SUBMISSIONS BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE
CRIMINAL PROCEDURE AMENDMENT BILL – B39 2010.

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Introduction

The Civil Society Prison Reform Initiative (CSPRI) was established in 2003 as a project of the Community Law Centre. The Centre, linked to the Law Faculty of the University of the Western Cape, was established in 1990 with a view to engage in policy development, advocacy and educational initiatives through high-quality research, focusing on areas critical to the realisation of human rights and democracy in South Africa and Africa in general.

The CSPRI focuses on prisons and places of confinement, with the aim of furthering constitutional and human rights imperatives within these settings. Much of the CSPRI's recent work has involved pre-trial detention the range of issues prevalent to the administration of justice from the time of arrest to sentencing.

As a general proposition, the CSPRI accepts that the use of deadly force will, in certain prescribed circumstances, be necessary during the carrying out of an arrest. The constitutional benchmark against which the use of all force will be examined is whether the use of force is reasonable and proportional in the circumstances. Importantly, this is a standard which has been articulated by the Constitutional Court based on the rights to dignity, life, the right to be free from all forms of violence, not to be tortured or treated in a cruel, inhuman or degrading way, and the right to security and control over one's body. Accordingly, any legislation purporting to regulate the use of force must comply with this constitutional standard. Put differently, legislation cannot be amended so as to alter the degree of constitutional protection already afforded to suspects being arrested. The Bill, we submit, alters the degree of protection to the extent that it is unconstitutional.

These submissions address, primarily, the legal ramifications of the Criminal Procedure Amendment Bill (Bill) in relation to relevant constitutional principles and values. In addition, the potentially anomalous relationship between the Correctional Services Act 111 of 1998 and the Bill, as well as the Bill's compliance in terms of the South African government's obligations under the United Nations Convention against Torture, will be examined. The amendment must ultimately bring greater clarity to law enforcement officials in the use of force and ensure compliance with the Constitution and international human rights law. It is this regard that the UN Special Rapporteur Extrajudicial, Summary or Arbitrary Executions advises:

> *The State's legal framework must thus "strictly control and limit the circumstances" in which law enforcement officers may resort to lethal force. In addition to being pursuant to a legitimate objective, the force employed by law enforcement officers must be strictly unavoidable for its achievement*.[1]

Constitutional Imperatives

1. South African courts have established a series of principles in relation to the use of force, including the use of deadly force, in effecting arrests.

2. The Supreme Court of Appeal in *Govender v Minister of Safety and Security*[2] considered the constitutionality of the use of force in general as regulated by the then section 49(1) of the Criminal Procedure Act.[3] In order to ensure its compliance with constitutional norms, the *Govender* Court held that the provision *must* be read so as to include a "proportionality test for the offence and the force used, and a proportionality test for the force used and the threat that the suspect posed to the police officer and to the general public."[4]

3. These very sentiments formed the reasoning of the Constitutional Court's decision in *Ex parte Minister of Safety and Security: In re S v Walters*.[5] The *Walters* Court declared unconstitutional the then section 49(2) of the Criminal Procedure Act (CPA) on the basis that it permitted the use of deadly force "where it may not be necessary or reasonably proportionate."[6] Importantly, the impugned section of Criminal Procedure Act in the *Walters*

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[1] E/CN.4/2006/53 para 48.
[2] 2001 (4) 273 (SCA).

[3] Prior to the 1998 amendment (promulgated in 2003), section 49(1) of the CPA read:

> 1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person-
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> a) resists the attempt and cannot be arrested without the use of force; or
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> b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

[4] *Govender* at para 21.

[5] 2002 (4) SA 613 (CC).

[6] *Walters* at para 47.

judgment was not that different from the Bill's proposed amendment now.[7] In essence, both provisions speak of the use of force when a certain category of crime has been committed, or was reasonably suspected of having been committed, and there was no other means of carrying out an arrest. The Bill is slightly narrower in that the suspect must pose a threat of serious violence to the arrestor or any other person.

4. The *Walters* Court directed that the use of force, including deadly force, be governed by section 49(1) of the CPA as interpreted by the Supreme Court of Appeal in *Govender v Minister of Safety and Security*.[8] Accordingly, lethal force can only be used when the police officer has reasonable grounds to believe that the suspect poses an immediate threat of serious bodily harm to the police officer or to another person, or that the person has committed a crime involving the infliction of serious bodily harm.

5. In paragraph 54 of the *Walters* judgment the main points of the decision are tabulated. The factors listed succinctly characterise the proportionality analysis to be undertaken by anyone authorized to effect an arrest (*Walters* principles). The listed principles are as follows (also contained in the memorandum attached to the Bill):

    a) the purpose of arrest is to bring before court for trial persons suspected of having committed offences;
    b) arrest is not the only means of achieving this purpose, nor always the best.
    c) arrest may never be used to punish a suspect;
    d) where arrest is called for, force may be used only where it is necessary in order to carry out the arrest;
    e) where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used;
    f) in deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances;
    g) shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only;
    h) ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or is suspected on reasonable grounds of having committed a crime

[7] Prior to the 1998 Amendment of the Criminal Procedure Act, section 49(2) read:

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

[8] 2001 (4) 273 (SCA).

involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later;

i) these limitations in no way detract from the rights of an arrester attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.

6. Subsequent to the *Govender* and *Walters* decisions section 49 was amended.[9] The current section 49 of the CPA mirrors, to a significant extent, the language of the *Walters* principles. In addition, section 49(2) lists three separate circumstances in which the use of deadly force will be justified. These are:

    a. That the force is immediately necessary to protect the arrestor, or any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

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

    c. That the offence is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

7. Section 49(2)'s emphasis on the immanency of the threat, the protection from life-threatening violence and immediate need for force, correspond well to the type of proportionality analysis envisaged by the *Govender* and *Walters* courts. Accordingly, section 49, as it currently reads, sets a constitutionally acceptable threshold for the limitation of a suspect's rights to life, dignity, freedom and security and to be presumed innocent until convicted by a court of law.[10]

8. Importantly, the principles of reasonableness and proportionality are not new to South African law. These notions are firmly entrenched in constitutional law and will remain the benchmark against which the lawfulness of the use of force will be assessed, including, of course, any legislation purporting to regulate it.

9. It is worth noting at this stage that this position is commensurate with international and foreign law. Article 2(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms states:

    "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary . . . (a) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained…"

[9] Act 122 of 1998 (promulgated in 2003).

[10] See for example paragraph 8 of *Govender*.

10. The European Court of Human Rights, in interpreting this section, has held that "potentially deadly force cannot be considered absolutely necessary where it is known that the person to be arrested *poses no threat to life or limb* and is not suspected of having committed a violent offence….even though a failure to use lethal force may result in the opportunity to arrest the fugitive being lost."[11]

11. Moreover, article 3 of the UN Code for Law Enforcement Officials provides that law enforcement officials restrain from using force unless it is "strictly necessary" and used only to the extent required for the performance of their duty. The UN commentary on article 3 states that national legislation should restrict the use of force by law enforcement officials in accordance with a principle of proportionality. Furthermore, firearms should generally not be used *"except when a suspected offender offers armed resistance or otherwise jeopardises the lives of others* and less extreme measures are not sufficient to restrain or apprehend the suspected offender."

12. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles) generally prohibits the use of firearms against persons, with the exception of officials acting in self-defence or in defence of others as a result of an imminent attack. Moreover, firearms may only be used to prevent serious crimes involving grave threats to human life, to arrest a person presenting such a danger and resisting the authority of law enforcement officials or to prevent the escape of a suspect. Lethal force in such circumstances may only be used if less extreme measures are insufficient to achieve these objectives and when "strictly unavoidable in order to protect life." When using a firearm, an official must identify himself or herself and give a warning of their intention to use a firearm. Warnings should then be followed by enough time for it to be observed, unless to do so would put the official at risk or would create the risk of death or serious harm to other persons. Warnings may only be dispensed with where they are clearly inappropriate or pointless in the circumstances of the incident.

13. The guidance provided by the UN and the European Court uses particular phrasing to define the threshold for the justifiable use of force, such as " strictly necessary", "to prevent grave crimes", and "strictly unavoidable to protect life". This phrasing is purposeful because the use of force by law enforcement may result in a person's death; an irreversible state. The narrowness of the scope for the use of potentially lethal force is therefore driven and motivated by the obligation to protect the right to life.

[11] *Nachova v Bulgaria* 42 EHRR 933 at para 95, 107 GC.

14. Compared to the current section 49(2), the Bill broadens significantly the grounds on which the use of deadly force may be used and justified:

    a. *where the suspect poses a threat of serious violence to the arrestor or any other person; or*

    b. *where 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 then, or later*.

15. Although the Bill only has two defences (compared to the current s 49(2)'s three), it permits the use of force in significantly more circumstances than envisaged by the *Walters* court.

16. Absent from the Bill's proposed defences justifying the use of force, are the following requirements:

    a. the requirement that force be *"immediately necessary"* for the purposes of the protecting the arrester or any other person from *imminent future death or grievous bodily harm*;
    b. the requirement that there be a substantial risk that the suspect will cause *imminent future death or grievous bodily harm* if the arrest is delayed; and
    c. the requirement that the offence be *in progress*.

17. Thus, according to the amendment Bill:

    a. Deadly force is no longer limited to circumstances in which a serious crime had occurred and the police responsed "immediately" attempting to arrest a suspect. The unfortunate consequence of this is that deadly force could be justified during the course of a routine investigation;

    b. The threat of danger to the arrestor or any other person need only be *serious*, (as opposed to grievous bodily harm required by the current text);

    c. There need not be a "substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed." Put differently, there need not be a genuine risk to the lives of enforcement officials to justify deadly force, a "physical tussle between law enforcement officials and a suspect that occurs long after the crime" would suffice.[12]

    d. There need not be an offence in progress that is of a forcible and serious nature and that involves the use of life threatening violence or a strong likelihood that it will

[12] S Woolman 'Security Services' in S Woolman, M Bishop and J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006)

> cause grievous bodily harm. Accordingly, the Bill obfuscates almost entirely the notion expressed clearly in the *Walters* principles: that if arrest is necessary, then the force must be the minimum necessary to effect the arrest, and must be proportionate to the offence committed or the continued threat of violence.[13]

18. Given the inconsistencies between the Bill and the constitutional requirements laid down in *Walters*, it is odd, then, that the preamble to the Bill claims to amend the law so as to "align section 49 with the criteria laid down [in that case]." Rather, the Bill drops the bar for permissible killing during arrest in a manner that falls short of the Constitution and international law. Moreover, it is diametrically opposed to the promise of the constitutional democracy which respect's every person's right to life.

19. It is worth noting at this stage that the 2009/2010 Independent Complaints Directorate Annual Report indicates that 46% of out of all deaths that occur as a result of police action (a total of 566) happen during the course of an arrest, 10% during an investigation and 4% during the course of an escape. These are alarming statistics indicating excessive reliance on the use of deadly force. Thus, if anything, efforts should be made at curbing these tendencies, not promoting or legitimising them by affording officials greater power to use lethal force.

20. It is recommended therefore, that the Bill *not* be adopted, and the current section 49(1) and (2) remain as is.

21. Alternatively, it is recommend that section 49(2) read as follows:

> *If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempts and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing*.

and what would then follow in the remaining subsections, would be the *Walters* princples, to function as guidelines for law enforcement officials.

22. The Constitutional Court has repeatedly expressed the need for there to be "guidelines" in relation to decisions involving a degree of discretion on the part of public officials where the constitutional rights are of those affected by such decisions could be harmed.[14] The need for

[13] Interestingly, the importance of there being an *imminen*t threat was recently discussed in the case of *Mondlane and Others v Minister for Safety and Security*[13] and indeed formed the basis of the High Court's decision to declare unlawful the use of force by the arresting officers.

[14] See for example *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

guidelines when it comes to the use of force is all the more important given the life-or-death consequences that flow from the decisions made in this regard.

The Correctional Services Act 111 of 1998 and differential treatment of detainees

23. Another, perhaps unintended , consequence of the Bill is the potentially differential treatment between detainees being kept in custodial settings classified as "correctional facilities" and detainees that are kept in other facilities such as SAPS holding cells and court cells.

24. The use of force, including deadly force, as a response to incidences that occur in Department of Correctional Services (DCS) facilities, is regulated by the Correctional Services Act (CSA). The use of force and deadly force as a response to incidences that occur in non-DCS facilities is regulated by the CPA.

25. The CSA contains a range of detailed provisions regulating the use of force, including deadly force (annexed to these submissions for ease of reference). These clearly emphasise the need to use only the minimum degree of force necessary and in a manner that is proportionate to the objective. Regarding the use of firearms, the CSA requires that they be used as a last resort and then only in self-defence, in defence of another, to prevent an inmate from escaping, or when the security or the safety of inmates is threatened. In addition, before a firearm is used, a verbal warning must be given. If the warning has no effect, a warning shot must be fired. If the warnings are still of no effect, the line of fire should be directed in such a manner that the probable result will not be a fatal injury.

26. A further guideline provided to DCS officials regarding the use of force is found in section 32(2) of the CSA stating that force may be used only when authorised by the Head of Prison, unless a correctional official reasonably believes that the Head of the Prison would authorise the use of force and that the delay in obtaining such authorisation would defeat the objective.

27. As explained above, the Bill offers a substantially lower standard of protection than the CPA does currently and what is constitutionally required. This means that detainees in DCS facilities are afforded greater protection by the law than detainees being held in non-DCS facilities. In other words, based on where they happen to be accommodated at a given time, detainees are not being treated equally by the law.

28. Section 9(1) of the Constitution states: "Everyone is equal before the law and has the right to equal protection and benefit of the law."

29. In its analysis of this section in the case of *Harksen v Lane*,[15] the Constitutional Court stated:

[15] 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC).

> "[t]he constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."

30. Accordingly, if the differential treatment bears "no rational connection to a legitimate governmental purpose" then the provision in question is a violation of section 9(1) of the Constitution.

31. Unless the state can illustrate the "legitimate government purpose" behind the differential treatment between detainees in SAPS facilities and detainees in DCS facilities, the Bill is unconstitutional and must not be adopted on this ground.

The UN Convention against Torture

32. UNCAT defines torture as:

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. <u>It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions</u>."

33. Despite the prohibition of torture in the Bill of Rights and the government's ratification of UNCAT on 10 December 1998, the act of torture has not been criminalised under South African law and other obligations have neither been fulfilled nor, where relevant, domesticated. This submission alerts the Committee to the relationship that the proposed amendment has with the absolute prohibition of torture.

34. In relation to the use of force by law enforcement officials it is the fourth component of the definition of torture that is of particular relevance: the exclusion of pain or suffering arising only from, inherent in or incidental to lawful sanctions. The drafters of the Convention were mindful of the fact that there are certain circumstances when the intentional inflicting of pain and suffering may be a result of pursuing a legitimate aim (e.g. the arrest of a person) but that that this must be described in law. In the above it was argued that guidance through principles on the lawful use of force has been provided in the *Walters* decision and that the current section 49 is harmonised with that. If the section 49 is indeed amended, it must rather aim to describe more

precisely and with greater firmness the parameters of "lawful sanctions" than perforate the existing boundaries.

35. The overwhelming majority of use-of-force incidents by law enforcement officials are, thankfully, of a non-lethal nature. The issue at stake is whether an incident of non-lethal use of force is, firstly, lawful and meet the requirements articulated in the current section 49 and the principles in the *Walters* decision. Secondly, if the incident fails to meet these standards, does it violate the absolute prohibition of torture? The broadening of the scope of the use of force, as proposed in the Bill, equally broadens the risk of torture being committed by a law enforcement official. In short, the legal framework should guide law enforcement officers on how to use force and how not to commit the crime of torture.

Conclusion

This submission has argued that the proposed amendment runs a real and substantial risk of being found unconstitutional. This risk arises from two main sources, namely that it removes the immediacy-of-the-threat requirement and, further, that it does away with the test of what would reasonably happen if force is **not** used (i.e. result in loss of life and limb).