FORCE IN CROWD MANAGEMENT

by

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DEDICATION

I dedicate this study to all the members of the South African Police Service. Never forget that you are the unseen heroes who keep us safe and allow us the freedom to enjoy the liberties that come from living in a constitutional state. “I salute you!”

‘*Victorious warriors win first, and then go to war, while defeated warriors go to war first, and then seek to win’*- **Sun Tzu** - The art of War.

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LIST OF ACRONYMS AND ABBREVIATIONS

AJ	-	Acting judge
AJA	-	Acting judge of appeal
APCOF	-	African Policing Civilian Oversight Forum
BPUFF	-	Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
CJ	-	Chief Justice (head of the Constitutional Court)
CPA	-	Criminal Procedure Act
CPAA	-	Criminal Procedure Amendment Act
CSVR	-	Centre for the Study of Violence and Reconciliation
DJP	-	Deputy Judge President
DP	-	Deputy President of the Constitutional Court
ECHR	-	European Convention on Human Rights
FCA	-	Firearms Control Act
ICD	-	Independent Complaints Directorate
IPID	-	Independent Police Investigative Directorate
ISD	-	Internal Stability Division
ISS	-	Institute for Security Studies
J	-	Judge
JA	-	Judge of the appeal
JJ	-	Justices
JP	-	Judge President
NGO	-	Non-governmental organisation
NI	-	National Instruction
P	-	President of the Supreme Court of Appeal
POP	-	Public order police

RGA	-	Regulation of Gatherings Act
S	-	Section
SAHO	-	South African History Online
SAHRC	-	South African Human Rights Commission
SAPS	-	South African Police Service
SO	-	Standing order
SO(G)	-	Standing Order General
UNDHR	-	Universal Declaration of Human Rights

SUMMARY

South Africa has a violent and oppressive past. They are various historical incidents[1] of extreme cruelty perpetrated by the previous apartheid regime. Much of the modern South African democratic state was forged by protests. During the 1970s and 80s, the legislator by passing unjust laws was used to assist the government to maintain the oppression of the people of South Africa.

From the Soweto uprising in the 1970s to the current service delivery protests of the 21st century, gatherings have always had the potential for deadly violence. The motivation for this research started with the emotions evoked by the iconic picture of the body of Hector Pietersen[2] being carried after being shot by the police. Strikingly the images of the killing by the police of Andries Tatane conjured further questions concerning the use of deadly force within crowd management situations.

The research undertook an analysis of the use of force by the police during crowd management situations. A brief analysis of South African law relating to the use of force by the police prior to 1996 is provided.

There are legislative prescripts for the use of force during the maintenance of public order. It must be noted that the legislation falls short on providing clear, concise authority for the use of deadly force. Normally, the use of force by the police and civilians for the purpose of arrest is regulated by the Criminal Procedure Act[3], whereas the Regulation of Gatherings Act[4] providing the authority for the use of force by the police in crowd management situations to preserve public order. At first glance, section 49 of the CPA seems to validate arguments that it violates some constitutionally protected rights, among which are the right to dignity, life, to freedom and security of the person, against cruel, inhuman or degrading treatment or punishment and to a fair

1 SAHO "The June 16 Soweto Youth Uprising" (17 June 2022) https://www.sahistory.org.za/article/june-16-soweto-youth-uprising (accessed 2022-08-08).

2 SAHO "Hector Pieterson" (18 June 2021) https://www.sahistory.org.za/people/hector-pieterson (accessed 2022-08-08).

3 51 of 1977.

4 205 of 1993.

trial, which includes the right to be presumed innocent. Section 49 however, withstood Constitutional muster as set out in *Re: S v Walters & another.*

As the right to life is a non derogable right.[5] The limitation of this right may lead to constitutional scrutiny. The emphasis will thus be on ensuring that the balance with regards to proportionality in the use of deadly force is maintained.

During the research it became apparent that the police, especially during crowd management situations, served political interests.[6] This had the unintended consequence that the laws were applied to suit the political narrative and not the rule of law.

The use of force in the policing arena is controversial. It is very clear that any misuse of force in crowd management situations will evoke the historical wounds associated with apartheid. However, within crowd management, the use of force and the authority to use deadly force is absolutely necessary.

The Marikana massacre was used to highlight the mistakes that police have made during inappropriate use of force and its catastrophic consequences.[7] It was observed that the legislative framework concerning the use of force, whether under section 49 of the CPA or section 9 of the RGA, is incoherent and too complex. The research argues for simplicity and accuracy within policy and applicable legislative alignment. The linkages from the applicable legislation to the institutional policies should never be outdated or incorrectly formulated.

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5 Table of non-derogable rights under section 37 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

6 Bruce "Marikana and the Doctrine of Maximum Force" (2012) https://justice.gov.za/comm-mrk/exhibits/Exhibit-FFF-14.pdf (accessed 2022-11-27) 15.

7 SAHO "Marikana Massacre 16 August 2012" (31 August 2022) https://www.sahistory.org.za/article/marikana-massacre-16-august-2012 (accessed 2022-10-01) 1.

The violent rhetoric from politicians such as ex-president Jacob Zuma,[8] Minister Fikile Mbalula [9] and Bheki Cele[10] fuels the argument that the police are susceptible to misdirected notions and may cause the police act unlawfully.

The Constitution requires the police to "enforce the law"[11] and as such there is an obligation on the police to do this within the constitutional parameters. The correct use of deadly force will only be achieved if the SAPS adequately resource, train and regularly refresh their members regarding the use of force when policing protests.

8 Newswire "Zuma Warns Criminals That 'Police Will Fight Back'" (6 September 2015) https://www.sowetanlive.co.za/news/2015-09-06-zuma-warns-criminals-police-will-fight-back/ (accessed 2022-07-02).

9 Ferreira "Shoot the Bastards" (12 November 2009) https://mg.co.za/article/2009-11-12-shoot-the-bastards-mbalula-says-of-criminals/ (accessed 2022-07-04).

10 Goldstone "Police Must Shoot To Kill, Worry Later – Cele" (1 August 2009) https://www.iol.co.za/news/south-africa/police-must-shoot-to-kill-worry-later-cele-453587 (accessed 2022-07-04).

11 S 205(3) of the Constitution of the Republic of South Africa, 1996.

CHAPTER ONE
INTRODUCTION TO THE RESEARCH

1.1 Introduction

The use of force in crowd management situations is controversial. The Constitution of South Africa guarantees the right to assemble peacefully.[1] During the previous political dispensation, parliament was sovereign[2] and fundamental human rights[3] were not constitutionally protected. During apartheid the police were used as an oppressive tool. The legislated mandate, provided by the Riotous Assemblies Act[4] and the Criminal Procedure Act,[5] allowed indiscriminate use of force.

Prior to the amendment of section 49 of the CPA, the application of the use of force created a trivial equation[6] between the right to life and the legislative power that was easily manipulated to justify the taking of human life.[7]

The disproportionate use of deadly force under the apartheid regime led to the killing of citizens in South Africa. An example was the Sharpeville massacre[8] where 69 unarmed protestors were shot by police. The legislative prescripts, at that time,[9] allowed for the systematic, justifiable killing of citizens through the working of the inadequate force model depicted in section 49 of the Criminal Procedure Act [10] and

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1 S 17 of the Constitution of the Republic of South Africa, 1996.

2 Parliamentary UK Parliament "Chapter 7: The Rule of Law and Parliamentary Sovereignty" (September 2020) https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/151/15110.htm (accessed 2022-09-30); Dlamini "Parliamentary sovereignty, a Bill of Rights and Judicial review" 1989 November *De Rebus* 865-871 at 865.

3 Ch 2 of the Constitution of the Republic of South Africa, 1996.

4 17 of 1956.

5 51 of 1977.

6 See *S v Basson* 1961 (3) SA 279 (T), where the court held that "to seriously assault [shoot] the offender for this type of offence could not be justified".

7 See the former s 49 CPA.

8 SAHO "Sharpeville Massacre, 21 March 1960" (18 March 2022) https://www.sahistory.org.za/article/sharpeville-massacre-21-march-1960 (accessed 2022-08-15).

9 S 49 can be traced back to s 1 of Ordinance 2 of 1837 (Cape), s 44 of the Criminal Procedure and Evidence Act 31 of 1917 and s 31 of the Criminal Procedure Act 56 of 1955.

10 51 of 1977. The relevant provision of s 49 of the CPA reads:
"(1) …

section 8 of the Riotous Assemblies Act.[11] These legislative provisions provided the foundation for the impunity concerning the use of force that exists in the police today. The failure of the legislature to create legitimate legal authority for the use of deadly force in crowd management situations is a flaw in a democratic society, particularly in South Africa where there is a propensity for violence. This is evident in the number of violent protests and looting in South Africa.[12]

With the advent of the Constitution, the protection of human rights came to the fore. The right to life, as stated in section 11 of the Constitution, was the emphasis in the *S v Makwanyane*,[13] which altered the perceptions with which the police viewed the application of state-sanctioned violence against the citizenry. The use of force in crowd management situations must meet the constitutional standard. Excessive force will not be allowed in a country that has a supreme Constitution where rights such as a person's freedom and security, life, privacy, assembly, and others are held in such high esteem.

This proverbial "cape of fundamental rights" not only protects the citizenry from arbitrary violence and oppressive policies but also allows the police to work in a manner that gives effect to their Constitutional mandate.[14]

Scrutiny by the courts of section 49 of the CPA in *Govender v Minister of Safety and Security*[15] case and later in *S v Walters*[16] led to the amendment of section 49. It must be noted that the amendment did not address the use of deadly force in crowd management situations. The Constitutional mandate of the police to maintain public

(2) Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground of having committed such an offence, and the person authorised under this Act to arrest or to assist is arresting him cannot arrest him or prevent him from fleeing by other means than killing him, the killing shall be deemed to be justifiable homicide".

11 See fn 8.

12 ISS Crime Hub "Public Protest and Violence Map" (undated) https://issafrica.org/crimehub/maps/public-protest-and-violence-stats (accessed 2022-09-30).

13 1995 (3) SA 391 CC.

14 S 205 of the Constitution.

15 2001 2 SACR 197 (SCA).

16 2002 2 SACR 105 (CC).

order will be enhanced when the stipulations relating to the use of force in crowd management situations are clear and concise.

The current guidelines concerning the use of force are found within the CPA, the Regulation of Gatherings Act[17] and the National Instruction on Crowd Management.[18]

Although the Constitution allows citizens the right to demonstrate peacefully,[19] recent protests have been more violent and destructive. Omar concurs with the statistics of the Institute for Security Studies (ISS) that "violent protests are on an all-time high".[20] This escalation in violent protests necessitates a need that public order policing legislation should be aligned to respond adequately to this issue. This can be achieved through the amendment of section 49 to include use of deadly force within crowd management situations.

It must be noted that although legislative prescripts are in place, the policing of protests has evolved in South Africa from an escalation of force model to a negotiated management model. For these strategies to be effective, the applicable laws should complement the strategies. In a constitutional democracy, the police should "manage" and not "control" protestors.[21] This may seem like a simple semantic change but in the South African context, it is a fundamental paradigm shift. It is submitted that the police did not make this "shift". The legislature must guide the police effectively concerning the use of force in crowd management. It is conceded that most demonstrations are peaceful, but when they turn violent and destructive the police must have clear guidelines to deal with protestors decisively. South Africa has legitimate competing interests; the right to protest *vis-à-vis* the obligation by the police to uphold public order.

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17 205 of 1993.

18 National Instruction 4 of 2014; National Municipal Policing Standard: Crowd Management.

19 S 17 of the Constitution stipulates, "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions".

20 Defenceweb "Crowd Control is One of the SAPS Most Important Functions" (30 Sept 2011) https://www.defenceweb.co.za/security/civil-security/crowd-control-is-one-of-the-sapss-most-important-functions (accessed 2022-08-18).

21 Omar "Crowd Control: Can Our Public Order Police Still Deliver?" (2006) https://journals.assaf.org.za/index.php/sacq/article/view/1001 (accessed 2022-08-18) 7.

Policing of crowds or demonstrations from the 1960s until the 1980s were based on riot control. In a democracy, the policing of crowds needs paradigm shift from "riot control" to "crowd management". It will be argued that such a paradigm shift has not occurred. In part this is due to the fact that legislation is lacking on key aspects of use of deadly force within such arenas. A consequence of this failure by the police to make the paradigm shift is the resultant deaths caused by police action during crowd management situations.[22] Furthermore, the legislature has failed to identify and address a fundamental gap by not providing the police with legal authority to use deadly force in crowd management situations. It is noted that there are various types of "gatherings" and that not all gatherings require the use of deadly force, but a provision is required. The Regulation of Gatherings Act[23] determines that there are demonstrations, picketing and gatherings; each with unique character but all have the potential to turn violent. Due to this inherent risk, the police should have clear legislative guidelines to protect life and limb or "critical infrastructure" from violent crowds. It is submitted that a stipulation that allows the use of deadly force is required.[24]

The Regulation of Gatherings Act[25] falls short of defining a "violent" crowd and leaves interpretation open to the discretion of the police officer, which increases the risk of erroneous decisions being made.

Violent service delivery protest is a daily occurrence in South Africa and the reason that the legislator stipulates the correct circumstances for the application of force. Rightly so, as Chaskalson P (as he then was) held in *S v Makwanyane*[26] that the use of force to arrest a person should be the final action step but in violent crowd situations the use of force requires a varied approach.

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22 IPID annual report 2020/2021 38.

23 205 of 1993.

24 International Association for Chiefs of Police Law Enforcement Center "Crowd Management" (April 2019) https://www.theiacp.org/sites/default/files/2020-08/Crowd%20Management%20FULL%20-%2008062020.pdf (accessed 2022-11-30).

25 205 of 1993.

26 *S v Makwanyane supra* par 140.

Adequate training in the police service is lacking. When inconsistency in training occurs the police run the risk of facing situations that spiral beyond their control. This inadvertently leads to an inappropriate application of force. The importance of this aspect is underpinned by the view held by the African Policing Civilian Oversight Forum (APCOF)[27] which stipulates that two imperatives in creating a professional approach to the use of force by the police are consistency and high standards of training.

Recent incidents of the incorrect application of the use of force indicate how the decisions to implement force has compromised the human rights culture that is purported to exist in South Africa.[28]

Real-life dangers exist for police members during the execution of their duties. There is thus a fundamental need for the police to defend themselves when the situation so requires. Despite the high police mortality rate,[29] South Africa has a significantly high number of pay-outs by the police[30] for wrongful or inappropriate use of force.

As stated above, the authority to use deadly force is stipulated in section 49 of the CPA. This predicates a lacuna in the Regulation of Gatherings Act, which is silent on the use of deadly force. A "one-size-fits-all" narrative by the legislature creates a falsehood because crowd management or maintenance of public order is very different than normal resistance against arrest as depicted within section 49. The idea that section 49 thus covers all "deadly force" situations are out of touch with the societal reality of violent protests in South Africa.

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27 CSVR "Police and the Use of Force in South Africa: Time for a New Approach" (undated) https://www.csvr.org.za/docs/Anewapproachtotheuseofforcebrochure.pdf (accessed 2022-06-16).

28 SAHO "The Death of Andries Tatane" (30 September 2019) https://www.sahistory.org.za/dated-event/death-andries-tatane (accessed 2022-06-17).

29 World Population Review "Police Killings by Country 2022" (undated) https://worldpopulationreview.com/country-rankings/police-killings-by-country (accessed 2022-06-30); Hyman "A Cop is Killed Every Four Days in SA" (9 June 2016) https://www.timeslive.co.za/news/south-africa/2016-06-09-a-cop-killed-every-four-days-in-sa/ (accessed 2022-06-30).

30 Rademeyer "SA Police Face R14 Billion in Civil Law Suits, Not R7 Billion as Reported" (22 April 2013) https://africacheck.org/ (accessed 2022-06-30).

Usually, little or no attention is paid to international trends on the use of force by operational police officers and this phenomenon exacerbates unlawful actions. Lessons learnt by other law enforcement agencies should be examined to determine best practices.

It must be stated that the application of force in a contact situation is over in a matter of seconds. The ability of the police member to form a justifiable shooting decision should be referenced from a proper understanding of the statutory prescriptions.[31]

Section 205(3) of the Constitution requires the SAPS to "maintain public order". Although arrest is a drastic and severe action step to achieve the constitutional goals, it presents a conundrum to the police member because there will be competing fundamental interests at play.

When arrests are met with resistance, section 49 of the CPA is the authority that allows the use of force. This narrow view should be applied *mutatis mutandis* to crowd management situations. Case law in South Africa supports the view that the purpose of arrest is to secure the attendance of the accused in court[32] and not to punish, degrade, humiliate or in any other way derogate the arrested person's fundamental rights. Force to effect an arrest cannot be equated to the force required to quell a violent crowd. The level of civil disturbance or disobedience should be factored into the force equation, as well as the propensity for violence displayed by the crowd.[33] Stipulating that force may only be used when there is resistance to arrest negates the rights of the police officer to self-preservation in a violent crowd situation.

When a police officer decides to execute an arrest, the officer needs to be wary of the citizen's constitutional rights contained in the applicable legislation, as set out above. The SAPS Act, in section 13(3) stipulates that:

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31 S 49 of the CPA; ss 13 and 39 SAPS Act.

32 *Tsose v Minister of Justice* 1951 (3) SA 10 (A) 17G–H; *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 SACR 105 CC 134E.

33 Munoz and Anduiza "If a Fight Starts, Watch the Crowd' The Effect of Violence on Popular Support for Social Movements" (12 February 2019) http://www.ub.edu/polexp/wp-content/uploads/2019/07/If_a_Fight_Starts__Watch_the_Crowd___The_Effect_of_Violence_on_Popular_Support_for_Protest_Movements___Copy_.pdf (accessed 2022-09-18).

"(a) A member who is obliged to perform an official duty, **shall**, with due regard to his/her powers, duties and functions, perform such duty in a manner that is **reasonable** in the circumstances.

(b) Where a member who performs an official duty is authorized by law to use force, he/she **may** use only the minimum force which is reasonable in the circumstances."

The foregoing extract distinguishes between peremptory and directive powers. It is trite that the peremptory provisions are distinguished using words/verbs of an imperative nature such as shall and must. This implies that the officer is compelled to act. It still be argued herein that in specific situations it will be reasonable for the police to use deadly force in violent crowd situation.

1.1.1 Competing interests/rights

The rights in the Bill of Rights[34] must be protected and in doing so, any fundamental right may only be limited if it is in accordance with section 36 of the Constitution. In this arena, the right to life and the right to "peacefully" protest is contrasted. The public interest and the constant international scrutiny add elements of pressure within the ambit of policing of crowds.

The Universal Declaration of Human Rights (UNDHR)[35] gives recognition of personal rights. This distinction makes it imperative that policing agencies consider best practices and international rules when handling crowds. The maintenance of public order in South Africa is a contentious issue because of our violent history in this regard.

1.1.2 Limitations

Like all fundamental rights, the rights to life and freedom may be limited by the application of the limitation clause,[36] which stipulates the factors that are considered when a right is limited.

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34 Ch 2 of the Constitution, 1996.

35 United Nations (1948) "Universal Declaration of Human Rights" https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed 2022-09-18).

36 S 36(1) of the Constitution, 1996 states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The doctrine of minimum force is part of the South African policing arena.[37] This is quite evident in the wording of section 13 of the SAPS Act and the considerations that the South African Human Rights Commission have argued during the proposed amendment of section 49 of the CPA.[38] This emphasis on restraint contradicts the very nature of a violent confrontation.[39] In a violent confrontation, any hesitation by the police member may lead to serious injury and possibly death. By no means does this imply that members should shoot indiscriminately but rather that the legislative prescript allows for immediate and clear interpretation by the member.

The current section 49 of the CPA departed significantly from its predecessor. It currently allows the use of force in instances that may occur in the future. The judiciary stood critical of the previous section 49 and in the cases of *S v Walters*[40] and *Govender v Minister of Safety and Security*[41] where the limitations on the use of force were made part of our law. This predated the current operationalisation of section 49. In July 2003 the new section 49 came into operation.[42] It replaced the legal framework for the use of lethal force as created by the courts. This enactment did not consider the aspect of deadly force specific to violent crowd situations. In light of the fact that the new enactment took legal strides in limiting the suspects rights in terms of life, dignity and freedom of the person, it is submitted that this section be further evolved to meet the demands within the context of the policing of violent and destructive crowds.

As the right to life is a non-derogable right,[43] the limitation of this right will lead to constitutional scrutiny. Therefore, it is suggested that the proposal on expansion of the use of force legislation should take cognisance of the Constitutional Court rulings in

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37 See also the National Policing Standard for Municipal Police on the Use of Force (30 November 2016) https://www.gov.za/sites/default/files/gcis_document/201612/40456gon1455.pdf (accessed 2022-09-18).

38 South African Human Rights Commission (undated) "Section 49: Criminal Procedure Act" https://static.pmg.org.za/docs/1998/980227sahrc.htm#:~:text=Section%2013(3)(b,is%20reasonable%20in%20the%20circumstances (accessed 2022-09-18).

39 S 13 of the SAPS Act.

40 2002 (2) SACR 105 (CC).

41 2001 (2) SACR 197 (SCA).

42 Bruce "Killing and the Constitution – Arrest and the Use of Lethal Force" (2003) http://www.csvr.org.za/docs/policing/killingandtheconstitution.pdf (accessed 2022-08-18).

43 Table of non-derogable rights under s 37 of the Constitution, 1996.

the case law above. The emphasis will thus be on ensuring that the balance with regards to proportionality in the use of deadly force is maintained.

Violence by suspects against the police and destruction of essential infrastructure lead to loss of life. It will be argued that the “future harm” context of the current section 49 is now part of our law. It is thus imperative that this aspect within the realm of public order policing should be included as a manifestation of a provision that allows for the use of deadly force under specific situations that are linked to the maintenance of public order. In part the constitutionality of the previous section 49 failed due to the incorrect use of force in circumstances where the crime was of a trivial nature. In the current context, if properly listed, the protection of essential infrastructure and the lives of police will meet the proportionality threshold under strict conditions.

1.2 Research problem

This research will explore the use of deadly force by the police during crowd management situations. A brief analysis of South African law relating to the use of deadly force by police officers prior to 1996 is provided followed by an in-depth discussion and evaluation of the statutory provisions applicable to the use of deadly force. The analysis will illustrate that although the right to life is universal, police officers in South Africa need legislation that is clear and concise when it comes to deadly force. The current section 49 does not include use of deadly force authority in crowd management situations. The failure of the legislature to provide concise guidelines inadvertently leads to errors in judgement and has catastrophic consequences.

In a constitutional state, the use of deadly force by the police at public order events is controversial. The law needs to provide such an authority to the police in a clear and simple way. This can be achieved by amending the law pertaining to use of force and broadening the scope to include justification for deadly force at crowd management situations under specific circumstances.

This study differentiates between “police brutality” and “excessive force”. Some of the recent case law highlights and exposes incorrect use of deadly force in crowd

management situations. By so doing, this research endeavours to create a clear legislative guideline and bring certainty to an officer when faced with the decision to use force in a crowd management situation. The stipulations in the Regulation of Gatherings Act [44] about the use of deadly force and the limitations stipulated in section 49 in the crowd management context are examined.

1.3 Purpose of the study

The purpose of this study is to undertake a review of the legislative guidelines concerning the use of deadly force in crowd management situations in South Africa. The research delivers a critical analysis of whether the statutes pertaining to the use of deadly force deliver on creating a clear understanding for the police officer, with recommendations in areas where it is found lacking.

1.4 Research questions and hypotheses

To achieve the research objective, the following research questions are formulated:

(i) Does South African legislation clearly provide justification for the use of deadly force in crowd management situations?

(ii) Is the current legislation appropriate and effective for the correct application of deadly force in crowd management situations?

(iii) Do the legislative provisions, related to use of deadly force, meet the constitutional standards?

(iv) Will a more concise and stepped guide reduce the incidents of death caused by police action during crowd management situations?

The hypotheses underlying the research are listed hereunder:

(i) The legislative prescripts concerning the use of deadly force crowd management situations is unclear and thus creating opportunities for abuse and misuse by the police.

(ii) The study will increase legal certainty by proposing amendments to the current legislation and thereby minimising incidents of police brutality.

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[44] 205 of 1993.

1.5 Literature review

An analysis of relevant literature revealed that there was sufficient information available to undertake this study. It appears this is a field of study where research can be undertaken, and the purpose of the study can be achieved.

1.6 Methodology

This research is a literature study and involved the study of books, journals, legislation, case law and interviews with experts in the field of interest and law enforcement personnel. The study was primarily a critical analysis of the relevant South African literature, case law and conclusions about international laws, guides, and prescripts to assist the use of force decision-making process among South African law enforcement officers.

1.7 Chapter outline

Chapter one presents the general background of the subject and introduces the purpose and scope of the research. The reasons for choosing this topic are explained and the statement of the research problem and hypotheses are presented. The ambit of the study and the chapter layout are presented.

Chapter two focuses on the pre-constitutional era with a reference to the historical environment in which the police operated. This chapter provides the historical perspective to the current section 49 of the Criminal Procedure Act[45] and the Regulation of Gatherings Act.[46]

45 Act 51 of 1971.
46 Act 205 of 1993.

The third chapter covers the current use of force legislative framework and the Constitution.[47] The various SAPS policies, Standing Orders and National Instructions, are evaluated to highlight any deficiencies in their application.

Chapter four concludes the study and considers the current legislative position regarding the use of force and the outcry from the community for a more professional police service. The main conclusions that emerged from the research are summarised, discussed and interpreted. Finally, recommendations are advanced for law reform and alignment of policies with the applicable legislative framework for the use of deadly force in South Africa.

47 The Constitution of the Republic of South Africa, 1996.

CHAPTER TWO
PRE-CONSTITUTIONAL ERA

2.1 Political environment which led to protests before 1994

The right to assemble peacefully was not constitutionally entrenched. It was stated that any demonstration amounted to an "act of war" that had to be suppressed.[48] This suppression was normally authorised by the Riotous Assembly Act.[49] Magistrates had the right to "ban" assembly under certain circumstances, especially if it was thought to pose a threat to public order.[50]

It is an unfortunate reality in South Africa that the violent treatment of protestors is a legacy of the apartheid regime.[51] This infamous legacy shapes the way the policing of crowds is affected by law enforcement officers. The police lacked proper crowd control training and were ill-equipped to deal with crowds. Their standard equipment to effect crowd control were rifles, batons and sjamboks. This resulted in disproportioned violence. This manifested itself as riot control and not true crowd control or crowd management. The protests during the pre-constitutional era were perceived by the government of the day as attempts at overthrowing the government. This is in stark contrasts to the current context within which protests occur.

South Africa had three Constitutions before 1994. These had very specific functionalities. The 1910 Constitution created the Union of South Africa, the 1961 Constitution created the Republic and the 1983 created the tricameral parliament.[52] These legislative products were all subordinate to parliament and as such the courts could not declare their stipulations as invalid. This further empowered the police to inculcate a culture of impunity for the rule of law and continued to use force as a tool

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48 Isaacson "Regulation of Gatherings Act, 1993 (Act 205 of 1993)" (1 February 2014) https://africanlii.org/ (accessed 2022-10-31).

49 17 of 1956.

50 S 46 of the Internal Security Act 74 of 1982.

51 Roberts, Bohler-Muller, Struwig, Gordon, Mchunu, Mtyingizane and Runciman "Protest Blues: Public Opinion on the Policing of Protest in South Africa" (December 2017) http://www.scielo.org.za/pdf/sacq/n62/08.pdf (accessed 2022-11-10) 64.

52 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 3ed (2000) 3.

that keeps the ruling *status quo* in power. In context of protest policing this background is critical because the predecessors to the Constitution had the cumulative effect that blacks were disenfranchised.[53] This created palpable tension between the races, and it was inevitable that resistance would be experienced in the form of protests.

One of the standout tragedies of the South African policing of crowds is the 1960 Sharpeville massacre. Police used live ammunition against a seemingly unarmed crowd of thousands of protesters, killing 69 and leaving multiple injuries in their wake.[54]

Unfortunately, this was not an isolated incident because similar incidents occurred in 1976 during the Soweto uprising as well as in Uitenhage in 1985, when 20 people were indiscriminately killed. This was a feature of "apartheid" protest policing, the violence was disproportioned, excessive and indiscriminate.

2.2 Use of force before a supreme Constitution

From the 1950s to the 1990s various laws were used to suppress protests by means of arrests and guidelines on prohibitions of gatherings.

It's noted that the Regulation of Gatherings Act[55] was promulgated as a response to a long history of suppression. Under apartheid, the right to assemble peacefully was not constitutionally protected.

The Gatherings Act was the outcome from the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation ("Goldstone Commission").[56] This Act created a new legislative framework for the right to assemble peacefully. It enshrined

53 SA History Online "A History of the South African Constitution 1910–1996" (27 August 2019) https://www.sahistory.org.za/article/history-south-african-constitution-1910-1996 (accessed 2022-11-01).

54 McRae "The Sharpeville Massacre" (undated) https://humanrights.ca/story/the-sharpeville-massacre (accessed 2022-11-10).

55 205 of 1993.

56 WITS University Research Archives "Goldstone Commission 1991–1994" (7 May 2021) http://historicalpapers-atom.wits.ac.za/goldstone-report-booklet (accessed 2022-11-1).

the values that were underpinning the interim Constitution[57] and enabled peaceful assembly under a supreme Constitution.

The statutes that were predominantly used in the policing of protests prior to the Gatherings Act, included but are not limited to: the Suppression of Communism Act,[58] the Public Safety Act,[59] the General Law Amendment Act,[60] the Riotous Assemblies Act,[61] and the Internal Security Act.[62]

The operation of these statutes can be seen in several reported cases.[63] For instance, in *PG Castel NO v Metal & Allied Workers Union*,[64] the wide powers of the Minister of Law and Order to prohibit a gathering were confirmed, provided they were exercised in accordance with section 46(3) of the Internal Security Act.[65]

In terms of section 46(3) of the Internal Security Act, the Minister of Law and Order could prohibit any gathering or any class of gathering if the Minister was of the view that it will maintain public peace. In the *PG Castel NO v Metal & Allied Workers Union* case[66] the Metal Workers Union wanted to hold their annual general meeting at an outdoor venue. This was against the prohibition by the Minister under section 46(3) of the Internal Security Act. The Minister had prohibited all outdoor gatherings except for sporting events. The interesting aspect is the fact that although the Chief Magistrate refused the application, the Durban Local Division granted the appeal. This decision by the Local Division of the High Court was overturned by the Appellate Division. This decision of the Appellate Division affirmed the "power of the Minister" in prohibiting

57 200 of 1993.

58 44 of 1950.

59 3 of 1953.

60 8 of 1953.

61 17 of 1956.

62 74 of 1982.

63 Moses *"Gathering" on Privately Owned Property: An Analysis of the Regulation of Gatherings Act 205 of 1993* (LLM Treatise, Stellenbosch University) 2018 https://scholar.sun.ac.za/bitstream/handle/10019.1/103940/moses_gathering_2018.pdf?sequence=1&isAllowed=y (accessed 2022-10-31).

64 1987 4 SA 795 (A).

65 74 of 1982.

66 See fn15 above.

gatherings and showed a tendency by the judiciary to move away from judicial activism.

Similarly, in *S v Turrel*[67] the powers of the Minister of Justice were confirmed as being just as broad, because it granted the Minister the power to prohibit particular gatherings.[68] In the *Turrel* case the court acknowledged that the right to freedom of expression and speech has always been recognised in the South African common law. In the period under which this case was decided the system of parliamentary sovereignty permitted the Minister to curtail these fundamental rights.[69]

These above-mentioned cases display the wide powers authorities had in attempting to curb resistance against the apartheid government.[70] Clearly there was a need for a new constitutional dispensation giving effect to peaceful assembly. It was a misconception that all assemblies in the new dispensation would be peaceful. It was obvious that the government under apartheid was the "monster" that needed to be curbed, but the reality of modern-day protest action is that violence has become a feature of protest action in South Africa. This legacy of violence has led to many commentators referring to the South African police as one of the deadliest in the world.[71]

2.3 Evolution of the policing of protests

With the reliance on of the aforementioned oppressive legislation, the police used the stipulations to brutally subdue any resistance to the government of the day. Any protests were an attempt to "overthrow" the political status quo. Political intolerance was enforced by promulgated legislation. This gave rise to the various models of protest policing.

67 1973 (1) SA 248 (C) 256 G.

68 *Supra*.

69 S 46(3) of the Internal Security Act 74 of 1982.

70 Egwu "South African Police are Undertrained, Uncontrolled and Deadly" (31 May 2021) https://foreignpolicy.com/2021/05/31/southafrica-police-brutality-julies/ (accessed 2022-10-31).

71 Egwu https://foreignpolicy.com/2021/05/31/southafrica-police-brutality-julies/.

In the 1960s the “escalated force” model was the dominant model for dealing with protest action.[72] This model did not give effect to constitutional right to peacefully protest. It must be noted that in South Africa this period was also characterised by the increased polarisation of the society and the laws mentioned above provided legislative methods of ensuring compliance through repressive sections. The 1980s and 1990s saw a moderate shift to a “negotiated” force model. During this time the idea of “managing crowds” was the prevailing theory. In South Africa, these theories had limited success because the training for crowd management personnel only changed in 1996.[73]

There is substantial support from academia that the prevailing approach to deal with the policing of protests rests on a two-tiered approach.[74] The two tiers rest on, police knowledge and on a cumulative impact of the police culture, socio-political environment, public perception, organisational structure and contact experiences between the police and the public. The prevailing culture of violence perpetuated by the police during protest action was often fuelled by the preservation of the dominant political party. Taking into account that the police force in South Africa is part of the machinery of the state, it becomes imperative to have regard to the political environment in which it operates. The police response to protests and unrest situations was divergent. This was mostly due to the motivation for the protests, as well as the perception of the threat to the national peace at the time of the protests. The police made use of the following strategies and normally deployed a combination of these to achieve the desired outcome. Strategies to deal with unrests are, but not limited to:[75]

- a “show of force” model that deploys police forces in overwhelming numbers in the hopes of preventing violence at protests and demonstrations.
- an “escalated force” model that matches the level of police aggression to that of the perceived aggression of the protesters or to subdue the protesters.

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72 Della Porta and Reiter “Policing Protest: The Control of Mass Demonstrations in Western Democracies” (1998) https://www.jstor.org/stable/10.5749/j.ctttv1tv (accessed 2022-10-31) 66.

73 Omar “SAPS Costly Restructuring: A Review of Public Order Policing Capacity” https://issafrica.s3.amazonaws.com/site/uploads/M138FULL.PDF (accessed 2022-11-10) 15.

74 Della Porta and Reiter https://www.jstor.org/stable/10.5749/j.ctttv1tv 66.

75 Harrison, Donohue, Moore and Hollywood “Protest Policing: When Does Tensions Escalate Between Protesters and Police?” (8 July 2022) https://www.police1.com/chiefs-sheriffs/articles/protest-policing-when-do-tensions-escalate-between-protesters-and-police-weEaXiTIx0smf6xP/ (accessed 2022-11-10).

- a “negotiated management” model that emphasizes police-protester communication ahead of protest events in the interest of developing and negotiating the limits of peaceful protest and preventing violence on the side of both police and protesters.
- a “strategic incapacitation” model that relies heavily on the identification and arrest of instigators of violence against the police, other persons, or property; and a “command and control” model, in which departments organise and deploy personnel and resources according to deliberate and careful planning that anticipates how a protest is likely to evolve.

The policing of protests during the pre-constitutional era was mostly the escalated force and command and control method. The use of the then South African Defence Force, also added complexity to the policing of protests milieu.[76]

The “escalated force” method of protest policing was further assisted by the relative ease with which the normal justification of force during arrest could be justified, either by means of section 49 of the CPA or the dispersal of crowds’ criteria in sections 7 and 8 the Riotous Assembly Act. Controversy has plagued the policing of public order in South Africa. This was in part due to the creation of the Riot Control Units, which were established under the banner of the South African Police (SAP) in the 1970s in response to the revival of the anti-apartheid resistance movements. In 1992, the Internal Stability Division (ISD) was formed for the purpose of “policing of unrest through proactive (preventive) and reactive measures and the prevention of crime in unrest-plagued areas”.[77] The Internal Stability Division adopted a paramilitary approach. This was in line with the “escalated force” model of dealing with public unrest. The Internal Stability Unit became notorious for its use brutality of the citizenry.

In this regard section 49 of the CPA is one of the sections that transformed/evolved alongside the stipulations from the above Acts to empower the police to use excessive

76 S 1(*iii*) Riotous Assemblies Act 17 of 1956.

77 Omar https ://issafrica.s3.amazonaws.com/site/uploads/M138FULL.PDF 16.

force on the citizens. The statutory provision for the use of force when effecting arrest has, in various forms, been part of South Africa law for more than a century.[78]

The use of force by the police is always a contentious issue. The wording within the sections that allow the use of force has changed over the years. In the 1955 version the "lawful arrestor" had the authority to justifiably kill a suspect, when the offence was a schedule one offence and there was no other means available to the lawful arrestor to stop the suspect from fleeing or to stop the resistance.[79] A similar narrative was found in the 1977 version of the use of force stipulation, with the inclusion of the reasonability phrase. This effectively brought at least two scenarios into play, the first, reasonable use of force to overcome resistance or stop the flight of the suspect for all offence types, and then, secondly, justifiable killing with reference to only schedule 1 type of offences, where it was a "last resort" by the arrestor to stop the resistance and stop the flight of the suspect. This basic evolution is critical to the discussion because it goes hand in hand with the authority to use force in protest environments during this pre-constitutional era. The original Riotous Assemblies Act[80] in its preamble articulates the "consolidation of laws dealing with riotous assemblies". In sections 7 and 8 the dispersal of protesters is clearly stipulated. The dispersal of the protesters was basically on two very specific grounds, which were a) the gathering was a prohibited gathering in terms of section 2 or b) the protesters "kill or injure" or "attempt to kill or injure" any person or "damage any valuable property" the police would be authorised by this section to disperse the crowd. The use of firearms was authorised in terms of section 8. The use of firearms was supposed to be used only against those that are assembled and then only when they "kill or seriously injure or attempt to kill or seriously injure" persons. There is a further ground, which was left to the discretion of the individual police officer, when the assembled crowd showed a "manifest intention of killing or seriously injuring any person" where the use of firearms is permitted. The use of firearms, which amounts to lethal force, was thus permitted if any of the requirements of section 8 were met. Interestingly under section 8 the command to use

78 Van der Walt "The Use of Force in Effecting Arrest in South Africa and the 2010 Bill: A Step in the Right Direction?" 2011 14(1) *PELJ* 138162 http://www.scielo.org.za/pdf/pelj/v14n1/v14n1a05.pdf (accessed 2022-11-01).

79 Criminal Procedure Act 56 of 1955.

80 17 of 1956.

the firearms was not subjected to a qualifier, which sought to have a specific instruction given by a particular person, like with section 7. Section 7 clearly notes that a ranking officer may give the instruction to disperse but under section 8 the statute is silent on this matter. The SAPS Standing Order (General) 251 closes this legislative gap by stating that the provisions of sections 7 and 8 makes provision for the "suppression of riotous assemblies". It stipulates further that the "Commander shall cause his members to fire at the leaders of the mob".[81] This clearly indicates that the police initiated an obedience to order augmentation of the legislated provision in order to give effect to the stipulations of the Riotous Assemblies Act.[82]

This provision is thus in line with the 1955 version of the CPA, that created a "linear" approach to the use of force. It is thus argued that the simplicity of the stipulation led to a clear action step for police in dealing with protests that met these requirements. Obviously, the police exploited these sections but the clarity in law that it emitted cannot be denied.

2.4 Conclusion

The use of force in dealing with protests are intrinsically linked to the development of the South African state. Simpson states that South Africa was "born out of war" and as such the legacy of violence is part of the collective psyche of the nation.[83] From its very inception, the population of South Africa has grappled with the suppression of the masses by the state.

This chapter explored the linkages between the political environment and the policing of protests before the start of the democratic South Africa. This led to an investigation of policing styles concerning protests from the 1950s to present day. This chapter looked at the role of the police in dealing with protests from the period of the liberation struggle to the first democratic election. It was noted that during this time, various legislation was used to form this oppressive legislative mantle.[84] Each period had its

81 South African Police Standing Order (General) 251.9.
82 S 8(1) Riotous Assemblies Act 17 of 1956.
83 Simpson *History of South Africa* (2021) xi.
84 Simpson *History of South Africa* 136.

own policing characteristic on how protests were handled. Fundamentally South Africa has a rich history of examples where the role of police in dealing protests resulted in brutal and deadly interaction with the protesters.[85] It should be noted that each legislative prescription saw the development and implementation of policing styles to meet the standard required by legislation. From riot control in the 1970s to the concept of public order policing of the 1990s. This phenomenon tied into the research done by Della Porta that indicate the two-tier approach to protest policing.[86] Although the developments in legislation and policing practice were evident, it did not lead to effective public order policing. This was not due to ineffective legislation, but rather to the ineffective application by the police in following the prescriptions of the law. It seems, from literature, that the police served the political direction and applied the laws to suit the political narrative of the period and not the rule of law. It must be noted that the certain legislation was clear and simplistic enough to be followed, but the police rather used excessive force to further the political aims of oppression instead of remaining objective.[87] This led to the catastrophes like Sharpeville and Uitenhage, and it could have been avoided had the police followed the law and been adequately trained and equipped to deal with the protests. This was because there was no supreme constitution to hold the police to account.

In the following chapter the impact of the constitutional era on the current legislative mandate is evaluated. This includes an evaluation of applicable SAPS Standing Orders and National Instructions.

85 Simpson *History of South Africa* 136.
86 See fn 18 above.
87 See fn 72 above.

CHAPTER THREE
CURRENT USE OF FORCE FRAMEWORK AND THE CONSTITUTION

3.1 Constitutional values impacted by use of force in crowd management situations

It is clear from the preceding chapter that the impact of the constitutional order in South Africa has a profound impact on the use of force in crowd management situations. The protection of human rights is of utmost importance. This was emphasised in *S v Makwanyane* where the court held "the rights to life and dignity are the most important of all human rights".[88] The policing of crowds in the period prior to 1994, did not emphasise the protection of human rights. Democratic policing in South Africa, as advanced by Muntingh *et al*, has at its core the protection of human rights, with the adherence to the rule of law and as a consequence to the requirement of "fair treatment of the public" there must be clear guidelines on the use of force.[89]

The importance of human rights in policing cannot be overstated. International and regional instruments[90] solidify this viewpoint. The European Convention on Human Rights (ECHR) stipulates in article 2(2) the requirements clearly for the protection of the right to life and assists this discussion by providing clear guidelines when an infringement or limitation of the right to life will be permissible. It stipulates four instances where a limitation can be validated, these are:

(a) in defence of any person from unlawful violence;
(b) to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

88 1995 (3) SA 391 (CC) par 144.

89 Muntingh, Faull, Redpath and Petersen "Democratic Policing: A Conceptual Framework" (2021) http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072021000100005 (accessed 2022-11-27) 121.

90 African Charter of Human and Peoples Rights in article 4,5 and 11 places emphasis on the protection of rights.

These instances are further qualified by the inclusion of the "absolutely necessary" requirement. In *Stewart v UK*, the Commission found that the list of circumstances in article 2 of the ECHR are "exhaustive". Furthermore, that the qualification of "absolutely necessary" be interpreted narrowly with the view that any evaluation must:

> "regard must be had to the nature of the aim pursued, the dangers to life and limb inherent in the situation and the degree of the risk that the force employed might result in loss of life. The Commission's examination must have due regard to all the relevant circumstances surrounding the deprivation of life."[91]

The narrower approach in evaluation of use of force under article 2 was also followed in *McCann and Others v United Kingdom* case.[92] In the *McCann* case the Court made a comparative analysis of the standards at national law in Gibraltar with that of the right to life in terms of the ECHR. The Court held that "difference between the two standards ,national standard of Gibraltar and that of the ECHR 'absolutely necessary', is not sufficiently great that a violation of article 2 could be found on this ground alone".[93] This is an important decision because normally the standards will differ, but the underlying principle will be evaluated to ensure that the most appropriate application has occurred.

The United Nations International Universal Instrument, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF)[94] further emphasise the applicable restriction on circumstances where lethal force may be used. Principles 9, 12 and 14 are important to note in the context of the current discussion. Principle 14 stipulates:

> "In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9".

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91 *Stewart v The United Kingdom* No 10044/82, 39 DR 162 171 (1984).

92 No. 18984/91 [155].

93 See fn 3 above.

94 United Nations "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials" (7 September 1990) https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement (accessed 2022-11-04).

From the above it is clear that the use of force in public order policing is allowed but under strict conditions.

3.2 Legislative prescripts on use of force in crowd management situations

Use of force is a drastic infringement of the fundamental rights of a person. It is for this reason that legislative prescripts and policies must be clear and simplistic to limit diverse interpretation that can lead to erroneous actions. All policing actions must be in line with the Constitution. Section 205(3) of the Constitution clearly articulates the mandate of the police. It is trite that when the police enforce their mandate human rights will be limited. The purpose of the criminal law is to order human behaviour and the police are the instrument the state uses to ensure that this fundamental principle of society is adhered to.[95] Limitation of fundamental rights by the police are justified in terms of the South African Constitution. Section 36, also known as the limitation clause, stipulates that the rights in Chapter 2 may be limited. Such a limitation can only be lawful, if it is in terms of a statute of parliament and it is "reasonable and justifiable" in a democratic state based on the values that underpin the Constitution such as human dignity, equality and liberty.

The laws that are used to limit the fundamental rights to privacy, dignity, life, freedom and security of the person, amongst others, are the CPA, SAPS Act and the RGA.

In addressing these stipulations from various statutes, the starting point is to provide the requirements for lawful application of force. Joubert, holds that the following are requirements for use of force under section 49 of the CPA:[96]

a) The person to be arrested must have committed an offence. If the police action is based on a suspicion, then it must be a reasonable suspicion;[97]
b) The arrester must have the legal authority to arrest;

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95 See fn 14 above.
96 Joubert, Ally, Kemp, Mokoena, Swanepoel, Terblanche and Van der Merwe *Criminal Procedure Handbook* 13ed (2020) 142–168.
97 *S v Purcell-Gilpin* 1971 (3) SA 548 (RA).

c) There must be an attempt by the arrester to arrest the suspect. It is now trite in SA law that an arrester cannot use force, if there was never an attempt made to arrest the suspect. This is also contrary to section 39 of the CPA;

d) The arrester has the *bona fide* intention to bring the suspect before court and not to punish the suspect. Punishment is the scope and authority of the courts not the police;[98]

e) The suspect must have attempted to escape or fled or resisted and fled;

f) The suspect must be aware that he stands to be arrested or at least that the police is trying to arrest him;[99]

g) There must be no other reasonable means available to the arrester to effect the arrest. This ties in with the *Makwanyane* ruling;

h) Force must be directed at the suspect and not at an innocent bystander. This is trite, as this is also part of the Firearms training unit standard 119649.

The courts have always maintained that the use of force is the last resort.[100] This principle has been included in the latest amendment of section 49. The SAPS Act[101] sets the principle of minimum force as a starting point in all actions that require the use of force. This principle within the context of use of force will not always be attainable, because each case or incident should be dealt with on its own merits. Instances where the police are faced with immediate life-threatening violence, all legislative justifications and the common law will come into play. It would thus be more correct to indicate that the police should deploy “reasonable and proportionate” force.

As stated before, the fundamental rights to life, bodily integrity, freedom and security, as well as privacy and dignity will always be impacted during any sanctioned policing actions. Even more so when force is used. The drastic nature of the application of force to the body of another is an area of grave concern to the legal and policing

98 *R v Malindisa* 1961 (3) SA 377 (T) 379–380.

99 *S v Barnard* 1986 (3) SA 1 (A).

100 1995 (3) SA 391 (CC) par 140.

101 See s 13(3(*b*) of the SAPS Act 68 of 1995.

fraternity.[102] It requires clear rules and regulations that are matched by precise policies.

The Constitution changed the way the law was applied when it came to the use of force. Section 49 of the CPA was constitutionally scrutinised by the two highest courts in South Africa. In *Govender v Minister of Safety and Security*[103] (*Govender*) the Supreme Court of Appeal did not declare section 49(1) unconstitutional. This was because the court held that a "restrictive" interpretation will save it from being declared unconstitutional. The apex court in South Africa, the Constitutional Court, confirmed the unconstitutionality of section 49(2) in *S v Walters*[104] (*Walters*) and the provision was declared invalid. This gave rise to the development of section 49 of the CPA. The 1998 amendment encompassed the requirements as laid down in *Walters*. From these developments it enhanced the impact from a human rights perspective. At the same time, it must be noted, that section 49 of the CPA is regarded as one of the most amended sections within the CPA. This characteristic of the development concerning section 49 of the CPA confirms the complexity of its application.[105]

Lawful use of force is permitted under very strict conditions. Of particular interest in any research on use of force, is that there is a delicate differentiation between unlawful use of force and excessive use of force. Unlawful force normally entails a breach with regards to the requirements of the use of force stipulation, whereas excessive force, refers to a blatant disregard for the fundamental rights and the principles of proportionality that are enshrined within this concept.[106]

Within the context of use of force applicable to the CPA, arrest is a precursor to the use of force. An arrest already infringes the fundamental rights of the individual. To add use of force to this scenario heightens the level of compliance that is expected

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102 Bruce "Police Brutality in South Africa" (2002) http://www.csvr.org.za/docs/policing/policebrutality.pdf (accessed 2022-11-04) 4.

103 2001 2 SACR 197 (SCA).

104 2002 2 SACR 105 (CC).

105 Le Roux-Kemp and Horne "An Analysis of the Wording, Interpretation and Development of the Provisions Dealing With the Use of Lethal Force in Effecting an Arrest in South African Criminal Procedure" (30 June 2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460443 (accessed 2022-11-05) 266.

106 Matubako *Use of Force by South African Security Services: A Comparative Critique* (doctoral thesis, UNISA) 2022 17.

from the police officer. Thus, it requires the police officer to know and fully comprehend the rights of the suspect. Even more importantly is the understanding of the restrictions that are placed on the actions of the police in limiting the afforded rights by means of applicable legislation.

When legislation is vague, complex and intricate, the decision making by the officer will be complicated and may lead to excessive force or unlawful actions.[107] In a democratic policing state, the requirements of the various sections applicable to legislation must be adhered to consistently. Masuku affirms the view that police action should not violate the rights of suspects.[108] This will mitigate against civil claims and the constitutional challenges to police actions. It for this reason that the requirements for the use of force from various police action perspectives will be illuminated below.

It is trite that use of force in terms of the CPA may not be used as a punishment of the suspect or arrested person. Punishment for offences is the competency of the judiciary and not of the police.[109] When the police use any force to punish a person it is unlawful.[110] The use of force provisions in the CPA and the RGA are there to *inter alia* protect the arrestor and the community against a violent and belligerent suspect. The restrictions on the use of force are necessary to limit and prevent abuse by police. The view is held that the police can mitigate the level of excessive force by means of understanding the limitation of their actions.[111] This is the challenge when stipulations are complex and vague.

In 1998 an amendment to section 49 was passed by Parliament in terms of section 7 of the Judicial Matters Second Amendment Act[112] and it came into effect in 2003. The reason why there was such a delay in its operationalisation was due to the criticism from various segments of society on this amendment. One of the most vocal detractors

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107 Van der Walt http://www.scielo.org.za/pdf/pelj/v14n1/v14n1a05.pdf 140.

108 Masuku "Numbers that Count: National Monitoring of Police Conduct" (5 July 2022) https://www.researchgate.net/publication/301276130_Numbers_that_count_National_monitoring_of_police_conduct (accessed 2022-11-27) 6.

109 S 165 of the Constitution of the Republic of south Africa, 1996.

110 Geldenhuys, Joubert, Swanepoel, Terblanche and Van der Merwe *Criminal Procedure Handbook* 10ed (2012) 135.

111 Bruce http://www.csvr.org.za/docs/policing/policebrutality.pdf 2.

112 122 of 1998.

was the then Minister of Safety and Security.[113] This delay was not only due to poor legislative writing but led to uncertainty in applying use of force by the police. At this very critical time in the development of section 49 of the CPA, politicians fuelled the situations by making calls to "shoot to kill". This had the unintended impact that between 1997 and 2000 more than 1500 people were killed by police in South Africa.[114] Maepa argues that the indecisive stance taken by the State increased the risk that the police faced in dealing with violent crime in South Africa. This is an important argument because the police are not legal practitioners and as such have limited interpretation skills. Training and re-training with adequate policy support is required when the police are faced with changes in legislation. Furthermore, the judiciary has warned that the police must make split second decisions and that the courts should "get out of the armchairs on the Bench and place ourselves, in the positions of the accused".[115]

Since the use of force stipulation within the CPA has been on the statutes for centuries, it has amassed clear precedents. This is not the case with instances where use of force in policing crowds are concerned. If the stipulations within the statutes are not clear it has the potential for major loss of life during crowd management situations. This supports the need to have clear guidance to the police in crowd management situations. Such clarity from the legislature assists the right to assemble peacefully.[116] The rights and responsibilities that accompanies this fundamental right is paramount to this discussion.[117]

Within this context there are very specific legislative guidelines from the RGA that applies to the use of force. These will be analysed below. The evolution of the use of force to effect an arrest has transformed and so too has the stipulation that allows use of force during protest policing. It is noteworthy that the changes within the section 49

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113 Maepa "How Much Might is Right? Application of Section 49 of the Criminal Procedure Act" (1 July 2002) https://issafrica.org/01-jul-2002-sacq-no-1/how-much-might-is-right-application-of-section-49-of-the-criminal-procedure-act (accessed 2022-11-27).

114 See fn 16 above.

115 *R v Metelerkamp* 1959 (4) SA 102 (E).

116 S 17 of the Constitution of South Africa, 1996.

117 Marikana Commission "Panel of Experts Report on Policing and Crowd Management" (27 May 2018) https://www.saps.gov.za/resource_centre/publications/pannel_of_experts_2021.pdf (accessed 2022-11-04).

ambit was necessitated by case law, whereas the tendency with changes to the use of force at protests normally are necessitated by means of an inquiry or commission. This is due to the magnitude of loss associated with the incorrect application of force in groups of people. Sharpeville, Soweto, Uitenhage, Marikana all led to commissions that explored the changes to the legislative framework.[118] This leads us to finding possible amendments to the current legislative framework to minimise catastrophes relating to use of force in crowd management situation.

3.3 Impact of varied police actions on the use of force in crowd management situations

The use of force is very dependent on the policing action that is implemented. In the arrest arena, the context is section 49, but within crowd management the applicable legal standard encompasses the CPA's section 49 but is predominantly shaped around the RGA. Furthermore, all police actions are refined by Standing Orders, National Instructions and the SAPS Act.

Within the context of public order policing actions that the police undertake, there is an overlapping of legislative principles when it comes to the use of force. The starting point is section 49 of the CPA. The requirements for the correct application of force in the constitutional era was set out by the courts in watershed rulings. These requirements were confirmed by the courts in the case of *Govender v Minister of Safety and Security*[119] and *Ex Parte: Minister of Safety and Security and Others: In Re S v Walters and Another*.[120] In the latter case the court stated that "shooting a suspect solely in order to carry out an arrest is permitted in very limited instances only".

It must be noted that section 49(2) of the CPA qualifies the current position by stipulating:

> "the arrestor may use deadly force only if–
> (a) the suspect poses a threat of serious violence to the arrestor or any other person; or

118 See Ch 2 above.
119 2001 (4) SA 273 (SCA).
120 2002 (4) SA 613 (CC).

(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later."

This is a departure from the previous version, which included the "future death" requirement.

What is very interesting in the wording of the current section 49(2) of the CPA is that the arrestor must "in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances" then only determine if lethal force is to be used. It is submitted that this creates a dual edged sword for the arrestor. Subjectively, in part the arrestor must believe that the suspect poses a "threat of serious violence" to him or "any other person". Take note that there is no qualification of this threat that the officer is facing. It is not an imminent threat, as previously stated, thus making it a neutral threat. This leaves it open to interpretation of the officer and could very well include future threats. Furthermore, the phrase "any other person" is also not qualified. This again leaves the interpretation too vague to the police officer and thus creates an opportunity for an error in judgement. It is further submitted that by not qualifying the type of person, it can also include a person that is not on the scene or a suspect that is yet to be identified. Botha and Visser criticise the omission of a clarifying adjective and are of the view that it may lead to "misuse".[121]

Section 49(2) Part b has more than two permutations. The suspects against whom force will be used, should have committed a crime. This is fundamental to this part of the section. The suspicion held by the arrestor must be a "reasonable" suspicion. This is an objective criterion which should be formed by each arrestor based on the facts of each case. Subjective belief or feelings is excluded in this segment. The view of Snyman is supported that the use of section 49(2) amounts to a ground of justification and does not necessarily rule out *mens rea*. Furthermore, the crime must have been committed with the "infliction/threatened infliction of serious bodily harm". Le Roux argues, correctly so, that the departure from the word "grievous" in this segment of the

[121] Botha and Visser "Forceful Arrests: An Overview of Section 49 of the Criminal Procedure Act 51 of 1977 and its Recent Amendments" (2012) http://www.scielo.org.za/pdf/pelj/v15n2/14.pdf (accessed 2022-11-04) 364.

sections, denotes a lessor form of violence. It is submitted that this “lesser” narrative opens the section up for abuse by police officers. Botha and Visser concur with Roux-Kemp and Horne that the use of the word “serious” denotes a lesser degree of severity and thus creates opportunity for abuse by the police.[122]

The section does not clarify the types of instances that constitute “serious” infliction and thus creates an opening for varied interpretations by police officers. The latter phrases in part b, relate to the availability of “alternatives” to use of force, whether immediate or at a later stage.

It is noted from the wording in the section that the use of the word “or” creates two distinct independent requirements for the use of deadly force. The initial part is clearly a self-preservation part. It covers the need for an arrestor to protect his life or the life of another, and basically affords him the common law justification of private defence or necessity. The part b of section 49(2) emphasises the seriousness of the offence and the crime control mandate that the police have in curbing violent crime.

3.4 Opportunities for abuse by the police in crowd management situations

One of the most gruesome misuses of force events in recent history is the Marikana massacre. This inadvertently demonstrates the abuse of lethal force that can occur within the domain of the policing of crowds. The Marikana Commission of Inquiry was established and chaired by Justice Farlam. This followed the killing of 34 striking miners by members of the South African Police Service (SAPS) at the Lonmin mine at Marikana on the 16th of August 2012. This was the most brutal killing of civilians in the post-apartheid period in South African history. It sent shock waves throughout the international community and left scores of families traumatised.

The events that unfolded at Marikana laid bare the lack of professional policing of crowds within the South African context. It illuminated gaps in the policing of complex crowd situations and specifically about the use of force within the constitutional mandate that SAPS find itself.

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122 Botha and Visser http://www.scielo.org.za/pdf/pelj/v15n2/14.pdf 363.

The Marikana Commission of Inquiry highlighted a range of systemic problems in the functioning of the SAPS, as it pertains to the policing of crowds. In accordance with the recommendations of the Marikana Commission, Cabinet established the Panel of Experts (Panel) in April 2016. The Panel advanced the view that there are inadequacies in the legal framework for providing guidance to SAPS members about the use of force.

The opportunity for abuse is amplified within the crowd management environment. The potential for violence is always present within the protest milieu.[123] It is important to note that demonstrations or gatherings can either be peaceful or violent. The Constitution allows protection for "peaceful assemblies". Violent assemblies or gatherings fall thus outside the immediate realm of section 17 of the Constitution.[124] The RGA is the primary legislative source for use of lethal force within crowd management. Section 9(2)(*d*) of the Act stipulates the requirements for the use of lethal force and against whom such force may be applied. Subsection (d) indicates that "any person who participates in a gathering or demonstration may be subjected to the use of deadly force" under strict conditions or "any person" who hinders, obstruct or interfere with any person at the gathering may be subjected to deadly force. The scope of when deadly force may be authorised by the police is limited to situations where the life of a person is in danger or there is a "manifest intention to kill or seriously injure a person" on the one hand and then on the other that destruction or an attempt to destroy valuable immovable or moveable property is at risk. The section then qualifies which officer from SAPS may "order" members to take the necessary steps to prevent the instances or threats against persons or property.

The immediate and obvious difference between section 49 of the CPA and section 9(2)(*d*) of the RGA is the protection of property. This is a very important aspect. It should be read with section 26 of the Critical Infrastructure Protection Act.[125] The

123 Lancaster and Mulaudzi "Rising Protests are a Warning Sign for South Africa's Government" (6 August 2020) https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government (accessed 2022-10-31).

123 8 of 2019.

124 See fn 19 above.

current wave of protests in South Africa is mostly related to service delivery.[126] This has seen an increase in the destruction of municipal and parastatal infrastructure. It is submitted that section 9(2)(*d*) empowers the police to act decisively in circumstances where such damage or attempt at damages is imminent or occurring, but that the poor understanding by the police of their legislative mandate is allowing the country to be destroyed. The most recent example of the failure of SAPS in dealing with the policing of crowds emanates from the recommendations of the Marikana report and the recommendations from the Panel of Experts established by the Marikana report. The motivation for the view that SAPS is failing society is based on the statistics presented by the panel in stating "the vast number of civil claims against the organisation every year are reflected in the R335 485 616.61 paid out following court orders against the SAPS during 2016/17. This represents 216% increase since 2011/12".[127] It must be noted that for the past twelve months there have been 962 protests recorded.[128] Lancaster and Mulaudzi lament the fact that the police react to peaceful protests with disproportionate force.[129] This is indicative of a policing service where there is no clear guidance on proper and appropriate procedures.

The National Instruction[130] of the Police on Crowd Management (NI 4/2014) is contradicting the RGA. It states under par 6(1)(*b*)(ii) that "intentional lethal force" may only be used in the protection of life. It qualifies this statement by prohibiting the use of lethal force in the protection of property. Clearly this is a departure from the legislation.

This presents a clear ethical dilemma for the police officer. By stating in the policy document its intention to "preserve life" it endangers the members through vicarious liability if critical infrastructure is damaged or destroyed by the protestors, while police officers are on the scene. The NI 4/2014 further contradicts itself in par 21(13). It

126 See fn 123 above.

127 Panel of Experts Report on Policing and Crowd Management (27 May 2018) https://www.saps.gov.za/resource_centre/publications/pannel_of_experts_2021.pdf (accessed 2022-11-05) 58.

128 Institute for Security Studies "Crime Hub: Public Protest and Violence Map" https://issafrica.org/crimehub/maps/public-protest-and-violence-stats (accessed 2022-11-29).

129 See fn 119 above.

130 National Instruction 4 of 2014: Public Order Policing: Crowd Management during Public Gatherings and Demonstrations version 02.00 Amended by Consolidation No. 12 of 2022.

seems that the NI 4/2014 was drafted without any due regard to the stipulations of section 9(2)(*d*) of the RGA. The narrative in the NI 4/2014 creates the impression that the police are "afraid" to act in a manner that the law provides. This is a direct consequence of the recommendations of the Farlam Commission and that of the Panel of Experts. This may have the effect that the police at crowd management situations will be regarded as impotent, because the legislation provides them with the tools to act but their lack of understanding of the legislative prescript inhibits their actions. This will have the impact that police will develop methods outside of the NI to deal with crowds and will result in disciplinary action against members and create legal uncertainty.

This is an intolerable situation, as the law of the country has not changed. The police cannot unilaterally decide to ignore the stipulations of the legislative framework due to the findings of the Marikana massacre. The findings of the commission of inquiry, Farlam Commission,[131] have a recommending feature and cannot be upgraded to law, just because the findings were against the police. The police are acting in haste, but their policy direction is causing legal uncertainty and the members on the ground will be the ones that pay the price.

It is affirmed by the Marikana Commission report that the McCann principle is part of our law.[132] This principle as cited by the South African Human Rights Commission (SAHRC) refers to it as "the principle of prevention/ precaution" and stipulates it as:

> "the principle of prevention/precaution requires that those in command of policing operations in which higher levels of force are anticipated as a possibility to plan and command those operations in such a way as to minimise the risk that lethal force will be used."

It must be noted that this principle does not erode the use of lethal force but enhances the constitutionality thereof by requiring adequate planning and prevention before initiating lethal force.

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131 Proclamation No. 50 of 2012 published in *GG* No. 35680 of 2012-09-12.

132 Farlam Commission "Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province" (10 July 2015) https://justice.gov.za/comm-mrk/docs/20150710-gg38978_gen699_3_MarikanaReport.pdf (accessed 2022-10-11) 40.

3.5 Conclusion

In conclusion, the use of force in any policing environment is controversial. It opens historical wounds associated with apartheid. However, in the context of crowd management it is absolutely necessary. All police officers have the right to be protected against unlawful attacks and while performing their duties without fear. As set out above, the legislative framework concerning the use of force is incoherent and too complex. It requires simplicity and appropriate linkages with institutional policies. From the preceding discussion, it is clear that a legal gap exists between the RGA and the National Instruction on Crowd Management by the police. This will undoubtedly create uncertainty and should be rectified immediately. The Marikana massacre was a colossal failure by SAPS. The laws governing protests might be outdated, but the failure at Marikana was operational in nature and not legislative. The international instruments quoted above provide clear guidelines on the use of force in dealing with protests. The legislation, if properly applied, with due regard for all the restrictions as mentioned above, can lead to greater constitutionality. This will only be achieved if the SAPS adequately resource, train and regularly refresh their members regarding the use of force when policing protests.

CHAPTER FOUR
CONCLUSIONARY REMARKS

The use of force in dealing with protests are intrinsically linked to the development of the South African state. Simpson states that South Africa was "born out of war" and as such the legacy of violence is part of the collective psyche of the nation.[133] This research demonstrated that the policing of crowds and the use of force in attaining public order has a rich and brutal history in South Africa.[134] From the colonial periods to recent crowd management incidents, such as Marikana, the South African police has grappled with the use of force and especially deadly force during crowd management situations.

This research traced the linkages between the political environment and the policing of protests before the start of the democratic South Africa. This led to an investigation of policing styles concerning protests from the 1950s to present day. This research further identified that during apartheid various legislative instruments were used to form an oppressive legislative mantle.[135] It was demonstrated that each historic period had its own "unique" crowd policing characteristics. From riot control in the 1970s to the concept of public order policing of the 1990s. This phenomenon confirmed the two-tier approach to protest policing.[136] It was clear from the research that developments in legislation did not lead to effective public order policing. It is suggested that the failures of the police in crowd management situations were not due to ineffective legislation, but rather to the ineffective application by the police in following the prescriptions of the law.

Regarding the use of force by the police, this research traced the development of section 49 of the CPA. At first glance, section 49 of the CPA seems to validate arguments that it violates some constitutionally protected rights, among which are the right to dignity, life, to freedom and security of the person as well as the rights protecting cruel, inhuman or degrading treatment or punishment and the right to a fair

133 Simpson *History of South Africa* (2021) xi.
134 Simpson *History of South Africa* 136.
135 Simpson *History of South Africa* 136.
136 See fn 72 above.

trial, which includes the right to be presumed innocent. Section 49 however, withstood Constitutional muster as set out in *Re: S v Walters & another.*[137]

During the research it became apparent that the police, especially during crowd management situations, served political interests.[138] This had the unintended consequence that the laws were applied to suit the political narrative and not the rule of law. It is submitted that the legislation regarding the policing of crowds is clear and simplistic, but that the police rather used excessive force to further the political aims of oppression instead of remaining objective.[139] The failures of the police to follow the letter of the law, pertaining to protests, even before the dawn of a human rights culture in South Africa, led to the catastrophes like Sharpeville. Adequate training in correct procedures and the correct interpretation of the law by the police would have prevented such massacres.

During this research the impact of the constitutional era on the current legislative mandate was evaluated. This was done to establish whether the applicable SAPS policies, Standing Orders or National Instructions conform to the Constitution and is adequately aligned to the applicable legislative prescriptions. Furthermore, legislation and policies were evaluated to determine its efficacy in crowd management situations. Unfortunately, these policies fell short of the standard and incorrect application thereof led to further massacres, most notably the Marikana massacre.

This research confirmed the view that use of force in any policing environment is controversial. Due to the impact of the Constitution on demonstrations in South Africa, it is very clear that any misuse of force in crowd management situations will evoke the historical wounds associated with apartheid. However, within crowd management, the use of force and the authority to use deadly force is absolutely necessary. All police officers have the right to be protected against unlawful attacks while performing their duties without fear.

137 2002 (4) SA 613 (CC) 640.

138 Bruce https://justice.gov.za/comm-mrk/exhibits/Exhibit-FFF-14.pdf 15.

139 Bruce https://justice.gov.za/comm-mrk/exhibits/Exhibit-FFF-14.pdf 26.

It was observed that the legislative framework concerning the use of force, whether under section 49 of the CPA or section 9 of the RGA, is incoherent and too complex. This research argues for simplicity and accuracy within policy and legislative alignment. The linkages from the applicable legislation to the institutional policies should never be outdated or incorrectly formulated. This was found to be the case at present. As pointed out in Chapter 3 there is a gap between the RGA and the National Instruction on Crowd Management. When policies, standing orders and national instructions are not aligned correctly to the empowering legislation, it creates an opportunity for misuse of power. It further creates an incorrect training environment because police officers will be inadequately prepared to face the threats that are imminent at violent crowd situations.[140] In recent history the Marikana massacre, as an international example of inappropriate use of deadly force, may be regarded as a "colossal failure by SAPS". To a lesser extent, the murder of Andries Tatane,[141] an unarmed protester by a group of Public Order police members should be a reminder that failures by the police in crowd management situations are not always regarded as a "massacre". It nevertheless impacts the lives of all citizens that have the right to assemble peacefully.[142] When these rights are unlawfully impeded it violates the very ethos of the Constitution.

The international instruments referred to in Chapter 3 above provide clear guidelines on the use of force in dealing with protests. This legislation, if properly applied, with due regard for all the restrictions, can lead to greater constitutionality. The use of force in South African law is sanctioned. The Constitution requires the police to "enforce the law"[143] and as such there is an obligation on the police to do this within the constitutional parameters. The correct use of deadly force will only be achieved if the SAPS adequately resource, train and regularly refresh their members regarding the use of force when policing protests.

140 Bruce https://justice.gov.za/comm-mrk/exhibits/Exhibit-FFF-14.pdf 27.
141 Bruce https://justice.gov.za/comm-mrk/exhibits/Exhibit-FFF-14.pdf 23.
142 S 17 of the Constitution of the Republic of South Africa, 1996.
143 S 205(3) of the Constitution of the Republic of South Africa, 1996.

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