

## THE USE OF FORCE IN EFFECTING ARREST IN SOUTH AFRICA AND THE 2010 BILL: A STEP IN THE RIGHT DIRECTION?

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### SUMMARY

In South Africa the use of force in effecting arrest is statutorily governed by section 49 of the *Criminal Procedure Act* 51 of 1977. The inception of the Constitution brought about a dramatic change in South African law in this regard. During 2001 and 2002 the two highest courts in the country had to decide on the constitutionality of sections 49(1) and 49(2) respectively. The Supreme Court of Appeal in *Govender v Minister of Safety and Security* 2001 2 SACR 197 (SCA) did not declare section 49(1) unconstitutional but found it had to be interpreted restrictively ("read down") to survive constitutional scrutiny. The Constitutional Court on the other hand confirmed the unconstitutionality of section 49(2) in *S v Walters* 2002 2 SACR 105 (CC) and the section was declared invalid. By then (as early as 1998) the legislature had already promulgated an amendment to section 49, but the amendment came into operation only in 2003 after section 49 had undergone intensive constitutional scrutiny. Legal scholars and others raised serious objections against the amendment – some were even of the opinion that it created a "right to flee" and that the rights of perpetrators were protected to the detriment of law-abiding citizens. The Department of Justice and Constitutional Development in 2010 drafted an Amendment Bill which was subsequently approved in Parliament. This paper discusses and concludes on: the developments over the last years in the South African law with regard to the use of force in effecting arrest by the South African Police Service (SAPS); international policies and guidelines of the police in this regard; and the application of the provisions of the Amendment Bill in practice and the possible pitfalls in the application of the latter.

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## **KEYWORDS**

Use of force in effecting arrest; Section 49 of the Criminal Procedure Act; reasonable, proportional and necessary force; deadly force; national arrest law manual; application of the use of force in practice.