THE POWERS OF A PEACE OFFICER TO ARREST A SUSPECT WITHOUT A WARRANT, DETAIN AND USE FORCE – ITS CONSTITUTIONALITY AND CONSEQUENCES ON THE RIGHTS OF A SUSPECT

by

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DECLARATION

This research is submitted in accordance with the requirements for the degree of Doctor of Laws (LLD) in the subject Criminal and Procedural Law at the University of South Africa.

I declare that **THE POWERS OF A PEACE OFFICER TO ARREST A SUSPECT WITHOUT A WARRANT, DETAIN AND USE FORCE – ITS CONSTITUTIONALITY AND CONSEQUENCES ON THE RIGHTS OF A SUSPECT** is my own work, and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

Signature: Date: March 2022

ARUSHA GOPAUL

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SUMMARY

Peace officers are empowered to arrest without a warrant, detain and use force on suspects. Suspects are guaranteed protection and promotion of their constitutional rights and any act that violates their constitutional rights will be unlawful. As a result of the unlawful actions of peace officers, suspects are subjected to poor conditions in police station holding cells. Consequent to the unlawful actions of peace officers, suspects are entitled to institute civil claims for damages. However, the disproportionate calculation of damages necessitates a uniform and mathematically correct method to calculate damages. Moreover, peace officers' lack of knowledge on the legal aspects of an arrest without a warrant, detention, the use of force and the importance of the constitutional rights of suspects is the reason for the rate of unlawful actions and violations of constitutional rights. South Africa is bound by international law and regional law instruments. However, due compliance with the provisions of the relevant instruments which promote the human rights of suspects is questionable. Furthermore, the South African legal principles will be compared with foreign jurisdictions such as Canada and the United Kingdom in order to determine whether South Africa can emulate their best practices in educating peace officers on the relevant legal principles and protecting the constitutional rights of suspects.

It is proposed that amendments to the existing legislation should be made in order to protect the constitutional rights of suspects and to limit the powers of peace officers so that the rate of unlawful actions are alleviated. In order to compensate for the violation of the constitutional rights of suspects, a mathematically accurate and uniform method should be implemented by all South African courts so that awards are proportionate, fair and reasonable. South Africa should make efforts to be more compliant with its obligations as provided for in international and regional instruments. Furthermore, South Africa should make efforts to emulate the practices and legal principles in Canada and the United Kingdom in order to enhance and develop the legal principles and practices in South Africa so that the police force can become professionalised and the constitutional rights of suspects are promoted and protected.

KEY WORDS: Constitution, suspect, peace officer, police powers, arrest without a warrant, detention, use of force, constitutional rights, right to personal liberty, conditions in police cells, international and regional instruments, foreign jurisdictions.

LIST OF ABBREVIATIONS

AChHPR – African Charter on Human and Peoples' Rights

ACHPR – African Court on Human and Peoples' Rights

ACommHPR – African Commission on Human and Peoples' Rights

AJ – Acting Judge

APCC – Association of Police and Crime Commissioners

BPDLP – Basic Police Development Learning Programme

CACP – Canadian Association of Chiefs of Police

CEGEP – *College d enseignement general et professional* (College of General and Vocation Education)

CJA – Criminal Justice Act 1988

CLA – Criminal Law Act 1967

CPA – Criminal Procedure Act 51 of 1977

CPAA – Criminal Procedure Amendment Act 9 of 2012

CPIX – Consumer Price Index

DHEP – Degree Holder Entry Program

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms

EHRC – Equality and Human Rights Commission

HRA – Human Rights Act 1998

HRC – Human Rights Committee

ICCPR – International Covenant on Civil and Political Rights

ICCPR – OP1 – Optional Protocol to the International Covenant on Civil and Political Rights

IPCC – Independent Police Complaints Commission

IPID – Independent Police Investigative Directorate

ICJ – International Court of Justice

IPLDP – Initial Police Learning and Development Program

JMSA – Judicial Matters Second Amendment Act 122 of 1998

JP – Judge President

NMIRF – National Mechanisms for Implementation, Reporting and Follow-up

NPCC – National Police Chiefs Council

NPM – National Preventive Mechanism

OPCAT – Optional Protocol to the Torture Convention

PACE – Police and Criminal Evidence Act

PCDA – Police Constable Degree Apprenticeship

PCTPA – Prevention and Combating of Torture of Persons Act 13 of 2013

PEQF – Policing Education Qualifications Framework

PJD – Pre-Join Degree

PSO – Police Standing Order

RCCP – Royal Commission of Criminal Procedure

SAHRC – South African Human Rights Commission

SAPS – South African Police Service

SCA – Supreme Court of Appeal

SOCPA – Serious Organised Crime and Police Act 2005

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNCAT – United Nations Convention Against Torture

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

This study explores the powers of peace officers[1] in South Africa to arrest a suspect without a warrant, detain and use force on a suspect. In addition, the constitutionality and the consequences of the unlawful acts of arrest without a warrant, detention and the use of force are pertinent aspects that will be critically analysed. The reason for the critical analysis is to establish ways to implement new legal principles and practices to protect and promote the rights of suspects. Joubert[2] explains that if a peace officer exceeds the powers conferred upon him in terms of the authorising legislation or the 1996 Constitution,[3] such arrest will be unlawful. Joubert[4] and the court in *Minister of Law and Order, Kwandebele, & others v Mathebe & another*[5] explain further that if a suspect is arrested unlawfully, the subsequent detention will also be unlawful. This principle was also reiterated by the court in *De Klerk v Minister of Police*.[6] It is interesting to note that the comments made by Joubert[7] were in 2013 and the comments made by the judicial officers in the aforementioned cases were made in 1990 and 2019 respectively. Therefore, it is argued that none of the existing literature provides any solutions to the recurring incidents of the unlawful actions of peace officers and the violations of the constitutional rights of suspects. It is therefore important to examine ways to alleviate the incidents of unlawful actions of peace officers by considering amendments to the legal principles to promote methods of ensuring a suspect's attendance at court without resorting to an arrest without a

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1 The definition of a "peace officer" is explained in 1.10.4 below. In the context of this study, the reference to a "peace officer" is reference to a police officer who is a member of the South African Police Service. This is explained further in 1.7 below.

2 Joubert *Applied Law* 256. An example is where a peace officer arrests a suspect without a warrant in a situation which is not expressly authorised by section 40 of the Criminal Procedure Act or by a provision in any other Act.

3 Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution").

4 Joubert *Applied Law* 256.

5 *Minister of Law and Order, Kwandebele, & others v Mathebe & another* 1990 (1) SA 114 (A) at [122D] (hereinafter referred to as "*Mathebe*").

6 *De Klerk v Minister of Police* (2019) ZACC 32 (hereinafter referred to as "*De Klerk CC case*").

7 Joubert *Applied Law* 256.

warrant. Du Toit *et al*[8] argue that although a peace officer holds the power to arrest a suspect without a warrant, in terms of section 40 of the Criminal Procedure Act[9], it is not necessarily the only correct procedure to follow. In *S v More*[10] the court held that in order to emphasise the principle that before conviction a suspect should be treated as being innocent, an arrest without a warrant should be made only where it is likely that other methods of securing the suspect's attendance at court, such as summons or written notice to appear, would be ineffective. Despite the comments made by Du Toit *et al*[11] and the judgment in the *More* case, the researcher submits that the existing literature does not address methods to regulate and alleviate the incidents where peace officers arrest suspects without a warrant as opposed to using less invasive methods of bringing a suspect to court.

Despite several amendments over the years, the current section 49 of the CPA has been criticised for being unconstitutional because its provisions violate the rights of suspects. Botha and Visser[12] refer to the cases of *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* [13] and *Govender v Minister of Safety and Security*[14] and criticise the amendment to section 49(2) of the CPA in that it does not protect the rights to life and human dignity.[15] Furthermore, the Botha and Visser[16] also criticise section 49(2) for broadening the powers of peace officers to use deadly force in instances where the suspect is suspected of committing any offence, as opposed to the previous section that provided for offences listed in schedule 1 of the CPA.[17] Moreover, the argument by the Open Society Foundation[18] is in line with the criticism by Botha and Visser.[19] The *Govender* and the *Walters* case made

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8 Du Toit *et al Commentary on the Criminal Procedure Act* chapter 5 page 1.

9 The Criminal Procedure Act 51 of 1977 (hereinafter referred to as the "CPA").

10 *S v Mo*re 1993 (2) SACR 606 (W) at [608b-j] (hereinafter referred to as "*More*").

11 Du Toit *et al Commentary on the Criminal Procedure Act* chapter 5 page 1.

12 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

13 *Ex Parte Minister of Safety and Security and Others: in re S v Walters* 2002 (2) SACR 105 (CC) at [616] (hereinafter referred to as "*Walters*").

14 *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at [16] (hereinafter referred to as "*Govender v Minister of Safety and Security*").

15 *Walters* at [9].

16 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

17 De La Harpe & Van Der Walt 2017 *PELJ* Volume 6 Issue 2 at 16.

18 Open Society Foundation for South Africa *Report on the OSF-SA roundtable discussion on the human rights and practical implications of the proposed amendments to section 49 of the Criminal Procedure Act* at 4.

19 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

comments about section 49 as early as 2001 and 2002 respectively. Furthermore, criticisms by Botha and Visser[20] and the Open Society Foundation[21] were made as early as 2012 and 2010 respectively. Despite the criticism in the existing literature that pertains to the unconstitutionality of section 49(2) of the CPA, it must be pointed out that there have since been no amendments to section 49(2) of the CPA to ensure that its provisions are constitutional to the extent that it protects and promotes the rights of suspects. This study therefore aims to highlight the existing literature and gaps in the existing legal principles and thereby propose solutions to the problem. Notwithstanding the existing literature on the issues pertaining to the unlawful actions of peace officers and the violation of the constitutional rights of suspects, there are various consequences that flow from the unlawful actions of peace officers that directly affect the rights of suspects.

As a result of the unlawful actions of peace officers, the constitutional rights of a suspect and the right to personal liberty are violated. As a result of the unlawful acts of arrest without a warrant and unlawful detention, suspects are subjected to poor conditions and overcrowding in police station holding cells.[22] Overcrowding in police holding cells is a growing concern. Peace officers are duty-bound to effect arrests of suspects and bring them to book. However, Dissel and Ngubeni[23] explain that suspects are supposed to be held in police holding cells for very short periods, usually not longer than 48 hours, after which they are sent to correctional facilities. However, the Dissel and Ngubeni[24] argue that there are situations where suspects are held in holding cells for periods of up to two weeks without appearing in court and in such cases, the police holding cells become too congested. Moreover, Edwards and Stone[25] argue that suspects are detained in police station holding cells for longer than the prescribed maximum period of 48 hours. Therefore, apart from a violation of the

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20 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

21 Open Society Foundation for South Africa *Report on the OSF-SA roundtable discussion on the human rights and practical implications of the proposed amendments to section 49 of the Criminal Procedure Act* at 4.

22 *L and Another v Minister of Police and Others* 2019 (1) SACR 328 at [59] (hereinafter referred to as "*L*").

23 Dissel and Ngubeni http://www.csvr.org.za/wits/papers/papadkn.htm (accessed on 1 July 2016) at [1].

24 Dissel and Ngubeni http://www.csvr.org.za/wits/papers/papadkn.htm (accessed on 1 July 2016) at [1].

25 Edwards & Stone http://apcof.org/ wp-content/uploads/2017/03/014-implementation-of-the-luanda-guidelines-review-of-arrest policecustody-and-remand-detention-in-south-africa-.pdf (accessed on 20 October 2021).

right to liberty, police stations are crowded with suspects who should not have been detained.[26] The court in *Motsei*[27] pointed out the indecency of crowded police station holdings cells with a large number of petty offenders. Despite the arguments set forth by the authors and the judicial officers, the literature fails to address the solutions to alleviate the incidents of overcrowding and poor cell conditions. The researcher submits that these consequences may be alleviated by a change in the existing legal principles and criminal legal system. Moreover, once a suspect successfully claims unlawful arrest, detention or the use of excessive force in a civil action against the State, a court must then determine an appropriate amount of damages. The courts have thus far calculated damages by considering amounts awarded in previous cases as a guide, without establishing whether it is indeed, an accurate calculation of damages. Courts have also held that the damages are such that it is not possible to calculate, with certainty, an appropriate amount which leaves the courts with a discretion to award an amount that it may see reasonable after considering the circumstances of the case.[28] This was reiterated in the case of *Rahim and 14 Others v the Minister of Home Affairs*[29] where the judicial officers held that:[30]

> "The deprivation of liberty is indeed a serious matter. In cases of non patrimonial loss where damages are claimed, the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general consideration play a decisive role in the process of quantification. **This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make appropriate and fair award.**[31] In cases involving deprivation of liberty the amount of satisfaction is calculated by the court *ex aequo et bono. Inter alia,* the following factors are relevant.
>
> 27.1 Circumstances under which the deprivation of liberty took place;
>
> 27.2 the conduct of the Defendants; and
>
> 27.3 the nature and duration of the deprivation."

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26 *Motsei v Minister of Safety and Security* (A1174/2006) [2010] ZAGPPHC 14 (4 March 2010) at [38] (hereinafter referred to as "*Motsei*").

27 *Motsei* at [38].

28 *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at [41] (hereinafter referred to as "*Tyulu*"); *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at [199]; Klopper *The Law of Third Party Compensation* 2nd ed at 152-158.

29 *Rahim and 14 Others v the Minister of Home Affairs* 2015 (4) SA 433 (SCA); [2015] 3 All SA 425 (SCA) at [27] (hereinafter referred to as "*Rahim*").

30 *Rahim* at [27].

31 Own emphasis.

Despite the recent comments made by the court in the *Rahim* case, the existing literature and the courts have not yet considered any alternative method that is accurate, fair and reasonable. The study therefore aims to propose a more accurate and uniform method of calculating damages. The background to the study dealt with a summary of the pertinent aspects of the literature review that will be dealt with throughout the study. However, before embarking on a detailed critical analysis of the existing literature and the gaps in the body of knowledge, it is important to first set out the statement of the problem in which the researcher analyses the existing problem that is associated with the unlawful actions of peace officers which leads to a discussion on the importance of dealing with the problem.

1.2 Statement of the problem

Section 7(2) of the Bill of Rights[32] provides that the State must protect, promote and fulfil the rights in the Bill of Rights. Moreover, South African legislation and the South African Police Standing Order (PSO)[33] give peace officers the power to arrest suspects without a warrant, detain and use force. However, a problem arises when peace officers take matters into their own hands and their conduct results in a series of actions which can negatively impact on the constitutional rights of a suspect. A suspect can suffer at the hands of peace officers who fail to exercise their tasks and duties properly.

Although the South African criminal justice system and courts condemn violations of the fundamental rights of suspects, South African courts are inundated with cases of unlawful arrests without a warrant, unlawful detention and the use of excessive force. This study therefore critically analysed the unlawful actions of peace officers and the violations of the rights of suspects by examining the existing relevant literature. The study also involves a critical analysis on compliance with international and regional obligations to promote the human rights of suspects so that South Africa can emulate

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32 The Constitution of the Republic of South Africa, 1996, Section 7 (2) (hereinafter referred to as the "Constitution").

33 Standing Order (G) 341, issued under Consolidation Notice 15/1999 and entitled 'Arrest and the Treatment of an Arrested Person until Such Person is Handed Over to the Community Service Centre Commander' (hereinafter referred to as the "PSO").

legal principles and best practices to develop and enhance its own criminal justice system. Furthermore, the study aims to propose solutions to the issues by recommending amendments to the existing legal principles and practices in the South African criminal justice system so that the constitutional rights of suspects are duly protected and promoted.

1.3 Purpose of the study

The study employs legal research methodology where the legal principles that relate to an arrest without a warrant, detention and the use of force and the constitutional rights of suspects are critically analysed. International and regional law and human rights instruments will be analysed in light of the South African legal principles to determine whether South Africa is complying with its international and regional obligations to promote and protect the rights of suspects and to establish ways in which the legal principles can be developed to ensure complete compliance with international and regional obligations. Furthermore, the study aims to identify the flaws or gaps in the legal system which negatively impact on the constitutional rights of suspects and the legal principles and practices in South Africa will be compared with the legal principles and practices in Canada and the United Kingdom (England and Wales) to establish whether South Africa can develop and enhance its legal system by emulating the practices and legal principles in these foreign jurisdictions.

1.4 Significance of the study

The study focuses mainly on the constitutional and human rights of suspects and the consequences of the unlawful actions of peace officers which result in violations of constitutional rights. The study aims to benefit persons who are arrested and detained and whose constitutional rights are affected due to the unlawful exercise of police powers. Indeed, the legal system caters for the powers of peace officers and for the rights of suspects. However, it is a grave concern that South African courts are inundated with civil claims for unlawful arrest, unlawful detention and the use of excessive force (as discussed under paragraph 1.2). The study also aims to strengthen and improve the police force by proposing ways to ensure that peace officers have knowledge of the legal principles and laws that govern the exercise of

their powers. Therefore, the study aims to benefit peace officers and the police force because the actions of peace officers directly affect the constitutional and human rights of suspects.

1.5 Objectives of the study

The objectives of the study are as follows:

a) to examine the constitutional violations and implications of a peace officer's act of unlawful arrest without a warrant, unlawful detention and the use of excessive force on a suspect;

b) to examine the introduction and use of alternative methods to an arrest without a warrant and detention as the fifth jurisdictional fact;[34]

c) to examine the infringements of the right to personal liberty, with further reference to poor conditions and overcrowding in police station holding cells as consequences of the unlawful actions of peace officers, and a discussion of ways to alleviate the rate of delicts and infringements;

d) to examine and analyse international and regional law and human rights instruments in relation to an arrest without a warrant, detention and the use of force and its relevance to the South African system;

e) to establish whether, or to what extent, South Africa is compliant with its international and regional obligations to promote and protect the constitutional and human rights of suspects.

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[34] The fifth jurisdictional fact is a suggested additional requirement which would be added to the existing four requirements for a lawful arrest. This fact or requirement means that when a peace officer is making an arrest, he must first consider whether there are other alternative and less invasive means other than an arrest to ensure that a suspect attends court. However, the fifth requirement has not yet been added to the existing legal requirements or principles for a lawful arrest.

f) to compare and analyse the legal principles in South Africa governing the powers of a peace officer to arrest a suspect without a warrant, detain and use force, with the legal principles in Canada and the United Kingdom respectively.

1.6 Research question and sub-questions

In addition to the outline of the objectives of the study, it is also necessary to outline the research questions of the study. The main research question deals with a holistic approach to the study and the research question is further categorised into sub-questions which deal with each chapter specifically. The research questions emanate from the objectives of the study.

1.6.1 Research question

What are the constitutional implications and consequences of an arrest without a warrant, detention and the use of force by a peace officer on a suspect?

1.6.2 Sub-questions

a) How can South Africa avoid the high number of violations of the constitutional rights of suspects which take place as a result of peace officers' acts of unlawful arrest, unlawful detention and the use of excessive force?

b) Can the introduction of the fifth jurisdictional fact as an alternative to an arrest without a warrant and detention alleviate the high rate of unlawful arrest without a warrant, unlawful detention and the use of excessive force?

c) How can South Africa ensure that peace officers who act in terms of the powers that are vested in them, act in accordance with the academic knowledge and understand the legal aspects that govern their powers to arrest without a warrant, detain and use force on a suspect?

d) How can South Africa alleviate the delicts committed by peace officers and the infringement of the right to personal liberty of a suspect, which occur as a result of the unlawful actions of peace officers?

e) How can South Africa alleviate the violations of the constitutional rights of a suspect due to poor conditions and overcrowding in police station holding cells?

f) Is South Africa compliant with its international and regional obligations to promote and protect the constitutional rights of suspects?

g) How can South Africa enhance or develop its legal system to make it more compliant with international and regional laws and human rights instruments?

h) Is the South African legal position with regard to the principles of arrest without a warrant, detention and the use of force more advanced or developed than that of Canada and the United Kingdom?

i) How can South Africa enhance or develop its legal system by implementing or emulating the legislative provisions or practices of Canada and the United Kingdom in order to promote the constitutional rights of suspects?

j) To what extent, if any, are South Africa, Canada and the United Kingdom complying with their international obligations to promote and enforce the provisions of the international human rights instruments that they have signed and ratified?

1.7 Scope and delimitations

Although the definition of a peace officer also includes persons other than police officers, this study focuses specifically on peace officers who are police officials and who are given the power to arrest without a warrant, detain and use force because it is police officials who embark on acts beyond their powers which result in daily breaches of fundamental rights. Furthermore, the study deals with the powers of peace officers to arrest without a warrant, detain a suspect and use force. However, this

category of criminal procedure is limited to the circumstances where peace officers go beyond their given powers and act unlawfully, thereby infringing on the constitutional rights of a suspect. With regard to the delimitations of the study, the researcher will confine the discussion of the legal principles that relate to the delictual elements and the calculation of damages in so far as it relates to the conduct of peace officers and the right to personal liberty of suspects. The researcher will not discuss these legal principles in detail as it may form part of a topic for another thesis. A further delimitation is that the researcher will confine the comparative review in the research to two foreign jurisdictions namely, Canada and the United Kingdom (England and Wales).[35] Although the study included limitations as discussed herein, the study also aims to make contributions to the body of knowledge in the area of study which are discussed hereunder.

1.8 Contributions to the body of knowledge in the area of study

The main issue that the study deals with is the misuse of the powers given to peace officers to arrest without a warrant, detain and use force. As a result of the unlawful actions of peace officers, the constitutional and human rights of suspects are violated. In a country such as South Africa where the rights that are guaranteed in the Constitution are of paramount importance, the alleviation of the unlawful actions of peace officers and the promotion and protection of the rights of suspects should be the main aim. This section aims to reflect on the literature review and show how the gaps in the existing knowledge will be addressed or sealed through contributions to the body of knowledge. This will assist in addressing the issues raised in the statement of the problem. The methodology that the researcher will use in the literature review is the historic-research method. The researcher will explain how the historic-research[36] method will be used to successfully highlight the gap in the knowledge in the area of study.

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[35] The reasons why these two foreign jurisdictions have been selected are explained in paragraph 1.9.2.

[36] The historic-research method will be addressed under paragraph 1.9.

As stated by Du Toit *et al*[37] and Botha and Visser,[38] there must be a balance between the constitutional rights of suspects and the due and proper exercise of the powers that are given to peace officers to arrest without a warrant, detain and use force. In support of these comments, the court in *Minister of Safety and Security v Glisson*[39] held that in a democratic State such as South Africa, preference ought to be given to the constitutional rights of suspects rather than the powers of peace officers. Despite the comments by Du Toit *et al*,[40] Botha and Visser[41] and the court in *Glisson*, the court in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[42] have strongly condemned the conduct of peace officers in cases where violations of fundamental rights to human dignity and freedom and security of person occurred during the act of arrest without a warrant. Although the existing literature emphasises the importance of the rights of suspects, especially the rights to freedom and security of person and human dignity, the study raises concerns about peace officers having adequate knowledge of the legal principles and constitutional rights so that they can exercise their powers whilst considering the importance of the rights of suspects. The critical analysis of the literature on an arrest without a warrant and the constitutional rights will assist the researcher to highlight the gap in the knowledge in that there is no contribution made towards developing the police force and educating peace officers on the legal principles and constitutional rights. According to Kruger,[43] Steytler[44] and the court in *S v Mbahapa*,[45] the detention of suspects beyond the maximum period of 48 hours is unlawful and unconstitutional. Although Mokoena[46] commented that knowledge of the legal principles can alleviate the unlawful actions of peace officers,

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37 Du Toit *et al Commentary on Criminal Procedure* 5 - 9. See also *Lapane v Minister of Police* 2015 (2) SACR 138 (LT) at [28] where the Court held as follows: "What is meant by s13 of the SAPS Act is that all police officers must act in accordance with the requirements of the Constitution and in doing so must have regard to particularly, the fundamental rights of every person they are dealing with in the course of their duties"; *Rasmeni v Minister of Safety and Security and Another* (2018) JOL 40633 (ECM) at [25]-[26].

38 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

39 *Minister of Safety and Security v Glisson* 2007 (1) SACR 131 E at [134] (hereinafter referred to as "*Glisson*").

40 Du Toit *et al Commentary on Criminal Procedure* 5 - 9.

41 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569..

42 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) (1995) ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) at [49] (hereinafter referred to as "*Ferreira*").

43 Kruger *Hiemstra's Criminal Procedure* at 5-29.

44 Steytler *Constitutional Criminal Procedure at* 126.

45 *S v Mbahapa* 1991 NR 274 (HC) (1991) (4) SA 668 at [280E – H] (hereinafter referred to as "*Mbahapa*").

46 Mokoena *A Guide to Bail Applications* 15.

no action has been taken to address the problem. Despite that fact that Kruger,[47] Steytler[48] and the court in *Mbahapa*[49] strongly condemn the detention of suspects for more than 48 hours, the issues that have not been addressed in the existing literature is that peace officers do not have the knowledge of the legal principles that govern the act of detention. Hence the continuous incidents of the unlawful detention of suspects. The critical analysis of the literature on detention will assist the researcher to highlight the gap in the knowledge, which is the lack of legal education of peace officers.

The historical-research method that will be used in the study includes a detailed critical discussion of the past developments and amendments to section 49 of the CPA. A critical discussion will highlight the ineffectiveness of the amendments of the section with regard to the promotion and protection of the constitutional rights of suspects. Burchell[50] argues that the use of force is provided for in legislation, however, the extent to which force is used must be limited. Botha and Visser[51] and the Open Society Foundation for South Africa Report[52] criticise the wording of section 49(2) of the CPA in which it is provided that a peace officer may use force on a suspect who has or is committing an offence, rather than a specific list of offences[53] and argued that the current section 49(2) is unconstitutional because it violates the constitutional rights to life, human dignity and bodily integrity. Furthermore, Botha and Visser[54] argue that section 49(2)(b) of the CPA requires further amendment because although the words "future death" have been deleted, the removal of the word "immediate" has the same effect as the word "future death" and the result is that peace officers may misuse their powers to use force and thereby exceed the lawful act of the use of force. The study also highlighted the fact that the *Walters* and the *Govender* cases were used by the legislature by copying the recommendations of the judicial officers in the courts without actually considering the constitutionality of the amendment. In the process of critically analysing the comments made by the authors and courts with regard to the use of

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47 Kruger *Hiemstra's Criminal Procedure* at 5-29.

48 Steytler *Constitutional Criminal Procedure at* 126.

49 *Mbahapa* at [280E – H].

50 Burchell *South African Criminal Law and Procedure Vol 1: General principles of criminal law* at 121.

51 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

52 Open Society Foundation for South Africa *Report on the OSF-SA roundtable discussion on the human rights and practical implications of the proposed amendments to section 49 of the Criminal Procedure Act* at 4.

53 For example, the list of offences in schedule 1 of the CPA.

54 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

force, the researcher will highlight the gap in the knowledge and show that indeed, further amendments to section 49 of the CPA are required to ensure the protection and the promotion of the rights of suspects. It is important to note that no developments and amendments have been made to section 49 of the CPA since the comments by Botha and Visser[55] and the Open Society Foundation for South Africa Report[56] and the comments by the judicial officers in the *Walters* and *Govender* cases.

The historic-research method will be used to critically analyse existing literature with the aim of highlighting and addressing the gap with regard to an arrest without a warrant and alternative methods which can alleviate the unlawful acts of arrest without a warrant and detention and promote the constitutional rights of suspects. A lawful arrest without a warrant is one in which a peace officer complies with the four requirements for a lawful arrest. The four requirements for a lawful arrest forms part of the existing legal principles. However, Joubert[57] and the court in *Tsose v Minister of Justice and Others*[58] were of the opinion that peace officers should consider alternative methods to ensure that a suspect attends court instead of using the method of arrest. Despite the comments made in favour of alternatives other than arrest, the court in *Tsose* held that there was no legal principle that required peace officers to arrest suspects using any other method that is less invasive than an arrest.[59] According to Hiemstra and Kruger[60] and the courts in *Motsei*[61] and *Louw v Minister of Safety and Security*[62] milder or alternative methods should be used instead of an arrest in order to reduce the number of unlawful arrests without a warrant. Despite the criticism by the courts against the use of milder methods other than arrest as stated in *Minister of Safety and Security v Sekhoto*[63] and *Charles v Minister of Safety and*

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55 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

56 Open Society Foundation for South Africa *Report on the OSF-SA roundtable discussion on the human rights and practical implications of the proposed amendments to section 49 of the Criminal Procedure Act* at 4.

57 Joubert *Applied Law* at 18.

58 *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A) at [17G-H] (hereinafter referred to as "*Tsose*").

59 *Tsose* at [17G-H].

60 Kruger *Hiemstra's Criminal Procedure* at page 5-2.

61 *Motsei* at [35].

62 *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) at [185a-187g] (hereinafter referred to as "*Louw*"). See also *Minister of Safety and Security & Another v Swart* 2012 (2) SACR 226 (SCA) at [20].

63 *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) (hereinafter referred to as "*Sekhoto*").

Security[64], Du Toit *et al*[65] are of the opinion that the introduction of the fifth jurisdictional fact that allows peace officers to use alternative methods other than arrest without a warrant will assist in alleviating the unlawful actions of peace officers and will protect and promote the constitutional rights of suspects. Although Du Toit *et al*[66] suggested this development, nothing has been done to ensure that the principle is added to the existing principles. In the relevant Constitutional Court case of *Raduvha v Minister of Safety and Security*,[67] the court held that there is no need for the fifth jurisdictional fact to be introduced into the law because peace officers should consider the rights of children in accordance with section 28(2) of the Constitution when exercising their discretion to arrest a child. The court in *Raduvha*[68] also stated that peace officers should use alternative methods other than an arrest to ensure that the child attends court. Tshehla[69] critically analyses the comments in *Raduvha* where the court preferred the discretionary powers of peace officers to use alternative methods other than an arrest, as opposed to introducing the fifth jurisdictional fact. Notwithstanding the fact that the court in *Raduvha* prefers that peace officers exercise their discretion, it must be argued, as Tshehla[70] argued, that there is no binding legislative provision that prescribes how the discretion must be exercised. Therefore, the researcher argues that despite the comments in *Sekhoto* and *Raduvha*, there still exists a gap in the law that explicitly provides that peace officers must use alternative methods other than an arrest. Since the judgment in *Raduvha*, the courts and the legislature have not expressed a clear and explicit approval for the introduction of the fifth jurisdictional fact, alternatively an amendment to the exiting legislation that duly promotes and protects the constitutional rights of suspects. A critical analysis of the introduction of the fifth jurisdictional fact will assist the researcher to highlight the gap in the existing body of knowledge and thereby contribute to the body of knowledge by arguing that the introduction of the fifth jurisdictional fact may assist in alleviating the unlawful actions of peace officers, protecting the constitutional rights of suspects and substantially reduce poor conditions and overcrowding in police station holding cells.

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64 *Charles v Minister of Safety and Security* 2007 (2) SACR 137 (W) (hereinafter referred to as "*Charles*").

65 Du Toit *et al Commentary on Criminal Procedure* 5 - 9.

66 Du Toit *et al Commentary on Criminal Procedure* 5 - 9.

67 *Raduvha v Minister of Safety and Security and Another* (2016) (2) SACR 540 (CC) at [58] (hereinafter referred to as "*Raduvha*").

68 *Raduvha* at [58].

69 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 95-96.

70 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 95-96.

1.9 Research methodology

This study used the legal methodology which focuses on a critical review of legal books and journal articles. This method is neither qualitative nor quantitative since it entails a systematic inquiry that includes historical-legal research which involves reliance on precedent and which requires that focus be placed on the past in order to answer the question under investigation.[71] The research also relies on primary sources, such as the constitutions, statutes, regulations and case law.[72] The study will also make use of a comparative review of the legal principles and practices in South Africa with foreign jurisdictions such as Canada and the United Kingdom. The reason for the comparative review is to establish and critically compare whether the South African principles and practices with regard to an arrest without a warrant, detention and the use of force aim to achieve the protection and promotion of the rights of suspects. This study will include a critical analysis and discussion of the existing literature in the field where authors and judicial officers have examined and criticised aspects that pertain to the unlawful actions of peace officers and the violations of the constitutional rights of suspects.

1.9.1 Literature review

According to Swanepoel, Lotter and Karels,[73] the reasonable suspicion test that is used by peace officers to arrest without a warrant is based on the objective standard of a reasonable peace officer. However, in the case of *Ralekwa v Minister of Safety and Security*[74] the court found that an arrest without a warrant is unlawful if the peace officer did not have a reasonable suspicion to arrest without a warrant. The comments by Swanepoel, Lotter and Karels[75] and the court in the *Ralekwa* case dates back to 2014 and it is therefore apparent that the issue of unlawful arrests without a warrant

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71 Russo 2005 *African Journals Online* Volume 23 Issue 1.

72 Russo 2005 *African Journals Online* Volume 23 Issue 1.

73 Swanepoel, Lotter & Karels *Policing and the Law* 178.

74 *Ralekwa v Minister of Safety and Security* 2004 (1) SACR 131 (T) at [11]-[1] (hereinafter referred to as "*Ralekwa*").

75 Swanepoel, Lotter & Karels *Policing and the Law* 178.

is an existing issue that requires attention. Botha and Visser[76] and Du Toit *et al*[77] are some of the leading authors who comment on the balance between the powers of peace officers and the constitutional rights of suspects. The court in *Ferreira*[78] associated the importance of the right to human dignity with the right to freedom and security of person in relation to an arrest without warrant. Furthermore, Freedman[79] and Cheadle, Davis and Haysom[80] explain that the right to freedom and security of a suspect is of utmost importance. The comments made by the court in *Zealand v The Minister of Justice and Constitutional Development and Another* [81] is evidence that a breach of the right to freedom and security is sufficient to establish the unlawfulness of a peace officer's action. Despite the comment that was made by the court in 2008, the literature does not provide any solutions to the problems associated with the violation of the right to freedom and security of person as a result of an unlawful arrest without a warrant. Furthermore, De Vos[82] and Cheadle, Davis and Haysom[83] explain the importance of the right to human dignity of a suspect and that any unlawful action by a peace officer will amount to a violation of the right to human dignity. However, nothing in the existing literature deals with the solutions to the problem associated with the violation of the right to human dignity as a result of an unlawful arrest without a warrant. It is clear that De Vos[84] and Cheadle, Davis and Haysom[85] correctly criticise the legal principles and the rights that are infringed due to the unlawful actions of peace officers. However, the existing literature is silent on whether peace officers have sufficient legal knowledge to properly execute their powers when dealing with suspects. It is not only the aspect of arrest without a warrant that is relevant to the literature review. The legal principles that pertain to detention of suspects are also relevant.

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76 Botha & Visser 2012 *PELJ* Volume 15 Issue 2.

77 Du Toit *et al Commentary on Criminal Procedure* 5 - 9.

78 *Ferreira* at [49].

79 Freedman 2012 *LAWSA* Volume 5 Part 4 at 1-348.

80 Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* at 131.

81 *Zealand v The Minister of Justice and Constitutional Development and Another*, unreported decision of the Constitutional Court: Case CCT 54/07 (hereinafter referred to as "*Zealand*").

82 De Vos *South African Constitutional Law in Context* at 457.

83 Cheadle, Davis and Haysom (eds) *South African Constitutional Law: The Bill of Rights at* 131.

84 De Vos *South African Constitutional Law in Context* at 457.

85 Cheadle, Davis and Haysom (eds) *South African Constitutional Law: The Bill of Rights at* 131.

Joubert,[86] Steytler[87] and Kruger[88] explain the importance of section 50(1)(c) of the CPA[89] by stating that any detention that is beyond the 48-hour period is unlawful and a violation of the constitutional right to freedom of movement. The court in *Minister of Law and Order v Kader*[90] and *Prinsloo v Die Nasionale Vervolgingsgesag en Andere*[91] dealt with the principles that are set out in section 50(1)(c) of the CPA and explain that it is important for peace officers to avoid detaining suspects for more than 48 hours to avoid incidents of unlawful detention and the violation of the constitutional rights of suspects. The comments in the *Kader* case were made in 1991 and the comments in the *Prinsloo* case were made in 2011. Despite the repetitive comments by the courts, the existing literature fails to address the problem associated with unlawful detention and the violation of the constitutional rights of suspects. Furthermore, there are no proposed solutions to alleviate the problems in the existing literature. However, Mokoena[92] elaborates on the powers of peace officers to act within the prescripts of section 50(1)(c) of the CPA by stating that peace officers can only be expected to practice the correct procedure and principles if they are trained and knowledgeable on these legal aspects. Despite the comments made by Mokoena,[93] nothing has been done to ensure that peace officers have the required knowledge of the legal principles. Notwithstanding the comments made by the authors and the courts, the existing literature falls silent on whether peace officers have knowledge of the legal principles that determine whether and when detention becomes unlawful. In addition to the criticism of the legal principles that pertain to an arrest without a warrant and detention, it is also significant to deal with criticism of the legal principles on the use of force because a peace officer's power to use force directly affects the constitutional rights of a suspect.

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86 Joubert *Applied Law* 264.

87 Steytler *Constitutional Criminal Procedure* 126.

88 Kruger *Hiemstra's Criminal Procedure* at 5-29.

89 *Bekker v Minister of Safety and Security and Another* (7944/2010) [2014] ZAKZDHC 53 (31 July 2014) at [153].

90 *Minister of Law and Order v Kader* 1991(1) SA 41 AD at [49 F] (hereinafter referred to as "*Kader*") at [49 F].

91 *Prinsloo v Die Nasionale Vervolgingsgesag en Andere* 2011 (2) SA 214 (GNP) at [24] (hereinafter referred to as "*Prinsloo*") at [24].

92 Mokoena *A Guide to Bail Applications* 15.

93 Mokoena *A Guide to Bail Applications* 15.

Joubert[94] and Du Toit *et al*[95] elaborate on the six requirements for the use of force and they emphasise that a peace officer should only use force when it is reasonable and proportionate to the circumstances of the case. Furthermore, the Supreme Court of Appeal (SCA) in *Govender v Minister of Safety and Security*[96] criticised the narrow meaning of the proportionality test that is used to determine the use of force and held that the proportionality test should be used in all circumstances where force is used and not only limit its application to the seriousness of the offence. One of the leading cases that deal with the use of force is *Walters*[97] where the court stated that the use of force may be used only where there is an imminent threat of violence. Prior to 1996, section 49 of the CPA was criticised for being contrary to the provisions of the Constitution and as a result a new section was formulated in 1998. Kruger,[98] Van der Walt[99] and Le Roux-Kemp and Horne[100] highlight the criticism and unconstitutionality of the provisions for the use of force in the 1998 amendment and stated that this criticism led to a further amendment in 2003. However, as apparent from the criticism highlighted by Botha and Visser,[101] Snyman[102] and the comments made in the *Walters* case with regard to sections 49(1) and 49(2) of the CPA, it appears that the 2003 amendment was not effective in promoting the constitutional rights of suspects and the amendments were peripheral in nature. As a result of this criticism, section 49 was amended further in 2012. With regard to the amendment to section 49(2) of the CPA, Botha and Visser[103] and the Open Society Foundation for South Africa Report[104] criticise section 49(2) by arguing that this amendment is unconstitutional because the rights to life, bodily integrity and human dignity of a suspect are violated. Furthermore, Botha and Visser[105] argue that section 49(2) fails to provide constitutional protection for suspects because even though the reference to 'future death' has been deleted,

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94 Joubert *et a*l *Criminal Procedure Handbook* at 137.

95 Du Toit *et al Commentary on Criminal Procedure at* ch5-p31.

96 *Govender v Minister of Safety and Security* at [16].

97 *Walters* at [49].

98 Kruger *Hiemstra's Criminal Procedure* at 5-21.

99 Van der Walt 2011 *PELJ* Volume 14 Issue 1 at [140].

100 Le Roux-Kemp & Horne 2011 *S. Afr. J. Crim. Justice* Volume 24 Issue 3 at page 273.

101 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

102 Snyman *Criminal Law* 134.

103 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

104 Open Society Foundation for South Africa *Report on the OSF-SA roundtable discussion on the human rights and practical implications of the proposed amendments to section 49 of the Criminal Procedure Act* at 4.

105 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

the reference to 'future death' is still implied, with the removal of the term 'immediate' before the word 'threat' and as a result, peace officers may misuse the power to use deadly force whilst they use their powers to arrest a suspect. The criticism levelled against section 49 of the CPA regarding the lack of promotion of the constitutional rights of suspects by the authors and the courts were made in 2012 and since then the criticism has failed to materialise into any form of positive amendments towards the improvement of the protection of the rights of suspects. It is argued that the unlawful actions of peace officers may be reduced substantially with the introduction of the fifth jurisdictional fact.

In the leading case of *Tsose*[106] the Appellate Division reiterated the legal position prior to 1994 by stating that there is no legal provision that stipulates that peace officers must use alternative methods other than arrest to ensure that a suspect attends court. However, the court made mention of the fact that alternative methods other than an arrest ought to be used in order to protect the rights of a suspect.[107] Despite the court's remark prior to 1994, the legal position after the introduction of the Constitution in 1996 remains unchanged in that there is no law that prescribes to peace officers that less invasive means other than arrest must be considered. This is notwithstanding the fact that the existing literature supports the argument that methods other than an arrest without a warrant must be used to ensure that a suspect attends court. This argument is evident in the leading cases of *Ralekwa* and *Seria v Minister of Safety and Security and Others*[108] where the court emphasised that peace officers should use less invasive methods of ensuring that a suspect attends court instead of opting for an arrest without a warrant in order to ensure that the constitutional rights of suspects are duly protected. Despite the fact that the court in *Ralekwa* and *Seria* made these comments as early as 2004 and 2005 respectively, there has been no amendments to the existing legal principles to reduce unlawful arrests without a warrant and detention. One of the leading cases that deal with the introduction of the fifth jurisdictional fact is *Louw*[109] and in support of the decision held in the *Louw* case, a leading author on this aspect, Msaule[110] holds the view that the fifth jurisdictional fact should form part of the legal

106 *Tsose* at [17G-H].
107 *Tsose* at [17G-H].
108 *Seria v Minister of Safety and Security and Others* 2005 (5) SA 130 (C) (hereinafter referred to as "*Seria*").
109 *Louw* at [185a]-[187g]. See also Msaule 2015 *De Jure* Volume 48 Issue 1 at page 244.
110 Msaule 2015 *De Jure* Volume 48 Issue 1 at page 244.

principles so as to ensure the protection and promotion of the constitutional right to freedom of suspects. However, there are opposing views with regard to the introduction of the fifth requirement as stated in *Charles* and *Sekhoto* where the courts expressed their preference that the existing four jurisdictional requirements are sufficient for a lawful arrest and that peace officers should not be limited in exercising their powers to arrest without a warrant. The researcher submits that the comments made by the court in the *Charles* and *Sekhoto* cases appear to be a movement back to the principles and practices prior to 1994 where the powers of peace officers were prioritised over the constitutional rights of suspects. However, Du Toit *et al*[111] supports the argument by Msaule[112] and the comments made in *Louw* in that the introduction of the fifth jurisdictional fact is necessary to ensure the complete protection and promotion of the constitutional rights of suspects. It is important to note that the comments by Du Toit *et al*[113] and Msaule[114] were made in 2012 and 2015 respectively and there has since been no amendment to the legal principles to include the fifth requirement for a lawful arrest. Furthermore, the rejection of the fifth jurisdictional fact by the court in *Raduvha* requires severe criticism. The court in *Raduvha* held that the powers of peace officers to exercise their discretion to use alternative methods other than an arrest is preferred against the introduction of the fifth jurisdictional fact.[115] As Tshehla[116] correctly argues, the court in *Raduvha* has intimated that the powers of peace officers are more important than the constitutional rights of suspects. Since the fifth jurisdictional fact has not yet been introduced into the South African legal system, suspects who are unlawfully arrested without a warrant and detained, experience various consequences of such actions. These consequences are discussed hereunder.

Neethling[117] and Nkosi[118] and the court in *Subjee v Minister of Police*[119] argue that the right to personal liberty is an important constitutional protection for suspects and a

111 Du Toit *et al Commentary on Criminal Procedure* at 5-9.
112 Msaule 2015 *De Jure* Volume 48 Issue 1 at page 244.
113 Du Toit *et al Commentary on Criminal Procedure* at 5-9.
114 Msaule 2015 *De Jure* Volume 48 Issue 1 at page 244.
115 Raduvha at [58].
116 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99-100.
117 Neethling South African Law Journal Volume 122 Issue 3 January 2005 at 572-573.
118 Nkosi 2015 *SALJ* 15.
119 *Subjee v Minister of Police* (2018) JOL 39431 (GJ) at [33] (hereinafter referred to as "*Subjee*").

violation of this right will be unlawful. However, it has been argued by the court in *Coetzee v National Commissioner of Police*[120] that the civil claims against the State for the infringement of the right to personal liberty do not serve as a deterrent against the unlawful actions of peace officers. Furthermore, Dissel and Ngubeni[121] and the court in *Black v Minister of Police*[122] state that there are unfortunate circumstances where suspects are detained in overcrowded police station holding cells and as a result, the constitutional rights of suspects are violated. This argument was elaborated in the case of *Mothoa v Minister of Police*[123] where the court emphasised that the rights of suspects are violated when they are subjected to detention in poor conditions and overcrowding in police station holding cells. Although the Police Standing Order[124] contain rules regarding the conditions in which suspects must be detained in a police station holding cell, Muntingh[125] highlights flaws in the rules that are contained in the PSO and states that amendments must be made to the PSO to ensure that the conditions in police station holding cells are adequate in promoting the constitutional rights of suspects. Moreover, the 2019/2020 report of the South African Human Rights Commission[126] is an important indication of the extent of poor conditions and overcrowding in police station holding cells which require immediate attention so that the constitutional right against cruel, inhumane or degrading punishment or treatment is promoted. As a consequence of the unlawful actions of peace officers and the violations of the right to personal liberty and constitutional rights, suspects have recourse to instituting civil actions against the State for damages. According to Neethling, Potgieter and Visser[127] and Nkosi[128] there is no mathematical calculation of damages for the unlawful actions of peace officers and judicial officers have a discretion to award an amount after considering awards in previous cases as a guide.

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120 *Coetzee v National Commissioner of Police* 2011 (2) SA 227 (GNP) at [46] (hereinafter referred to as "Coetzee") at [46].

121 Dissel & Ngubei http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.578.1494&rep=rep1&type=pdf (accessed on 6 May 2018).

122 *Black v Minister of Police* an unreported judgment by Windell J, dated August 2013, under South Gauteng High Court, case No 38093/2011 (hereinafter referred to as the "*Black* case").

123 *Mothoa v Minister of Police* (unreported, GSJ case no 5056/11, 8 March 2013) at [10] (hereinafter referred to as "*Mothoa*") at [10].

124 PSO.

125 Muntingh 2012 'Children deprived of their liberty: protection from torture and ill-treatment' at 165.

126 Report of the South African Human Rights Commission https://www.justice.gov.za/ilr/docs/2019-20-NPM-AnnualReport-SAHRC.pdf (accessed on 26 December 2020).

127 Neethling, Potgieter & Visser *Neethling's Law of Personality* at 60.

128 Nkosi 'Balancing deprivation of liberty & quantum of damages' at [13].

This was elaborated further in *Minister of Safety and Security v Seymour*[129] where the court held that consideration of the awards in previous cases is accurate. However, the court in *Minister of Safety and Security v Tyulu*[130] was of a different opinion because it held that the consideration of awards in previous cases may be misguiding. It is interesting to note that the court in *Minister of Police v Samanithan*[131] dealt specifically with the discretion to award damages for the unlawful actions of peace officers and it was held that the use of previous awards as a guide is the only suitable method of determining damages. Furthermore, the comment by the court in the *Samanithan* case were made as recently as 2020. The researcher submits that the legal practice that is currently used by the courts must be developed so that awards are fair and reasonable. Despite the cases that deal with the calculation of damages, neither the courts nor any authors have suggested a mathematically accurate calculation of damages that can be considered fair and reasonable. Although the South African legal principles are discussed and critically analysed in this study, it is also important to critically discuss international and regional law and human rights instruments which govern an arrest without a warrant, detention and the use of force and the constitutional violations thereof in South Africa. The reason for such a discussion is to determine whether South Africa is complying with its international obligations and to determine ways in which existing legal principles and legislation can be amended to fully comply with international and regional obligations.

The researcher submits that in as much as it is necessary to critically analyse the South African literature on the existing principles and practices that relate to an arrest without a warrant, detention and the use of force, it is of utmost importance to broaden the discussion to include international and regional legal instruments. The reason is that South Africa's development of the existing principles emanate from compliance with international and regional instruments. Therefore, a critical analysis of the South African literature is interrelated with the provisions of international and regional

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129 *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at [17] (hereinafter referred to as "*Seymour*") at [17].

130 *Tyulu* at [26].

131 *Minister of Police v Samanithan* [2020] ZAECGHC 62 (hereinafter referred to as "*Samanithan*").

instruments. The Universal Declaration of Human Rights (UDHR),[132] International Covenant on Civil and Political Rights (ICCPR),[133] and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[134] are the three main international human rights instruments that South Africa is obligated to comply with to promote the human rights of suspects. Scheinin[135] and Petersen[136] argue that the constitutional rights to life and security of person are important both internationally and domestically. Furthermore, Alleweldt and Fickenscher[137] argue that arbitrary detention of suspects must be prohibited. However, Marcoux[138] argues that despite the emphasis on the promotion of the human rights of suspects, the procedural aspects of human rights law do not protect suspects against arbitrary treatment. Since South Africa is bound by international obligations to promote the human rights of suspects, it has a duty to comply with the recommendations of the UN Human Rights Committee[139] and to consider its concluding observations. The Human Rights Committee outlined several concerns about a lack of steps by South Africa to promote the human rights of suspects which relate to an arrest without a warrant, detention and use of force and have recommended that South Africa take steps to improve and comply with international standards. According to Tait[140] South Africa should review and revise its legislation in order to ensure compliance with the recommendations of the UN Human Rights Committee. Despite the recommendations by the Committee and Tait[141] no changes have been effected to ensure due compliance with the recommendations of the Committee. With regard to the use of

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132 United Nations general Assembly Universal Declaration of Human Rights https://www.refworld.org.docid/3ae6b3712c.html (accessed 16 January 2022) (hereinafter referred to as "UDHR").

133 United Nations General Assembly International Covenant on Civil and Political Rights https://www.refworld/org/docid/3ae6b3aa0.html (accessed on 16 January 2022) (hereinafter referred to as "ICCPR").

134 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (http://www.refworld.org/docid/3ae6b3a94.html) (hereinafter referred to as "UNCAT").

135 Scheinin *International Protection: Rights to Security* at [13].

136 Petersen *International Protection: Right to Life* at [1].

137 Alleweldt and Fickenscher (ed) *The Police* at 1-2.

138 Marcoux 1982 *International and Comparative Law Review* Volume 5 Issue 2 at 370.

139 Concluding observations on the initial report of South Africa: Human Rights Committee https://digitallibrary.un.org/record/1317444?ln=en (accessed on 23 July 2021).

140 Tait https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23066_E.pdf (accessed on 7 August 2021).

141 Tait https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23066_E.pdf (accessed on 7 August 2021).

force, articles 4 and 16 prescribe to State parties that the prohibition on the use of torture must be legislated domestically. As a result, South Africa enacted the Prevention and Combating of Torture of Persons Act (PCTPA).[142] However, the provisions of the PCTPA repeated the provisions of UNCAT *verbatim* and Boulesbaa[143] argues that the words "cruel, inhumane or degrading punishment or treatment" that is lacking in the definition of torture is controversial and problematic. However, Mujuzi[144] and the court in *Mthembu v S*[145] argue that South Africa has complied with its international obligation to domestically legislate the prohibition on torture. Despite these arguments, Muntingh and Fernandez[146] argue that despite the international and domestic legislative provisions that prohibit the use of torture, suspects are still subjected to torture whilst in detention in police station holding cells. The UN Committee against Torture[147] made concluding observations and recommendations to South Africa and raised concerns about South Africa's initiatives to promote the human rights of suspects and ensure the prohibition on torture. However, despite the fact that the recommendations of the Committee were made in 2019, no efforts were made to ensure due compliance with the recommendations of the Committee. Furthermore, an important regional human rights instrument is the African Charter on Human and Peoples' Rights (AChHPR)[148] and South Africa is bound by this regional human rights instrument in relation to an arrest without a warrant, detention and the use of force. The concluding observations and recommendations of the African Commission[149] is an important document because South Africa is expected to act upon these recommendations to improve the protection and the promotion of the rights of suspects. However, since 2016, South Africa has not submitted any report to confirm compliance with the recommendations of the

142 Prevention and Combating of Torture of Persons Act 13 of 2013 (hereinafter referred to as "PCTPA").

143 Boulesbaa A *The UN Convention on Torture* at 31.

144 Mujuzi 2015 *AHRLG* at 89-109.

145 *Mthembu* v S (64/2007) [2008] ZASCA 51 at [22] (hereinafter referred to as "*Mthembu*").

146 Muntingh and Fernandez *SAJHR* 2008 24 at 123.

147 Concluding observations on the second periodic report of South Africa: Committee against Torture https://www.justice.gov.za/ilr/docs/2019-CAT-SA-ConcludingObservations-SecondPeriodicReport-May2019.pdf (accessed on 25 July 2021).

148 Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights ("Banjul Charter") https://www.refworld.org/docid/3ae6b3630.html (accessed on 6 January 2022) (hereinafter referred to as "AChHPR").

149 Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights https://www.achpr.org/public/Document/file/English/co_combined_2nd_periodic_republic_of_south_africa.pdf (accessed on 27 July 2021).

African Commission. In addition to a discussion of international and regional law and human rights instruments, the aspect of foreign law is also important. Therefore, the study also includes a comparative review of South Africa and two foreign jurisdictions namely, Canada and the United Kingdom.

1.9.2 Comparative review

According to Formad,[150] legal research on any legal system, legal traditions or topic is either explicitly or implicitly comparative because none is self-contained or self-reliant. Furthermore, Formad[151] argues in favour of adopting comparative legal research methods and correctly points out that comparison in legal studies also serves as part of methodology. A thorough legal comparison will be undertaken as it is anticipated that this research will be of significant value in providing new insights and knowledge, which may in turn give rise to suggestions for meaningful legal reform.[152]

The comparative review of the study is based on the legal systems in South Africa, Canada and the United Kingdom (England and Wales). The reason why Canada is the chosen jurisdiction is that it has a Constitution and legal provisions that are similar to that of the South African justice system. The reason why the United Kingdom is the chosen jurisdiction is that its law of criminal procedure is similar to the South African law of criminal procedure.[153] Furthermore, South Africa and the United Kingdom follow English law as the common law system. Although there are similarities between the legal systems of South Africa and Canada and the United Kingdom, the study will highlight the best practices and legal principles in the two foreign jurisdictions which South Africa can emulate to develop and enhance its own legal system. The best practices and legal principles in Canada and the United Kingdom are confined to aspects of an arrest without a warrant, detention, the use of force and the promotion of the human rights of suspects.

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150 Formad 2018 *Journal of Legal Education* Volume 67 Issue 4 at 984-1004.

151 Formad 2018 *Journal of Legal Education* Volume 67 Issue 4 at 984-1004.

152 Venter et al *Regsnavorsing* at 215-217.

153 Weimar & Vines 'UK-South Africa Relations and the Bilateral Forum' Programme Paper Catham House June 2011.

Flanagan[154] and Neyroud[155] argue that Canadian peace officers should be made to undergo training and receive knowledge about policing and this should be done through an undergraduate degree wherein they are taught the theoretical aspects that govern their powers. The Canadian Association of Chiefs of Police (CACP) and the Canadian Police Knowledge Network work together to ensure that peace officers are provided with the relevant legal knowledge to properly conduct their powers of arrest, detention and the use of force. Similarly, Paterson[156] Brown[157] and Patterson[158] argue that the education of peace officers in the United Kingdom on the legal aspects that govern their powers is imperative and the aim should be towards making the police force professional. Hence, the policing professionalisation agenda of the College of Policing and the 'Policing Vision 2025' recognise policing as a graduate level.[159]

Despite the training of police officers in South Africa, there is a lack of programs that aim to ensure professionalisation of peace officers who can lawfully apply legal knowledge when performing their powers in order to avoid unlawful acts and promote the rights of suspects. Therefore, a critical comparison of the best practices and legal principles in Canada and the United Kingdom is necessary to determine what steps South Africa must take to ensure that the constitutional rights of suspects are duly protected and the promoted.

1.10 Definition of terms

1.10.1 Arrestor – any person who is authorised by the Act to arrest or assist in arresting a suspect.[160]

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154 Flanagan 2008 'The Review of Policing' at 4-6.

155 Neyroud 2011 'Review of Police Leadership and Training' at 11.

156 Paterson 2011 *Police Practice and Research* Volume 12 Issue 4 at 286-297.

157 Brown 2020 'Police powers: an introduction' at 7.

158 Patterson *Higher Education, police training, and police reform: A review of police-academic educational collaborations* at pages 119-136.

159 National Police Chief's Council (NPCC) https://www.npcc.police.uk/documents/Policing%20Vision.pdf (accessed on 02 July 2021).

160 Judicial Matters Second Amendment Act 122 of 1998, section 1(a) (hereinafter referred to as the "JMSA Act").

1.10.2 Deadly force – force that, when used, possesses a high risk of death or serious injury to a suspect, irrespective of whether or not death, serious injury or serious harm actually occurs.[161]

1.10.3 Non-deadly force – force that, when used, is not likely to result in serious bodily injury or death.[162]

1.10.4 Peace officer - any "magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334(1), any person who is a peace officer under that section".[163]

1.10.5 Reasonable suspicion test – a reasonable person's judgement on grounds that do not have to be exact or true but must be founded in line with the objective standard of a reasonable peace officer.[164]

1.10.6 Suspect – any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.[165]

1.11 Structure of the dissertation

The thesis consists of six chapters. Chapter 2 consists of a critical analysis of an unlawful arrest, unlawful detention and the use of excessive force and the constitutional violations thereof. The requirement of reasonable suspicion and the lawfulness of an arrest without a warrant will be discussed. With regard to detention, the 48-hour rule and the constitutional violations of detention beyond this time period will be analysed. A critical discussion follows on the developments of the legal principles relating to the use of force, the issues that pertain to the use of excessive force and the constitutional violations thereof. The legal principles that involve the

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161 Del *Criminal Procedure: Law and Practice* at 184.
162 Del *Criminal Procedure: Law and Practice* at 184.
163 CPA, section 1.
164 Swanepoel, Lotter & Karels *Policing and the Law* 178.
165 JMSA Act, section 1(b).

introduction of the fifth jurisdictional fact to the existing four requirements for a lawful arrest as an alternative method other than an arrest without a warrant will also be examined as a means to promote the constitutional rights of suspects and alleviate the unlawful acts of peace officers.

Chapter 3 involves a discussion of the consequences of the unlawful actions of peace officers. This chapter dealt with the delictual requirements for the infringements of the right to personal liberty, which includes a critical analysis of wrongfulness, negligence, causation and damage and the relationship between these requirements and the acts of peace officers in ensuring that the requirements are duly met. This chapter also includes a critical discussion of poor conditions and overcrowding and death of suspects in police station holding cells as a consequence of the unlawful actions of peace officers and the violation of the constitutional rights thereof. A further important aspect that chapter 3 dealt with is a discussion of the introduction of a mathematical calculation of damages for the unlawful acts of peace officers as opposed to using awards in previous cases as a guide.

Chapter 4 dealt with international and regional law and human rights instruments such as the UDHR, ICCPR, UNCAT and the AChHPR with regard to an arrest without a warrant, detention and the use of force. The South African legal system and legislative provisions will be critically discussed in light of these human rights instruments to determine whether South Africa is complying with its international obligation to promote the human rights of suspects. Furthermore, the concluding observations and recommendations of the UN Human Rights Committee and the UN Committee against Torture and the African Commission will be examined to establish whether South Africa is complying with the recommendations made by the Committees and the Commission. Two particular legislative enactments namely the PCTPA and the SAHRC will also be discussed to establish whether these South African provisions are compliant with international standards and to determine whether any amendments to existing legislation or new legislation should be implemented to ensure better compliance.

Chapter 5 is a comparative review of an arrest without a warrant, detention, the use of force and the constitutional rights of suspects in South Africa, Canada and the United

Kingdom. The first half of the chapter deals specifically with South Africa and Canada. The second half of the chapter deals with South Africa and the United Kingdom. Furthermore, the chapter dealt with a comparison of the reforms and implementations of the legal system in Canada and the United Kingdom which can be used as best practices in South Africa. The importance of foreign law to South Africa will also be discussed. In light of the discussions in chapter 4, it is also necessary to establish whether Canada and the United Kingdom are compliant with international human rights instruments.

Chapter 6 will provide a summary of the findings, the conclusion of the study and the recommendations of the study.

1.12 Chapter conclusion

This chapter dealt with the introductory aspects of the study and outlined the objectives and primary research questions that the study will deal with. Chapter 2 will involve a detailed critical analysis of the literature section of the study where the existing literature that deals with the objectives and primary research questions of the study will be critically analysed.

CHAPTER TWO

THE UNLAWFUL ACTIONS OF A PEACE OFFICER, THE CONSTITUTIONAL IMPLICATIONS THEREOF AND THE INTRODUCTION OF THE FIFTH JURISDICTIONAL FACT TO ALLEVIATE UNLAWFUL ACTIONS

2.1 Introduction

This chapter focuses on the issues that arise from the unlawful actions of peace officers on suspects as well as the introduction of the fifth jurisdictional fact to the legal system. The unlawful actions of peace officers occur because peace officers do not have sufficient knowledge of criminal procedure and the principles that govern their powers. In this regard, the researcher aims to highlight the issues that are apparent from the unlawful actions of peace officers and discuss this in light of the constitutional rights of a suspect. It is the researcher's submission that if the fifth jurisdictional fact is introduced into South African law, its application may alleviate the unlawful actions by peace officers and may promote the constitutional rights of a suspect.

2.2 Constitutional implications and violations of a peace officer's act of unlawful arrest without a warrant, unlawful detention and the use of excessive force

This aspect deals with the first objective of the study in which the researcher examines the violations and implications of a peace officer's act of unlawful arrest without a warrant, unlawful detention and the excessive use of force. These three aspects are interrelated since an act of unlawful arrest without a warrant means that the subsequent detention is also unlawful. Furthermore, during an arrest without a warrant or during the detention, there are instances where a peace officer uses excessive force on a suspect. Any unlawful act during any of the aforementioned three steps directly affects the constitutional rights of a suspect. It is the researcher's submission that the unlawful acts are due to the peace officer having poor knowledge about criminal procedure and about the powers that are vested in them. These aspects are discussed in further detail hereunder.

2.2.1 Constitutional implications of an unlawful arrest without a warrant by peace officers

Prior to embarking on a discussion of the violations of the relevant constitutional rights as a consequence of an unlawful arrest, it is necessary to first examine the legal principles relating to an arrest without a warrant and the requirement of a reasonable suspicion that would make an arrest without a warrant either lawful or unlawful. The purpose of the discussion of these legal principles is to determine what constitutes an unlawful arrest. Once it has been determined that a particular arrest is unlawful, the next aspect to be examined is the impact that such unlawfulness has on the constitutional rights of a suspect. In analysing these legal principles, the researcher aims to answer the primary research questions and objectives of the study.

2.2.1.1 An arrest without a warrant and the determination of unlawfulness

An arrest of a suspect without a warrant is regulated by legislation.[166] However, before a peace officer makes an arrest without a warrant, he must have a reasonable suspicion to conclude that the suspect has committed an offence listed in schedule

[166] Section 40 of the CPA. See also *Nokeke v Minister of Safety and Security* 2008 JDR 0512 (Tk) at [62]; *Theobald v Minister of Safety and Security and Others* 2011 (1) SACR 379 (GSJ) at [186]; *Tjipepa v Minister of Safety and Security and Others* 2015 (4) NR 1133 (HC) at [28].

1[167] of the CPA.[168] Incorporated in the powers of a peace officer, is the discretion whether they should arrest a suspect or not.[169] For instance, peace officers are not compelled to make use of their powers of arrest and they may decide not to arrest a suspect.[170] According to the court in *Devenish v Minister of Safety and Security*[171] a

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167 Schedule 1 offences include: treason; sedition; public violence; murder; culpable homicide; rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; bestiality as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; robbery; kidnapping; child-stealing; assault when a dangerous wound is inflicted; arson; malicious injury to property; breaking or entering any premises, whether under the common law or statutory provision, with intent to commit an offence; theft whether under common law or statutory provision; receiving stolen property knowing it to have be stolen; fraud; forgery or uttering a forged document knowing it to have been forged, offences relating to coinage; any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine; escaping from lawful custody, where the person concerned is in such custody in respect any offence referred to in schedule 1 or is in such custody in respect of the offence of escaping from lawful custody; any conspiracy, incitement, or attempt to commit any offence referred to in schedule 1. See Du Toit *et al Commentary on Criminal Procedure* at ch5-p12 where it is stated that although escaping from lawful custody falls within schedule 1, it is excluded from operation in terms of section 40(1)(b) of the CPA. A reasonable suspicion that a suspect has escaped from lawful custody is insufficient basis upon which to arrest a suspect without a warrant. The peace officer must be convinced that the suspect has in fact escaped. Assault is a schedule 1 offence only if a serious injury is inflicted. For an assault to fall within schedule 1, 'a dangerous wound' must have been inflicted. Any attempt to commit an offence that is listed in schedule 1 will also constitute a schedule 1 offence. The concept of 'grievous bodily harm' and 'dangerous wound' do not have the same meaning. A person who commits an assault with intent to do grievous bodily harm does not attempt to commit an assault in which a dangerous wound is inflicted and the arrest is therefore unlawful under section 40(1)(b) of the CPA. See also *Areff v Minister van Polisie* 1977 (2) SA 900 (A) at [913B] where the court held that due to the punishment which can be imposed, only crimes created by statute fall within schedule 1. In this regard, see *R v Gwantshu* 1931 EDL 29; Kruger A *Hiemstra's Criminal Procedure* (LexisNexis 2013) at [33]-[25]; Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 354-569; *Ex Parte Minister of Safety and Security and Others*: In re *S v Walters and Another* [2002] 4 SA 613 (CC) 614; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC).

168 *Nkambule v Minister of Law and Order* 1993 (1) SACR 434 (T). See also *Manqalaza v MEC for Safety and Security, Eastern Cape* (2001) 3 All SA 255 (Tk); *Minister of Police and Another v Muller* 2020 (1) SACR 432 at [20]; *R v Van Heerden* 1958 (3) SA 150 (T) at [152]; *S v Reabow* 2007 (2) SACR 292 (E) at [297c–e].

169 *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC) [60] (hereinafter referred to as the Van "*Van Niekerk* case"). See also *Dlamini v Minister of Safety and Security* 2016 (2) SACR 655 (GJ).

170 *Ramphal v Minister of Safety and Security* at 2009 (1) SACR 211 (E) at [10]. See also *Matsietsi v Minister of Police* (unreported, GJ case no A3103/2015, 20 February 2017) at [11] where the court held that the peace officer did not exercise a discretion at all.

171 *Devenish v Minister of Safety and Security* (unreported, GJ case no 07151/2013, 16 May 2016) at [101]-[106]. See also *Sithebe v Minister of Police* 2014 JDR 1882 (GJ) at [189]-[191] where the Court held that where there are people available who claim to be eye-witnesses to a robbery and who also claim to be in a position to identify the suspects, an investigating officer should listen to those so-called eye-

peace officer must, before making an arrest, exercise his discretion to arrest *bona fide*, rationally and without bias. In order to determine whether a peace officer acted lawfully in arresting a suspect, it must be clear that the peace officer had a reasonable suspicion to arrest. If the peace officer did not form a reasonable suspicion to arrest, the arrest is unlawful.

2.2.1.2 The requirement of reasonableness of suspicion and lawfulness of an arrest without a warrant

In conjunction with the principle that a peace officer must have a discretion to arrest without a warrant, is the requirement of reasonable suspicion which is a test used to determine whether a peace officer actually had a reasonable suspicion to arrest a suspect without a warrant.[172] An important comment made by the court in *Ralekwa*[173] is that before determining whether or not a suspicion is reasonable, a court must be satisfied that the peace officer effecting the arrest did indeed form this suspicion because if a peace officer relied on the suspicion of someone else, the arrest would become unlawful. The information that gave rise to the peace officer's suspicion must have been within the peace officer's knowledge prior to the arrest.[174] The aim is to determine how a peace officer would know when a suspicion is a 'reasonable suspicion' to be able to arrest a suspect without a warrant.[175]

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witnesses and analyse and assess the quality of the information before arresting the suspect. If the peace officer fails to do this and instead relies on the filmsy information of a complainant, the requirement of "in good faith, rationally and not arbitrarily" have not been met; *Ngwenya v Minister of Police* (924/2016) 2017 ZANWHC 78 (2 November 2017).

172 South African Police Service Act 68 of 1995, section 13(3) (hereinafter referred to as the "SAPS Act"). In terms of sub-paragraph *(a)* peace officers must perform their allocated duties in line with their powers, duties and functions in a reasonable manner in the given circumstances and must assess all the circumstances before commencing with any action of arrest; Joubert C *Applied Law* 16; *National Commissioner of Police v Coetzee* an unreported decision (649/11) (2012) ZASCA 161 (16 November 2012) at [14]; *Tjipepa v Minister of Safety and Security and Others* 2015 (4) NR 1133 (HC); *Minister of Safety and Security and Another v Linda* 2014 (2) SACR 464 (GP); *Minister of Police and Another v Muller* 2020 (1) SACR 432; *Mahleza v Minister of Police and another* 2020 (1) SACR 392 (ECG).

173 *Ralekwa* at [11]-[14]. See also *Dunjana and Others v Minister of Police* (unreported, ECP case no 01/2015, 9 March 2017) at [20]; *Mlilwana v Minister of Police* (unreported, ECM case no 2212/2012, 22 May 2017).

174 *Mupundu v Minister of Safety and Security* 2015 JDR 0048 (GJ) at [26].

175 *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) at [42]; *Molewa v Minister of Police* (unreported, NWM case no 56/2015, 15 December 2016.

Swanepoel, Lotter and Karels *et al*[176] explain that the reasonable suspicion test or standard test depends on the reasonable person's judgement on grounds that do not have to be exact or true but must be founded in line with the objective standard of a reasonable peace officer. Once it has been established that a peace officer did not have a reasonable suspicion to arrest without a warrant, the arrest is not only unlawful but it amounts to a violation of the constitutional rights of a suspect. The authors have commented on what constitutes reasonable suspicion and have explained the test used to determine whether the peace officer had a reasonable suspicion to arrest without a warrant. However, the authors have not explicitly dealt with the issue surrounding the reasons why a peace officer would fail to form a reasonable suspicion. As a result, the literature on this aspect of the law is silent as it fails to offer solutions to this problem. It is the peace officer's lack of legal knowledge on the actual "reasonableness of suspicion" requirement that creates the issue. If the peace officer has no knowledge of the requirement, they are bound to act contrary to what is required from them. This results in unlawful actions and infringements of constitutional rights, which are discussed in further detail hereunder.

2.2.1.3 Unlawful arrest without a warrant and its impact on constitutional rights

Undoubtedly, a peace officer's power to arrest is very important in the execution of the duty to fight crime. However, Botha and Visser[177] argue that it is also a concept that demands careful balancing of the fundamental rights of a suspect to dignity, life, and freedom and security of person against the fundamental rights of the society. An arrest constitutes a serious infringement of a suspect's right to freedom and security[178] and can also impair the suspect's dignity[179] and privacy.[180] Therefore, there is a need for a balance between the fundamental rights of a suspect and the power to arrest and in

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176 Swanepoel, Lotter & Karels *Policing and the Law* 178. See also *Mosinki and others v Minister of Police* [2020] JOL 47540 (NWM) at [13].

177 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569. See also *Ramphal v Minister of Safety and Security*.

178 Constitution of the Republic of South Africa, 1996, section 12(1)(a)-(e) (hereinafter referred to as the "Constitution").

179 Section 10 of the Constitution.

180 Section 14 of the Constitution.

an attempt to achieve this balance, the so-called limitation clause[181] is employed by our courts. According to Du Toit *et al*,[182] what is necessary is a balance between the protection of the fundamental right to freedom of movement of a suspect on the one hand and the avoidance of unnecessary restriction on peace officers in the execution of their duties on the other hand. The court in *Glisson*[183] elaborated further on the aspect of balance and stated that where the two situations are evenly balanced, the preference in a democratic country such as South Africa will be on the side of the freedom of movement of a suspect.

Despite the attempt by the authors and the courts to establish a balance between the rights of a suspect and the powers of a peace officer, it has to be determined whether the rights of a suspect are prioritised over the unlawful actions of peace officers. In such instances, courts are burdened with several cases for alleged unlawful arrests as a result of police actions and courts must then determine the constitutionality of the particular arrest in order to compensate a suspect. What is necessary for the purpose of answering the primary questions and objectives of this study is to emphasise the effect of an unlawful arrest on the constitutional rights to dignity and freedom and security of person. Botha and Visser[184] and Du Toit *et al*[185] omit to raise the issue regarding a peace officer's lack of knowledge on the constitutional provisions that relate to the arrest of a suspect without a warrant. Peace officers know that they have

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181 Section 36 of the Constitution. This section specifically limits rights provided for in the Constitution only in terms of the 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, taking into account all relevant factors which includes: (a) the nature of the right (to be limited); (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve its purpose. In the Constitutional Court case of *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 3 BCLR 309 (CC) at [50]–[51], the court held that as soon as there is a reasonable suspicion that an offence has been committed, the right to dignity does not necessarily protect a person from being named a suspect. In the law of defamation, "[one] of the primary defences against defamation, viewed as an injury to a person's dignity, is the defence of truth" and that because the existence of a reasonable suspicion "is the truth" the mere communication of the objective facts to a person does not infringe human dignity. There is no such right not to be named as a suspect in a criminal matter.

182 Du Toit *et al Commentary on the Criminal Procedure Act* 5 - 9.

183 *Glisson* at [134]. See also *Khanyile v Minister of Police* (33478/11) (2013) ZAGPJHC 234 (5 August 2013) at [41].

184 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

185 Du Toit *et al Commentary on the Criminal Procedure Act* at 5 - 9.

powers to arrest a suspect without a warrant, however, their knowledge is limited to their powers at the least.

According to Joubert,[186] constitutional rights are guaranteed to all suspects even though they are suspected of committing an offence. More specifically, the relevant fundamental rights are the rights to life,[187] equality,[188] freedom and security of person,[189] privacy[190] and the right of a suspect to have his or her dignity respected.[191] Without a doubt, the Constitution places importance on these interconnected fundamental rights. For instance, in the Constitutional Court case of *S v Makwanyane*[192] it was held that the State is responsible for the promotion and upholding of the respect for human life and dignity as entrenched in the Constitution[193] and should also promote this as a practice of law in so far as lives of suspects should be spared. Even though the court made this remark as early as 1995, South Africa still faces issues with regard to unlawful arrests and violations of the constitutional rights of a suspect. Furthermore, despite the comments made by authors such as Botha and Visser[194] and Du Toit *et al*,[195] which emphasise the importance of the fundamental rights of a suspect as opposed to the powers of peace officers, the South African police is a party to civil claims for unlawful arrest and the infringement of constitutional rights on a daily basis.[196] It is the researcher's submission that the enforcement of the

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186 Joubert *et al Criminal Procedure Handbook* 134.

187 Section 11 of the Constitution. See also *S v Makwanyane* 1995 (2) SACR 1 (CC).

188 *S v Ntuli* 1996 (1) SA 1207 (CC); *S v Rens* 1996 (1) 1218 (CC); *S v Jordan* 2002 (6) SA 642 (CC).

189 *Nel v Le Roux* 1996 (3) SA 526 (CC); *S v Makwanyane* 1995 (2) SACR 1 (CC); *S v Williams and Others* 1995 (7) BCLR 861 (CC); *S v Thebus* 2003 (6) SA 505 (CC).

190 *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

191 Section 10 of the Constitution; *Hiemstra's Criminal Procedure* at chapter 5, section 40, Last Updated May 2019 – S1 12; *Minister of Law and Order and Another v Dempsey* 1988 (3) SA 19 (A) at [38C]; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at [56]-[59]; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at [148]; *Pharmaceutical Manufacturers Association of South Africa and Another in re: Ex parte President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC) at [20]; *Kanes v Minister of Police* [2020] JOL 46765 (FB) at [1].

192 *S v Makwanyane* at 1995 (2) SACR 1 (CC) at [222] (hereinafter referred to as "*Makwanyane*").

193 Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter referred to as the "interim Constitution").

194 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

195 Du Toit *et al Commentary on the Criminal Procedure Act* at 5 - 9.

196 Sithole https://www.firearmtrainingacademy.co.za/wp-content/uploads/2020/01/SAPS-Circular-Arrest-and-detention-19.11.2019.pdf (accessed on 16 December 2020); Chothia https://www.thesouthafrican.com/news/saps-police-claims-unlawful-behaviour/ (accessed on 16 December 2020).

promotion of constitutional rights is yet to be understood because peace officers are ostensibly under an impression that as soon as an arrest is made, the suspect is guilty and should be treated as if he committed a crime.

In addition to the comments made by the authors and decisions of the court, the court in *Ferreira* have emphasised the importance of fundamental rights in the Bill of Rights and have strongly condemned the conduct of peace officers in cases where violations of fundamental rights to human dignity and freedom and security of person have occurred during the act of arrest. For instance, the court in the *Ferreira* case emphasised that there is a clear connection between the right to human dignity and the right to freedom and furthermore that the essence of the right to human dignity has little value without reference to the right to freedom. Furthermore, the court held that the rights to freedom and human dignity are inseparably connected and if a suspect was denied his right to freedom, it means that a suspect is denied his right to human dignity too.[197] The researcher submits that the remarks made by courts will have no effect on the current situation nor will it make any difference where peace officers are concerned because peace officers are not familiar with judicial comments and remarks, despite the fact that the comments have a direct influence on the manner in which peace officers conduct themselves. Furthermore, the comments by the court regarding the violation of the right to freedom and the right to human dignity during an arrest is undoubtedly obvious, however what the court failed to deal with is how peace officers will avoid unlawful acts of arrest without a warrant and thereby ensure that the rights to freedom and human dignity of a suspect are protected.

a) Impact on the right to freedom and security of the person

An arrest is a clear example of the limitation of freedom.[198] According to Freedman,[199] the primary purpose of the right to freedom is to protect the physical integrity of a

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197 *Ferreira* at [49].

198 *Bid Industrial Holdings (PTY) LTD v Strang* 2008 (3) SA 335 (SCA) at [33]-[35].

199 Freedman 2012 *LAWSA* Volume 5 Part 4 at 1-348. See also *Ferreira* case; *Coetzee v Government of the RSA*; *Matiso v Commanding Officer*, *Port Elizabeth Prison* 1995 10 BCLR 1382 (CC); *S v Huma* 1995 2 SACR 411 (W); Sibanda M J K & Sibanda O S 'Use of deadly force by the South African Police Services re-visited' Department of Criminal and Procedural Law (University of North West) 2016 at page 1.

suspect. In addition to the comments made by Freedman,[200] Currie and De Waal[201] state that the rights contained in section 12 may have a residual role in protecting fundamental freedoms that are not adequately protected by other sections of the Bill of Rights. A lawful arrest will automatically mean a violation of the right to freedom of person.[202] Cheadle, Davis and Haysom[203] also comment that the right to freedom is a fundamental right that is guaranteed to every person.[204] In addition, section 12(2) protects a specific aspect of bodily and psychological integrity, which is the ability to control bodily movement.[205] The authors reiterate the principle that the right to freedom of person is guaranteed. However, this does not assist in any way with the current issue of unlawful arrests that violate the constitutional rights of a suspect.

Currie and De Waal[206] explain that the right to freedom and security of person has substantive and procedural aspects. With regard to the substantive aspect, the right may be limited and such limitation must be in accordance with proper procedures which is termed the procedural aspect. In an article by Pieterse and Hassim[207] it is explained further that this relates to the general limitation clause with regard to the limitation of rights because it concerns both the purpose and the nature of the limitation. However, Pieterse and Hassim[208] state further that academic efforts to

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200 Freedman 2012 *LAWSA* Volume 5 Part 4 at 1-348.

201 Currie & De Waal *The Bill of Rights Handbook* at page 293.

202 Section 12(1) of the Constitution provides that:- "Everyone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily and without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way." Freedman DW 'Constitutional Law: Bill of Rights' LAWSA Volume 5 Part 4 (2012); *Malachi v Cape Dance Academy International* (*Pty*) *Ltd* 2010 11 BCLR 1116 (CC) at [28].

203 Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* at 131.

204 Section 12 of the Constitution; *Zealand* where the Court emphasised the importance of the right to freedom and security of person; *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) at [28] where the Court held that the Constitution imposes a duty on the State and its organs not to perform any act that will violate the entrenched rights, such as the right to freedom and security of person; *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at [42]–[44].

205 *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC) at [28] (hereinafter referred to as "*De Lange*"); Rautenbach I M *Bill of Rights Compendium* (LexisNexis 1996) at 1A60.1; Currie & De Waal The Bill of Rights Handbook, chapter 12.

206 Currie & De Waal *The Bill of Rights Handbook* at 293. See also Freedman 2012 LAWSA Volume 5 Part 4; *De Lange v Smuts NO* at [27]-[25], [129], [165], [172]; *S v Coetzee* 1997 (4) BCLR 437 (CC) at [159]; *S v Boesak* 2001 (1) BCLR 36 (CC) at [38]; *Bernstein v Bester* 1996 (4) BCLR 449 (CC) at [51}, [145]-[146].

207 Pieterse and Hassim 2009 *SALJ* 231 at 240. Academic efforts to distinguish between the substantive and procedural aspects of section 12(1)(a), on the one hand, and section 36 analysis, on the other hand, have not been convincing.

208 Pieterse and Hassim 2009 *SALJ* 231 at 240.

distinguish between the substantive and procedural aspects of section 12(1)(a), on the one hand, and section 36 analysis, on the other hand, have not been convincing. In addition to the comments made by Pieterse and Hassim,[209] courts have also pronounced on the substantive and procedural aspects of the right to freedom and security of person.[210] For example, the court in *De Lange*[211] held that there was a second source of substantive protection which the right in section 12 offered, namely that apart from a rational connection, the purpose of and the reason for cause of the deprivation of freedom had to be 'just'. In an article that is written by De Waal,[212] which analyses the judgment in the *De Lange* case, it is stated that the dual substantive test that was adopted by the court was correctly preferred over the doctrine of 'without just cause' as a means to afford substantive protection against the deprivation of freedom. The court in *S v Thebus*[213] followed the approach taken in the *De Lange* case but the court went further by examining the facts based on 'just cause'. *De Lange* also emphasised that the procedural protection is important in the nature of the rights contained in section 12.[214] Cheadle, Davis and Haysom[215] explain that taking into account the manner in which the right to freedom is qualified by compliance with both procedural and substantive safeguards, the next question would be the role of the limitation enquiry. In this regard, the Constitutional Court in *Bernstein and others v Bester NO*[216] distinguished between a limitation enquiry and the qualification imposed by the requirement of fundamental justice or 'just cause'. Since this distinction would constitute a completion of the enquiry into the application of the right, the further consideration relating to the justification of a limitation in terms of section 36 is yet to

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209 Pieterse and Hassim 2009 *SALJ* 231 at 240.

210 Madi & Mabhenxa 2018 *South African Crime Quarterly* Issue 6 at 19-30.

211 *De Lange* at [30]. See also Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights*; *Zealand v The Minister of Justice and Constitutional Development and Another*, unreported decision of the Constitutional Court: Case CCT 54/07.

212 De Waal 1999 *SAJHR* 217. See also Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights*; *S v Coetzee and Others* 1997 (4) BCLR 437 (CC).

213 *S v Thebus and Another* 2003 (6) SA 505 (CC). The Court held that 'just cause' must be grounded in the values of the Constitution to the concept of common purpose. Common purpose does not amount to an arbitrary deprivation of freedom. The doctrine is linked to the objective of limiting and controlling joint criminal activities. The test of 'just cause' is passed where a rational connection between measure and purpose is established.

214 *De Lange* at [24]. See also *Freedom of Expression Institute and Others v President of the Ordinary Court Martial NO and Others* 1999 (3) BCLR 261 (C).

215 Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* at 131.

216 *Bernstein and others v Bester NO* 1996 (4) BCLR 449 (CC) at [151] (hereinafter referred to as "*Bernstein*").

be established.[217] Furthermore, the Constitutional Court in *Zealand* also dealt with the aspect of a remedy for any violation of the rights contained in section 12 and emphasised that an unjustifiable breach of section 12(1)(a) is sufficient to establish unlawfulness with regard to a plaintiff's delictual action for unlawful arrest and unlawful detention.[218] This judgment sets out the principle that an unlawful act by a peace officer amounts to a violation of the fundamental rights of a suspect.[219] Even though courts are condemning the actions by peace officers, the problem persists.

Furthermore, even though the principles of substantive and procedural protection are present, as explained by the authors above, a suspect's right to freedom and security is compromised as a result of the powers given to peace officers to arrest without a warrant. In circumstances where the arrest is unlawful, the infringement of the right to freedom and security becomes serious because it is not just an act of arrest, but an act of unlawful arrest. As discussed above, the right to freedom is linked with the right to human dignity and therefore requires some discussion under this subject.

b) Impact on the right to human dignity

De Vos[220] explains that the term 'dignity' extends further than just the well-being of a person. Woolman[221] and Currie and De Waal[222] also explain the term 'dignity' by stating that it is based on the principle that all human beings have an equal moral worth and have the right to be treated equally and with respect. The importance of the right to dignity is a fundamental provision in the Constitution[223] in which it is provided

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217 Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* at 131; the *Reference re Section 94(2) of the Motor Vehicle Act* (1986) 24 DLR (4th) 536 (SCC); *S v Coetzee and Others* 1997 (4) BCLR 437 (CC) at [177]–[180].

218 *Zealand* at [52] and [144]. The importance of the value of freedom in terms of section 12 as set out in *Zealand*, was confirmed in *Minister of Home Affairs v Rahim* (CCT 124/15) (2016) ZACC 3 at [27], where the court said: "The protection of personal liberty has a long history in the common law both of this country and abroad. It is now entrenched in our law by the guaranteed right of everyone in section 12(1) of the Constitution to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause."

219 Ndou 2019 *Nelson Mandela University Law Journal* Volume 40 Issue 3 at 241-251.

220 De Vos *South African Constitutional Law in Context* 457.

221 Woolman *Dignity* in Woolman and Bishop 36.3.

222 Currie & De Waal *The Bill of Rights Handbook* at chapter 10.

223 *Makwanyane* at [329]; *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development* (CCT12/13) (2013) ZACC 35; 2013 (12) BCLR 1429 (CC) (3 October 2013) at [52].

that South Africa is founded on the values of human dignity, realization of equality and the development of human rights and freedoms.[224] When one has to consider and analyse the provisions as set out in the Bill of Rights, the specific right to human dignity is the cornerstone for the interpretation of all other fundamental rights in the Bill of Rights.[225] The importance of the right to human dignity is further emphasised in *Ferreira*[226] where Ackerman J stated that this right will only be appreciated and respected if a person develops humanity for others.

In respect of the fundamental right to human dignity, De Vos[227] explains that a suspect should be protected from treatment that may or will infringe on his sense of self-worth in the society. For instance, any sort of treatment of a suspect that falls within the category of being abusive, degrading, humiliating or demeaning, is a violation of the right to human dignity.[228] Cheadle, Davis and Haysom[229] also explain that any conduct which amounts to treatment of a suspect as non-human or less than human or as an object is unacceptable and will constitute a violation of the fundamental right to human dignity.

In light of the explanations provided by the aforesaid authors, it is clear that peace officers have the power to act reasonably and in accordance with their discretion and are expected to perform such power whilst having regard to the right to human dignity and ensuring that a suspect is afforded the right to human dignity. Therefore, if a peace officer arrests a suspect in a manner that is contrary to the legal requirements for a lawful arrest, then it follows that the arrest is unlawful and the right to human dignity has been violated. This is due to the fact that the essence of human dignity is a

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224 Section 1(a) of the Constitution; Currie & De Waal *The Bill of Rights Handbook* 250.

225 *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* (CCT35/99) (2000) ZACC 8; SA 936; 2000 (8) BCLR 837 (7 June 2000) at [35].

226 *Ferreira* at [49].

227 De Vos *South African Constitutional Law in Context* 457.

228 De Vos *South African Constitutional Law in Context* 457; *S v Williams and Others* (CCT20/24) (1995) ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) (9 June 1995), which concerned corporal punishment, the Constitutional Court held at [45] that 'the fact that the adult is stripped naked (for purposes of whipping) merely accentuates the degradation and humiliation. The whipping of both is, in itself, a severe affront to the dignity as a human being.'

229 Cheadle, Davis and Haysom (eds) *South African Constitutional Law: The bill of Rights at* 131. See also Davis DM (1999) Equality: the majesty of legoland jurisprudence *South African Law Journal* 116:398-414; Cowen S (2001) Can dignity guide South Africa's equality jurisprudence? *South African Law Journal on Human Rights* 17(1):34-58 at 34; Fagan (1998) 220.

person's self-worth which must not be ignored or diminished. However, an indication as to whether or not a peace officer has knowledge of and understands the importance of this right for a suspect, is not evident from the current literature.

Despite the decisions and comments of our courts on the legal principles and rights that must be prioritised, the bitter reality is that South Africa still faces a situation where peace officers act contrary to their powers, and infringe the constitutional rights of a suspect. A further discussion on this issue is dealt with in chapter 3 below. Once it is established that an arrest without a warrant violates the two main fundamental rights to freedom of person and human dignity, the subsequent detention also becomes unlawful and there are also constitutional implications. A discussion on the aspect of detention follows hereunder.

2.2.2 Constitutional implications of the unlawful acts of detention by peace officers

When discussing and examining the implications of unlawful detention on the constitutional rights of a suspect, it is crucial to analyse the legal principles pertaining to the 48-hour period of detention. An evaluation of these principles ultimately enables the researcher to determine what constitutes lawful or unlawful detention. Once it has been determined that a particular detention is unlawful, the next aspect that is examined is the constitutional implications that such unlawfulness has on the constitutional rights of a suspect. In dealing with these legal principles, the researcher aims to answer the primary research questions and objectives of the study.

Section 50(1)(c) of the CPA expressly provides that after an arrest, a suspect must appear in a District Court as soon as reasonably possible, but not after a period of 48 hours since his arrest.[230] Joubert[231] states that the purpose of this provision is to inform the court of the detention and to allow the court to decide on the further detention of a suspect and this provision is obligatory and may not be ignored or violated.[232] This

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230 *Ndaba and Others v Minister of Police* [2014] ZAGPPHC 180 (1 April 2014) at [38].

231 Joubert *Applied Law* at 264.

232 Joubert *Applied Law* at 264.

means that detention beyond the 48-hour period without being taken to court will be considered unlawful and a violation of the right to freedom of movement of a suspect. Joubert[233] confirms that this constitutional right is consistent with section 50 of the CPA which provides that a suspect must be taken to court before the expiry of the 48-hour period, which is calculated from the time of arrest. In this regard, Steytler[234] further confirms this principle by restating the comments made by Joubert. Furthermore, Kruger[235] states that emphasis is on the fact that the suspect must be brought before a court as soon as possible after arrest and any unnecessary delay on the part of the peace officer would mean that this right has been denied and it would follow that any further detention is unlawful. However, the issue remains as to whether a peace officer knows and understands the concept of the 48-hour rule. Whether it is merely a legal principle that is provided for in criminal procedure or whether this principle is actually practiced by peace officers is yet to be known. Therefore, the authors have not dealt with the specific aspect that this research aims to deal with. The current situation with regard to unlawful detention which extends beyond the 48-hour period and the civil claims for compensation are issues that require attention. It is the researcher's submission that peace officers are either not familiar with this rule or disregard this rule.

2.2.2.1 The 48-hour rule in relation to unlawful detention and constitutional implications thereof

Steytler[236] argues that once the 48-hour period expires, the detention then becomes unconstitutional and unlawful.[237] In this regard the court in *Mbahapa*[238] held that if a suspect is either not brought to court before the expiration of the 48-hours, or if he is not released, then the continued detention is a violation of the fundamental right to freedom of a suspect. The right to be taken to court is limited by two factors, namely

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233 Joubert *Applied Law* at 256.

234 Steytler *Constitutional Criminal Procedure* 126.

235 Kruger *Hiemstra's Criminal Procedure* at 5-29. See also *Damon v Greatermans Store* 1984 (4) SA 143 (W); *Mahlongwana v Kwatinidubu Town Committee* 1991 (1) SACR 669 (EC) where the peace officers unlawfully detained a suspect overnight in a police van.

236 Steytler *Constitutional Criminal Procedure at* 126.

237 *Endeshan v Minister of Safety and Security* at (27012/2013) (2016) ZAGPPHC 608 (7 April 2016) at [47] (hereinafter referred to as "*Endeshan*"); *Mdlalose and Another v Minister of Police and Another* 2016 (4) All SA 950 (WCC) at [82] and [951].

238 *Mbahapa* at [280E – H].

the principle that it must be done "as soon as reasonably possible" and by extensions of the 48-hour period.

According to Swanepoel, Lotter and Karels *et al*,[239] the purpose of taking a suspect to a police station is to ensure that he is in fact detained in a place of safety but only for a period not exceeding 48 hours.[240] In addition, Steytler[241] explains that detention of a suspect may be regarded as unconstitutional if the 48-hour period has not yet lapsed and the peace officer had the opportunity to bring the suspect to court within the 48-hour period but he failed to do so. Steytler[242] further states that the investigations and capabilities of the peace officer as well as the constitutional rights of the suspect are factors that must be taken into account. However, Steytler[243] further argues that it is in the suspect's interest and within his constitutional right to be brought before a court as soon as possible in order to determine the need for his continued detention. The court in *Mbahapa*[244] referred to article 11(3) of the Namibian Constitution which provides that a suspect must be brought to court before the expiration of the 48-hour period after his arrest and if this is not done, then the suspect must be released. The court placed further emphasis on the fact that the suspect must be brought before a court as soon as possible and any unnecessary delay on the part of the police may mean that this right has been denied, thereby rendering the further detention unlawful.[245]

The provisions in both the Constitution[246] and the CPA[247] are on par with the principle that the initial 48-hour period of detention may be extended if it is interrupted by a weekend or public holiday when the court is not in session. However, Swanepoel, Lotter and Karels *et al*[248] argue that this does not mean that peace officers may delay the process by not investigating the matter throughout the weekend and detain a suspect until the following Monday, with the idea in mind that they are entitled to detain

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239 Swanepoel, Lotter & Karels *Policing and the Law* at 187.
240 Swanepoel, Lotter & Karels *Policing and the Law* at 187.
241 Steytler *Constitutional Criminal Procedure at* 126.
242 Steytler *Constitutional Criminal Procedure at* 126.
243 Steytler *Constitutional Criminal Procedure at* 126.
244 *Mbahapa* at [280E – H].
245 *Mbahapa* at [280E – H].
246 Section 35(1)(d)(ii) of the Constitution.
247 Section 50 of the Criminal Procedure Act. See also *Hash v Minister of Safety and Security* (2011) ZAECPEHC 34 at [71]; *Mashilo v Prinsloo* 2013 (2) SACR 648 (SCA) at [146].
248 Swanepoel, Lotter & Karels *Policing and the Law* at 188. See also *Endeshan* at [48].

the suspect for a period of 48 hours before he has to be brought to court for the first time. The authors further argue that peace officers are not entitled to detain a suspect for the entire 48-hour period without bringing the suspect to court if his release can be arranged before the expiry of that period.[249] It can quite correctly be said that the authors' arguments are in line with the provisions of the Constitution as well as the CPA. However, the authors have not addressed the issues pertaining to the situation where peace officers are under the impression that their act of detaining a suspect means that the suspect is to either be released or charged and taken to court immediately prior to the expiration of the 48-hour period. It is as a result of this erroneous impression that peace officers act unlawfully and violate the rights of a suspect. This results in the civil claims by suspects for damages.

Even though the existing research on the aspect of unlawful detention and the constitutional implications thereof condemn the unlawful actions of peace officers and the violation of the rights of a suspect, the issue remains as to whether peace officers have an in-depth legal knowledge of the provisions of the Constitution and the CPA. Therefore, the effect of the comments made by authors on the subject and the comments by courts can go no further than to merely highlight the issues. Furthermore, the pertinent issue is whether peace officers are acting unlawfully by keeping a suspect in detention for longer than 48 hours and in so doing violate the rights of a suspect.

The court in *Prinsloo*[250] held that detention of a suspect in a police holding cell for more than 48-hours without being charged is considered unlawful and unconstitutional

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249 *Mashilo v Prinsloo* 2013 (2) SACR 648 (SCA) at [146] (hereinafter referred to as "*Mashilo*"); Section 50(1) of the Criminal Procedure Act and section 35(1) of the Constitution; Swanepoel, Lotter & Karels *Policing and the Law* 188.

250 *Prinsloo* at [24]. In this case, the applicant was suspected of murder of his wife, who had been killed on 12 October 2009. He was arrested on the morning of 18 November 2009 (a Wednesday). The applicant's attorney approached the investigating officer on 19 November (Thursday) with the intention of bringing a bail application in the lower court. The investigating officer responded by saying that he was busy with other matters and therefore could not attend to the suspect's application soon, as requested. He further intimated that he would only be able to attend to the applicant's application on 23 November (Monday). By this time the 48-hour period would obviously have elapsed. The suspect approached the High Court on 19 November for relief. The court ordered that the applicant be brought before a lower court on 20 November (Friday, before or at 13:00), failing which he could then approach the High court once more without lodging any papers. Subsequently the bail application in the lower court was aborted. The reason advanced was that the magistrate who was to hear the bail application was precluded as he had previously heard the confession of the suspect's alleged accomplice.

and may result in civil claims against the State. The court held further that in addition to instituting a civil action, the suspect may leave the police station without permission or authorisation of the peace officers who are in charge of the police cells or police station.[251] Since the purpose of section 50 of the CPA is to protect suspects from being detained for long periods before being brought before a court, in such a case the Magistrate's Court for the district also has jurisdiction and peace officers must take the suspect to the Magistrate's Court, otherwise the detention will be unlawful.[252] In the case of *Kader*[253] the court held that section 50(1) of the CPA aims to ensure that a suspect who has been arrested is taken to a court within a short or reasonable period of time. This principle discourages secret and irregular arrests and detentions of suspects.[254] If a suspect is detained for a period that exceeds the prescribed 48-hour period then such further detention is unlawful.[255] The court in *Mashilo*[256] resorted to a narrow interpretation of section 50(1)(d). The outer limit of 48 hours envisaged means that a peace officer is expected to bring a suspect to court even before the expiry of the 48 hours if it is reasonably possible for the peace officer to do so.[257] This principle operates whether or not the 48 hours expires before or during the weekend.[258]

Mokoena[259] points out that fortunately, it is a well-grounded principle to guard against violations of the personal freedoms of suspects at the hands of certain peace officers, who may be acting out of good or ill intentions. Mokoena[260] also argues that sound knowledge of the relevant legal provisions and the relevant case law on the part of a peace officer can ensure that such abuse does not occur or that it is kept to a minimum. Mokoena[261] makes a valid point in this regard as his suggestion seems to be in line

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Furthermore, no other magistrate was available to entertain the application at the time, nor were the police prepared to have the matter transferred to another magisterial district. The court ordered the opposing parties to appear before it at 14:00 (20 November). After the hearing of the argument, the applicant was released with immediate effect in terms of the *interdictum de libero homine exhibendo*. The court awarded damages against the investigating officer for the applicant's legal fees.

251 *Prinsloo* at [24].

252 *Sias v Minister of Law and Order* 1991 (1) SACR 420 (E).

253 *Kader* at [49 F].

254 *Kader* at [49 F].

255 Section 50 of the CPA; *Ndaba and Others v Minister of Police* (48208/2012, 48209/2012,49490/2012) [2014] ZAGPPHC 180 (2 April 2014) at [45].

256 *Mashilo* at [16].

257 *Mashilo* at [16].

258 *Mashilo* at [16].

259 Mokoena *A Guide to Bail Applications* 15.

260 Mokoena *A Guide to Bail Applications* 15.

261 Mokoena *A Guide to Bail Applications* at 15.

with the primary research question of this study in that violations of the constitutional rights of a suspect can be avoided if peace officers actually know the legal principles behind the powers. Although, as pointed out by Mokoena,[262] guarding against violations of the constitutional rights of a suspect is a well-grounded principle, the pertinent issue is whether the principle is, indeed, acknowledged and practised by peace officers who hold the power to detain a suspect and who consequently violate the constitutional rights of a suspect. Therefore, it can be said that violations of the provisions relating to the 48-hour rule would mean that constitutional rights have also been infringed and such an infringement is unacceptable in a democratic state like South Africa. Nevertheless, suspects are still held in police holding cells for periods exceeding 48 hours without being charged or released. Therefore, the issue regarding the protection and promotion of constitutional rights deserve attention. Apart from the unlawful act of arrest without a warrant and unlawful detention by peace officers, a further aspect that deserves attention is the use of excessive force on suspects. A discussion of this aspect follows hereunder.

2.2.3 The use of excessive force by a peace officer and its constitutional implications

One of the objectives of this research is to examine the constitutional violations and implications of a peace officer's use of excessive force on a suspect. In order to do this, it is necessary to also discuss and examine the legal principles that have evolved over the years that relate to a peace officer's power to use force. The existing literature on the requirements for the use of force as well as the use of force under reasonable circumstances will be discussed. Once these principles have been discussed, the study aims to review the existing literature surrounding section 49 of the CPA regarding the background principles on the use of force, the developments in the law which aimed to make the section constitutionally sound and the constitutionality of the current section 49 of the CPA. Once these principles have been discussed, the researcher is then in a position to determine what constitutes the use of excessive force. Undoubtedly, the use of excessive force by a peace officer is beyond the powers given to a peace officer and such conduct becomes unlawful. As a consequence of

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262 Mokoena *A Guide to Bail Applications* at 15.

the unlawfulness thereof, there is a violation of the constitutional rights of the suspect. Therefore, there is a link between the use of excessive force and the infringement of the rights of a suspect; an aspect which the study aims to highlight through a critical analysis of the existing literature on the subject. In doing so, the researcher aims to deal with the objectives of the study and answer the primary research questions.

Botha and Visser[263] argue that there are strict rules and guidelines that relate to a peace officer's power to use force on a suspect. For many years, the legal principles relating to the use of force have been amended, all with the aim of promoting and protecting the fundamental rights of a suspect. Even though the act of arrest itself is an infringement of the right to dignity and freedom and security of a suspect, the use of force on a suspect is regarded as a further violation of these rights as well the right to life. In this regard, Joubert[264] argues that if force is used in order to punish the suspect, then such arrest is unlawful. Placing further emphasis on the violation of rights as a result of the use of excessive force is a study by the Centre for the Study of Violence and Reconciliation[265] which states that the use of force during an arrest is supposed to be used in a manner which does not violate the dignity of a suspect and must not be applied inappropriately. Burchell[266] states that peace officers are given the power to use force in certain circumstances, but there are strict limitations to their powers.

However, the issue is whether peace officers are adhering to these limitations. They would only be able to adhere to these limitations if they knew the limitations. In the absence of such knowledge, peace officers are bound to act beyond their powers. A further issue is whether the documenting of principles pertaining to the use of force for academic or judicial use, will benefit peace officers and protect the constitutional rights of a suspect in any way. There are two categories of force that exist which is necessary for a discussion on the subject. Both these categories have certain criteria that either amounts to force within the prescribed limits or the use of excessive force that is

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263 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

264 Joubert *et a*l *Criminal Procedure Handbook* at 134.

265 Centre for the Study of Violence and Reconciliation https://www.csvr.org.za/docs/Anewapproachtotheuseofforcebrochure.pdf (accessed on 6 May 2017).

266 Burchell *South African Criminal Law and Procedure Vol 1: General principles of criminal law* at 121.

unconstitutional. Del[267] explains the two types of force that can be used during the arrest of a suspect as non-deadly force and deadly force. Del[268] further defines non-deadly force as force that, when used, is not likely to result in serious bodily injury or death, and deadly force is force that, when used, possesses a high risk of death or serious injury to a suspect, irrespective of whether or not death, serious injury or serious harm actually occurs. Even though the types of force are categorised in two parts, there is a list of requirements that make the use of force lawful and if the requirements are not complied with, the use of force will be unlawful.

2.2.3.1 The requirements for the use of force

The principles that relate to the use of force prescribe strict requirements which relate to the circumstances in which a peace officer can use force when arresting a suspect. According to Joubert,[269] Du Toit[270] and courts, peace officers must comply with the following requirements when using force during an arrest:

a) The peace officer who effects the arrest must first attempt to arrest the suspect.[271] Joubert[272] explains this requirement to mean that a peace officer cannot use force without any attempt on his part to first arrest the suspect.

b) The suspect must attempt to escape by fleeing or by trying to resist arrest in order for the peace officer to use force.[273] According to Floyd,[274] a State has a systematic interest in ensuring that suspects are brought to justice through a trial and possible punishments and if suspects were able to flee successfully from arrest on more or less a regular basis, the threat of punishment would be weakened and the efficiency of the criminal justice system as a deterrent to crime will be undermined. However, the court in *Govender v Minister of Safety and Security*[275] referred to the argument by Floyd[276] and critically assessed the position in light of the constitutional rights of suspects. The court in *Govender v*

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267 Del *Criminal Procedure: Law and Practice* at 184.
268 Del *Criminal Procedure: Law and Practice* at 184.
269 Joubert *et a*l *Criminal Procedure Handbook* at 137.
270 Du Toit *et al Commentary on the Criminal Procedure Act at* ch5-p31.
271 *R v Metelerkamp* 1959 (4) SA 102 (E) (hereinafter referred to as "*Metelerkemp*").
272 Joubert *et a*l *Criminal Procedure Handbook* at 137.
273 *Hughes en andere v Minister van Wet en Orde en andere* 1992 (1) SACR 338 (A) at [344d], [345c].
274 Floyd 1976 *Harvard Civil Rights – Civil Liberties Law Review* Volume 11 Issue 1 at 361 – 389.
275 *Govender v Minister of Safety and Security* at [12]-[13].
276 Floyd 1976 *Harvard Civil Rights – Civil Liberties Law Review* Volume 11 Issue 1 at 361 – 389.

Minister of Safety and Security[277] stated that a suspect who is fleeing from peace officers has, usually, not been convicted of an offence and the constitutional rights[278] apply to fleeing suspects as well. The court further raised the issue on how the interests of the State and the rights of a fleeing suspect can be brought into balance.[279] The court proposed an answer that lies in a constitutional test by posing the question – when is a statutory provision allowing the wounding of a fleeing suspect under certain circumstances reasonable and justifiable in an open and democratic society based on freedom and equality?[280] This enquiry involves a close scrutiny of the circumstances under which section 49 (1) of the CPA allows the wounding of a fleeing suspect[281] (this aspect is discussed further in (f) below).

c) The suspect must be aware that an attempt is being made to arrest him and must in some way be informed of the intention, but continues to try to flee or resist the attempted arrest despite being aware of the imminent arrest.[282] Joubert[283] explains further that the peace officer effecting the arrest may not take it for granted that the suspect knows that the peace officer is attempting to arrest him. The court in *S v Barnard*[284] embraced the suggestion by Joubert[285] and stated that it must be clear to the suspect that the peace officer effecting the arrest is attempting to arrest him.

d) Joubert[286] states that there must be no other reasonable means available to effect the arrest of the suspect. The court in *Macu v Du Toit*[287] elaborated on

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277 *Govender v Minister of Safety and Security* at [12]-[13].

278 The right to life (section 9); a right to physical integrity (section 11 (1)); a right to protection of his or her dignity (section 10); a right to be presumed innocent until convicted by a court of law (section 25 (3) (e)) and the right to equality before the law and to equal protection of the law (section 8 (1)).

279 *Govender v Minister of Safety and Security* at [12]-[13].

280 *Govender v Minister of Safety and Security* at [12]-[13].

281 *Govender v Minister of Safety and Security* at [12]-[13].

282 Joubert *et a*l *Criminal Procedure Handbook* at 138.

283 Joubert *et a*l *Criminal Procedure Handbook* at 138.

284 *S v Barnard* 1986 (3) SA 1 (A). In this case the deceased used his pick-up van to make exploding noises by switching the vehicle's engine on and off whilst driving. One night, he drove through the streets of Pietermaritzburg and made the exploding noises with his van. Shortly before this, there was a terrorist attack on the court building. B, a peace officer, heard the exploding noises made by the deceased's vehicle which was also near the court building. He attended the area thinking that terrorists were making their escape in the 'bakkie'. He gave chase in the police vehicle and fired when the persons in the 'bakkie' seemed to ignore his signals to stop. The deceased was killed, being unaware that he was being chased by the peace officer. B was accordingly held liable.

285 Joubert *et a*l *Criminal Procedure Handbook* at 137.

286 Joubert *et al Criminal Procedure Handbook* at 138.

287 *Macu v Du Toit* 1983 (4) SA 629 (A) at [635] (hereinafter referred to as "*Macu*").

the requirement and held that when a court has to consider whether there were alternative means available to the peace officer effecting the arrest which would have involved a lesser degree of force than shooting at the suspect, there are two considerations that have to be borne in mind. First, is a certain action only considered to be an alternative if it would be practicable and reasonably effective in order to bring about the detention of the suspect; and second, the time that the peace officer who is effecting the arrest has at his disposal to consider possible alternative methods of action (which is often limited and may call for a swift decision to prevent the suspect from fleeing). In addition to the aforesaid elaboration as set out in the *Macu* case, in *Metelerkamp* De Villiers JP stated that a court should place itself in the position of the peace officer who has to take a decision with regard to the extent of force to be used on a suspect in order to effect an arrest. In the case of *S v Labuschagne*[288] the Appellate Division held that it is important to consider whether it is possible to arrest the suspect to prevent him from fleeing without having to kill the suspect. What could have been done means what could a reasonable person in the peace officer's position have done, after taking into account the facts which the peace officer knew or should have known.[289]

e) The force used must be directed at the suspect himself.[290]

f) Du Toit *et al*[291] explains that the degree of force that may be used in order to effect the arrest must be reasonably necessary and proportional in the circumstances. The authors explain further that courts have emphasised that the reasonableness of the degree of force must be looked at in light of the circumstances in which the act took place and the reasonableness must be judged objectively. Furthermore, the sequence of steps ought to be taken practically, for example, a verbal warning, a warning shot, a shot at the legs and as a last resort a shot with the intention to kill the suspect, depending on the

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288 *S v Labuschagne* 1960 (1) SA 632 (A) at [635G] (hereinafter referred to as "*Labuschagne*"). See also *Sambo v Milns* 1973 (4) SA 312 (T) at [317]-[318].

289 *Labuschagne at* [317]-[318].

290 *Government of the Republic of South Africa v Basdeo* 1996 (1) SA 355 (A).

291 Du Toit *et al Commentary on the Criminal Procedure Act at* ch5-p31. See also *Matlou v Makhubedu* 1978 (1) SA 946 (A) 958B; *S v Swanepoel* 1985 (1) SA 576 (A) at [582G], [589C]- [589F]; *Minister van Wet en Orde en 'n ander v Ntsane* 1993 (1) SACR 256 (A) at [262c] – [262d]; *Dikane v Minister van Wet en Orde* 1992 (2) SACR 211 (W); *Mazeka v Minister of Justice* 1956 (1) SA 312 (A) at [316]; *R v Labuschagne* 1960 (1) SA 632 (A); *S v Scholtz* 1974 (1) SA 120 (W) at [124] – [125].

circumstances.[292] In addition to the commentary by the aforementioned authors, the Constitutional Court in *Walters* elaborated on this requirement by stating that when a peace officer has to decide what degree of force is reasonably necessary, he must consider the imminent threat of violence that the suspect poses either to himself, the peace officer or any other person, as well as the type of offence for which the suspect is to be arrested. When a peace officer is burdened with the decision to shoot at a suspect, he should only exercise this act in exceptional circumstances where for example, a suspect is suspected of committing an offence which involves grievous bodily injury.

A discussion of the requirements regulating the use of force is necessary for the determination of what constitutes the use of excessive force. If the requirements are not complied with, the use of force is unlawful and such act consequently becomes excessive force or force beyond the parameters of the powers given to a peace officer. Therefore, the next aspect for discussion are the principles and literature that relate to section 49 of the CPA, which make provision for the use of force on a suspect. The discussion commences with the review of the background to the principles on the use of force in relation to section 49. The discussion also includes a review on the use of force under reasonable circumstances as well as the developments over the years of section 49 which aimed to promote constitutional rights. However, the issue is whether these developments pertaining to the use of force have made any significant difference with regard to the constitutional rights of suspects and with regard to the limitation on the use of excessive force.

2.2.3.2 Background to the principles on the use of force in relation to constitutional rights

[292] Du Toit *et al Commentary on the Criminal Procedure Act at* ch5-p31.

Van der Walt[293] points out that there has been criticism and amendments for over 165 years relating to laws on the use of force during an arrest.[294] Subsequently this has also been pointed out by Du Toit *et al*[295] and Botha and Visser[296] as well as in a thesis written by Albertus.[297] Le Roux-Kemp and Horne[298] further emphasise that section 49 is one of the most amended sections in South African Criminal Procedure. Over the years, section 49(1) underwent great scrutiny to bring it in line with the provisions of the Bill of Rights. Before embarking on a detailed discussion of section 49 of the CPA, it is important to highlight the fundamental rights that have been elaborated by judicial officers in the Constitutional Court with regards to the use of force.

The Constitutional Court decision of *Makwanyane*[299] deals with the rights to life and dignity as the most important in light of other rights in the Constitution and it is important to value these rights as democracy is based on the recognition and promotion of human rights. It was also held that the use of force must be regarded as a last resort in a situation where a suspect's life is in danger.[300] The court further emphasised that the power vested with peace officers to use force on a suspect is limited because peace officers should first consider alternative methods other than the act of arrest to ensure a suspect's attendance at court.[301] The limitation on the power to use deadly force can be seen as a consequence of a democratic and constitutional country where a suspect's right to life is respected.[302] It is apparent from the comments made by the court in the *Makwanyane* case that the suggestion that there should be alternative methods of ensuring a suspect's attendance at court was introduced as early as 1995. However, it should be highlighted that the court in the *Makwanyane* case states that the use of force is limited because peace officers should use

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293 Van der Walt 2011 *PELJ* Volume 14 Issue 1 at 140. See also Van der Walt 2007 *Tydskrif vir die Suid-Afrikaanse Reg* (1) at 96-111; Albertus *The Constitutionality of using deadly force against a fleeing suspect for purposes of arrest*.

294 Section 1 of Ordinance 2 of 1837 (C); section 41 of the Criminal Procedure Ordinance 1 of 1903 (T); section 44 of the Criminal Procedure Act 31 of 1917 and section 37 of the Criminal Procedure Act 56 of 1955.

295 Du Toit *et al Commentary on the South African Criminal Procedure Act* at 5-25.

296 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-568.

297 Albertus *The Constitutionality of using deadly force against a fleeing suspect for purposes of arrest* at 15.

298 Le Roux-Kemp & Horne 2011 *S. Afr. J. Crim. Justice* Volume 24 Issue 3 at 266.

299 *Makwanyane* at [144]. See also Currie & De Waal *The Bill of Rights Handbook*, chapter 11.

300 *Makwanyane* at [140] and [144]. Also as prescribed by section 49(2) of the CPA.

301 *Makwanyane* at [140] and [144].

302 *Makwanyane* at [140] and [144]; Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 1.

alternative methods other than arrest to ensure that the suspect attends court. The court's comment is surprising because at the time it pronounced judgment, the use of alternative methods other than arrest was not part of our law and it is not part of our law today. It is uncertain whether the court meant that alternative methods should be made part of our law, or whether the court misdirected itself in assuming that alternative methods already formed part of the law. Further discussions on this aspect follow in paragraph 2.3 below. The pertinent aspects of section 49 with regard to the use of force in relation to constitutional rights are discussed hereunder.

Joubert[303] states that previously, the CPA provided for the killing of a suspect who was attempting to escape and who was reasonably suspected of committing a schedule 1 offence but could not be stopped from escaping by means other than by killing the suspect.[304] However, Joubert[305] explains further that in light of the introduction of the Constitution, this principle became a topic of debate after 1996 and the main issue surrounding the debate was the lack of balance between the proportionality requirement and the degree of force that is used as well as the circumstances of the offence committed. As a result of the uncertainty about whether section 49 would trump against constitutional provisions, an entirely new section was formulated in 1998. However, Kruger[306] states that it received opposition from the South African Police and the Minister of Safety and Security. Van der Walt[307] elaborates on Kruger's[308] comment by stating that the opposition emanated from the Minister's supposition that the proposed 1998 amendment only empowered peace officers to shoot at suspects in the case of self-defence which means that peace officers would be at risk of being assaulted or fatally injured by suspects. Van der Walt[309] argues that the section was criticised as being complicated, confusing and lacking in legal clarification. Le Roux-Kemp and Horne[310] also state that this criticism arose out of uncertainties relating to the use of firearms by peace officers, because this became a

303 Joubert *Applied Law* at 252.

304 Msaule 2015 *De Jure* Volume 48 Issue 1 at [243]-[254].

305 Joubert *Applied Law* at 252. For example, a suspect suspected of stealing fruit could be lawfully shot and killed if he could not be caught, since theft is a schedule 1 offence.

306 Kruger *Hiemstra's Criminal Procedure* at 5-21.

307 Van der Walt 2011 *PELJ* Volume 14 Issue 1 at [140].

308 Kruger *Hiemstra's Criminal Procedure* at 5-21.

309 Van der Walt 2011 *PELJ* Volume 14 Issue 1 at [140].

310 Le Roux-Kemp & Horne 2011 *S. Afr. J. Crim. Justice* Volume 24 Issue 3 at page 273.

problem for peace officers. As a result of the criticism of the section, the amendment to the section only came into force five years later on 18 July 2003.

Clearly, the legislature aimed at improving the legal situation in order to accommodate the safety of peace officers who exercise their powers. The issue with this section is that there was too much focus on the protection of a peace officer's powers at the cost of the constitutional rights of a suspect. There was no mention of a balance or proportionality between the constitutional rights of a suspect and the powers of peace officers. It should be noted that after 1996, when constitutional democracy prevailed, the legislature omitted to give preference to the constitutional rights of a suspect. An attempt was made, however, to cure the issues that arose from the debate and criticism. However, the amendment that was effected in 2002 was not sufficiently acceptable and not in line with the Bill of Rights. This resulted in another amendment taking effect in 2012. According to Swanepoel, Lotter and Karels *et al*,[311] section 49 of the CPA was substituted twice since the beginning of South Africa's constitutional dispensation in 1994. The researcher discusses section 49 under the subheadings hereunder with regard to its amendments and development over the years. The important issue that the study aims to highlight is the relationship between these developments and the aim of promoting the constitutional rights of a suspect. However, as will be discussed and analysed in the discussions below, the pertinent issue to be determined is whether the developments assisted, in any way, with protecting the constitutional rights of suspects, or whether there are gaps that remain in the law that ought to be given attention. In discussing these issues, the researcher aims to deal with the objectives and primary research question of the study with regard to the use of excessive force by peace officers and the constitutional implications of such unlawfulness on a suspect.

a) The original text of section 49

The original provisions of section 49 were directed at harsh and discriminatory treatment due to the apartheid era. This meant that force could openly be used on anyone and for any reason possible and there was no regard for human dignity and

311 Swanepoel, Lotter & Karels *Policing and the Law* at 182.

the right to freedom and security of person. As it was held in cases such as *R v Britz*[312] and *Mazeka v Minister of Justice*,[313] the 1977 version of section 49 allowed the killing of fleeing suspects who were wanted for any offences listed in schedule 1 of the Act. Swanepoel, Lotter and Karels *et al*[314] as well as Burchell and Milton[315] argue that in effect, protecting one's property and protecting a life were on equal footing to the extent that one could kill to protect property or life and as a consequence, protecting life or property were legal grounds for using deadly force. As a result of this constitutional dissatisfaction, the two significant cases that created amendments to the original section 49 are *Govender* and *Walters*. Both Burchell[316] and Albertus[317] distinguished the purpose of the amendments to sections 49(1) and 49(2) by explaining that section 49(1) provided a framework for the use of force only, whilst section 49(2) set the basis under which the use of deadly force would be justified. Du Toit *et al*[318] also explains that the *Govender* case contributed to the development of section 49(1) and the *Walters* case contributed to the development of section 49(2). However, Burchell[319] points out that section 49(2) did not create the need for a peace officer to distinguish between a suspect who resisted arrest and a suspect who fled.

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312 *R v Britz* 1949 (3) SA 293 (A) at [303] – [304].

313 *Mazeka v Minister of Justice* 1956 (1) SA 312 (A) at [315] – [316] (hereinafter referred to as "*Mazeka*"). See also S *v Swanepoel* 1985 (1) SA 576 (A) where the reverse onus upheld in the latter decision was confirmed.

314 Swanepoel, Lotter & Karels *Policing and the Law* at 183.

315 Burchell & Milton *Principles of Criminal Law* at pages 312 – 323. See also Burchell *South African Criminal Procedure Vol 1 General Principles of Criminal Law* 4 ed (2011) at pages 198 – 215.

316 Burchell *South African Criminal Law and Procedure Vol 1: General principles of criminal law* at 121. See also *R v Britz* at [303] – [304]; *Mazeka v Minister of Justice* at [315] – [316]. To invoke the powers of section 49(1), it was required that the peace officer prove on a balance of probabilities that (a) the arrestor was authorized under the Act to arrest the suspect; (b) an attempt to arrest the suspect was made; (c) the suspect resisted arrest and could be restrained only with the use of force; (d) or the suspect fled while it was clear to him that an attempt was being made to arrest him; (e) his flight could not be prevented without the use of force; (f) the force used was reasonably necessary in the circumstances.

317 Albertus *The Constitutionality of using deadly force against a fleeing suspect for purposes of arrest* at 15. See also Watney M 'To shoot or not to shoot: The changing face of section 49 of the Criminal Procedure Act 51 of 1977' September 1999 *De Rebus* 28-32. According to Du Toit *et al Commentary on the Criminal Procedure Act* at 32, the last requirement (f), meant that if the peace officer denied that he intentionally killed the suspect and the State failed to prove beyond a reasonable doubt that there was such an intention, section 49(2) did not apply but the peace officer could be found guilty of culpable homicide, provided that the State was able to prove beyond a reasonable doubt all the elements of culpable homicide including the element of negligence; *R v Britz*; *S v Swanepoel* 1985 (1) SA576 (A); *S v Barnard*; *R v Malindisa* 1961 (3) SA377 (T).

318 Du Toit *et al Commentary on the Criminal Procedure Act* at 5-24. See also Watney 1999 *De Rebus* 28-32.

319 Burchell 2000 *S. Afr. J. Crim. Justice* Volume 13 Issue 2 at 200-248. See also Albertus *The Constitutionality of using deadly force against a fleeing suspect for purposes of arrest* at 15-18.

The court in *Mazeka* correctly pointed out that due to the wide powers that were given to peace officers under the original section 49, the legislature intended for circumstances to be closely examined so that conditions for the protection of suspects are fulfilled. The authors have distinguished between the two sub-sections of section 49 in light of the two cases. However, they have not linked the importance of the developments to sections 49 and the distinguishing factors, to the importance of the rights of a suspect and the fact that peace officers must have knowledge about the section so that they can perform their functions in line with constitutional values.

Albertus[320] argues that as a result of the wide powers given to peace officers to use force in terms of section 49, the legislature attempted to place limitations on the conduct of the peace officers by requiring that their conduct be reasonable. In this regard, the court in *Matlou v Makhubedu*[321] dealt with the assessment for the reasonableness of the peace officer's conduct. The requirement that a peace officer had to believe on reasonable grounds that he had grounds to act in terms of section 49 made it difficult for peace officers to justify their conduct under the section and the decision in *S v Swanepoel*[322] created greater limitations for peace officers. Albertus[323] argues that the main points of criticism of sub-sections (1) and (2) was the lack of the requirement of proportionality between the force used by a peace officer and the seriousness of the offence as well as the inadequacy of the requirement that the suspect should have committed a schedule 1 offence in order for the peace officer to use deadly force. As a result of the lack of constitutionality in the original section 49, there was a need for amendments which would develop constitutional protections for suspects and aim to fill the gaps that existed. Albertus[324] comments on the fact that

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320 Albertus *The Constitutionality of using deadly force against a fleeing suspect for purposes of arrest* at 15.

321 *Matlou v Makhubedu* 1978 (1) SA 946 (A) at [947G] – [947H] (hereinafter referred to as "*Matlou*"). See also *S v Basson* 1961 (3) SA 279 (T); Watney, M., 'To shoot or not to shoot: The changing face of section 49 of the Criminal Procedure Act 51 of 1977' September 1999 *De Rebus* 28-32; *R v Arlow* 1960 (2) SA 449 (T) at [453G]; *S v Scholtz* 1974 (1) SA 120 (W) at [124G]– [125C], *Macu v Du Toit* 1983 (4) SA 629 (A) at 636 (A) at [636B]-[636C].

322 *S v Swanepoel* 1985 (1) SA 576 (A); *R v Britz* 1949 (3) SA 321 (A).

323 Albertus *The Constitutionality of using deadly force against a fleeing suspect for purposes of arrest* at 15 See also *Government of the Republic of South Africa v Basdeo* 1996 (1) SA 355 (A) at [368D]-[368E], where the Court held that the power conferred on arrestors had to be exercised with great circumspection and strictly within the prescribed bounds to avoid the wide-spread killing of innocent people; *R v Denysschen* 1955 (2) SA81(O); *Meterlerkamp* case.

324 Albertus *The Constitutionality of using deadly force against a fleeing suspect for purposes of arrest* at 15.

peace officers should act in terms of the principles of reasonableness when they use force according to section 49. However, the author is silent on the pertinent issue on whether or not peace officers know the provisions of section 49 and what is expected of them. If the peace officer ought to believe on reasonable grounds that he can act in terms of section 49, it follows that such conduct can only take place if the peace officer himself knows and understands section 49. As a result of the apparent concerns with the original section 49, the 2003 amendment took place.

b) The position in 2003

Several authors such as Botha and Visser,[325] Van der Walt,[326] Burchell,[327] Le Roux-Kemp and Horne[328] note that changes were effected in 2003 which relaxed the severity of the provisions and consequences of the original text and, as a result, section 49 was amended by section 7 of the JMSA Act,[329] which only came into force in 2003 due to severe criticism by the then Minister of Safety and Security. However, this amendment raised dissatisfaction which is discussed hereunder in detail. It should be pointed out that the 2003 amendment was subject to criticism by the State. The reason behind the criticism is discussed hereunder.

Swanepoel, Lotter and Karels *et al*[330] explain that the South African Police Service raised issues relating to the interpretation and enforceability of the amendment relating

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325 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

326 Van der Walt 2007 *Tydskrif vir die Suid-Afrikaanse Reg* (1) at 96-111. See also Van der Walt 2011 *PELJ* 139.

327 Burchell J *South African Criminal Law and Procedure Vol 1: General principles of criminal law at* 201.

328 Le Roux-Kemp & Horne 2011 *S. Afr. J. Crim. Justice* Volume 24 Issue 3 at 273.

329 Section 2 of the JMSA Act provides that if an arrestor attempts to arrest a suspect and the suspects resists arrest or attempts to flee, or resists the attempt and flees, when it is clear that there is an attempt to arrest the suspect, 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 resistance or to prevent the suspect from fleeing, on condition that the arrestor is justified in terms of this section to use deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if the arrestor believes, on reasonable grounds that (a) force is immediately necessary for the purpose of protecting the arrestor, 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) the offence for which the arrest sought 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; Snyman CR *Criminal law* 5th ed (LexisNexis Durban 2008).

330 Swanepoel, Lotter & Karels *Policing and the Law* at 183. See also Van der Walt T "The use of force in effecting arrest in South Africa and the 2010 Bill: A step in the right direction?" at 140; Snyman CR

to the training of peace officers and as a result, there was a delay between the promulgation and the coming into effect of section 7. According to Botha and Visser,[331] the issues raised with the redefined section 49(1) is that it did not provide the framework for the use of force but only defined the terms "arrestor" and "suspect". Section 49(2) provided for the circumstances in which force and deadly force may be used.[332] In addition, Keebine-Sibanda and Sibanda[333] as well as Botha and Visser[334] explain that the only aspect that was different from the previous section 49(1) was the inclusion of the 'proportional requirement' that force should no longer only be 'reasonably necessary' but also 'proportional'. Le Roux-Kemp and Horne[335] describe this test as the proportionality test and Burchell[336] explains that it applies to both the use of non-deadly force and the use of deadly force. The criticism of the 2003 amendment omitted to include the rights of a suspect. The link between the 2003 amendment (that aimed to be different and better than the original text) and the constitutional rights of suspects is missing. The issue that the authors have not addressed is whether the legislature amended the section to improve and assist peace officers with the execution of their powers, or whether it intended to protect the rights of a suspect.

Criminal law 5th ed (LexisNexis Durban 2008); Van der Walt 2007 *Tydskrif vir die Suid-Afrikaanse Reg* (1):96-111; Du Toit *et al Commentary on the South African Criminal Procedure Act*; Bruce D "Submission to The Portfolio Committee on Justice and Constitutional Development" *Re: Criminal Procedure Amendment Bill, 39 of 2010.* 22 July 2011.

331 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

332 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569. The first part of section 49(2) deals with the use of force only and the remaining parts deal with deadly force.

333 Keebine-Sibanda and Sibanda 2003 *Crime Research in South Africa* Volume 5 Issue 1 at 1-6.

334 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

335 Le Roux-Kemp & Horne 2011 *S. Afr. J. Crim. Justice* Volume 24 Issue 3 at 277. See also Botha & Visser 2012 *PELJ* Volume 15 Issue No.2 at 346-569; Snyman *Criminal Law* 131. The requirement that the use of force must by 'reasonably necessary' generally implies any force that may be used to guarantee an arrest. If there were other means available to the peace officer, then those alternative means should be used. In addition, before a peace officer discharges a firearm at a suspect, he or she must issue a verbal warning followed by the discharge of a warning shot. If this does not bring about the desired effect, the peace officer should direct a shot at the lower parts of the suspect's body. The proportionality test not only refers to the seriousness of the crime which the suspect is suspected to have committed, but also the threat or danger the suspect poses to the peace officer, the bystanders or society as a whole. In this regard, see *April v Minister of Safety and Security* (2009) 2 SACR 1 (SE) at [2], [8]-[9].

336 Burchell *South African Criminal Law and Procedure* 203.

The second part of section 49(2) replaces the entire part of the previous section 49(2) that was declared unconstitutional by the *Walters* case and Botha and Visser[337] argue that it appears to be even more strict than that suggested by the court in the *Walters* case. Snyman[338] explains that according to the previous section 49(2), a peace officer was authorised to kill or seriously injure the suspect in an attempt to prevent him or her from fleeing, where the suspect committed a schedule 1 offence, even where the conduct of the suspect when apprehended by the peace officer was not immediately threatening to the arrestor or any other person, and even if there was no danger that the suspect would kill or seriously injure someone in the near future. According to the amended section 49(2), this is no longer allowed.[339] However, Snyman[340] argues that there has been criticism regarding the wording of the second part of the amended section 49(2) in that the wording of section 49(2)(b) fails to differ in any way from what is already set out in section 49(2)(a).

Botha and Visser[341] state that despite the arguable wording of the 2003 amendment to section 49(2), the legislature indeed complied with the requirements as laid down in the *Govender* and *Walters* cases. However, in 2012 further amendments to section 49 were effected, which resulted in the present version of section 49. The present section 49 is discussed hereunder in detail in relation to the use of excessive force that is used by peace officers.

c) The present section 49 in relation to constitutional violations

The present version of section 49 was introduced by the Criminal Procedure Amendment Act,[342] which came into operation on 25 September 2012.[343] As a result

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337 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569. See also the 2003 redefined section 49(2) of the Criminal Procedure Act 51 of 1977; Neethling and Potgieter 2004 *Tydskrif vir die Suid-Afrikaanse Reg* 3 at 605; Keebine-Sibanda and Sibanda 2003 *Crime Research in South Africa* Volume 5 Issue 1.

338 Snyman *Criminal Law* 134. See also Botha & Visser 2012 *PELJ* Volume 15 Issue No.2 at 346-569.

339 Le Roux-Kemp & Horne 2011 *S. Afr. J. Crim. Justice* Volume 24 Issue 3 at 278; Burchell *South African Criminal Law and Procedure* 207.

340 Snyman *Criminal Law at* 132-133. See also Burchell *South African Criminal Law and Procedure* 204; Neethling and Potgieter 2004 *Tydskrif vir die Suid-Afrikaanse Reg* 605.

341 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

342 Criminal Procedure Amendment Act 9 of 2012 (hereinafter referred to as the "CPA Act").

343 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

of the amendment to the section, the text in respect of section 49(1) and 49(2) reads as follows:

> "49(1) For the purposes of this section-
> (a) 'arrestor' means any person authorized under this Act to arrest or to assist in arresting a suspect; [and] (b) 'suspect' means any person in respect of whom an arrestor has [or had] a reasonable suspicion that such a person is committing or has committed an offence; and (c) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.
> (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt 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, but, in addition to the requirement that force must be reasonably necessary and proportional in the circumstances, 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 (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."

The first portion of the 2003 version of section 49(2) remains unchanged, however, Botha and Visser[344] explain that an amendment was effected in respect of the use of deadly force and the authors explain that the term deadly force has been included in the definition of terms under section 49(1). The authors explain further that the changes to section 49(2) are the deletion of the requirement that deadly force can only be used when it is immediately necessary to protect the arrestor, and the addition that deadly force is used when a "suspect poses a threat of serious violence to the arrestor or any other person, or 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

344 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346/569.

or later."[345] Botha and Visser[346] comment on the *Govender* case where the court held that in order for the use of serious force to be justified, an immediate threat of serious bodily harm to the peace officer or any other person has to be present. In addition, the *Walters* case confirmed that "to be at the very least also the prerequisite in a case where the suspect is killed by the peace officer".[347] Botha and Visser[348] argue that the amendment relating to the use of deadly force where a person is suspected on 'reasonable grounds' of having committed a crime involving the infliction or threatened infliction of serious bodily harm, would appear to be a movement back to the previous section 49(2) which referred to schedule one listed offences, the only difference now is that it refers to any crime. On the same point the Open Society Foundation for South Africa Report[349] also argues that this amendment is unconstitutional and violates a suspect's right to dignity, life and bodily integrity. In light of the arguments put forward, an amendment to this part of the Act is required so that the fundamental rights of a suspect are duly protected. An amendment will also aim to reduce the use of excessive force by peace officers. The criticism by Botha and Visser[350] are in line with the objectives of this study in that the amendment is supposed to be aimed at promoting democratic values and constitutional rights. However, the amendment resulted in peace officers having wider powers to use force on a suspect because the list of offences for which force would be used was broadened to more than just the list of offences under schedule one.

According to Swanepoel, Lotter and Karels *et al*,[351] the previous version of section 49(2)(b) allowed for the use of deadly force when a peace officer suspected that there

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345 Open Society Foundation for South Africa *Report on the OSF-SA roundtable discussion on the human rights and practical implications of the proposed amendments to section 49 of the Criminal Procedure Act* 28 April 2010 (Johannesburg, South Africa) at 2; Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 1; Le Roux-Kemp and Horne at 281 where the authors comment on the deletion of the word 'grievous' and the addition of the word 'serious', suggesting that if one has to consider the strict interpretation of the word 'serious' then it would mean a less serious situation than 'grievous' which would then diminish the strict criteria for the use of deadly force to which peace officers are bound by, while at the same time, limiting the scope for acquiring liability.

346 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

347 *Walters* at [616].

348 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

349 Open Society Foundation for South Africa *Report on the OSF-SA roundtable discussion on the human rights and practical implications of the proposed amendments to section 49 of the Criminal Procedure Act* at 4.

350 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

351 Swanepoel, Lotter & Karels *Policing and the Law* at 185.

was ‘a substantial risk that the suspect could cause imminent or future death or grievous bodily harm if the arrest is delayed’. However, Botha and Visser[352] point out that a pertinent aspect that is apparent from the 2012 amended section 49(2) is that the reference to ‘future death’ has been deleted. Botha and Visser[353] also argue that the reference to ‘future death’ is still implied, with the removal of the term ‘immediate’ before the word ‘threat’ and as a result, peace officers may misuse the power to use deadly force whilst they use their powers to arrest a suspect. The authors raised this concern as early as 2012, when the amendment to section 49 took place. However, since then nothing has changed in light of the authors’ criticism and the legal position remains.

In addition to the issues raised about the current section 49 text, Joubert[354] states that South African courts have interpreted the words ‘reasonably necessary’ to include the proportionality test which means that the degree of force used should be in proportion to the seriousness of the offence for which the suspect is to be arrested. Joubert[355] explains that the less serious the offence in respect of which the attempt is made to arrest, the lesser the degree of force may be used in order to arrest a suspect. However, the issue about whether or not peace officers know about the meaning or interpretation behind this provision and whether they are in a position to act accordingly, are aspects which Joubert[356] fails to address. In *Govender v Minister of Safety and Security*[357] the SCA made reference to the Constitution and held that the proportionality test referred to in the Appellate Division case of *Matlou* is too narrow and should not only refer to the seriousness of the offence, but should actually refer to all the circumstances in which force is used. According to the SCA, this represents a balanced and impartial way of balancing the interests of the State, society, the peace officers involved and the suspect.[358] Furthermore, the SCA held that weighing up the interests of the crime with the degree of force that a peace officer uses is not as useful

352 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

353 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

354 Joubert *et a*l *Criminal Procedure Handbook* at 134.

355 Joubert *et al Criminal Procedure Handbook* at 134-135.

356 Joubert *et al Criminal Procedure Handbook* at 134-135.

357 *Govender v Minister of Safety and Security* at [16]. See also Botha & Visser 2012 *PELJ* Volume 15 Issue No.2 at 1; Du Toit *et al Commentary on the Criminal Procedure Act* 5-27; Neethling J and Potgieter J M ‘Section 49 of the Criminal Procedure Act 51 of 1977, private defence and putative private defence: regspraak’ 2004 *Tydskrif vir die Suid-Afrikaanse Reg* 3 at 602-608.

358 *Govender v Minister of Safety and Security* at [293].

because the degree of force that is used does not protect the interests of the suspect and it also fails to properly define the appropriate circumstances in which a peace officer is permitted to use force on a suspect.[359] The court in the *Govender v Minister of Safety and Security* expanded the proportionality requirement further and held that an additional factor to be considered was whether the suspect posed an immediate threat or danger of serious physical harm to the peace officer, other people or to society.[360] Joubert[361] elaborates further with regard to the use of force by stating when a peace officer is supposed to determine whether or not the use of force is justified when effecting the arrest, he must consider the seriousness of the offence as well as whether the suspect is armed, whether the suspect poses a threat to the peace officer effecting the arrest or another person, and whether the suspect is known and can easily be arrested at a later stage.

Van der Walt[362] explains that contrary to the issues laid down in the *Govender* case, in 2002 the Constitutional Court in *Walters* dealt with the constitutionality of section 49(2) of the CPA. Before the new text of section 49 came into effect, section 49(2) of the original 1977 text was declared unconstitutional and invalid as it violated the rights of a suspect to dignity, life and security of person.[363] The Constitutional Court ruled that the then section 49(1) had been correctly interpreted by the SCA in *Govender v Minister of Safety and Security* and the court simplified the principles relating to the use of force to effect an arrest. When an arrest is being effected and the use of force is required, minimum force must be used and should only be used when it is reasonably necessary to do so.[364] If severe force is used, for example the shooting of

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359 *Govender v Minister of Safety and Security* at [10].

360 *Govender v Minister of Safety and Security* at [17]-[22] where the court held that the words "use such force as may in the circumstances be reasonably necessary to prevent the person concerned from fleeing" from section 49(1)(b) of the Act must therefore generally speaking (there may be exceptions) be interpreted so as to exclude the use of a firearm or similar weapon unless the person authorized to arrest, or assist in arresting, a fleeing suspect has reasonable grounds for believing that the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public, or that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm; Le Roux-Kemp and Horne 2011 *SACJ* 274; Burchell *South African Criminal Law and Procedure* 201; *Tennessee v Garner* 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985).

361 Joubert *et a*l *Criminal Procedure Handbook* at 135.

362 Van der Walt 2007 *Tydskrif vir die Suid-Afrikaanse Reg* (1) at 98. See also Du Toit *Commentary on the Criminal Procedure Act* 5-33.

363 *Walters*; Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 347/569; Van der Walt 2007 *Tydskrif vir die Suid-Afrikaanse Reg* (1) at 96-111; Burchell *South African Criminal Law and Procedure* 202.

364 *Walters* at [54] where reference was made to the *Makwanyane* case where the court "greater restriction on the use of lethal force may be a consequence of establishing a constitutional State which

a suspect, then such force will be justified if the suspect committed an offence which involves grievous bodily harm or if the peace officer is acting in self-defence and the peace officer has no other choice but to make use of the harshest method of force in order to apprehend the suspect.[365] Albertus[366] explains this link with constitutional rights by stating that if force is used to arrest, the limitation of the right to human dignity and bodily integrity are greater and where deadly force is used, these rights including the right to life becomes negated. In order to justify such a limitation, the court had to find a balance between the public interest that is protected by section 49 and the right that it limited.[367] As a result, an attempt was made in order to strike a balance between the public interest that should be protected and the rights that are violated, and as a result, peace officers were still not authorised to act in private defence.[368] Although the courts and the authors on the subject have criticised and offered suggestions for improvement of section 49, the researcher submits that the issue which remains is that peace officers do not know the provisions on the CPA, especially section 49 and that peace officers have no insight into the legal or academic origins and developments to the relevant sections. They are not required to study any parts of the CPA or to familiarise themselves with the developments on the subject. Therefore, the effectiveness behind the literature written on the topic, regarding a peace officer's execution of powers is yet to be known.

The Constitutional Court in the *Walters* case also stated that the Constitution[369] obliges peace officers to fulfil their duties by taking all reasonable steps, including the use of reasonable force, to perform and exercise their duties.[370] However, the court also

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respects every person's right to life." Reference was also made to the *Makwanyane* case where it was made clear that shooting at a fugitive in terms of section 49(2) should only be used as a last resort where there are no alternative means to ensure that the suspect attends court and that rights violated by section 49 are "individually essential and collectively foundational" to our value system and should therefore not be compromised.

365 *Walters* at [54].

366 Albertus *The Constitutionality of using deadly force against a fleeing suspect for purposes of arrest* at 15-20.

367 *Walters* at [30].

368 *Walters* at [33]. Section 49 was intended to prevent suspects from fleeing or escaping to easily from arrest, but at the same time consideration should be given to a fleeing suspects' rights. In order to find a correct balance, it had to be established whether the limitations brought about by section 49 was reasonable and justifiable in an open and democratic society, based on freedom and equality.

369 Section 205(3) of the Constitution. To prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

370 *Walters* at [48]; *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) [465]-[456]; *Govender* at [206e].

emphasised that resistance to arrest or a suspect fleeing arrest does not have to be overcome or prevented without limitations.[371] This means that a suspect who can later be identified and traced does not have to be arrested even if the suspect is likely to escape if force is not immediately used.[372] The full force of the law need not be used in order to bring a suspect suspected of committing a trivial offence to court.[373] Hence the need for the introduction of a fifth requirement that there should be alternative means other than arrest to ensure that a suspect attends court. If this requirement is introduced into our law, the rate of excessive force that is used by peace officers during an arrest will be substantially reduced. This aspect will be given further attention in paragraph 2.3 below.

It is important to note that although the latest amendment to section 49 took place in 2012, the *Govender v Minister of Safety and Security* and *Walters* cases, which were dealt with as early as 2001 and 2002, respectively, already outlined the principles that were later laid down in the 2012 amendment. Botha and Visser[374] argue that the aim of the legislature, when drafting the 2012 amendment, was to incorporate the guidelines outlined by the *Walters* judgment which they then did, by copying the portion of the *Walters* judgment, without considering the meaning, implications and background of the wording. In addition to the argument set out by Botha and Visser,[375] the Open Society Foundation for South Africa Report[376] criticises the legal position by stating that the 2012 amendment broadens the circumstances in which peace officers are authorised to use force on a suspect during an arrest which then makes the amendment unconstitutional. These comments are in line with the objectives of this

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371 *Walters at* [49].

372 *Walters* [49].

373 *Walters at* [54].

374 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569. See also *Walters* case at 616 where the Court held "h) ordinarily, such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or 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 carrying out the arrest, whether at that time or later."

375 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

376 Open Society Foundation for South Africa *Report on the OSF-SA roundtable discussion on the human rights and practical implications of the proposed amendments to section 49 of the Criminal Procedure Act* at 4.

study. Criticism by Botha and Visser[377] as well as the Report[378] were made in 2012 and 2010 respectively and since then, no developments were made in light of these criticisms. In light of the criticism on the current section 49, attention must be given to this aspect of the law as it has an effect on the powers of a peace officer to use force, to the extent that such force may become excessive force. As a result of the apparent unconstitutional section 49, there are currently violations of the constitutional rights of a suspect. This aspect has not yet been addressed in literature or by the judiciary. Perhaps the introduction of a method other than arrest to ensure that a suspect attends court, will assist in alleviating the problems associated with unlawful arrest without a warrant, unlawful detention and the use of excessive force on a suspect.

2.3 Legal position of the fifth jurisdictional fact as an alternative method to an arrest without a warrant and subsequent detention and its introduction into South African law of criminal procedure in order to promote constitutional rights

The objective of this section is to determine whether the introduction of the fifth requirement to the existing four requirements for a lawful arrest without a warrant will be constitutionally sound. Before commencing with a discussion of the introduction of the fifth requirement and the constitutional benefits thereof, it is important to set out the existing four requirements. After highlighting the four requirements, the researcher can establish any gaps in the existing law where constitutional rights are not given the priority that they should be given. The position in South Africa prior to the coming into effect of the Constitution is discussed in order to compare the position after the coming into operation of the Constitution. A comparison between the two periods will assist in analysing and determining the effectiveness and constitutionality of the existing four requirements. During the discussion of the position after 1996, the legal position of the Police Standing Order[379] is also relevant in the discussion because the provisions of the PSO make it clear that alternatives to an arrest should be preferred over an arrest. The pertinent issue is the fact that the alternative method is not yet part of our law.

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377 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

378 Open Society Foundation for South Africa *Report on the OSF-SA roundtable discussion on the human rights and practical implications of the proposed amendments to section 49 of the Criminal Procedure Act* at 4.

379 PSO.

However, the PSO makes provision that alternative methods should be preferred over an arrest and if a peace officer arrests a suspect when he could have used alternative means, then he would be acting contrary to the PSO. The reason why the alternative methods are not yet part of the existing requirements for a lawful arrest without a warrant is yet to be determined. After discussions on these aspects, a detailed discussion follows on the fifth jurisdictional fact and the benefit that its introduction will have to the promotion and protection of the constitutional rights of a suspect.

2.3.1 Lawful arrest without a warrant and the requirements thereof in relation to constitutional rights

Reddi[380] explains an arrest as an act which occurs when a suspect is taken into custody and thereby deprived, at least temporarily, of his freedom of movement and it is regarded as a harsh method of making sure that a suspect presents himself at court.[381] Furthermore, Du Toit *et al*[382] explains that an arrest without a warrant constitutes a violation of fundamental rights, especially the right to freedom of movement and it is *prima facie* unlawful.[383] An unlawful arrest means that the subsequent detention is unlawful.[384] Msaule[385] points out that the fundamental right to freedom was recognised and protected by our courts even prior to the advent of the Constitution. The law guarantees the right to freedom and security of person, which

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380 Reddi 2019 *SACJ* Volume 32 Issue 1 at 104-118.

381 *Theobald v Minister of Safety and Security and Others* 2011 (1) SACR 379 (GSJ) at [174]-[175] (hereinafter referred to as "*Theobald*"); *Coetzee v National Commissioner of Police and Others* 2011 (1) SACR 132 (GNP) at [32].

382 Du Toit *et al Commentary on the Criminal Procedure Act* 5 – 9. See also *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A); *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at [589E-F]; *Sekhoto* case; *Theobald* case at [175]; *National Commissioner of Police and Another v Coetzee* (649/11) (2012) ZASCA 161 (16 November 2012); *Mothibedi v Minister of Safety and Security and Another* (1680/2009) (2013) ECHC (06 September 2013); *Raduvha v Minister of Safety and Security and Another* (2016) ZACC 24; *Kruger v Minister of Police* (525/2014) (2017) ZANWHC 109 (6 April 2017) at [35]; Joubert *Applied Law* 236 which states that when an arrest occurs the rights that the suspect has to privacy and human dignity are also infringed.

383 *Subjee*.

384 *Mathebe* at [122D]; *Minister of Law and Order and Another v Dempsey* 1988 (3) SA 19 (A) at [38B-C]; *Bolekwa Nokeke v Minister of Safety and Security and Another* (Case No: 1089/07, (ECM) 9 May 2008) at [18]; *Tlhaganyane v Minister of Safety and Security* (1661/2009) [2013] ZANWHC 12 (14 February 2013) at [51]; *Minister of Safety and Security v Tyokwana* (2015) JOL 33375 (SCA) where the Court held as follows: "if the arrest of the respondent were unlawful it would follow that his subsequent detention was also be unlawful"; *Mneno v Minister of Police* (647/2013) (2016) ZAECBHC 15 (14 June 2016) at [13]; *Rasmeni v Minster of Safety and Security and Another* (2018) JOL 40633 (ECM) at [27].

385 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.

includes the right not to be deprived of freedom arbitrarily or without just cause.[386] Similar to other rights in the Bill of Rights, the right to freedom is not absolute and can, where it is reasonable and justifiable, be limited. In this regard, the limitation clause provides for the general limitation of rights in the Bill of Rights.[387] However, the limitation clause cannot operate where a peace officer's conduct is unlawful and he has acted beyond the scope of his reasonable discretion or with improper motives. It is the researcher's submission that despite this, peace officers defend their unlawful actions when the matter reaches a civil court in a claim for damages. In order for an arrest without a warrant to be lawful, it has to satisfy four jurisdictional facts:-[388]

a) The arrest without a warrant must be authorised in the correct manner. This means that the arrest must be authorised by a legal or statutory provision.
b) The peace officer must exercise control over the suspect by limiting the freedom of movement of a suspect. Contact with the suspect's body is a requirement for a valid arrest.[389] The physical touching of a suspect may be dispensed with only where the suspect subjects himself to the peace officer effecting the arrest.[390]
c) The suspect must be informed of the reason for the arrest.[391] It is enough that the peace officer conveys the substance of the reason to the suspect.[392]

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386 Section 12 of the Constitution.

387 Section 36 of the Constitution. The arrest of a suspect is the most common method of limiting a suspect's right to freedom.

388 *Duncan v Minister of Law and Order* at 1986 (2) SA 805 (A) [818G-H]; *R v Kleyn* 1937 CPD 288 at [293]-[294]; *Sekhoto* case at [6] and [28]; *Moses v Minister of Safety and Security* (unreported, GJ case no 6983/2013, 20 February 2015) at [6.2]; *Madiseng v Minister of Safety and Security* (unreported, GP case no A515/10, 31 March 2016) at [18]; *Baloyi v Minister of Police and Another* (unreported, GP case no A77844/2014, 23 September 2016) at [15] and [16]; *Mlilwana v Minister of Police* (unreported, ECM case no 2212/2012, 22 May 2017) at [11]; *The Minister of Safety & Security v Schuster* 2017 JDR 0504 (ECG) at [11]; *Minister of Police v Dhali*, unreported, ECG CA 327/2017 delivered on 26 February 2019; *Mahleza v Minister of Police and another* 2020 (1) SACR 392 (ECG); *Mosinki and Others v Minister of Police* [2020] JOL 47540 (NWM) at 12.

389 *Gcali v Attorney-General, Transkei* at 1991 (2) SACR 406 Tk [408d]; *Tjipepa v Minister of Safety and Security and Others* 2015 (4) NR 1133 (HC) at [28].

390 *S v Thamaha* 1979 (3) SA 487 (O) at [490].

391 Joubert *et al Criminal Procedure Handbook* at 119; *R v Ndara* 1955 (4) SA 182 (A) at [184]; *R v September* 1959 (4) SA 256 (C) at [258]; *S v Ngidi* 1972 (1) SA 733 (N) at [736]; *R v Ndara* 1955 (4) SA 182 (A) at [184]; *R v September* 1959 (4) SA 256 (C) at [258]; *S v Ngidi* 1972 (1) SA 733 (N) at [736]; *Rautenbach v Minister van Veiligheid en Sekuriteit* 1995 (2) SACR 245 (W) at [250a–b]. See also *Macu v Du Toit en 'n ander* 1983 (4) SA 629 (A) at [643H] where it was the minority judgment by Botha JA that the requirement of a notification of the reason for the arrest consisted of two components, that is the reason for the arrest and the arrest itself.

392 *Damon v Greatermans Stores LTD* 1984 (4) SA 143 (W) at [148D].

d) The suspect must be taken to the police station as soon as possible.[393]

In light of the existing four requirements for a lawful arrest without a warrant, it means that if it is shown that the peace officer complied with the four requirements when making an arrest without a warrant, such arrest is lawful. However, the pertinent issue is whether these four requirements are sufficient to determine the constitutionality of making an arrest without a warrant, when in fact, there could be other means of ensuring that the suspect attends court. When reference is made to other means, it implies other methods that will not violate the constitutional rights of a suspect.

2.3.2 A shift away from the principle that an arrest without a warrant is a commonly used method to ensure that a suspect attends court

Joubert[394] states that a peace officer who exercises a discretion must be familiar with the various alternative methods of bringing a suspect to court and must carefully consider the various options and try as far as possible to prevent infringing the rights of the suspect. Prior to 1994, South African courts held the view that there was no rule which empowered a peace officer to opt for less invasive methods of bringing a suspect to court.[395] The position relating to less invasive methods of ensuring a suspect's attendance at court before and after 1994 is discussed hereunder. The importance of discussing the position prior to 1996 and after 1996 is to determine whether the changes that were intended to be made to the law, made any difference from a constitutional point of view, or whether the changes strengthened the powers that are given to peace officers at the cost of the constitutional rights of a suspect.

2.3.2.1 The position before the coming into operation of the Constitution

Prior to 1994, peace officers could have used their powers to arrest a suspect without a warrant freely, without having to seek less invasive methods of ensuring that a suspect attends court. This is because there was no law that stated that alternative

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393 Joubert *et a*l *Criminal Procedure Handbook* at 119. Section 50(1)(a) of the CPA provides that a suspect must be taken to the police holding cell as soon as possible.

394 Joubert *Applied Law* at 18. In light of section 13(1) of the SAPS Act.

395 *Tsose* at [17G-H).

methods should be resorted to first and an arrest should be the last option. In *Tsose* the Appellate Division held that a peace officer should resort to alternative methods of ensuring that a suspect attends court rather than resorting to the most severe method of arrest. However, the court, at the same time emphasised that there is no legislation that prescribes to peace officers that they must use alternative methods other than arrest to ensure that a suspect attends court.[396] It is interesting to note that prior to 1996, when there was no constitutional preference given to suspects, the judiciary suggested that peace officers ought to use other less invasive means other than an arrest on a suspect. What is of further of interest is that after 1996, the law remained unchanged and the comments made by the judiciary prior to 1996 were simply ignored. A further discussion on this aspect follows in paragraph 2.3.2.2 below.

2.3.2.2 The position after the coming into operation of the final Constitution

With the advent of the final Constitution, courts began to express doubt at the views expressed in *Tsose*. For instance, in *Ralekwa* de Vos J referred to the *Tsose* judgment and stated:

> "the question is whether, in view of the fact that we now have a Constitution that restricts the exercise of public power through a justiciable Bill of Rights…there can be no doubt that an examination into the lawfulness of an arrest against the backdrop of a statement that there is no rule of law requiring the milder method of bringing a person into court will be different from an enquiry which starts off on the premise that the right of an individual to personal freedom is a right which should be jealously guarded."[397]

In *Seria* Meer J also made a comment about a peace officer who decides to arrest a suspect, instead of warning him to appear in court without having to be arrested.[398] If a suspect is not a danger to the public, will not evade trial, will not harm anyone or be harmed by anyone and has a reasonable defence to the allegations against him, an

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396 *Tsose* at [17G-H)

397 *Ralekwa* at [11].

398 *Seria*.

arrest will not be the best option to secure a suspect's presence at court.[399] Kruger[400] argues that peace officers should generally use their wide powers to arrest only when a summons or a written notice will, on reasonable grounds, be considered to be insufficient to ensure that the suspect will attend his trial. It follows that an arrest should therefore be used only after all other options have been considered.[401] In *Motsei*[402] it was held that law or legislation should prescribe to peace officers that they must use alternative and milder methods of ensuring a suspect's attendance at court instead of resorting to arrest so as to not infringe on the right to freedom of a suspect.[403] An example of an alternative method is to issue the suspect with a summons or a written notice where it is reasonable to do so.[404] In *Louw*[405] Bertelsmann J made similar remarks as that stated in *Motsei*. It appears that the comments by courts and literature on this issue commenced as early as 2004 and in light of these comments, the introduction of the fifth requirement seems to be favoured. However, the steps taken by the legal system to implement and introduce this requirement to the existing four requirements with the aim of alleviating the unlawful actions of peace officers has not yet been effected. In addition to the judicial comments and the literature on the use of alternative methods other than an arrest, the PSO[406] also make provision for alternative methods to be used.

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399 *Le Roux v Minister of Safety and Security* 2009 (4) SA 491 (N) at [7] (hereinafter referred to as "*Le Roux*").

400 Kruger *Hiemstra's Criminal Procedure* at page 5-2. See also *Coetzee v National Commissioner of Police and Others* 2011 (2) SA 227 (GNP); *S v More* 1993 (2) SACR 606 W at [608b-j].

401 *Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E); Standing Order (G) 341 at [3(1)]; *National Commissioner of Police v Coetzee* an unreported decision (649/11) (2012) ZASCA 161 (16 November 2012) at [13].

402 *Motsei* at [35]. See also *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) at [185a-187g] where the court held that a peace officer's act of arrest has to be objectively reasonable and must take into account whether alternative methods of bringing a suspect before court is not as effective as the act of arrest; *Munyai v Minister of Police* (unreported, GP case no 16266/2013, 15 December 2015) at [137].

403 *Motsei* at [35].

404 *Motsei* at [35]; *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB) at [14], [15] [22] and [25] (*Sekhoto* a *quo* case); *Van der Merwe v Minister of Safety and Security* 2014 JDR 2013 GP at [9.2]; *Prinsloo* at [45]–[46]; *Theobald* at [314]–[317].

405 *Louw* at [185a-187g]. See also *Munyai v Minister of Police* (unreported, GP case no 16266/2013, 15 December 2015) at [137].

406 PSO.

With regards to the PSO[407] and relevant judicial commentary, it was held in *Khanyile v Minister of Police*[408] that the purpose of an arrest is always to ensure that the suspect appears before a court. The court in *Khanyile* held that the intention of the peace officers was not to bring a suspect before a court, instead their intention was to punish him, contrary to the PSO. Sachs J in *Van Niekerk*[409] held that this is an area where internal regulation should be encouraged. Furthermore, this principle was emphasised in the Constitutional Court case of *Van Niekerk*[410] where Sachs J referred to the PSO by stating that a peace officer should use a milder method of bringing a suspect to court. The PSO is clear in that an arrest is a drastic procedure which should not be used if there are less invasive means of ensuring that a suspect attends court.[411] It is stated in *Le Roux*[412] that a peace officer should take into account what is contained in the PSO when making a decision about whether or not to arrest a suspect. In the case where a peace officer exercises a discretion in violation of the PSO, that may mean that the discretion was not properly exercised and that the arrest without a warrant was unlawful.[413] The pertinent issue that the courts are silent about is whether peace officers are familiar with the guidelines that are set for them to abide by. If they are not familiar with the guidelines or if they know about the PSO and they choose not to abide by the guidelines, the effect of the comments and criticism made in literature and by courts are yet to be determined.

The PSO is a well-documented set of rules for peace officers to follow and peace officers should become familiar with this set of rules the moment they commence their duties as peace officers. The researcher submits that despite the fact that peace officers' ought to know the provisions of this legal document for the performance of their duties and the exercise of their powers, many peace officers either choose not to abide by the rules or simply do not know the rules. As a result, the fundamental rights

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407 PSO. See also *Botha v Minister van Veiligheid en Sekuriteit* 2003 (2) SACR 423 (T) at [435j]–[440i]; *Bekker v Minister of Safety and Security and Another* (7944/2010) [2014] ZAKZDHC 53 (31 July 2014) at [145] where it was held that the wording of the PSO is directive and should, if applied properly by peace officers, oust fears by members of the public, of unlawful arrest.

408 *Khanyile v Minister of Police* (33478/11) (2013) ZAGPJHC 234 (5 August 2013) at [48] (hereinafter referred to as "*Khanyile*").

409 *Van Niekerk* at [18].

410 *Van Niekerk* at [18].

411 *Van Niekerk* at [18] and [19].

412 *Le Roux* at [34].

413 *Le Roux* at [34].

of a suspect may be violated. After analysing the case law as discussed above, courts have emphasised the shift towards the use of milder methods other than arrest and have identified this as an important shift towards the promotion of a suspects' rights. However, there is still no law which stipulates that peace officers must consider alternative and milder methods other than arrest. The reason why the legislator has not given any value to the comments made by judges in different courts on the same aspect of law is yet to be determined.

Despite these principles that are well-established in our law that relate to the requirements for a lawful arrest and the purpose of an arrest, academics and legal authorities have for decades debated about the introduction of a fifth jurisdictional fact that ought to be added to the existing principles. The existing four requirements are substantially good enough in guiding peace officers and courts to determine exactly what constitutes a lawful arrest and an unlawful arrest. However, the importance of this additional fifth jurisdictional fact is highlighted on the basis that it promotes the constitutional rights and freedoms of a suspect and it is in line with the principles of democracy, human rights and dignity. The debate and criticism around this fifth jurisdictional fact are discussed in detail hereunder.

2.3.3 The introduction of the fifth jurisdictional fact as a means to alleviate unlawful arrest without a warrant, unlawful detention and the use of excessive force

Over the years there has been criticism and debate about adding the fifth jurisdictional fact to the existing four jurisdictional facts for a lawful arrest without a warrant. The suggested fifth jurisdictional fact is linked to a peace officer's power to arrest without a warrant as it is suggested that alternative methods of ensuring a suspect's attendance at court should be considered instead of using the method of arrest. It can also be argued that the fifth jurisdictional fact will assist in the promotion and exercise of fundamental rights as enshrined in the Constitution and alleviate the rate of unlawful acts of peace officers.

In the case of *Louw*[414] the court held that in light of the guaranteed fundamental values such as equality, dignity and freedom, suspects should not be deprived of these rights where milder methods other than arrest could be an option for peace officers in order for suspects to appear in court. Five years after the *Louw* judgment, Msaule[415] further states that since the inception of the Constitution, South African High Courts have found that the fifth jurisdictional fact is a necessary fact that should be added to the existing four facts in order to promote the right to freedom that our Constitution aims to guarantee every suspect. An interesting point of the *Louw*[416] case is that it aimed to extend the traditional jurisdictional facts that are required for a lawful arrest. An examination of the lawfulness of an arrest with reference to the Bill of Rights is required when aiming to satisfy the four jurisdictional facts that are required to make an arrest lawful.[417] In essence, peace officers' power to arrest has to be objectively reasonable and peace officers should also consider alternative methods of ensuring that a suspect appears in court, other than using the method of arrest.[418] This means that where less invasive and alternative methods could ensure that the suspect appears in court, such alternative methods should be preferred over an arrest.[419] However, this view has not been unanimously shared by the High Courts.[420] The court in *Olivier v Minister of Safety and Security and another*[421] attempted to reconcile the constitutional views expressed in *Louw* with the reservations in the *Charles* case and held that each case ought to be decided on its own facts. However, in the SCA case of *Minister of Safety*

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414 *Louw* at [185a]-[187g]. See also *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (7) BCLR 771 (CC); *Raduvha v Minister of Safety and Security and Another* (2016) ZACC 24.

415 Msaule 2015 *De Jure* Volume 48 Issue 1 at page 244.

416 *Louw* at [185a]-[187g]. See also *Le Roux v Minister of Safety and Security and another* 2009 (2) SACR 252 (KZP) at [36]; *Minister of Safety and Security v Sekhoto and another* 2010 (1) SACR 388 (FB) at [25]; *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (W) at [90] –[94], [97]; *Sydney v Minister of Safety and Security* (unreported, ECG case no CA115/2009, 18 March 2010 at [17]; *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (E) at [10].

417 *Louw* [185a]-[187g].

418 *Louw* [185a]-[187g].

419 *Louw* [185a]-[187g]; *Motsei* case; *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA).

420 *Charles* at page 12.

421 *Olivier v Minister of Safety and Security and another* 2008 (2) SACR 387 (W) at [393g] – [393h], [398e]-[398f] (hereinafter referred to as "*Olivier*") where the Court held that an adjudicator on the facts should determine whether the arrest of the plaintiff (suspect) under the circumstances, taking into account factors such as flight risk, permanency of employment and residence, cooperation on the part of the plaintiff, his her standing in the community amongst peers, the strength or weakness of the case and any other relevant factors, was avoidable, justified or the only reasonable means to attain the objectives of the police investigation? The court may also take into account the interests of justice. After considering all these factors, the court should exercise its discretion in favour of the plaintiff's right to liberty. See also *Minister of Safety and Security v Niekerk* 2008 (1) SACR 56 (CC).

and Sekhoto the court preferred the conservative view adopted in *Charles*. In the *Charles*[422] case, Goldblatt J agreed with the approach of Shreiner AJ in the *Tsose* case and stated that the legislature gives peace officers the power to arrest a suspect without a warrant as this rule provides protection to peace officers against the allegation of unlawful arrest.[423] In this instance, peace officers can safely use their powers of arrest without a warrant and need not use milder methods to ensure that a suspect attends court.[424] However, the issue is whether it is correct to argue that peace officers ought to be protected against allegations of unlawful arrest. The constitutional rights of a suspect in a case of unlawful arrest must be given importance in such an instance. It would seem as if courts such as in the *Charles* case were moving back to the system prior to 1996 where the constitutional rights of suspects were not as important and democracy did not prevail.

Msaule[425] states that the SCA analysed judgments of the High Courts and found that the High Courts' development and explanation of the fifth jurisdictional fact comes from the principles of interpretation. However, the SCA was not clear about whether this development was through an interpretation of the Bill of Rights, or whether they developed the common law with the adoption of section 39 of the Constitution, or whether section 40(1) of the CPA was interpreted.[426] Furthermore, it found the interpretation of section 40(1)(b) of the CPA to be quite interesting because the High Courts did not deal with the constitutionality or otherwise of this provision.[427] Secondly, relying on the case of *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*[428], the SCA held that with the availability of interpretational methods, it was unable to conclude that the fifth jurisdictional fact could derive from the proper reading of section 40(1) of the CPA without straining the language of the provision.

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422 *Charles* at page 12.

423 Section 40 of the CPA; *Charles* case at page 12.

424 *Charles* at page 12.

425 Msaule 2015 *De Jure* Volume 48 Issue 1 at page 245.

426 *Sekhoto* at [14].

427 *Sekhoto* at [14]; *Mvu v Minister of Safety and Security and another* 2009 (2) SACR 291 (GSJ).

428 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* (2001) 1 SA 545 (CC) at [14], [21]-[26]. See also *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) at [3].

The SCA held that the fifth jurisdictional fact could not be developed through the common law because legislation has outdated the common law.[429] Therefore, courts are under an obligation to read legislation in light of the values enshrined in the Bill of Rights.[430] According to the SCA, section 40(1)(b) was not capable of being interpreted in the manner in which the High Courts were trying to interpret it.[431] In this regard, the SCA drew a distinction between interpreting legislation in terms of section 39(2) of the Constitution (reading down) and the process of reading words into or severing them from a statutory provision that has been declared unconstitutional.[432] With regard to the reading-down process, Currie and De Waal[433] explain that the courts do not need to declare an otherwise unconstitutional provision invalid but must read it in conformity with the importance and values enshrined in the Bill of Rights to save it from invalidity. With regard to the reading-in process, Currie and De Waal[434] explain that a court must declare a provision unconstitutional before saving it from invalidity by either reading-in or removing words from the provision.

The SCA held that the reliance on section 39(2) was incorrect.[435] In this regard, the SCA held that the High Court's finding that a fifth jurisdictional requirement is apparent in section 40(1)(b) of the CPA was that the High Courts failed to draw a distinction between the object of the arrest and the reason to arrest.[436] According to the SCA, it is the object, and not the reason, that is relevant in determining whether an arrest is lawful or not.[437] Furthermore, when the jurisdictional facts are present and the purpose of arresting a suspect is to ensure his attendance at court, then a peace officer has a discretion to arrest and he does not have to effect an arrest in order to fulfil this purpose.[438] If a peace officer exercises a reasonable discretion, then an arrest will not be unlawful.[439] If a peace officer uses his power to arrest a suspect for the purpose

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429 *Sekhoto* at [22]-[24].

430 Section 39(2) of the Constitution.

431 *Sekhoto* at [22]-[24]; Currie and De Waal *The Bill of Rights Handbook*, chapter 32, page 778.

432 *Sekhoto at* [15].

433 Currie & De Waal *The Bill of Rights Handbook* at 67.

434 Currie & De Waal *The Bill of Rights Handbook* at 67.

435 *Sekhoto* at [15].

436 *Sekhoto* at [30].

437 *Sekhoto at* [31].

438 *Sekhoto* at [28]; *Raduvha v Minister of Safety and Security and Another* (2016) (2) SACR 540 (CC) at 24; *Pharmaceutical Manufacturers Association of SA; In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC). See also Currie and De Waal *The Bill of Rights Handbook*, chapter 32, page 778.

439 *Sekhoto* at [30].

other than ensuring a suspect's attendance at court, then the discretion is exercised unlawfully.[440]

Therefore, the SCA found that the fifth jurisdictional fact should not be part of the law and its reason is that a peace officer has a discretion to arrest without a warrant. The SCA argues that the peace officer should be free to exercise his discretion and if he believes that an arrest is warranted, then it should be made but if, after exercising such discretion, the peace officer decides not to arrest, then that should stand. Msaule[441] argues that it is hard to understand why the SCA had difficulty establishing the course taken by the High Courts to formulate the fifth jurisdictional fact. Firstly, the constitutionality or otherwise of section 49(1) of the CPA was not at issue in the High Courts that developed the fifth jurisdictional fact.[442] With regard to the second concern that the High Courts failed to explain the basis for widening the traditional jurisdictional facts, the High Courts relied on section 39(2) of the Constitution.[443] Despite the SCA claims that the interpretational aids at its disposal do not justify the development of the fifth jurisdictional fact (the SCA second concern), the High Courts' read section 40(1)(b) of the CPA in a manner that embraced the values underlying the constitutional project according to section 39(2) of the constitution injunction.[444] Msaule[445] argues further that it is not clear where the confusion of the SCA in this regard stems from. It must be noted that the High Court's reliance on section 39(2) of the Constitution derived from the comments made by the court in *Govender v Minister of Safety and Security*[446] in which the SCA found that the threshold requirement for the exercise of power conferred by that provision was very low, as the arresting officer had only to be satisfied that the legislative requirements for the use of force are present without having to adhere to the standard of reasonableness. Msaule[447] argues that the formulation of the fifth jurisdictional fact in the manner that the High Courts did is therefore, nothing alien to the constitutional jurisprudence. The Constitutional Court in the *Walters* case has since confirmed the soundness of the interpretation adopted in

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440 *Sekhoto* at [30]-[31].
441 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
442 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
443 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
444 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
445 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
446 *Govender v Minister of Safety and Security*.
447 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.

Govender v Minister of Safety and Security. Msaule[448] states that a failure to use milder methods, without any justifiable reason, where the CPA grants the arrestor that discretion, should surely amount to a failure to exercise one's discretion reasonably, if not failure to act in accordance with the objects of the empowering legislation. This position is confirmed in *Govender v Minister of Safety and Security*.[449] It is interesting to note that the court in *Sekhoto* failed to refer to *Govender v Minister of Safety and Security*. With regard to section 40(1)(b) of the CPA, the arrestor is granted the discretion to arrest upon a reasonable suspicion that the suspect has committed an offence listed in schedule 1. Given the usage of the modal verb "may" and a number of choices available to the arrestor to bring the suspect before court, it defies logic to argue that once the arrestor has decided to arrest no questions could be raised as to why the arrestor did not use milder methods.[450] Even in the case of unlawful arrest, the court can, as the High Courts did, chart and define circumstances under which a lawful arrest could take place.[451] Therefore, it cannot be argued that these cases are distinguishable to the extent that the application of section 39(2) of the Constitution is acceptable in one and not the other.[452] As the *Sekhoto* case did not displace *Govender v Minister of Safety and Security*, the latter was binding on the former.[453] This clearly, shows that the High Courts were justified in their formulation of the fifth jurisdictional fact and the *Sekhoto* case failed to follow precedent.[454] In addition, it is common cause that, in a constitutional state, courts should be wary of limiting the rights of individuals unless it is shown that such limitation is reasonable and justifiable.[455] Msaule[456] concludes that the question of the lawfulness of the fifth jurisdictional fact has not yet been resolved. Therefore, the researcher argues that the correctness of the SCA's argument that a peace officer is to use his discretion to arrest and that the fifth jurisdictional fact is not required, is incorrect. Furthermore, the argument does not support the promotion of the constitutional rights of a suspect.

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448 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
449 *Govender v Minister of Safety and Security* at [21].
450 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
451 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
452 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
453 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
454 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
455 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.
456 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.

The debate surrounding the introduction of the fifth jurisdictional fact involved a critical analysis of the comments in the *Sekhoto* case and a critical analysis set out by Msaule[457] as discussed above. Furthermore, a significant aspect of the discussion that surrounds the introduction of the fifth jurisdictional fact is the comments made by the Constitutional Court in *Raduvha*. In essence, the Constitutional Court held that effect of the Bill of Rights is not a fifth jurisdictional fact to the requirements of section 40(1)(b) of the CPA. According to Okpaluba,[458] the court in *Raduvha* dealt with the arrest of a child and did not add the fifth jurisdictional fact to the requirements but ruled that a peace officer faced with the exercise of the discretion to arrest a child must not only balance the conflicting interests, but must take into consideration the constitutional requirements of the best interests of the child and the limitation regarding the detention of a child in sections 28(2) and 28(1)(g) of the Constitution.[459] The Constitutional Court made the following remarks about the addition of a jurisdictional fact to the existing facts:[460]

> "[64] In my view the nub of the enquiry should not be whether this should be added to section 40 as an additional jurisdictional fact, but whether this should be considered in the exercise of their discretion in section 40. Section 39(2) enjoins the courts, in interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights. This requires courts to interpret section 40(1) in line with these constitutional values. However, the constitutionality of section 40(1) was not attacked. In essence, what the applicant seeks is for this Court to amend section 40(1) by including or reading-in section 28(2) as an additional requirement. Absent a formal constitutional attack, it is not open to this Court to do that, as doing so would be tantamount to an impermissible amendment of section 40.[38]"
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> "[65] There is no need to make section 28(2) an additional jurisdictional requirement. It is sufficient that in arresting a child, police officers must do it through the lens of the Bill of Rights and pay special attention to the paramount importance of the best interests of such a child. The Constitution demands that of the police as a constitutive part of the State.[39] A failure to do this would render such an arrest inconsistent with the Constitution and thus unlawful."

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457 Msaule 2015 *De Jure* Volume 48 Issue 1 at 244.

458 Okpaluba 2017 *S. Afr. J Crim. Justice* Volume 30 Issue 1 at pages 1-22.

459 Okpaluba 2017 *S. Afr. J Crim. Justice* Volume 30 Issue 1 at pages 1-22.

460 *Raduvha* at [64] – [65].

One of the objectives of this chapter is to determine whether the longstanding debate involving the introduction of the fifth jurisdictional fact to the existing requirements for a lawful arrest has reached the Constitutional Court and whether the Constitutional Court has settled the debate in favour of the introduction of the fifth jurisdictional fact. Upon a proper interpretation of the comments made by the court in *Raduvha*, it can be argued that the court is of the opinion that a fifth jurisdictional fact need not be added to the existing requirements because a peace officer should consider the need to arrest a child in terms of the peace officer's discretion. The researcher argues that when the court makes reference to the additional requirement, it is referring to the peace officer's consideration of section 28(2) of the Constitution when using a discretion to arrest a child. The researcher argues further that the court is not specifically referring to the proposed fifth jurisdictional requirement that involved the critical debate as reflected in the *Sekhoto* case with reference to using alternative methods other than an arrest to ensure that a suspect attends court. Indeed, the court in *Raduvha*[461] mentioned that the peace officers in this case ought to have considered alternative means other than an arrest such as summons or a written notice to appear, since the child was not a danger and not a flight risk. However, the researcher emphasises that there is a difference between the argument in relation to using alternative methods other than an arrest to ensure that a suspect attends court, and using alternative methods other than an arrest, with the incorporation of section 28(2) of the Constitution when arresting a child. The researcher argues that the difference specifically lies in the fact that the former aspect deals with suspects in general and the latter aspect deals only with children. As evident from the comments by the court in *Raduvha*, the latter aspect was specifically dealt with. Therefore, the issue is whether the comments by the Constitutional Court in *Raduvha* are binding in the circumstances where peace officers have a discretion to arrest suspects (other than children). Despite that fact that the researcher acknowledges that the court in *Raduvha* dealt with the constitutionality and the lawfulness of an arrest without a warrant and the alternative methods other than an arrest to ensure that a child attends court, the researcher argues that in the absence of any ruling or commentary by the Constitutional Court that pertains specifically to the use of alternative methods other than an arrest to ensure that a suspect attends court, would mean that the law in this regard is not yet settled. The researcher argues that

461 *Raduvha* at [52] and [58].

the issue lies in the fact that a peace officer who uses a discretion to arrest an adult suspect, will still be permitted (according to the current legal principles) to arrest a suspect even if there are methods other than an arrest that are at their disposal.

Furthermore, the court in *Raduvha* made it clear that it had no place to propose amendments to section 40(1) of the CPA because there was no constitutional attack before the court and if the court interferes in that specific arena, it would amount to an impermissible amendment to section 40(1) of the CPA.[462] Therefore, one could also argue that the comments made by the court in *Raduvha* with regard to a peace officer's discretion and the incorporation of section 28(2) of the Constitution is non-binding on peace officers because the legal position has still not changed. The legislature has not amended the existing legislation to incorporate the views expressed in *Raduvha* concerning the arrest of children. Furthermore, the legislature has not amended the existing legal provisions to incorporate a strict test to determine what constitutes a proper discretion on whether or not to arrest without a warrant. This means that peace officers may continue to arrest children even if there are alternative methods other than an arrest of a child.

In addition to the arguments discussed above regarding the confinement of the court in *Raduvha* to section 28(2) of the Constitution and the best interests of a child during an arrest without a warrant, the researcher finds it necessary to critically discuss the comments by the court in *Raduvha* about the court's preference over the legal principles relating to the discretion of a peace officer to decide whether to use alterative methods other than an arrest to ensure a suspect's attendance at court, as opposed to the introduction of the fifth jurisdictional fact. Tshehla[463] argues that even though the deferent approach by courts such as in *Sekhoto* and *Raduvha* are not peculiar to peace officers' discretion but true for all situations where discretion is exercised, it is particularly significant, given the extent to which peace officers exercise discretion when it comes to an arrest, makes the exercise of that discretion the key determinant in the deprivation of liberty. The peace officer makes the final decision regarding who to arrest and who to bring to court without arrest.[464] While the critical role of peace

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462 *Raduvha* at [64].

463 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 86.

464 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 86.

officers and the centrality of the exercise of their discretionary powers are plainly beyond any gainsaying, several cases[465] show that some peace officers do not seem to exercise the discretion bestowed on them with the necessary diligence.[466] Tshehla[467] argues further that peace officers are vested with wide discretionary powers in the arrest process. However, the discretionary powers are bestowed by the CPA without guidelines regarding how the discretion should be exercised.[468] This leaves the exercise of these discretionary powers to the general principles applicable to exercise of discretionary powers which, as reaffirmed in *Sekhoto*,[469] is the default position where a statute bestowing discretionary powers does not provide guidelines.[470] However, as apparent from comments by courts, peace officers do not always exercise their discretionary powers in *favorem libertatis*.[471] Moreover, in some instances, they are not even aware of the discretion available to them, let alone exercise it.[472] Tshehla[473] suggests that the proper exercise of discretion can serve the same purpose if proper guidelines are given such as those that are contained in PSO, but that does not solve the problem, because the PSO are not legally binding and this means that peace officers can ignore or contravene them without effect on the (un)lawfulness of the arrest. What may be necessary, therefore, is for the PSO to be elevated to a legal requirement and, it seems, the legislative route is the only remaining option.[474] This is because, on the one hand, judicial intervention in the form of the fifth jurisdictional fact has failed and, on the other, peace officers cannot be relied on to safeguard the right to liberty through the exercise of their discretion.[475] It seems untenable that the right to liberty should be left to the mercy of peace officers in this

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465 *Le Roux* is an example of a case where the police officer was not aware of the discretionary powers while *Gellman* is an example of the police officer's improper exercise of discretionary powers.

466 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 86.

467 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99.

468 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99.

469 *Sekhoto* at [40].

470 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99.

471 The cases of *Gellman* and *Pallourios v Minister of Safety and Security and Another* (20924/2012) [2016] ZAGPPHC 973 (25 November 2016), to mention just two of the several cases where arrest was made unnecessarily, demonstrate this point.

472 This can be seen in cases such as *Le Roux* and *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (ECD), where, respectively, the arresting officer was not aware of the available discretionary powers and the arresting officer was under the impression that an instruction from a prosecutor removed the need to exercise discretion on the part of the arresting officer.

473 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99-100.

474 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99-100.

475 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99-100.

manner.[476] Police management seems to appreciate the value the Constitution places on the right to liberty, as is clear from the PSO that call upon peace officers to use an arrest as a measure of last resort.[477] However, this appreciation sounds hollow if not translated into action.[478]

The researcher submits that if one has to accept the comments in *Raduvha* that the discretionary powers vested in peace officers are to be utilised when deciding whether alternative methods other than an arrest must be used instead of introducing the fifth jurisdictional requirement, one can rely on the argument by Tshehla[479] that peace officers may abuse their discretion to arrest without a warrant or, in some cases, peace officers may not even know that they have a discretion. Notwithstanding the fact that Tshehla[480] made these critical comments, nothing has been amended in the existing law to ensure that peace officers exercise their discretionary powers while keeping in mind the most important aspect which is the constitutional rights of suspects. The researcher argues that the perception created by the courts in *Sekhoto* and *Raduvha* is that the powers of peace officers outweigh the constitutional rights of suspects. The researcher therefore emphasises that such a perception is unwarranted in a democratic State such as South Africa where the constitutional rights of suspects must be promoted and protected. There is clearly a need for amendments to the existing legislation, alternatively, there should be an explicit approval and introduction of the fifth jurisdictional fact.

According to the judgments of the High Courts and the court in *Sekhoto*, the fifth jurisdictional fact need not be a requirement for the arrest of a suspect to be lawful. Furthermore, despite the fact that the court in *Raduvha* expressed its views about peace officers using a discretion, while incorporating the provisions of section 28(2) of the Constitution when arresting a child, the court did not shed any light on the specific debate involving the fifth jurisdictional fact when suspects are arrested. According to

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476 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99-100.

477 South African Police Service "Arrest and the treatment of an arrested person until such person is handed over to the Community Service Centre Commander" Standing Order (G) 341, Consolidation Notice 15/1999.

478 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99-100.

479 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99-100.

480 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99-100.

Du Toit *et al*,[481] it is no longer a requirement for a peace officer, in a civil claim for damages for unlawful arrest, to prove the existence of a fifth jurisdictional fact that there were no other alternative methods of ensuring that the suspect attends court. As apparent from the comments made by courts in the various cases referred to, it appears that the High Courts tried to strike a balance between the constitutional rights of a suspect and the powers of peace officers to ensure a suspect's attendance at court in the least invasive manner. However, other than the comments made in *Raduvha* with regard to the arrest of a child and the comments by Tshehla[482] who suggests that the legislature should intervene to legislate the discretionary powers of peace officers, there has been no development in the law specifically with regard to peace officers using alternative methods other than an arrest for suspects who are not children. The problem is that law-makers seem to have lost sight of the simple reason behind the introduction of the fifth jurisdictional fact which is intended to promote the constitutional rights of a suspect as a main priority, as opposed to ensuring that peace officers are protected against civil claims for unlawful arrest. If the fifth requirement is added, the number of arrests and detentions will reduce and consequently the rate of unlawful arrests, unlawful detention and the use of excessive force will also reduce. As a result, the violations of the constitutional rights of suspects will also decrease. The debate has gone on for decades but still the fifth jurisdictional fact has no secured place in our law. In support of this suggestion, Du Toit *et al*[483] states that our law and the criminal justice system should allow the fifth jurisdictional fact to be part of existing principles on what constitutes a lawful arrest. This would also protect the constitutional rights and freedoms which our lawmakers aimed to guarantee to all persons, including those who are suspects.

2.4 Chapter conclusion

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481 Du Toit *et al Commentary on the Criminal Procedure Act* at ch5-p12B – ch5-12E. See also *Reynolds and Another v Minister of Safety and Security* 2011 (1) SACR 594 (WCC) at [22] and [24]; *Minister of Safety and Security and Another v Linda* 2014 (2) SACR 464 (GP) at [29]-[30]; *Bekker v Minister of Safety and Security* 2014 JDR 2404 (KZD) at [4]; *National Commissioner of Police and another v Coetzee* 2013 (1) SACR 358 (SCA) at [13].

482 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99-100.

483 Du Toit *et al Commentary on the Criminal Procedure Act* at ch5-p12B – ch5-12E.

The discussions and critical analysis were based on the constitutional implications and violations of a peace officer's act of unlawful arrest without a warrant, unlawful detention and the use of excessive force, as well as the introduction of the fifth jurisdictional fact, alternatively there should be amendments to the existing legislation by the legislature with regard to the discretionary powers of peace officers with the aim of promoting constitutional rights. The review of literature that is relevant to the issues that are highlighted in the objectives have been examined and compared with each other. However, certain aspects or gaps that exist in the legal system which are absent in the current literature have been highlighted, with the aim of developing and finding a solution to the issues.

It is the unlawful actions by peace officers that result in violations of the constitutional rights of a suspect. In light of these same legal issues, chapter 3 is introduced and deals with the consequences of an unlawful arrest without a warrant, unlawful detention and the use of excessive force on a suspect. In this regard, there are further discussions on the liability for civil claims by suspects who have experienced unlawful acts of peace officers and whose constitutional rights have been violated. In addition to the discussion on liability for unlawful actions, the calculation of damages is examined and a new approach to calculating damages is suggested. Furthermore, as a consequence of the unlawful actions of peace officers, suspects who are unlawfully detained suffer as a result of the poor conditions in police station holding cells and this is a problem which also requires attention.

CHAPTER THREE

THE CONSEQUENCES OF THE UNLAWFUL ACTIONS OF PEACE OFFICERS IN RELATION TO THE CONSTITUTIONAL RIGHTS OF A SUSPECT

3.1 Introduction

This chapter focuses on the consequences of a peace officer's act of unlawful arrest without a warrant, unlawful detention and the use of excessive force on a suspect. The consequences of these acts are the infringements of the right to personal liberty as well as subjecting suspects to poor conditions and overcrowding in police station holding cells. As a result of the unlawful actions of peace officers and the consequences thereof, suspects have a right of recourse through a civil action for damages.[484]

One of the objectives of this chapter is to determine and examine the requirements for delictual liability and the infringement of the right to personal liberty as the consequences of the unlawful actions of peace officers. A further objective is to determine and examine the extent of poor conditions and overcrowding in a police station holding cell as a consequence of an unlawful arrest without a warrant and unlawful detention. An additional objective is to determine a mathematical approach to calculate damages for the unlawful actions of peace officers as opposed to using awards in previous cases as a general method. The pertinent aspect that is discussed is the delictual requirements for liability for infringements of the right to personal liberty. In this regard the delictual requirements for liability are wrongfulness, negligence, causation (factual and legal) as well as damage. According to the State Liability Act,[485] the South African Police is vicariously liable for the unlawful actions of peace officers.

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484 Loubser *et al The Law of Delict in South Africa* at 265-266; Nkosi 'Balancing deprivation of liberty & quantum of damages' at [1].

485 State Liability Act 20 of 1957. Section 1 of the Act provides as that: "any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant."

The thesis focuses on a discussion and examination of the requirements for delictual liability in order to set out the principles that exist to hold the South African Police liable for the unlawful actions of peace officers and to determine what constitutes infringements of the right to personal liberty. In doing so, the chapter will highlight gaps in the existing law or flaws in the existing literature and will be able to introduce possible solutions to the problem. The aims and objectives of this chapter are to determine whether a lack of knowledge by a peace officer on the legal aspects pertaining to the requirements for delictual liability and the principles that relate to the rights to personal liberty are the reasons for the non-compliance with the requirements thereof as well as infringements of the right to personal liberty, which are the consequences of an unlawful arrest without a warrant, unlawful detention and the use of excessive force.

The aim of this chapter is to highlight the issues that emanate from the unlawful actions of peace officers and critically analyse the current literature in order to determine possible methods that will alleviate the consequences that arise from the unlawful actions of peace officers. A further aim of this chapter is to introduce a fair and reasonable mathematical approach to calculating damages as opposed to the current method of calculating damages based on previous cases as a general method. The importance of discussing these aspects is to highlight the link between the unlawful actions of peace officers and the constitutional rights of suspects. The infringements of the right to personal liberty can be categorised as a consequence of a peace officer's unlawful actions. By examining this consequence, the researcher will highlight the issues that are associated with this consequence and then suggest solutions to alleviate these infringements of the right to personal liberty of suspects. By doing this, the researcher also deals with the objectives and primary research questions of the study.

3.2 Delictual requirements for liability for infringements of the right to personal liberty as a consequence of the unlawful actions of peace officers

According to Neethling[486] and Modiba,[487] the State is liable for omissions by peace officers if the requirements for delictual liability are met and these requirements consist of wrongfulness, negligence, causation (factual and legal) as well as damage. Each of these requirements are discussed in further detail hereunder. The importance of discussing these requirements is to determine the prerequisites for a determination of liability as well as the infringements of the right to personal liberty. According to Van der Walt and Midgley,[488] and the court in *Kruger v Coetzee*,[489] if these requirements are evident in a particular situation or case, it means that the peace officer omitted to lawfully act in accordance with his powers and a suspect who is claiming an infringement of the right to personal liberty is successful in such a claim. However, one of the objectives and aims of the study is to determine whether a peace officer has sufficient legal knowledge and necessary academic background to be in a position to prevent the infringements of the right to personal liberty of suspects when he acts in terms of his powers.[490]

Another relevant aspect with regard to delictual liability is that the South African Police, as a State department, is vicariously liable for the unlawful actions of peace officers.[491] However, Burchell,[492] Van der Walt and Midgley[493] and Van Eeden[494] state that peace officers escape any form of personal punishment for these unlawful actions merely because the South African Police is held accountable and shoulders the responsibility for the unlawful actions of peace officers.

The objective of this chapter is to determine whether peace officers take advantage of the fact that the State will be held accountable for their unlawful actions and that no personal liability may be imputed to them, and persist in committing unlawful actions

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486 Neethling 2005 *SALJ* Volume 122 Issue 3 at 579.

487 Modiba 2003 *The quarterly law review for people in business* Volume 11 Part 2 at 112.

488 Van der Walt & Midgley *Principles of Delict* at 125.

489 *Kruger v Coetzee* 1966 (2) SA 428 (A) at [430E] – [430F] (hereinafter referred to as "*Kruger*").

490 Bruce *SA Crime Quarterly* No. 21 September 2007 at 17.

491 Neethling, Potgieter & Visser *Law of Delict* 338; *Minister van Polisie v Gamble* 1979 4 SA 759 (A).

492 Burchell and Milton *Principles of Criminal Law* at 312-322.

493 Van der Walt & Midgley *Principles of Delict* at 125. See also *Minister Van Polisie v Rabie* 1986(1) SA 117(A) at [132]; *Masuku v Mdlalose* 1998(1) SA 1(A) at [14]-[16].

494 Van Eeden *The Constitutionality of vicarious liability in the context of the South African Labour Law: a comparative study* at 6 and 8. See also Van der Walt & Midgley *Principles of Delict* at 125; *Minister Van Polisie v Rabie* 1986(1) SA 117(A) at [132]; *Masuku v Mdlalose* 1998(1) SA 1(A) at [14]-[16].

as there is no preventative measure in place to curb the persistence of this issue. Hence, there are still cases where peace officers exceed the powers vested in them and the South African Police must take responsibility for the consequences of their actions.[495] This aspect forms part of the objectives and primary research questions of the study.

3.2.1 Wrongfulness and the duty of care

According to the court in *Minister of Safety and Security v Carmichele*,[496] there is a general duty on the State to protect its citizens and the State will be held liable for a failure to perform this duty, unless there is evidence of compelling reasons to deviate from this principle. Even though the State is liable for the omissions by a peace officer, there is no requirement that a peace officer ought to be personally liable for the omissions made by him.[497] Hence, the State becomes liable for any omission or unlawful action taken by a peace officer in the execution of his duties and a peace officer takes no personal responsibility or liability for his unlawful actions.[498] This issue that ought to be determined is whether a rule or procedure exists to prevent or alleviate the unlawful actions of peace officers during an arrest without a warrant or detention or when excessive force is used on a suspect.

Neethling, Potgieter and Visser[499] explain that the general requirement to determine wrongfulness is the legal requirements of the community, the *boni mores*. Neethling[500] explains that in each case concerning a delictual omission, a court has to exercise a

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495 *K v Minister of Safety & Security* 2005 (9) BCLR 835; 2005 (6) SA 419 (CC); *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *Nkumbi v Minister of Law and Order* 1991 (3) SA 29 (E).

496 *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA) at [43] (hereinafter referred to as "*Minister of Safety and Security v Carmichele"*. See also *Ramushi v Minister of Safety and Security* (2016) JOL 36451 (GNP) at [14] (hereinafter referred to as "*Ramushi*"). See also *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at [20] and [21]; *Olitziki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) at [31]; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at [73]-[78].

497 Van Eeden *The Constitutionality of vicarious liability in the context of the South African Labour Law: a comparative study* at 6 and 8.

498 Van Eeden *The Constitutionality of vicarious liability in the context of the South African Labour Law: a comparative study* at 6 and 8.

499 Neethling, Potgieter & Visser *Neethling's Law of Personality* at 83. See also *Ramushi v Minister of Safety and Security* at [17]; *Schultz v Butt* 1986 (3) SA 667 (A) at [679D]-[679E]; *Premier Hangers CC v Polyoak* (Pty) Ltd 1997 (1) SA 416 (A) at [422E]-[422F]; *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA).

500 Neethling 2005 *SALJ* Volume 122 Issue 3 at 579.

value-judgment to determine whether there is a legal duty to act positively in order to avoid a loss. Indeed, the Neethling[501] emphasises the principle regarding a legal duty, however the author is silent on the issue as to whether a peace officer understands the principle or legal basis surrounding the legal duty to act positively in order to avoid a loss. It is the researcher's submission that a peace officer is entrusted with the important power to arrest without a warrant, detain and use force, however if the peace officer's judgment lacks the necessary legal background, then such judgment is meaningless.

An omission is regarded as unlawful when the circumstances of the case are of such a nature that the legal convictions of the community demand that the omission should be regarded as wrongful.[502] According to Millner,[503] the duty of care comprises two levels, the one being fact-based, and the other being policy-based.[504] Millner[505] explains that the fact-based duty of care forms part of the enquiry as to whether the peace officer's behaviour was negligent in the given circumstances and the policy-based or notional duty of care is an organic part of the wrongful act as it is basic to the development and growth of negligence and therefore determines its scope or range of relationships and interests that are protected by it. Millner[506] sets out the explanation for the duty of care and the determination of negligence on the part of the peace officer. However, the author does not address the aspects surrounding the reasons why a peace officer would act negligently in the performance of his powers. According to the court in *Carmichele v Minister of Safety and Security*,[507] the test for wrongfulness is

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501 Neethling 2005 *SALJ* Volume 122 Issue 3 at 579.

502 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) (hereinafter referred to as "*Ewels*"); *Ramushi v Minister of Safety and Security* at [13].

503 Millner *Negligence in Modern Law* at page 230; *Ramushi* at [7].

504 Millner *Negligence in Modern Law* at page 230; *Ramushi* at [7].

505 Millner *Negligence in Modern Law* at page 230.

506 Millner *Negligence in Modern Law* at page 230.

507 *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at [956]–[957] and [970] (hereinafter referred to as "*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*"). See also *Minister of Safety and Security v Hamilton* at [229]–[230]; *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) at [528]; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust*, *as amicus curiae*) 2003 (1) SA 389 (SCA) at [395]–[396]; *Minister of Safety and Security v Van Duivenboden* at [442]–[444]; *Minister van Polisie v Ewels* at [597]; *Botha v Minister van Veiligheid en Sekuriteit* 2003 (6) SA 568 (T) at [583]–[584]; *Saaiman v Minister of Safety and Security* 2003 (3) SA 496 (O) at [503]–[505]; *Mpongwana v Minister of Safety and Security* 1999 (2) SA 794 (C) at [797]–[798], [800]–[801]; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at [317]–[318]; *Ramushi v Minister of Safety and Security* at [8]; *Minister of Defence v Mkhatswa* (1997) 3 All SA 376 (W) at [379], [380a]-[380c].

one of reasonableness, which is determined by taking into consideration the legal convictions of the community, which is the application of the *boni mores* criterion for wrongfulness. However, it is important for the legal convictions of the community to be incorporated into the values and norms of the Constitution.[508] The constitutional embodiment of the right to *corpus* is an indication of the legal duty that lies with peace officers to take reasonable measures in order to avoid violence or assault against suspects.[509] Every infringement of the body automatically results in the infringement to the personality right to *corpus*, which is *contra bonos mores* and therefore wrongful.[510] Neethling[511] correctly explains that although constitutional provisions place a positive duty on peace officers to protect the right to security of the person, there are factors which play a role in promoting the existence of such a duty. The factors are: statutory obligations of the peace officer that are applicable to particular situations;[512] the fact that the physical violation was observed by peace officers;[513] knowledge or foreseeability on the part of the peace officer of the assault or threatened assault;[514] a special relationship (or proximity) between the State (through the peace

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508 *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust*, *as amicus curiae*) 2003 (1) SA 389 (SCA) at [396]–[397] (hereinafter referred to as the "*Van Eeden* case"); *Minister van Veiligheid en Sekuriteit v Geldenhuys* at [528]; *Minister of Safety and Security v Hamilton* at [228]–[231]; *Minister of Safety and Security v Van Duivenboden* at [444]–[448]; *Carmichele* at [962]–[963]. The courts have a duty to develop the *boni mores* by taking into account the spirt, object and purport of the Bill of Rights as provided for in section 39(2) of the Constitution; *Sayed v Editor Cape Times* 2004 (1) SA 58 (C) at [61].

509 *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* at [938]; *Minister of Safety and Security v Hamilton* at [236]; *Minister of Safety and Security v Van Duivenboden* at [451]–[452]; *Van Eeden* at [399]).

510 *Stoffberg v Elliot* 1923 CPD 148; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at [153].

511 Neethling 2000 *THRHR* Volume 63 Issue 1 at 150.

512 *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at [438]–[439] (hereinafter referred to as "*Van Duivenboden*"); *Minister of Safety and Security v Hamilton* at [231] and [235]; *Botha v Minister van Veiligheid en Sekuriteit* at [574]–[577], [581]–[582], [585]; *Mpongwana v Minister of Safety and Security* 1999 (2) SA 794 (C) at [804].

513 *Ewels* at [590]; *Mtati v Minister of Justice* 1958 (1) SA 221 (A) at [221]; *Nkumbi v Minister of Law and Order* 1991 (3) SA 29 (E) at [29].

514 *Van Duivenboden* at [439] – [441], [448]; *Minister of Safety and Security v Carmichele* at [324] (compare *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* at [960]; *Saaiman v Minister of Safety and Security* 2003 (3) SA 496 (O) at [511] – [512]; *Van Eeden* case at [400]; *Van der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE) at [475]; *Mpongwana v Minister of Safety and Security* 1999 (2) SA 794 (C) at [802].

officer) and the victim;[515] an obligation by the peace officer to protect the suspect;[516] a representation by the peace officer that the suspect will be protected;[517] the likely extent of harm that the suspect could have suffered;[518] what preventive measures is reasonably required, what the chances are that the measures will be successful, and whether the costs of taking those measures are proportional to the damage the suspect could have suffered;[519] the public interest will not be served by imposing a legal duty on the State (or the peace officer); and[520] a multiplicity of actions that could result from placing a legal duty upon the peace officer.[521] Although these factors play an important role in determining the duty of care on the part of a peace officer, Neethling[522] is silent on the link between these legal factors and the test for the duty of care with the conduct of peace officers. Even though these factors form part of the legal principles in criminal procedure, the issue remains as to whether peace officers know that these principles and factors exist which play an important role in the execution of their powers. It is the researcher's submission that if peace officers do not know that these principles exist or if they know that they exist, but choose not to abide by them, it results in suspects being deprived of their constitutional rights and infringements of the right to personal liberty occur.

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515 *Minister of Safety and Security v Carmichele* at [498]–[499]; *Van Eeden v Minister of Safety and Security* at [660]–[661]; Neethling 2000 *THRHR* Volume 63 Issue 1 at 277; Carpenter G 'The right to physical safety as a constitutionally protected human right' in Gretchen Carpenter (ed) *Suprema lex: Opstelle oor die Grondwet aangebied aan Marinus Wiechers* (1998) 139 at 151; *Minister of Safety and Security v Carmichele* at [323]–[324] (compare *Carmichele* case at [960]); *Saaiman v Minister of Safety and Security* at [506]–[508]; Neethling J & Potgieter J M ''n Spesiale verhouding tussen die polisie en misdaadslagoffers: 'n Onontbeerlike faktor vir die bestaan van 'n regsplig op die polisie om misdaadslagoffers te beskerm?' (2004) 67 *THRHR* 490 at 493–494); *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C) at [114]–[115].

516 *Nkumbi v Minister of Law and Order* 1991 (3) SA 29 (E) at [29]; Neethling 2000 *THRHR* Volume 63 Issue 1 at 153. Compare *National Media Ltd v Jooste* 1996 (3) SA 262 (A) at [272].

517 Where a person (e g the possible victim of a terror attack) acts in reasonable reliance on the impression created by the police that they will protect him, a legal duty may rest on the police to take reasonable steps to prevent harm to that person (see J Neethling 'Liability for acts of terrorism under South African law' in Koch (ed) *Terrorism, Tort Law and Insurance: A Comparative Survey* (2004) 72 at 83).

518 *Mpongwana v Minister of Safety and Security* 1999 (2) SA 794 (C) at [803]; Neethling 2000 *THRHR* Volume 63 Issue 1 at 154; *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at [361].

519 *Van Eeden* at [400]; *Minister van Polisie v Ewels* at [597]; *Saaiman v Minister of Safety and Security* at [410].

520 *Van Duivenboden* at [447]–[448]; *Carmichele* at [324]; *Van Eeden* case at [399]–[400]; *Minister of Safety and Security v Hamilton* at [236]; *Saaiman v Minister of Safety and Security* at [510]; *Mpongwana v Minister of Safety and Security* at [803].

521 *Saaiman v Minister of Safety and Security* 2003 (3) SA 496 (O) at [505]–[506], [511]–[502]; compare *Van Eeden* at [400]; *Minister of Safety and Security v Hamilton* at [236]–[237].

522 Neethling 2000 *THRHR* Volume 63 Issue 1 at 150.

A Constitutional Court case which specifically dealt with the legal duty of peace officers with regard detention and the duty to promote the constitutional rights of suspects is *Mahlangu and Another v Minister of Police*.[523] In this case, the peace officers arrested the suspects (applicants) and fabricated a confession through assault and torture.[524] The peace officers failed to disclose this to the criminal court and it was this conduct that led to the applicants further detention.[525] Furthermore, the peace officers' duty to be honest and inform the prosecutor in the criminal court that the arrest was unlawful and that the confession was obtained unlawfully persisted during the full period of the detention of the applicants.[526] The court in *Mahlangu*[527] also made mention of the importance of the constitutional rights of suspects and concluded that public policy dictates that delictual liability must attach, lest we find ourselves in a situation where freedom as a constitutional value and the right to freedom and security of the person are devalued. In essence, the court in *Mahlangu* held that peace officers have a legal duty to protect suspects and ensure that their constitutional rights are duly protected and promoted during detention. The researcher argues that despite the comments made by the court in *Mahlangu*, there exists no solution to the existing problem which lies in the fact that peace officers do not have an in-depth knowledge of their legal duty to prevent an omission and protect suspects. Furthermore, the researcher argues that the State is responsible and answerable for the continued unlawful acts and omissions whereas peace officers simply continue with their unlawful actions without any punishment. This discussion is further developed below with an analysis of the second requirement for delictual liability.

3.2.2 Negligence

According to Neethling,[528] despite case law deciding to the contrary,[529] there are justifiable reasons for the element of negligence to be determined only after the

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523 *Mahlangu and Another v Minister of Police* 2021 (2) SACR 595 (CC) (hereinafter referred to as "*Mahlangu*").

524 *Mahlangu* at [34] and [36].

525 *Mahlangu* at [34] and [36].

526 *Mahlangu* at [34] and [36].

527 *Mahlangu* at [44].

528 Neethling 2005 *SALJ* Volume 122 Issue 3 at 586.

529 *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) at [228] – [229] (hereinafter referred to as "*Hamilton*"); *Van Duivenboden* at [442], [453]; *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* case at [305]; *Minister van Veiligheid en Sekuriteit v Geldenhuys*

element of wrongfulness has been established. When a court has to evaluate the failure of a peace officer to act according to a duty of care, reference is made to the test that was applied in *Kruger*,[530] that is whether a reasonable person would have foreseen the reasonable possibility of damage to a person and would have then taken reasonable steps to avoid such damage. According to the court in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*,[531] when a court is determining whether or not the violence to the suspect is reasonably foreseeable, the general nature of the harm and the manner in which the harm occurred is relevant and not the exact harm which occurred. The emphasis under this requirement is the reasonable foreseeability test on the part of the peace officer.[532] The court has set out the meaning of this requirement. However, the researcher submits that the court does not address the issue of whether a peace officer has any knowledge or understanding of the reasonable foreseeability aspect that the law expects a peace officer to know in order for him to properly execute his powers. A further issue is the purpose of having such a test and enforcing this requirement as part of the determination for liability, when there is uncertainty about whether the requirement is, indeed, part of a peace officer's understanding and knowledge.[533] It is the researcher's submission that the lack of knowledge on the test for negligence

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at [515]; *Van Duivenboden* at [431]; *Van Eeden* case at [389]; *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C) at [106].

530 *Kruger* at [430E] – [430G]. See also *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at [31]; *Ramushi v Minister of Safety and Security* at [9]; *Minister of Safety and Security v Carmichele* at [325]; *Minister of Safety and Security v Hamilton* at [237]–[238]; *Minister of Safety and Security v Van Duivenboden* at [441]–[442], [448]; *Botha v Minister van Veiligheid en Sekuriteit* at [585]; *Van der Spuy v Minister of Correctional Services* at [472]; Neethling, Potgieter & Visser *Law of Delict* (2002) at 153–154; Neethling 'Self-defence: The ''unreasonable'' reasonable man' (2002) 119 *SALJ* 283 at 285–286; Neethling 'Wrongfulness in South African law of delict' in H Koziol (ed) *Unification of Tort Law: Wrongfulness* (1998) at 104–105; *Moses v Minister of Safety and Security* at [113]–[114]; compare *Moses v Minister of Safety and Security* at [116]–[117]; *Ntamo v Minister of Safety and Security* 2001 (1) SA 830 (TkH) at [838]–[839] the court stressed that the criterion of the reasonable policeman, and not that of the reasonable person, should be applied: 'I wish to express strong disagreement with the view expressed by Van Winsen AJ in *Ntanjana v Vorster & Minister of Police* 1950 (4) SA 398 (C)] at 410E. That view is to the following effect: ''The law requires of the police no higher and no less a standard of duty than is required of any member of the public placed in a similar situation, viz that standard to which the ordinary and reasonable man in the street is required to conform''.

531 *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* at [326]–[327]. See also *Van der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE) at [472]–[473].

532 *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* at [326]–[327].

533 Newham https://issafrica.org/iss-today/roots-of-the-crisis-facing-the-south-african-police (accessed on 24 January 2021).

results in unlawful actions by peace officers, and as a consequence, the right to personal liberty of suspects is infringed.[534]

3.2.3 Causation

For liability to arise, there must be a causal link or *nexus* between such negligence and the plaintiff's damage.[535] Neethling, Potgieter and Visser[536] explain that there are two types of causation, namely, factual causation and legal causation. Factual causation involves the *nexus* between a peace officer's omission and the assault on the suspect and this is determined on a balance of probability which involves the *conditio sine qua non* (or 'but for') test.[537] According to this test, the omission in question must be mentally eliminated and instead the situation must be seen in terms of a hypothetical positive conduct.[538] The question in this hypothetical scenario is whether the assault would have taken place or not.[539] If the answer is in the negative then it means that the omission was the factual cause of the assault.[540]

Neethling, Potgieter and Visser[541] explain that legal causation deals with the harmful consequences which the peace officer (the South African Police) is to be held liable

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534 Newham https://issafrica.org/iss-today/roots-of-the-crisis-facing-the-south-african-police (accessed on 24 January 2021).

535 *Minister of Police v Skosana* 1977 (1) SA 31 (A) at [34F]-[34H] and [35A]-[35D]. See also *Ramushi v Minister of Safety and Security* at [10];

536 Neethling, Potgieter & Visser, *Law of Delict* 338. See also *Minister of Police v Skosana* at [34F]-[34H] and [35A]-[35D] where the Court held that causation gives rise to two distinct problems. The first is a factual problem which relates to the question whether the negligent act or omission in question caused or materially contributed to the harm caused which gives rise to a claim. If it did not, then no legal liability can arise. If it did, then the second problem is relevant and that is whether or not the negligent act or omission is related to the harm sufficiently close enough or directly for legal liability to ensue, or whether the harm is too remote. This becomes a juridical problem in which considerations of public policy are relevant.

537 For criticism of this test see Neethling, Potgieter & Visser, *Law of Delict* 176-180.

538 *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* at [328]–[329] and [969]. See also Neethling, Potgieter & Visser, *Law of Delict* 150 at 181; *Minister van Veiligheid en Sekuriteit v Geldenhuys* at [532].
It has been opined that the omission should be replaced by a hypothetical course of lawful conduct (eg *Moses v Minister of Safety and Security* at [117]–[118]); compare *Carmichele* at [328]; Neethling 2000 *THRHR* Volume 63 Issue 1 at 495; Neethling, Potgieter & Visser *Law of Delict* at 181.

540 *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* at [327]–[328]. See also *Van Duivenboden* case at [449]; *Hamilton* at [239]–[240]; *Minister van Veiligheid en Sekuriteit v Geldenhuys* at [531]–[532]; *Moses v Minister of Safety and Security* at [117]–[118]; *Van der Spuy v Minister of Correctional Services* at [472].

541 Neethling, Potgieter & Visser *Law of Delict* at 588.

with regard to a wrongful and culpable omission and the peace officer (the South African Police) cannot be held liable for an allegation that is too remote. Neethling, Potgieter and Visser[542] explain further that the flexible approach is used and the issue to be determined is whether there is a close link between a peace officer's omission and the harmful consequences that may be imputed in light of policy considerations which is based on fairness, reasonableness and justice.[543] Legal causation should be distinguished from wrongfulness and negligence.[544]

It is apparent from the literature on the requirement of causation, that the authors[545] explain and emphasise the meaning of the requirements for delictual liability. The authors[546] also differentiate between the two forms of causation and they provide examples of situations where the two forms of causation exist.[547] There is no doubt that this requirement is important in the determination of delictual liability for the South African Police as a result of the conduct of a peace officer. However, the authors[548] fail to draw a link between the requirement and the reason behind the unlawful action by peace officers. It is uncertain whether the non-compliance with the requirement is as a result of a lack of legal and academic knowledge on the part of a peace officer, which creates errors in judgment.

3.2.4 Damage

Neethling, Potgieter and Visser[549] explain that damages can only be claimed by a person who has actually suffered damage. Potgieter, Steynberg and Floyd[550] also explain that damage that may result from the use of excessive force on a suspect will be patrimonial damage (medical costs and loss of income) and non-patrimonial

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542 Neethling, Potgieter & Visser *Law of Delict* at 588.

543 Neethling, Potgieter & Visser *Law of Delict* at 588.

544 *Van der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE) at [463]. See also Neethling & Potgieter Journal of South African Law Volume 2004 Issue 4 at 764; *Kruger* at [428] & [473]; Neethling, Potgieter & Visser *Law of Delict* at 201); *Ramushi v Minister of Safety and Security* at [12]; *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at [39D]-[41B].

545 Neethling, Potgieter & Visser *Law of Delict* at 588.

546 Neethling, Potgieter & Visser *Law of Delict* at 588.

547 *mCubed International (PTY) LTD and another v Singer and others* 2009 (4) SA 471 (SCA) at [21]-[26].

548 Neethling, Potgieter & Visser *Law of Delict* at 588.

549 Neethling, Potgieter & Visser *Law of Delict* page 211.

550 Potgieter, Steynberg & Floyd *Visser and Potgieter Law of Damages* at 64 and 94. See also Neethling, Potgieter & Visser *Law of Delict* at 219 and 232.

damage (pain and suffering and loss of amenities of life). It is the suspect who must prove that he suffered damage and must prove the extent of such damage.[551] The issue with regard to the fair and reasonable method to calculate damages is discussed in paragraph 3.4 below.

The importance of discussing and examining the requirements for delictual liability arising from the unlawful actions of peace officers is to highlight the current legal position that the South African Police is faced with, in relation to the unlawful actions of peace officers and its impact on the right to personal liberty of a suspect. According to Swanepoel, Lotter and Karels,[552] since direct liability is not imputed to a peace officer personally, peace officers are not in a position to identify their incorrect actions and rectify their errors. Instead, Burchell,[553] Van der Walt and Midgley[554] and Van Eeden[555] state that the legal position is that when a peace officer acts unlawfully, it is the State that is liable for those unlawful actions. However, whether or not this legal position is correct, is yet to be determined. Furthermore, Neethling, Potgieter and Visser,[556] as mentioned in the paragraphs above, correctly explain and define the principles and requirements for delictual liability and courts refer to these principles when dealing with cases involving delictual liability. However, the objective of this thesis is to determine whether a peace officer subjectively knows about the legal principles and requirements that exist, which form the basis for actions within the powers vested in him. In *Hamilton*,[557] the court emphasised that the "plaintiff's invaded interest" is the right to bodily integrity, which in law is regarded as "one of an individual's absolute rights of personality".

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551 *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) at [535]–[536]. See also Neethling & Potgieter 'Deliksvereistes vir polisie-aanspreeklikheid weens versuim om die fisies-psigiese integriteit te beskerm' at 505–6; Potgieter, Steynberg & Floyd *Visser and Potgieter Law of Damages* at 125–8.

552 Swanepoel, Lotter & Karels *Policing and the Law* at 178.

553 Burchell and Milton *Principles of Criminal Law* at 312-322.

554 Van der Walt & Midgley *Principles of Delict* at 125. See also *Minister Van Polisie v Rabie* 1986(1) SA 117(A) at [132]. See also *Masuku v Mdlalose* 1998(1) SA 1(A) at [14]-[16].

555 Van Eeden *The Constitutionality of vicarious liability in the context of the South African Labour Law: a comparative study* at 6 and 8.

556 Neethling, Potgieter & Visser *Law of Delict* at 219 and 232.

557 *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) (hereinafter referred to as "*Hamilton*").

3.3 Infringements of the right to personal liberty of a suspect as a consequence of the unlawful actions of peace officers

Neethling[558] explains that the right to personal liberty is recognised both in common law[559] as well as in the Bill of Rights[560] because personality and constitutional rights ought to be protected. However, whether a peace officer is familiar with the meaning and purpose of the right to personal liberty is yet to be established. Courts favour the general principle that the right to liberty is an important right that is guaranteed to a suspect.[561] Furthermore, the court in *In re: Willem Kok and Nathaniel Balie*[562] held that courts have a duty to protect a suspect's liberty when his right to liberty is violated. Indeed, courts have the duty to protect a suspect's liberty, however, the issue is whether a court should be burdened with protecting the right to liberty of a suspect, or whether a peace officer should be burdened with this duty. The issue is whether the court is correct in stating that courts have the duty to protect the right to personal liberty of a suspect. The court failed to address the fact that it is the peace officer's duty to ensure that a suspect's right to personal liberty is protected. Furthermore, the court failed to highlight the reasons why a peace officer would fail to protect a suspect's right to personal liberty. The right to personal freedom is a right which has always been protected and promoted by courts and deprivation of such personal liberty is regarded by courts as a serious injury.[563] In *Subjee*,[564] the court correctly pointed out that an unlawful arrest without a warrant and unlawful detention constitutes a serious violation of a suspect's right to freedom. However, the court was silent on providing suggestions to alleviate the number of violations of the right to personal liberty. Nkosi[565] explains that in principle, the interference with a suspect's right to personal liberty is regarded

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558 Neethling 2005 *SALJ* Volume 122 Issue 3 at 572-573.

559 *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at [145]–[146]. See also *Stoffberg v Elliott* 1923 CPD 148; *Nell v Nell* 1990 (3) SA 889 (T) at [895] and [896]; *Minister of Law and Order v Monti* 1995 (1) SA 3 (A) at [39]; *S v Orrie* 2004 (3) SA 584 (C) at [589]–[590] and [591]; *Minister of Home Affairs v Rahim and others* (2016) 3 SA 218 (CC) at [27]; *Lebelo v Minister of Police* [2019] LNQD 3 (GP) at [26].

560 Section 12 of the Constitution. See also *Hamilton* case.

561 *Mogakane v Minister of Police* (2018) JOL 39453 (MCC, Mbombela) at [4].

562 *In re: Willem Kok and Nathaniel Balie* (1879) 9 Buch 45 at [64] (hereinafter referred to as "*Balie*").

563 *Balie.*

564 *Subjee* at [33]. See also *Ochse v King Williams Town Municipality* 1990 (2) SA 855 at [860F]–[860G]; *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at [707B]. See also *Dunjana and Others v Minister of Police* (unreported, ECP case no 01/2015, 9 March 2017 at [21]).

565 Nkosi 2015 *SALJ* 15 at 62. See also *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC), 2014 3 SA 394 (CC) at [53].

as *prima facie* wrongful. The Constitutional Court in *Zealand*[566] held that in light of the fact that the right to personal liberty has been jealously guarded, it has also been correctly held by courts that any interference with a person's liberty can only take place under restrained conditions because in a constitutional state, the right to personal liberty is treasured. In the case of *Minister of Safety and Security v Van Der Merwe and others*[567] the court held that it is clear that an arrest, although an important method which assists peace officers to exercise their powers to prevent, combat and investigate crime, is a major interference with a person's right to personal liberty. Furthermore, in *Theobald*,[568] the court held that it has long been settled law that the arrest and detention of a suspect are a drastic infringement of his basic rights, in particular the right to freedom and human dignity and in the absence of due and proper authorisation, the arrest and detention is unlawful. The author[569] and the judicial officers reiterate the current legal principles but fails to address the issues that surround the constant violation of the rights to personal liberty and the reasons thereof. After the commencement of the new constitutional era in South Africa, courts continued to place emphasis on the importance of the right to personal liberty.[570] However, the issue is whether mere emphasis on the existing legal principles will assist in any way, to alleviate the violations of a suspect's right to personal liberty. There is uncertainty that peace officers are familiar with the comments made by the authors in the existing literature, or with the comments made by judicial officers in cases that involve a peace officer and infringement of the right to personal liberty.

The many civil claims brought against the Minister of Safety and Security or the Minister of Police for unlawful arrests without a warrant and unlawful detentions do not appear to be a deterrent to peace officers.[571] According to Okpaluba,[572] although an arrest of a suspect is a method available to peace officers to promote justice and

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566 *Zealand* at [11]-[12].

567 *Minister of Safety and Security v Van Der Merwe and others* 2011 (2) SACR 301 (CC) at [35] (hereinafter referred to as "*Van Der Merwe*").

568 *Theobald* at [175].

569 Nkosi 2015 *SALJ* 15 at 62.

570 *Ochse v King Williams Town Municipality* 1990 (2) SA 855 at [860F]–[860G] where the Court held that "the right of an individual to personal freedom is a right which has always been jealously guarded by our courts and our law has always regarded as deprivation of personal liberty as a serious injury. The unlawful arrest and detention of the plaintiff amounted to a serious invasion of this right".

571 *Kruger* at [46]. See also Nkosi 2015 *SALJ* 15 at 62.

572 Okpaluba 2012 *SAJHR* Volume 28 Issue 3 at 458.

combat criminal acts, an arrest is an interference with the right to liberty of a suspect.[573] The right to liberty is a suspect's most valued right and this right is linked to the fundamental rights of human dignity, freedom and security.[574] Neethling[575] explains that it is a rule of practice for all South African courts to recognise, develop and promote the law of personality as part of the law of delict, taking into account the spirit, purport and objects of the Bill of Rights. According to the court in *Woji v Minister of Police*,[576] there is a general duty on the South African Police to avoid any conduct that will violate the entrenched rights, such as the right to life, human dignity and freedom and security of person and this is regarded as a duty in public law. Courts have taken the right to personal liberty very seriously and encourage the promotion and exercise of rights to personal liberty. A further consequence of the unlawful actions of peace officers is the poor conditions and overcrowding within police station holding cells. This aspect is discussed in detail hereunder.

3.4 Poor conditions and overcrowding, including death of suspects in police station holding cells as consequences of the unlawful actions of peace officers in relation to the constitutional rights of suspects

This section deals with the poor conditions and overcrowding in police station holding cells. These aspects form part of the consequences that arise due to a peace officer's unlawful act of arrest without a warrant and unlawful detention. It is the researcher's submission that it is important to discuss these consequences because they are current issues that occur on a daily basis. The PSO also prescribe rules which peace officers are expected to follow with regard to the conditions of detention.[577] It is the researcher's submission that one of the reasons behind the poor conditions and the

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573 *Van Der Merwe* at [35]. See also *Van Eeden* at [12].

574 *Masisi v Minister of Safety and Security* 2011 (2) SACR 262 GNP at [18]. See also *Mabona and Others v Minister of Law and Order and Others* at [660D]-[660E]; *S v Williams and Others* 1995 (3) SA 632 (CC) at [654F]-[655B]; *S v Dodo* 2001 (3) SA 382 (CC) at [403C]-[403F]; *Minister of Police v du Plessis* 666/2012[2013] ZASCA 119 (20 September 2013) at [15].

575 Neethling *Persoonlikheidsreg*. See also Neethling, Potgieter & Visser *Law of Delict* 5. See also Section 39(2) of the Constitution; *Carmichele* at [33].

576 *Woji v Minister of Police* 2015 (1) SACR 409 SCA at [418b]-[418f] (hereinafter referred to as "*Woji*"). See also *Liu Quin Ping v Akani Egoli (PTY) LTD t/a Gold Reef City Casino* 2000 (4) SA 68 WLD at [86D] where the Court held that deprivation of a suspect's liberty is always a serious issue; *S v Williams and Others* 1995 (2) SACR 251 (CC) at [76] – [77].

577 Standing Order (General) 361: Handling of persons in the custody of the Service from their arrival at the police station.

overcrowding in police station holding cells is due to a peace officer's lack of academic and legal knowledge of the principles that govern his powers which result in his unlawful actions.[578] This aspect has been addressed in detail in chapter 2 above. The researcher aims to highlight the link between the unlawful actions of peace officers and the poor conditions and overcrowding in police station holding cells. The researcher argues that if the unlawful arrests without a warrant and detentions are alleviated by the introduction of the fifth jurisdictional fact as alternatives to an arrest without a warrant, this will have a positive impact on the conditions and overcrowding in police station holding cells. Undoubtedly, when a suspect is unlawfully arrested without a warrant and detained in a police station holding cell and if such acts occur at a high rate and on a daily basis, this will amount to infringements of the constitutional rights of suspects.[579] The objective of the study is to deal with the issues that surround the poor conditions and overcrowding in police station holding cells and the impact that this has on the constitutional rights of a suspect. A discussion of these aspects also includes the issues that relate to death of suspects who are in detention in police station holding cells. This aspect is also important as it deals directly with the constitutional right to life and human dignity. Literature on these aspects is discussed and examined and the researcher critically analyses the current literature to illustrate the gaps or flaws in the current legal system, and suggest ways in which to improve the legal system in order to promote the constitutional rights of a suspect. In this way, the researcher aims to deal with the objective of the study as well as the primary research questions.

3.4.1 Poor conditions and overcrowding in police station holding cells in relation to the constitutional rights of a suspect

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578 There may be other reasons such as a lack of resources or a lack of physical space (not enough holding cells). However, the discussion in this context specifically deals with the reasons and the consequences of a peace officer's unlawful actions.

579 *Mothoa v Minister of Police* (unreported, GSJ case no 5056/11, 8 March 2013) at [10] (hereinafter referred to as "*Mothoa*"). See also *Maharaj v Minister of Safety and Security* (unreported, KZD case no 11275/2012, 5 October 2017) at [51]-[53].

Makgopa[580] describes a police station holding cell as a cell which detains suspects who have not yet appeared in court. Dissel and Ngubeni[581] also describe a police station holding cell as a temporary facility where suspects are meant to be detained for no more than 48 hours. However, Dissel and Ngubeni[582] argue that in certain cases, suspects are detained in a police station holding cell for up to two weeks. In *Black*[583] the court condemned the conduct against a suspect who was detained for a total period of 40 hours in an overcrowded police station holding cell and at court before his first appearance in court. In *Mothoa*[584] the court held that where physical conditions in a police station holding cell fall below the legislative standard,[585] it follows that the constitutional rights of the suspect who is detained in such a cell are violated and the detention accordingly becomes unlawful. In addition to the comments made by judicial officers in these cases, the PSO provide that police station holding cells must have adequate light and fresh air, reasonable opportunity to rest and suspects in cell detention must have mattresses or sleeping mats which are clean and in decent condition.[586] The issue is whether police station holding cells are indeed, complying with the guidelines set out by the PSO. A further issue is whether those peace officers who are vested with the power to detain and oversee the detention process are familiar with the rules that are set out in the PSO. Furthermore, the PSO provides that suspects who are detained must be visited every hour.[587] There is uncertainty whether this rule

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580 Makgopa *Prevention of Deaths in Police Cells* at 13.

581 Dissel & Ngubeni http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.578.1494&rep=rep1&type=pdf (accessed on 6 May 2018).

582 Dissel & Ngubeni http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.578.1494&rep=rep1&type=pdf (accessed on 6 May 2018) at page 2.

583 *Black*; *Mathe v Minister of Police* 2017 (2) SACR 211 (GJ) at [38].

584 *Mothoa* at [10]. See also *Maharaj v Minister of Safety and Security* (unreported, KZD case no 11275/2012, 5 October 2017) at [51]-[53] the Court held that the 'intolerably unhygienic environment in the cells in (the two) police stations were inhumane and intolerable'. It was found that the plaintiff had been sexually harassed in one police station holding cell and the failure of the peace officers to allow her to see her family members (section 35(2)(f)(ii) and her constitutional right to dignity in terms of section 10 of the Constitution were infringed. Her right in terms of section 12 (cruel and unusual treatment) as well as her section 35(2)(e) right was also infringed. The Court held that the quality of public facilities such as police station holding cells should be a part of public interest. *Mbhele and Another v Minister of Police* (unreported, KZP case no AR790/16, 3 November 2017); *Mkwati v Minister of Police* (2018) ZAECMHC 2 (unreported) Case No. 2902/2013, Eastern Cape High Court, Mthatha, dated 23 January 2018 (also reported at (2018) JOL 39499 (ECM) – Ed) at [19]; *Subjee* case at [38].

585 The standard adopted by section 35(2)(e) of the Constitution.

586 PSO.

587 Standing Orders, 13(6).

is complied with. In addition, Muntingh[588] argues that the PSO do not provide solutions to the several problems in order to improve the safety of suspects in detention. Muntingh[589] argues further that the PSO do not define the term "safe custody" and the possible threat which relates to the health and safety of suspects in detention at a police station holding cell and as a result, peace officers who are at the operational level arrive at their own conclusion about what "safe custody" is and the threats that may emanate from such custody.[590] The researcher agrees with the argument presented by Muntingh[591] on this aspect. However, if the PSO was amended to address the issues highlighted by Muntingh,[592] there is still uncertainty whether peace officers will know the provisions and amendments to the PSO and whether they will enforce the orders that the PSO sets out.

A peace officer's duty is to ensure and maintain life, health and property of a suspect who is in police detention.[593] However, there are instances where peace officers violate a suspect's right against cruel, inhumane and degrading treatment and a suspect's right to dignity and feelings are infringed through the unlawful conduct of peace officers.[594] The PSO[595] also stipulate that peace officers must obtain the necessary medical assistance for suspects who require medical treatment.[596] However, the extent to which this rule is enforced by peace officers is yet to be determined.

In light of the uncertainties about the conditions and overcrowding in police station holding cells as a result of the unlawful actions of peace officers, the researcher highlights case studies of police stations where the conditions of the cells and overcrowding have a negative impact on the constitutional rights of a suspect. In this

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588 Muntingh *Children deprived of their liberty: protection from torture and ill-treatment* at page 165.

589 Muntingh *Children deprived of their liberty: protection from torture and ill-treatment* at page 165.

590 Muntingh *Children deprived of their liberty: protection from torture and ill-treatment* at page 165.

591 Muntingh *Children deprived of their liberty: protection from torture and ill-treatment* at page 165.

592 Muntingh *Children deprived of their liberty: protection from torture and ill-treatment* at page 165.

593 Section 14 of the SAPA. See also PSO; 205(3)1C; (2)8(1); 41(1)(c), read together with sections 38, 39(1), 39(2) and 173 of the Constitution; *Mtati v Minister of Justice* at [224]; *Minister of Police v Skosana*; *Mrasi v Minister of Safety and Security* where the Court dealt with a claim for damages for unlawful arrest and detention as well as the assault of the suspect by a peace officer whilst she was in police detention.

594 *Mrasi v Minister of Safety and Security* 2015 (2) SACR 28 (ECG).

595 South African Police Standing Order (G361) and sections 7(2); 205(3)1C; (2)8(1); 41(1)(c).

596 *Minister of Safety and Security and Others v Craig and Others NNO* 2011 (1) SACR 469 (SCA) at [61].

regard, the 2019/2020 report of the South African Human Rights Commission (SAHRC)[597] is important as it deals with the existing issues that suspects are experiencing while in detention in a police station holding cell. According to the report from the SAHRC,[598] every day across South Africa, suspects are deprived of their liberty in police station holding cells which are under the management of the South African Police. The SAHRC[599] argues that there is no system of regular station and cell inspections by persons who are independent of the South African Police who will ensure that suspects are detained and treated in accordance with their constitutional rights. The SAHRC[600] conducted observations at several police stations[601] in order to formulate its report and it found that cells were dirty, in a state of neglect and decay and were therefore condemned for use. When a police station holding cell is condemned for use, it means that the station has to move the suspects who are in detention to various other stations.[602] Furthermore, the SAHRC found that the water and sanitation infrastructure was a problem since many stations had leaking pipes and blocked toilets and suspects had access to only cold water.[603] The SAHRC also formulated a table which reflects the examples of police stations that are affected by overcrowding which the researcher includes hereunder.[604]

3.4.1.1 Police stations that are affected by overcrowding

Station	Number of suspects that can be held in the cell	Total number of suspects in the cell during the inspection (+ additional suspects who are held at the	Percentage (%) of overcrowding when all suspects are in the cells

597 Report of the South African Human Rights Commission https://www.justice.gov.za/ilr/docs/2019-20-NPM-AnnualReport-SAHRC.pdf (accessed on 26 December 2020).

598 Report of the South African Human Rights Commission https://www.justice.gov.za/ilr/docs/2019-20-NPM-AnnualReport-SAHRC.pdf (accessed on 26 December 2020).

599 Report of the South African Human Rights Commission https://www.justice.gov.za/ilr/docs/2019-20-NPM-AnnualReport-SAHRC.pdf (accessed on 26 December 2020).

600 Report of the South African Human Rights Commission https://www.justice.gov.za/ilr/docs/2019-20-NPM-AnnualReport-SAHRC.pdf (accessed on 26 December 2020).

601 Police stations at Boitekong (North-West), Sebayeng (Limpopo) and Imbali (KwaZulu-Natal).

602 Report of the South African Human Rights Commission https://www.justice.gov.za/ilr/docs/2019-20-NPM-AnnualReport-SAHRC.pdf (accessed on 26 December 2020).

603 Report of the South African Human Rights Commission https://www.justice.gov.za/ilr/docs/2019-20-NPM-AnnualReport-SAHRC.pdf (accessed on 26 December 2020).

604 Report of the South African Human Rights Commission https://www.justice.gov.za/ilr/docs/2019-20-NPM-AnnualReport-SAHRC.pdf (accessed on 26 December 2020).

		station but not currently in the cells)	
Butterworth	50	96 (+15)	122%
Cofimvaba	24	37	54%
Diepkloof	12	9 (+10)	58%
Elukwatini	20	54	170%
Hazyview	10	18 (+10)	180%
Polokwane	73	29 (+60)	22%
Sheshego	56	60 (+17)	38%
Tzaneen	74	134	81%

When interpreting the table above, it can be deduced that many police station holding cells are overcrowded. The inspection was conducted at 8 different police stations in South Africa. The number of suspects who are meant to be detained in a single cell are recorded in the second column. The number of suspects detained in a single cell plus additional suspects who were not physically in the cell at the time of the survey (these suspects may have been attending court at the time) are recorded in the third column. The fourth column records the excessive rate at which the single police station holding cell is overcrowded.

In Butterworth Police Station, a maximum number of 50 suspects can be held in the police station holding cell. However, the police station is holding more than double the number, which amounts to an overcrowded rate of more than 100%. In Confimvaba Police Station, the police holding cell can accommodate a maximum of 24 suspects. However, the police station has 13 additional suspects who are not meant to be in the cells. The Diepkloof Police Station is meant to hold 12 suspects. However, the cell was crowded with an additional 7 suspects. At the Elukwatini Police Station holding cell, an additional 34 suspects were detained as opposed to a maximum number of 20 suspects that the cell can hold, thereby making the cell overcrowded by 170%. Similarly, at the Hazyview Police Station, an additional number of 18 suspects were detained in the cells, which implies that the cell was overcrowded by 180%. Polokwane Police Station had the lowest percentage of overcrowding at 22% with 16 additional suspects as compared to the maximum number of 73 suspects that the cell can accommodate. Shesego Police Station was meant to accommodate 56 suspects, however, the cell was overcrowded with 21 additional suspects. Tzaneen Police

Station was overcrowded by 81%, holding 134 suspects as compared to the maximum number of 74 suspects that the cell is meant to accommodate.

Although this report is essential in highlighting the existing problem that is associated with overcrowding in police station holding cells, the report will not have any effect if no steps are taken to alleviate this problem. It is the researcher's submission that if the number of unlawful arrests without a warrant is reduced, perhaps the conditions of cells and the problem of overcrowding can be minimised. Furthermore, it is the researcher's submission that if the fifth jurisdictional fact as an alternative to an arrest without a warrant is introduced into our law, it may assist in alleviating the problems of poor cell conditions and overcrowding.

3.4.2 Deaths of suspects in police station holding cells

Plato[605] explains that no matter how guilty a suspect may appear to be, peace officers have a duty to protect all suspects who are in police detention to the best of their ability. However, the issue is whether peace officers are, indeed, acting in accordance with their duty to protect the constitutional rights of suspects who are in detention. Deaths of suspects who are in detention in police station holding cells occur either as a result of assaults by peace officers or as a result of assaults by other detainees. In some instances, deaths of suspects are a result of suicides. The death of a suspect who is detained in a police station holding cell involves the infringement and violation of the constitutional right to life, human dignity and the right to freedom and security of person. It is a great injustice if peace officers do not act in a manner that will protect these rights, and the South African criminal justice system fails in its duty to promote constitutional rights and democracy.

3.4.2.1 Deaths of suspects caused by peace officers

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[605] Plato https://www.westerncape.gov.za/news/death-police-custody-full-report-safety-measures-requested (accessed on 6 May 2018).

In *Govender and others v S*,[606] the court held that there is a legal duty on peace officers who are present and who witness the assault on a suspect, to take action to stop the assault. The peace officers in this case participated in the assault when they could have foreseen the resultant death and some of the peace officers associated themselves with the assault and resultant death, although they did not physically participate in the assault.[607] It is evident from this decision, that courts were taking steps to deal with actions of peace officers which cause the death of suspects who are arrested and detained and whose constitutional rights were being violated. However, the decision in this case did not stop the acts of peace officers in causing the deaths of suspects. Once again, in the case of *Mkhize and others v S*,[608] peace officers were found to have assaulted suspects in order to obtain evidence in an alleged robbery and rape investigation and as a result of the assault, one suspect died and another was severely assaulted. In 2019,the case of *Mkhize* was taken on appeal and the SCA also made reference to *Govender and others v S* when delivering judgment.[609] The court correctly held that peace officers cannot hide behind a defence that they were not aware of what was going on in their presence with regard to the assault and death of a suspect.[610] The court also emphasised that there was a duty on those peace officers who, despite not participating in the interrogation, witnessed the assault, to report such acts to a superior at the station.[611] The peace officers in this case did not participate in the assault, but omitted to prevent the assault and the resultant death of the deceased.[612] Yet, peace officers have a duty to society to prevent the acts of crime by reporting such incidents. The court emphasised further that the deceased suspect had a right to be treated with dignity and a right not to be assaulted and interrogated to the extent that such acts resulted in his death.[613] It appears that the decision and sentence handed down in this judgment aimed to send a message that the public will not tolerate such defiance and lawlessness by peace officers. It has not been

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606 *Govender and others v S* 2004 (2) ALL SA 259 (SCA) at [28] (hereinafter referred to as "*Govender and others v S*").

607 *Govender and others v S*. The association in the resultant death of the suspect is called common purpose.

608 *Mkhize and others v S* 2009 JOL 24118 (KZP) (hereinafter referred to as "*Mkhize*").

609 *Mkhize* at [22] and [27].

610 *Mkhize* at [22] and [27].

611 *Mkhize* at [22] and [27].

612 *Mkhize* at [22] and [27].

613 *Mkhize* at [22] and [27].

established whether these comments by the SCA have positively influenced peace officers when they execute their duties.

3.4.2.2 Deaths of suspects caused by other detainees or by suicide

The PSO[614] instructs peace officers to search suspects who are in detention at a police station holding cell as well as the suspects' visitors and to confiscate any objects that are found in their possession which are suspected to cause injury to the suspect in detention or any other person. Several authors including Makgopa,[615] Dissel and Ngubeni[616] and Bruce[617] explain that a failure of a peace officer to conduct the search as prescribed in the PSO results in objects being used by suspects to commit suicide. The authors explain the importance of the PSO with regard to the safety of a suspect in detention. However, the authors are silent on whether peace officers are familiar with the instructions in the PSO and whether they are, indeed, exercising their powers in accordance with those instructions.

The deaths of suspects in custody can be the result of assaults by peace officers, assaults by other suspects who are detained in the same cell, or suicidal acts by suspects themselves. In all instances, a peace officer has a duty to ensure that the constitutional rights of a suspect such as the right to freedom and security of person, and the rights to life and human dignity are protected while a suspect is in police detention. However, whether peace officers are, indeed, taking steps to ensure that the constitutional rights of suspects are duly protected, is yet to be determined. The next aspect that is discussed is the final stage of the process whereby suspects have a right of recourse by means of a civil action for damages for the unlawful acts of peace officers and the infringements of constitutional rights. This aspect also requires attention with regard to the appropriate award of damages.

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614 South African Police Service Standing Order (General) (SAPS [SOCG])361.11. See also section 23 of the Criminal Procedure Act 51 of 1977; Makgopa *Prevention of Deaths in Police Cells* at 39-40.

615 Makgopa *Prevention of Deaths in Police Cells* at 13.

616 Dissel & Ngubeni http://www.csvr.org.za/index.php?option=comcontext&view=article&id=1448%3Aa (accessed on 6 May 2018).

617 Bruce http://www.csvr.org.za/articles/artdeath.htm (accessed on 6 May 2018). See also Ryan M *Lobbying from below: Inquest in defence of civil liberties* 1996 London: University College London Press.

3.5 A new mathematical calculation of damages for the unlawful actions of peace officers and the violations of the constitutional rights of a suspect as opposed to basing the amount of damages on awards in previous cases

The objective of this sub-paragraph involves a discussion of the existing method that is used by courts to calculate damages for an unlawful arrest without a warrant, an unlawful detention and the use of excessive force, as well as the infringement of the constitutional rights of a suspect. The reason for a discussion on the aspects that are related to damages and compensation is that these aspects are the consequences that arise as a result of the unlawful actions of peace officers. Hence, there is a link between the unlawful actions of peace officers and the damages that are awarded to a suspect. A new mathematical method should be introduced so that the compensation that is awarded is fair and reasonable and consistent with the type of damage suffered by suspects. The researcher commences with a discussion and comparison of existing case law to highlight the disproportionate and unfair awards for the unlawful actions of peace officers and the infringements of constitutional rights. The researcher illustrates this comparison by referring to case law from the years 2018, 2019 and 2020. The reason why a comparison is made using case law is that these most recent cases are effective in illustrating and highlighting the flaws in the method used by judicial officers to calculate damages. It is also meant to highlight the fact that the judicial officers dealing with the most recent cases[618] have not introduced a mathematical approach to the calculation of damages. The importance of referring to case law is to highlight the problems associated with the calculation of damages. The important aspect that the researcher aims to emphasise is that courts are awarding damages without any accurate or mathematical calculation. Instead, judicial officers simply base the amount of damages by referring to the amount of damages in previous cases and then pronounce on an amount of damages without any substantial reasons for awarding the particular amount.

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618 *Madyibi v Minister of Police* [2020] LNQD 11 (ECM) (hereinafter referred to as "*Madyibi*"). See also *Mjali v Minister of Police* [2020] ZAECMHC 49; *Oriyomi v Minister of Police* (14132/13) [2020] ZAGPPHC 224 (6 April 2020).

Once the researcher discusses and critically analyses the current situation, the next step is to propose and examine the introduction of a new mathematical method to calculate damages that are fair and reasonable. In order to do this, the researcher sets out an explanation of how the proposed method is to be calculated. In addition to this explanation, the researcher sets out the proposed calculation by way of a hypothetical example. This new mathematical approach may assist judicial officers to accurately calculate damages for the unlawful actions of peace officers and for the infringement of constitutional rights, as opposed to merely pronouncing on amounts without any mathematical calculation to justify the amount that is awarded.

3.5.1 The quantification and assessment of damages in relation to unlawful actions of peace officers and violations of the constitutional rights of a suspect

Okpaluba[619] explains that once a court finds that there is in fact a breach of a constitutional right, the next issue that the court must deal with is the appropriate relief that should be awarded to the aggrieved party (suspect). Okpaluba and Budeli-Nemakonde[620] also explain that a suspect's right to freedom and liberty may be infringed by the act or omission of a peace officer. These authors explain that the quantification of damages can either be related to the impairment of a suspect's dignity and reputation through the unlawful act or omission by a peace officer,[621] or the loss of a body part due to an unlawful police shooting.[622] According to Okpaluba and Budeli-Nemakonde,[623] the law in relation to the liability and quantum of damages has been settled in common law areas in which peace officers are liable for the unlawful violation of a suspect's right to personal liberty while performing law enforcement

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619 Okpaluba 2001 *Stell LR* 462; 2002 SAPR/PL 98 102-105.

620 Okpaluba and Budeli-Nemakonde 2017 *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* Volume Number 3 at 528. See also *Mkwati v Minister of Police* (2018) ZAECMHC 2 (unreported) Case No. 2902/2013, Eastern Cape High Court, Mthatha, dated 23 January 2018 (also reported at (2018) JOL 39499 (ECM) – Ed) at [19]; *Latha ad Another v Minister of Police and Others* (2018) JOL 40275 (KZP) at [67.5].

621 Okpaluba and Budeli-Nemakonde 2017 *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* Volume Number 3 at 528.

622 *Fortuin v Minister of Safety and Security* (27228/02) 2007 ZAWCHC 3 (25 January 2007). See also *Latha ad Another v Minister of Police and Others* (2018) JOL 40275 (KZP) at [64.1].

623 Okpaluba and Budeli-Nemakonde 2017 *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* Volume Number 3 at 526 – 546. See also Okpaluba 2014 SACJ 325.

duties such as an arrest without a warrant and detention. It is submitted that the authors are correct in making this statement.

Okpaluba and Osode[624] explain that there are several South African cases which have dealt with the quantification of damages following the unlawful actions of peace officers which resulted in the infringement of constitutional rights. Common law is sufficient in determining compensation for a person who suffered a breach of constitutional rights.[625] However, in cases where constitutional rights have been breached or violated and damages are claimed as relief, the pursuit of constitutional damages has also been effective.[626] When dealing with the quantification of damages in the law of delict, South African courts also recognise and protect[627] the rights to bodily integrity, human dignity,[628] mental integrity,[629] bodily freedom,[630] reputation,[631] privacy,[632] feeling[633] and identity.[634] A wrongful deprivation or reduction of these personality rights entitles a plaintiff (suspect) to non-patrimonial damages.[635]

However, the current method that courts use to calculate damages may not be sufficient to comply with the general test for fair and reasonable damages.[636] According to Nkosi,[637] the awards made by the courts with regard to the infringement of the right to personal liberty reveal a disparity between what judicial officers state about the protection of a suspect's right to personal liberty and what they do when this

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624 Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* at 20.1.

625 *Fose v Minister of Safety and Security* (1997) 3 SA 786 (CC) at [62] and [70].

626 *Zeeland*, where a delict action for wrongful detention was argued only on the reliance and breach of section 12(1)(a) of the Constitution on the right to freedom and security of person.

627 Neethling, Potgieter & Visser *Neethling's Law of Personality* at [3.3]. see also Potgieter *et al Law of Damages* at 104; Neethling & Potgieter *Law of Delict* at 15.

628 *Brenner v Botha* 1956 (3) SA 257 (T).

629 *Christian Lawyers' Association v National Minister of Health* 2004 (10) BCLR 1086 (T). See also *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SE); *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC); Du Plessis and De Ville "Personal rights: life, freedom and security of the person, privacy and freedom of movement" in Van Wyk *et al* (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) at 212.

630 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC).

631 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

632 *Jansen van Vuuren NNO v Kruger* 1993 4 SA 842 (A).

633 *Makwanyane.*

634 *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W).

635 *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) at [40]. See also *Mandleni v Minister of Police*, an unreported judgment of this division dated 24 April 2017, by Hellens AJ, under case No 37539/14 at [13]; *Masisi v Minister of Safety and Security* 2011 (2) SACR 262 (GNP).

636 *Seymour*.

637 Nkosi 'Balancing deprivation of liberty & quantum of damages' at [13].

right is infringed. In this regard, the court in *Ramakulukusha v Commander, Venda National Force*[638] made the following remarks:

> "When researching the case law on the quantum of damages, I took note with some surprise of the comparatively low and sometimes almost insignificant awards made in southern African courts for infringements of personal safety, dignity, honour, self-esteem and reputation. It is my respectful opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual, especially in group-orientated societies where there appears to be an almost imperceptible but inexorable decline in individual standards and values."

Neethling, Potgieter and Visser[639] and Nkosi[640] state that there is no fixed formula for the calculation of damages and such determination is at the discretion of the judicial officer who must take into account all the relevant factors and circumstances of the case. The court in *Tyulu*[641] held that it is very difficult to determine an amount of damages for this form of *iniuria* through any form of mathematical calculation, and whilst awards in previous cases may serve as a guide, this method may be misguiding. The judicial officer in this case was correct in stating that awards in previous cases may be misguiding but it is submitted that he or she was incorrect in finding that it is difficult to use any form of mathematical calculation to determine an amount of damages. Furthermore, the court in *Seymour*[642] held that one very accurate and correct method is to look into the facts of the particular case and then determine the amount of compensation based on the facts of the case. However, the court in the *Seymour* case also stated that the assessment of awards for general damages with reference to awards made in previous cases is fraught with difficulty.[643] The court correctly stated that the facts of a particular case need to be examined as a whole and few cases are directly comparable. The court also criticised the existing method by stating that previous awards are a useful guide to what other courts consider to be appropriate but that they have no higher value than that. It appears that the courts in *Seymour* and *Tyulu* accepted the existing method but also criticised the method for

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638 *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at [847B] – [847C].

639 Neethling, Potgieter & Visser *Neethling's Law of Personality* at 60.

640 Nkosi 2015 *SALJ* 15 at 62.

641 *Tyulu* at [26].

642 *Seymour* at [17]. See also *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) at [39]; *Lebelo v Minister of Police* [2019] LNQD 3 (GP) at [16].

643 *Seymour* at [17].

being nothing more than a guide. However, the courts made no mention of an alternative method that is accurate, fair and reasonable. Furthermore, the reasons why the courts in *Tyulu* and *Seymour* hold the view that the existing general method is accurate and correct, has not been explained.

In the case of *Mjali v Minister of Police*[644] the appeal court held that in assessing the plaintiff's claim, whilst no two cases are alike, guidance in the assessment of any appropriate award for general damages can be obtained by comparing factors in different cases. The court stated that he would refer to certain cases and work his way out in the appropriate assessment of damages in the consolidated cases.[645] It should be noted that the judicial officer is, in effect, merely reading various cases and then making up his own mind about a particular figure to be awarded. This is done without any consideration of the fact that the amount awarded is not derived from an accurate mathematical calculation. In *Samanithan*[646] the court of appeal held that it is trite that the award of damages is a discretionary matter for the trial court and a court of appeal will only interfere if there has been misdirection regarding the law or the facts, or if the damages are so unreasonably exorbitant or inadequate so as to warrant an inference that the trial court did not exercise its discretion properly. In this case, the court stated that none of these grounds were present in the case and that the trial court judicial officer had proper regard to the applicable legal principles and the circumstances, and gave extensive reasons for the decision.[647] It was pointed out further that although it can be argued that the awards may be generous, the court of appeal was of the opinion that it was not unreasonably exorbitant so as to warrant interference by the court of appeal.[648] The important issue with regard to the views by the court of appeal is that the court reiterates the existing legal principles with regard to the general method of calculating damages. Furthermore, the court failed to make any attempt at introducing a new mathematical approach to calculating damages so that a court of appeal will be in a position to correctly determine whether an amount that is awarded is fair and reasonable. It is the researcher's submission that it is incorrect for a court to accept

644 *Mjali v Minister of Police* [2020] ZAECMHC 49 at [66] (hereinafter referred to as the "*Mjali*" case).
645 *Mjali* at [66].
646 *Samanithan* at [4].
647 *Samanithan* at [4].
648 *Samanithan* at [4].

the general method of awarding damages so confidently, as it did in the *Samanithan* case, without using its powers as a court of appeal to attempt to develop the law.

Furthermore, the court in *Alves v LOM Business Solutions (PTY) LTD*[649] held that courts must avoid creating the impression that unreasonably large monies are paid out to plaintiffs for the unlawful actions of peace officers but at the same time, the amount awarded should not diminish the importance of the right to freedom. In this regard, the court made an attempt to emphasise the link between the unlawful actions of peace officers and the importance of the constitutional rights of a suspect. However, the judicial officer does not make any suggestion with regard to the introduction of a mathematical calculation. It appears that the court accepted the existing method as accurate and correct.

In *Mathe v Minister of Police*[650] the court dealt with a claim for damages for unlawful arrest without a warrant and unlawful detention and the court found that the appellant suffered arbitrary deprivation of her personal liberty rights in that she was traumatised and humiliated because of the unlawful arrest and unlawful detention. In assessing an amount of damages for the unlawful arrest and detention, the court in the *Mathe* case referred to *Tyulu* in which the latter case dealt with the assessment of damages for unlawful arrest and detention. The SCA in the *Tyulu* case held that when

649 *Alves v LOM Business Solutions (Pty) Ltd* 2011 4 All SA 490 (GSJ); 2012 1 SA 399 (GSJ) [36]. Factors that can play a role in determining the amount of damages are the circumstances in which the deprivation of liberty took place, the presence or absence of improper motive or 'malice' on the part of the defendant, the harsh conduct of the defendants, the duration and nature of the deprivation of liberty, the status of the plaintiff, the extent of the publicity given to the deprivation of liberty, the presence or absence of an apology or satisfactory explanation of events by the defendant, awards in previous comparable cases, the fact that, in addition to physical freedom, other rights such as honour and good name have been infringed and the high value of the right to physical liberty. See also *Donono v Minister of Prisons* 1973 at [265H]; *Ramakulukusha v Commander*, *Venda National Force* at [849C]; *Seria v Minister of Safety & Security* 2005 2 All SA 614 (C); 2005 5 SA 130 (C) 633i (All SA), [151B]–[151C] (SA); *Minister of Safety & Security v Tyulu* at [27]; *Rowan v Minister of Safety & Security* 2011 3 All SA 443 (GSJ) [72]; *Masisi v Minister of Safety & Security* at [9], [18] and [19]; *Minister for Safety & Security (now Minister of Police) v Scott* 2014 3 All SA 306 (SCA); 2014 6 SA 1 (SCA) [44]; *Minister of Safety & Security v Van der Walt* 2015 1 All SA 658 (SCA) [29]; *Rahim v Minister of Home Affairs* 2015 3 All SA 425 (SCA); 2015 4 SA 433 (SCA) [27]; *Mathe v Minister of Police* at [19] and [22]; *De Klerk v Minister of Police* 2018 2 All SA 597 (SCA) [17]; *Thandani v Minister of Law & Order* at [707C]–[707E]; *Louw v Minister of Safety & Security*; *Naidoo v Minister of Police* 2015 4 All SA 609 (SCA) [49]; *Sibiya v Minister of Safety & Security* 2008 4 All SA 570 (N) [573i]–[573j], [574c], [574g]–[574j]; *Olivier v Minister of Safety & Security* 2009 3 SA 434 (W) [445H]–[446D] (SA), [398i]–[399e] (SACR); *Rudolph v Minister of Safety & Security* 2009 3 All SA 323 (SCA); 2009 5 SA 94 (SCA) [27]; *Woji* at [40]; *Rahim v Minister of Home Affairs* [2015] 3 All SA 425 (SCA).

650 *Mathe v Minister of Police* 2017 4 All SA 130 (GJ) at [16] (hereinafter referred to as "*Mathe*").

considering the amount of damages for unlawful arrest and detention, it is important to note that the main aim is not to enrich the plaintiff with compensation, but to offer the aggrieved party *solatium* for the injured feelings.[651] The court held that it is therefore important to make sure that the compensation awarded is proportionate with the injury that is inflicted on the suspect.[652] Furthermore, the court emphasised that it is important for courts to award the amount of compensation that clearly reflects the importance of the right to personal liberty in South African law.[653] The court in *Mkwati v Minister of Police*[654] echoed similar principles as the principles echoed in the *Mathe* and *Tyulu* cases. It is evident from the reading of case law on the quantification of damages, that the courts emphasised the need to award amounts that are proportionate to the injury sustained by a suspect due to a peace officer's unlawful actions. However, the courts did not make any attempt at introducing a mathematically accurate method to calculate the damages. Yet, there is a possible method that can be introduced and used which may be fair and reasonable. This method is discussed in detail in paragraph 3.4.3 below.

With regard to the calculation of damages, Neethling, Potgieter and Visser[655] explain that there is no fixed method of calculation or formula to determine damages and each court has its own discretion with regard to the amount of damages, based on what a court deems just and fair. The purpose of awarding damages is to compensate the injured party for loss or hurt rather than to punish the wrongdoer.[656] Neethling, Potgieter and Visser[657] explain that the general rule with regard to monetary compensation is to place the aggrieved party in the same position as if the wrong had not been committed and such compensation is determined on a balance of

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651 *Tyulu* at [26]. See also *Lebelo v Minister of Police* [2019] LNQD 3 (GP) at [29].

652 *Tyulu* at [26].

653 *Tyulu* [26]. See also *Olgar v Minister of Safety and Security and Another* (586/2012) [2012] ZAECGHC 8; 2012 (4) SA 127 (ECG) (20 February 2012) where Jones J held that in modern South Africa the just award for damages for unlawful arrest and detention should reflect the importance of the fundamental right to individual freedom and liberty, and should properly take due account of the facts of the case, the personal circumstances of the victim, the nature, extent and degree of the violation of the person's dignity and sense of personal worth; *Mgele v Minister of Police and Others* (2015) ZAECMHC 70 – (unreported) Case No. 1257/2011, Eastern Cape High Court, Mthatha, dated 6 October 2015; *Latha ad Another v Minister of Police and Others* at [67.8.]

654 *Mkwati v Minister of Police* (2018) JOL 39499 (ECM) (hereinafter referred to as "*Mkwati*").

655 Neethling, Potgieter & Visser *Neethling's Law of Personality* at 60. See also *Thandani v Minister of Law and Order* at [707A]-[707B].

656 *Mogakane* at [3].

657 Neethling Potgieter & Visser Neethling *Law of Personality* at 605.

probabilities, which can be inferred or assessed from the evidence tendered at the trial. These authors explain further that the primary purpose of a claim based on unlawful arrest and detention is to vindicate infringed rights to liberty, which means to give the aggrieved party compensation in the form of money. Neethling, Potgieter and Visser[658] also state that there is no exact or exhaustive list for the quantification of damages but such discretion rests on the presiding officer at the trial, who must determine the quantum, taking into account all the relevant factors and circumstances according to what is fair and reasonable. The authors reiterate the existing legal principles and they mention that there is no fixed mathematical method of calculating damages. They are correct in making this statement. However, they have failed to provide a proposed mathematical calculation as an alternative to the existing general method.

The literature on the aspect of quantification of damages has been discussed and criticised for the lack of attention that is given to the use of the general method as opposed to a new mathematical approach. However, in order to highlight this issue, a comparison of case law is required. In doing this, the researcher aims to demonstrate the issues with regard to the disproportionate awards that the courts are awarding for the unlawful actions of peace officers and the infringements of constitutional rights.

3.5.2 A comparison and analysis of case law – disproportionate awards for the unlawful actions of peace officers

Courts have a discretion to determine the amount of damages in instances where it finds that an arrest and detention is unlawful. In order to determine the amount of damages, courts are guided by the awards in previous cases and they also consider the facts of the particular case. However, the main hurdle is ensuring that the determination of the amount of damages is fair and reasonable. Courts are given the discretion to determine the particular amount and this discretion is the final decision unless challenged on appeal and the decision is changed by another court. As a result, a plaintiff's right to personal liberty is compromised because there may be instances where one plaintiff receives a specific amount of damages by one court, and

658 Neethling Potgieter & Visser Neethling *Law of Personality* at 605.

there are instances where another plaintiff is awarded a different (lower or higher) amount based on very similar facts in another court. A comparison is made with cases for the years 2018, 2019 and 2020 in order to reflect the disproportionate awards in similar cases.

3.5.2.1 An analysis of cases from 2018

In the case of *Fuduswa v Minister of Police*[659] the court awarded damages in the amount of R70 000 – 00 for the unlawful arrest and detention that occurred in 2015. The plaintiff was arrested and detained for 24 hours. However, in another 2018 case of *Mogakane*[660] the court awarded an amount of R200 000 – 00 as damages for the unlawful arrest and detention which lasted for a period of about 72 hours and an amount of R150 000 – 00 as damages for the assault that took place on the plaintiff in 2015 (the same year as in *Fuduswa* above). The court in the *Mogakane* case held that an appropriate award of damages that is calculated per day for unlawful detention should be R100 000 – 00.[661] The award of R200 000 – 00, if calculated on a daily rate, amounts to R66 666 – 66 for unlawful arrest and detention. The facts of this case appear to be more serious than the facts of the *Fuduswa* case discussed above. However, the court in *Fuduswa* awarded R70 000 – 00 and the daily rate for *Mogakane* is R66 666 – 66. Furthermore, in *Tate v Minister of Police*,[662] the court found no reason to disagree with the legal representatives of both parties in that the daily award for unlawful arrest and detention should be R25 000 – 00. The period of detention of the plaintiff in this matter was three days and a globular amount of R75 000 – 00 was awarded for the unlawful arrest and detention that occurred in 2015 (the same year as *Fuduswa* and *Mogakane* above).[663] The issue that remains is that it is not clear which method was relied upon by the parties' legal representatives in order to reach agreement that R25 000 – 00 should be a daily rate. Furthermore, keeping in mind that the court has the final discretion to determine the appropriate award of damages, on what basis then did the court rely on, to agree with the suggestion of both legal representatives? If one compares the awards in the three cases discussed above,

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659 *Fuduswa v Minister of Police* [2018] JOL 40153 (ECG).

660 Mogakane at [22].

661 *Mogakane* at [22].

662 *Tate v Minister of Police* [2018] JOL 40059 (ECM) (hereinafter referred to as "*Tate*").

663 *Tate*.

there is disparity in the amount of damages, and more particularly the award in the *Tate* case, which has a daily rate of R40 000 – 00 less than the awards in *Fuduswa* and *Mogakane*.

In *Mkwati*,[664] the court decided that an amount of R560 000 – 00 for unlawful arrest and a period of about 31 days of unlawful detention was an appropriate award. If calculated on a daily rate, the amount of damages would be R18 064 – 52. Even without attempting to calculate the daily rate based on the globular amount of damages, it is still questionable how the court determined the amount of R560 000 – 00 and what particular method was used, other than taking into consideration previous awards and the facts of the particular case. It is the researcher's submission that some sort of accurate and mathematical calculation should prevail in such instances.

3.5.2.2 An analysis of cases from 2019

In the case of *Mphindwa v Minister of Police*,[665] the court awarded damages in the amount of R480 000 – 00 for the unlawful arrest and detention of a plaintiff who was detained for 5 days in April 2015. This award should be compared with the award of damages in the *Mkwati* case, where damages were awarded in the amount of R560 000 – 00 for detention for a period of 31 days. If one has to compare the awards in 2018 and consider the year in which the incident occurred, with a 2019 award, it is apparent from the calculation that the awards are disproportionate. Albeit, in all instances, the award is for unlawful arrest and detention.

In *De Klerk v Minister of Police*[666] the SCA awarded damages in the amount of R330 248 – 00 for unlawful arrest and detention for a period of 8 days, which occurred in December 2012. This award is compared with the award in the *Mphindwa* case and there is a clear disparity in the amount awarded in light of the number of days in detention and the facts of the case. Furthermore, in *Mtola v Minister of Police*,[667] the court decided that an amount of R125 000 – 00 for unlawful arrest and detention for a period of 5 days was fair and reasonable. When arriving at this decision, the court took

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664 *Mkwati*.

665 *Mphindwa v Minister of Police* [2019] JOL 41245 (ECM) (hereinafter referred to as "*Mphindwa*").

666 *De Klerk v Minister of Police* 2018 2 All SA 597 (SCA) at [56] (hereinafter referred to as "*De Klerk*").

667 *Mtola v Minister of Police* [2019] JOL 41184 (ECM) at [29] (hereinafter referred to as "*Mtola*").

into consideration previous awards that were made in comparable cases.[668] What remains uncertain is which cases were actually used as authority in order for the court to make this comparison. It is the researcher's submission that a mere statement that regard is to be given to previous awards in comparable cases is insufficient grounds to justify the award of a certain amount. In such cases, the rights to personal liberty of an individual are of utmost importance and the only form of *solatium* is monetary compensation.

If the court in the *Mphindwa* case in 2018 awarded an amount of R480 000 – 00 for unlawful arrest and detention for a period of 5 days, it appears highly unfair and unreasonable for a court in the 2019 *Mtola* case to award an amount of R125 000 – 00 for unlawful arrest and detention for a period of 5 days. It appears that the court in the *Mphindwa* case was too generous in awarding such a large amount. Nonetheless, the awards are disproportionate and as a result, different plaintiffs are awarded different amounts by different courts for similar facts on infringements of personal liberty rights.

3.5.2.3 An analysis of cases from 2020

In the case of *Madyibi*[669] the court awarded an amount of R40 000 – 00 for unlawful arrest without a warrant and unlawful detention, to a plaintiff who was arrested and detained for 1 day in 2017. The court found that the arrest without a warrant and the detention was unlawful because the peace officer arrested and detained the suspect before the police investigations were complete. In *Mjali*[670] the plaintiffs were unlawfully arrested without a warrant and detained from 09:00 on 28 September 2014 to 16:00pm on 30 September 2014 when they were released without being charged and without appearing in court. In this case, the court awarded an amount of R200 000 – 00 to each of the plaintiffs for their unlawful arrest without a warrant and subsequent detention for a period of 55 hours.[671] When comparing the award in the *Madyibi* case with the award in the *Mjali* case, it is evident that there is disparity. In *Madyibi*, an

668 *Mtola* at [29].
669 *Madyibi* at [39].
670 *Mjali* at [1].
671 *Mjali* at [104].

amount of R40 000 - 00 was considered fair and just for arrest and detention for one day. However, the court in *Mjali* found that it was fair and just to award an amount of R200 000 – 00 for arrest and detention for almost two and a half days. If the amount of R200 000 – 00 in *Mjali* is to be calculated on a daily rate, the estimated daily rate would be approximately R66 666 – 66. Clearly this amount is not proportionate to the amount awarded in the *Madyibi* case for unlawful arrest without a warrant and detention. In another 2020 case of *Samanithan*[672] the appeal court confirmed the award by the court a *quo* of an amount of R80 000 – 00 as damages, to a plaintiff who was unlawfully arrested and detained from 6 March 2017 until 11:00 on 7 March 2017 (for a period of 13 hours). If this award is compared with the awards in *Madyibi* and *Mjali*, it is evident that there is disparity because a higher amount (R80 000 – 00) was awarded for a shorter period of detention (13 hours) in *Samanithan*, as compared to the lower award (R40 000 – 00) for a longer period of detention (1 day or 24 hours) as in the case of *Madyibi*.

After making a comparison with several cases in each of the three years respectively, it is evident that the amounts that were awarded were disproportionate to each other. All the cases referred to above were claims for damages for unlawful arrest without a warrant and detention. Furthermore, it is not only the awards in cases in their respective years that are disproportionate but when comparing the cases from one year to the other, there is also disparity. Therefore, the amounts awarded do not increase in value every year. After examining the amounts awarded in 2018 and then in 2020, there are instances where a lower amount is awarded in 2020 based on similar facts to a case where a higher amount was awarded in 2018.

3.5.3 A proposed mathematical method to calculate fair and reasonable damages for the unlawful actions of peace officers and for violations of the constitutional rights of suspects

It may be more accurate or mathematically correct to calculate damages by means of a specific method of calculation. One would start off by determining what issues need to be considered for the calculation of damages. For example, the arrest or detention

672 *Samanithan* at [5].

of the plaintiff or the assault on the plaintiff. Then, one would refer to previous case laws which relate to the specific issue such as unlawful arrest, detention or assault. This means that there has to be a common denominator as a basis. Several cases with their amounts of damages which relate to one aspect is to be placed under one category. These cases may vary from year to year, for example one case on unlawful arrest and detention can be a 2002 case and another a 2017 case. A group of about ten or fifteen cases, or more, on the particular aspect can be researched and the award of damages in each are to be recorded separately. The number of cases chosen may vary, however, the more cases researched and used on similar facts may strengthen the accuracy of the average finding. The court cases that should be selected are South African cases of the High Court, SCA and the Constitutional Court. The reason for this limitation is that the judgments of these three courts are published for the public to refer to and the reasoning and judgments of the courts have a binding effect. The next step would be to take the Consumer Price Index (CPIX) rate for the current year (for example year 2018) and divide that figure by the CPIX rate for the year in which a court already awarded damages in the researched case. The result is multiplied with the actual award in the researched case and the final amount is the new amount of damages based on CPIX calculation. This step must be repeated for each and every case researched for the particular aspect. Each of the current amounts must be added together (for example the ten or fifteen amounts) and that amount must be divided by the number of cases (for example ten or fifteen) to determine the average amount of damages. This final amount would be a fair and reasonable amount of damages, taking into account the awards in previous cases and the facts of the particular case. In order to determine the CPIX rate, reference must be made to the Quantum Year Book.[673] This book is published annually and sets out the case law for unlawful arrest and detention and assault, with the CPIX rates. It is not clear why courts do not make use of this book or the calculations included in the book to calculate damages on these aspects. Despite the existence of this book with the proposed figures and cases, courts prefer to continue using awards in previous cases as a general method. Despite the researcher's argument in favour of the proposed method of calculating damages, there may be limitations to the practice of such a method. These limitations include a lack of training of judicial officers in the precise method of calculation or even a lack of

673 Koch *The Quantum Yearbook* at 2-42.

persons in a position to train judicial officers on the method of calculation. These limitations may be overcome through the introduction of programs, seminars, tutorials or written guidelines which can be published for use by the relevant persons.

In addition to using the awards in previous cases and the facts of the particular case to determine the average amount of damages, one should also take into account the degree of pain and suffering that the plaintiff (suspect) suffered as a result of the unlawful arrest and detention or assault. This is determined by the value of the evidence tendered by the plaintiff or expert witnesses during the trial. In order to illustrate the proposed method of calculations explained, the researcher uses a hypothetical example as set out hereunder.

3.5.3.1 Hypothetical example of proposed method

In 2018, a suspect is arrested and detained for 24 hours in a police station holding cell. After the expiry of the 24 hours, he is released. He brings a civil action against the State for damages that arose from unlawful arrest and detention. He alleges that peace officers arrested and detained him for personal reasons that arose as a result of a private civil agreement with one of the peace officers. The arrest and detention were a form of punishment in order for the peace officer to extract certain information from the plaintiff. The court found that the arrest and detention were indeed unlawful and then had to determine the amount of damages to be awarded.

Three previous cases are researched and these cases dealt with unlawful arrest and detention. The fair and reasonable amount of damages ought to be calculated as follows (the CPIX for 2018 is 7123):

Case	Year	Damages	CPIX	Current calculated damages
Seria v Minister of Safety and Security and others	2005	R50 000 – 00	3291	R108 000 – 00
Minister of Safety and	2008	R100 000 – 00	4114	R173 000 – 00

Security v Moloi[674]				
Mathe v Minister of Police	2017	R140 000 – 00	6720	R148 000 – 00

The current calculated damages for all three cases are added together to total R429 000 – 00. This amount is divided by three to determine the average amount which is R143 000 – 00. This final amount should be the fair and reasonable damages that ought to be awarded in 2018 for an arrest and detention for a period of 24 hours.

This section forms an important aspect of the objectives of the study as well as the primary research question that the researcher aims to answer. The literature on this subject as well as the comments and findings by judicial officers in the cases indicate that there is an acceptance or approval of the existing general method of calculating damages. The authors and the courts clearly state that the amounts that are awarded should be proportionate to the injury suffered by the suspect. The researcher concurs with these views because the suspect should be properly compensated for the infringement of his constitutional rights. However, the fact that the authors and courts have not made any recommendations to develop or mathematically quantify the calculation of the amount of damages is an issue that must be addressed.

3.6 Chapter conclusion

Delictual liability and the requirements thereof are important aspects of the discussion because it is one of the consequences of the unlawful actions of peace officers. Delictual liability and damages are linked because if the court finds that delictual liability exists, the court must also determine an amount of damages for the delictual actions. The result of the unlawful actions of peace officers is the infringement of the right to personal liberty. This is an important aspect of the subject because it deals with the constitutional rights of a suspect. Literature and case law on these aspects have been discussed and critically analysed. The gaps that remain in the law have also been highlighted. There is no doubt that there is a lack of literature with regard to

674 *Minister of Safety and Security v Moloi* (FSB case A262/2005, 28 February 2008).

alleviating the problems that arise as a consequence of a peace officer's unlawful actions. Furthermore, the poor conditions and overcrowding in police station holding cells are another consequence of the unlawful actions of peace officers. A new mathematical method of calculating damages as opposed to using awards in previous cases should be introduced so that suspects who have suffered as a result of the unlawful actions of peace officers, are fairly compensated for the infringements of their constitutional rights. All the aspects that were discussed in this chapter, form part of the consequences of the unlawful actions of peace officers. Once the unlawful actions have been minimised, the consequences will be minimised and there will be a reduction in violations of the constitutional rights of a suspect.

The next chapter deals with the principles of international and regional law that relate to an arrest without a warrant, detention, the use of force on a suspect and the conditions in police station holding cells which infringe or violate the constitutional or human rights of a suspect. It is important to consult international and regional law in order to determine whether South Africa is complying with its international and regional legal obligations.

CHAPTER FOUR

INTERNATIONAL AND REGIONAL LAW WITH REGARD TO AN ARREST WITHOUT A WARRANT, DETENTION, THE USE OF FORCE AND THE HUMAN RIGHTS OF SUSPECTS

4.1 Introduction

This chapter includes a discussion and examination of the international and regional law and human rights instruments relating to an arrest without a warrant, detention, the use of force and the human rights of a suspect. Furthermore, the chapter also deals with the problems that are associated with peace officers in the proper exercise of their duties when making an arrest without a warrant, detaining and using force on suspects. The chapter commences with a discussion of international law. International human rights instruments such as the UDHR and the ICCPR relating to an arrest without a warrant, detention and human rights are examined. The provisions of the UDHR and the ICCPR are analysed and compared with domestic provisions to determine whether South Africa is complying with its international obligations. Particular attention is given to the United Nations Committee on its concluding observations with regard to the ICCPR with a critical analysis on whether South Africa is adhering to the recommendations of the international community. In addition, international human rights instruments such as the UDHR, ICCPR and the UNCAT are relevant in the examination of the principles that relate to the use of force. Attention is also given to the concluding observations and recommendations of the Committee against Torture with a critical discussion on whether South Africa has implemented the recommendations of the Committee as part of the process of developing its domestic law in line with international standards for the prohibition on the use of excessive force. In this regard, the PCTPA is also discussed and analysed to determine its effectiveness in South Africa. The UDHR, ICCPR and the UNCAT are chosen for discussion and analysis because South Africa is bound by the provisions of these instruments. A discussion of regional law will highlight the importance and meaning of regional law. The AChHPR is a regional human rights instrument within the African continent and it is therefore relevant to South Africa with regard to an arrest without a

warrant, detention and the use of force or torture. The chapter will focus on the concluding observations and recommendations of the African Commission and whether South Africa has taken steps to implement the recommendations of the African Commission so that regional compliance is discernable. The relationship between the international and regional human rights instruments and the domestic legal provisions in South Africa is explained and international law as an interpretive source of fundamental rights is analysed. Furthermore, the SAHRC is an important piece of legislation that was enacted to ensure the proper promotion of the human rights of suspects. However, the effectiveness of this legislation ought to be analysed. Throughout the discussions and analysis of the aspects highlighted above, the researcher will also embark on a critical analysis of the comments and opinions of existing literature. This criticism will assist the researcher to deal with the objectives of the chapter.

Prior to commencing with the discussion and analysis of the various aspects highlighted above, the objectives of this chapter ought to be emphasised (as set out in chapter 1). The first objective of this chapter is to examine and analyse international and regional law and human rights instruments in relation to an arrest without a warrant, detention and the use of force and its relevance to South Africa. The second objective of this chapter is to establish whether, or to what extent, South Africa is compliant with its international and regional obligations to promote and protect the constitutional and human rights of suspects. The rest of this chapter aims to deal with the objectives that have been set out herein. A critical discussion and analysis of the international and regional law and human rights instruments will lead to a determination of where South Africa finds itself internationally and will result in the primary research questions (as set out in chapter 1) being answered. It is important to commence with a discussion and analysis of international law.

4.2 International law

According to Acikgonul,[675] the principles of international law derive from the resolutions of international organisations, treaties and other declarations that contain

[675] Acikgonul *McGill Journal of Dispute Resolution* Volume 5 2018-2019.

normative rules. Besson[676] defines international law as the legal order which is meant to structure the interaction between State Parties who participate and shape international relations. According to Wolfrum,[677] international law is constituted by legally binding norms which derive from different sources which relate to two different, albeit interrelated, issues, namely, the process and procedure through which binding rules of international law emanate. International law includes human rights instruments that relate to an arrest without a warrant, detention and the use of force on a suspect. International human rights law focuses on the State's obligation to protect the 'inherent dignity' and 'inalienable rights' of individual human beings.[678] Omar[679] explains that international human rights law exists in two forms: treaty law and customary international law. A treaty is defined by article 2(1)(a) of the Vienna Convention on the Law of Treaties[680] as an international agreement that is concluded between States in writing and governed by international law, whether embodied in a single instrument or in two or more related instruments. However, customary international law finds its source in the widespread consistent practice of States.[681] International custom is seen as a source of international law because the idea is that if States act in a consistent manner, out of a sense of legal obligation, then such States may be acting in such a manner because they have a sense of legal obligation.[682] If a sufficient number of States act in such a consistent manner, out of a sense of legal obligation, for a long period of time, a new rule of international law is created.[683] South Africa is a party to several treaties which are embodied in legal instruments such as the ICCPR, UNCAT and the AChHPR. Furthermore, South Africa is also bound by customary international law such as the UDHR. The discussion below deals with the international legal instruments on an arrest without a warrant and detention in relation to human rights, with specific reference to the UDHR and the ICCPR.

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676 Besson 'Theorizing the Sources of International Law' in S Besson J Tasioulas (eds) *The Philosophy of International Law* at 163.

677 Wolfrum *Sources of International Law* at [1]-[6].

678 UDHR.

679 Omar *International Law* at 701.

680 *Vienna Convention on the Law of Treaties* https://www.refworld.org/docid/3ae6b3a10.html (5 January 2019) (hereinafter referred to as "the Vienna Convention").

681 Buergenthal and Murphy *Public International Law* at 269, 389.

682 Baker 2010 *EJIL* Volume 21 Issue 1 at pages 173-204.

683 *Asylum (Columbia v. Peru)* [1950] ICJ Rep 266.

4.2.1 International legal instruments which deal with arrest without a warrant and detention in relation to human rights

The legal principles of an arrest without a warrant and detention are contained in international human rights law and instruments. Therefore, the discussion of an arrest without a warrant and detention below will commence with the definition of arrest and detention in international law and thereafter the discussion will move onto the relationship between domestic legal provisions and international law on an arrest without a warrant and detention. The United Nations Committee[684] defines the term "arrest" as the act of taking a suspect into State custody in terms of the law or by compulsion of any kind which begins at the time the suspect is restrained from movement and freedom until the suspect is brought before a court of law and an order is made either to release him or to continue with his detention. The United Nations Committee[685] also defines the terms "detention" as the act of confining a suspect to a restricted place, whether it is in continuation of an arrest or not under a restraint that prevents the suspect from continuing with his normal duties and chores and which prevents him from being with family or at work or leisure. In addition, Dorr[686] describes detention as the holding of suspects beyond their will thereby depriving them of their freedom to physically leave a place. With this in mind, the right to liberty does not grant freedom from detention, but obliges States to set up substantive preconditions and procedural requirements for detention.[687]

Since the definitions of arrest and detention in international law have been discussed, it follows that the human rights instruments such as the UDHR and the ICCPR that govern the principles of an arrest without a warrant and detention must be discussed in order to establish whether South Africa is complying with international standards. Furthermore, the domestic legal provisions such as section 11 and 12 of the Constitution require further discussion (these provisions were discussed in chapter 2)

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684 United Nations Commission on Human Rights: Committee on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile https://digitallibrary.un.org/record/642868?ln=en (accessed on 12 August 2021) (hereinafter referred to as "Committee on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile").

685 Committee on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile.

686 Dorr *Arbitrary Detention* at [1].

687 Dorr *Arbitrary Detention* at [1].

in the international and human rights context. Despite the fact that these domestic legal provisions are every similar to legal provisions contained in the human rights instruments, the main issue is whether South Africa is making efforts to ensure that it complies not only with the domestic legal provisions but also with the international human rights instruments. In addition, the discussion also requires a critical analysis of whether South Africa has made efforts to comply with the recommendations of the UN Human Rights Committee which seeks to improve and promote the due exercise of human rights.

4.2.1.1 UDHR with regard to an arrest without a warrant, detention and human rights

Articles 3 and 9 of the UDHR are the relevant provisions that relate to an arrest without a warrant and detention and the human rights of suspects. Therefore, a detailed discussion and analysis of these provisions must be dealt with. The UDHR is a historic document which outlines the rights and freedoms of persons.[688] It was the first international agreement which set out the basic principles of human rights.[689] Although the UDHR is not legally binding on a State, the contents of the UDHR have been elaborated and incorporated into subsequent international treaties, regional human rights instruments, and national constitutions and legal codes.[690] Steiner and Alston[691] have argued that because countries have consistently invoked the UDHR for more than 50 years, it has become part of customary international law.[692] Articles 3 and 9 of the UDHR is of particular importance to the discussion of international human rights with regard to an arrest and detention. The reason why these articles are selected for discussion is that the provisions of sections 11 and 12 of the South African Constitution are similar to the provisions of articles 3 and 9 of the UDHR, respectively. With regard to compliance of the provisions with the UDHR, a pertinent

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688 Equality and Human Rights Commission https://www.equalityhumanrights.com/en/what-are-human-rights/what-universal-declaration-human-rights (accessed on 12 August 2021).

689 Equality and Human Rights Commission https://www.equalityhumanrights.com/en/what-are-human-rights/what-universal-declaration-human-rights (accessed on 12 August 2021).

690 United Nations Peace, Dignity and equality on a healthy planet https://www.un.org/en/sections/universal-declaration/human-rights-law/index.html (accessed on 12 August 2021).

691 Steiner and Alston *International Human* 60, 69.

692 Hannum 1998 *Health Hum Rights* Volume 3 Issue 2 at 145.

feature is whether the existing laws or principles should become more stringent with regard to the proper exercise of police powers to arrest without a warrant and detain a suspect and promote the rights of suspects.

Article 3 of the UDHR provides that "everyone has the right to life, liberty and security of person." Petersen[693] argues that the right to life is often claimed to be the most important of all human rights because life is the precondition for the exercise of any other right and State parties are not only required to respect this provision, but also to ensure the promotion of the rights of the UDHR. Section 11 of the South African Constitution is founded on article 3 of the UDHR and guarantees the right to life. Therefore, South Africa has, to an extent, ensured the promotion of the right to life through its Constitution. However, the pertinent issue is whether the protection of the right to life as contained in the Constitution is sufficient and effective in alleviating the violation of human rights. According to Scheinin,[694] the international protection of the right to security of person can be seen to relate to the positive obligations of the State to prevent, investigate or punish horizontal interferences with an individual's enjoyment of human rights by other members of the society. The provisions of section 12[695] of the South African Constitution are similar to the wording of the provisions of article 3 of the UDHR with regard to the right to security of person. Although Petersen[696] and Scheinin[697] argue about the importance of the rights to life and security of person respectively, both domestically and internationally, they fail to critically discuss whether or not South Africa is fully compliant with the provisions of this article. It is important that the relevant provisions of the Constitution are adequate to ensure compliance with customary law and to consider whether any new legislation can be introduced which is specifically intended for peace officers to ensure better compliance with customary law.

Article 9 of the UDHR provides that "no one shall be subjected to arbitrary arrest, detention or exile." Dorr[698] states that every deprivation of liberty must be free of

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693 Petersen *International Protection: Right to Life* at [1].

694 Scheinin *International Protection: Rights to Security* at [13].

695 Section 12(1) of the Constitution provides as follows: "Everyone has the right to freedom and security of the person".

696 Petersen *International Protection: Right to Life* at [1].

697 Scheinin *International Protection: Rights to Security* at [13].

698 Dorr *Arbitrary Detention* at [3] and [21].

arbitrariness. According to Doswald-Beck,[699] 'deprivation of liberty' presupposes some form of detention and the avoidance of 'arbitrary deprivation of liberty' constitutes three main conditions: (a) the detention must be based on existing law; (b) the grounds for the detention must be reasonable and must be in accordance with the aim and purpose of human rights; and (c) procedures must be followed to ensure that the previous two conditions are respected. Although Dorr[700] and Doswald-Beck[701] explain the meaning of arbitrary deprivation of liberty and the conditions thereof, the authors fail to critically analyse whether this customary principle is adhered to in South Africa and whether the rights of suspects are duly protected. The ICCPR is an international human rights covenant which also deserves attention in light of the fact that South Africa is bound by its provisions.

4.2.1.2 ICCPR with regard to an arrest without a warrant, detention and human rights

Similar to the provisions of the UDHR, article 9 of the ICCPR is relevant to the discussion of an arrest without a warrant, detention and the human rights of suspects as it forms part of international standards that govern the promotion of human rights of suspects. Furthermore, the UN Human Rights Committee oversees State parties' adherence to the provisions of the ICCPR and have made concluding observations and recommendations to South Africa. This aspect will be critically analysed. The United Nations General Assembly adopted the ICCPR on 16 December 1966 which came into force on 23 March 1976.[702] South Africa signed the ICCPR on 3 October 1994 and thereafter ratified the ICCPR on 10 December 1998.[703] As a result of this ratification, South Africa is legally bound by the provisions of this international legal instrument.[704] A discussion and analysis of the relevance of article 9 of the ICCPR to the South African context is important to determine international compliance by South Africa.

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699 Doswald-Beck *Human Rights* at 713-714.

700 Dorr *Arbitrary Detention* at [3] and [21].

701 Doswald-Beck *Human Rights* at 713-714.

702 ICCPR; de Londras 'The Right to Challenge the Lawfulness of Detention: an international perspective on US detention of suspected terrorists' at 224.

703 ICCPR.

704 ICCPR.

Article 9 of the ICCPR

> "1. Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

According to Joseph and Castan,[705] the right to liberty and security of a suspect are protected by article 9 of the ICCPR. However, with regard to the right to liberty, article 9 does not grant complete freedom from arrest or detention.[706] South Africa is a State party to the ICCPR and is therefore bound by the obligation to promote human rights that is in accordance with the provisions of article 9, however, the researcher submits that there are instances where the international human right to security of person is violated because peace officers act unlawfully (as discussed in chapter 2). Moreover, the International Court of Justice (ICJ) in its *dictum* in the *Hostages in Case Concerning United States Diplomatic and Consular Staff in Tehran*[707] case stated that, "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated

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705 Joseph & Castan *Part III Civil and Political Rights* at 10.

706 Joseph & Castan *Part III Civil and Political Rights* at 10.

707 *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran); Order*, 12 V 81, International Court of Justice (ICJ), 12 May 1981.

in the Universal Declaration of Human Rights" in particular Article 3 of which guarantees "the right to life, liberty and security of person". Notwithstanding that a State may not have ratified or otherwise adhered to any of the preceding human rights treaties, such a state is nonetheless obligated to promote and or ensure a suspect's right to respect for his liberty and security. All human beings have the right to liberty and security.

According to Jordan,[708] the detention of a suspect should be an exception rather than a rule. However, a suspect can be detained according to a specific list of grounds.[709] In this regard, Casedevall[710] explains that the specific grounds are meant to be the only grounds that legalise or justify detention of a suspect. A suspect who is detained must be informed of the reason for his detention and must be given the opportunity to challenge the lawfulness of his detention.[711] Any derogation from these provisions is unacceptable.[712] Since the lawfulness of detention is determined by both national and international law, the international law right to challenge the lawfulness of detention includes the right to challenge compatibility with both national and international levels, and the review of the lawfulness of detention must not be limited to compliance with domestic law only.[713] de Londras[714] explains that this does not mean that international human rights law must be justiciable in domestic law. Instead, it merely requires that it can be a factor that is challenged and taken into account by the judiciary.[715] Alleweldt

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708 Jordan *ILJ* 44 at 503, 505-6.

709 The specific list of grounds are as follows: (a) to bring a convicted person to a correctional facility; (b) to secure a court order; (c) to bring a suspect to court before a presiding officer because the suspect has committed an offence or to prevent the suspect from committing an offence; (d) to bring a child suspect before a competent authority for educational reasons; (e) to prevent the spreading of diseases and infections and to control persons with drug addiction, mentally ill persons; (f) to control the issue of illegal entry of persons into the country and the exit of persons and extradition or deportation.

710 Casedevall *El Conveni europeu de drets humans, el Tribunal d'Estrasbourg I la Seva jurisprudencia*.

711 de Londras 2007 *Journal of Conflict and Security Law* Volume 12 Issue 2 at 242; *Ilombe and Shandwe v Democratic Republic of the Congo* Complaint No. 1177/2003, Views adopted 16 May 2006, UN doc. CCPR/C/86/D/1177/2003 - it is not acceptable to detain someone for breach of national security without substantiating the complaint against them.

712 *Ilombe and Shandwe v Democratic Republic of the Congo* Complaint No. 1177/2003, Views adopted 16 May 2006, UN doc. CCPR/C/86/D/1177/2003.

713 *A v Australia,* HRC, Complaint 560/1993, Views Adopted 30 April 1997, UN doc. CCPR/C/59/D/560/1993; *Van Alphen v Netherlands* Complaint No. 305/1988, Views adopted 23 July 1990, UN doc. CCPR/C/39/D/305/1988; *Campbell v Jamaica* Complaint No. 618/1995, Views adopted 20 October 1998, UN doc. CCPR/C/64/D/618/1995; *ECtHR, Elci and others v Turkey*, judgment of 13 November 2003, No.63129/15 at [680] – [682].

714 de Londras 2007 *Journal of Conflict and Security Law* Volume 12 Issue 2 at 245.

715 de Londras 2007 *Journal of Conflict and Security Law* Volume 12 Issue 2 at 245.

and Fickenscher[716] argue that internationally, arbitrary detention should be prevented, irrespective of whether or not it is prohibited in the national legislation of a State. However, Marcoux[717] correctly argues that although these guidelines are procedural in purpose, and have a limited role in determining the general standard of protection that is offered by "arbitrary" with regard to substantive laws, these principles or guidelines do not provide protection for suspects against arbitrary treatment. Furthermore, De Londras[718] argues that it is important that the power of a peace officer to arrest and detain a suspect is regulated by law and is exercised in compliance with the accepted international law and standards. Although the authors[719] correctly emphasise that a suspect can be detained in certain circumstances and that an unlawful detention ought to be challenged domestically and internationally in light of article 9 of the ICCPR, however there are issues that go beyond just these aspects of detention because a determination ought to be made on whether the State (peace officers), such as South Africa is indeed, complying with the provisions of the ICCPR. Although the researcher is in agreement with the comment made by Marcoux,[720] it is argued that there is no legal basis to prescribe to peace officers how they should go about exercising their powers to detain within the prescripts of the law so that the rights of suspects are duly protected. Furthermore, the researcher argues that there are no penalty clauses in any legislation that can be used as a deterrent against peace officers who act unlawfully and in breach of the provisions of the Constitution and the ICCPR.

South Africa submitted its report in response to the concluding observations of the UN Human Rights Committee some 14 years after the due date for the initial submission, on 27 April 2016.[721] The concluding observations of the initial report of South Africa highlighted concerns about a lack of awareness of the ICCPR and the Optional

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716 Alleweldt and Fickenscher (ed) *The Police* at 1-2.

717 Marcoux 1982 *ICLR* Volume 5 Issue 2 at 370.

718 de Londras 2007 *Journal of Conflict and Security Law* Volume 12 Issue 2 at 240. The right to be free from arbitrary detention forms part of internal customary law.

719 Casedevall *El Conveni europeu de drets humans, el Tribunal d'Estrasbourg I la Seva jurisprudencia*; de Londras 2007 *Journal of Conflict and Security Law* Volume 12 Issue 2 at 242; Alleweldt and Fickenscher (ed) *The Police* at 1-2.

720 Marcoux 1982 *International and Comparative Law Review* Volume 5 Issue 2 at 370.

721 Concluding observations on the initial report of South Africa: Human Rights Committee https://digitallibrary.un.org/record/1317444?ln=en (accessed on 23 July 2021).

Protocol to the International Covenant on Civil and Political Rights[722] (ICCPR-OP1) and the inconsistencies between the text of the Constitution, which provides that a self-executing provision of an international agreement approved by parliament is considered to be part of domestic law, and the information contained in the core document which states that the provision of a treaty cannot be invoked before or directly enforced by the courts, and the following recommendation was made to South Africa:[723]

> "The State party should consider taking measures to give full legal effect to the Covenant under domestic law, and make more vigorous efforts to raise awareness about the Covenant and the Optional Protocol among judges, lawyers, prosecutors and the public at large. In the event of a violation of the Covenant, the State party should ensure access to an effective remedy, in accordance with article 2 (3)."

In analysing the concluding observations of the UN Human Rights Committee, there is an indication that the Committee is unhappy with the delay in submitting the periodic report and with the fact that South Africa has not done enough to create awareness about the provisions of the ICCPR in South Africa. Hence, the researcher argues that peace officers also lack the insight into the obligations that the provisions of the ICCPR create. The researcher argues that if peace officers are not aware about the international obligation to protect the rights of suspects, it will be unreasonable to expect peace officers to comply with domestic legislation that is enacted as a result of the ICCPR. The researcher submits that the concluding observation and recommendations were made as recently as 2016 which is an indication that South Africa's compliance with its international obligations with regard to the ICCPR is questionable. Furthermore, in response to South Africa's initial periodic report to the UN Human Rights Committee and the Committee's concluding observations and

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722 United Nations General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights https://www.refworld.org/docid/3ae6b3bf0.html (accessed on 23 July 2021). The ICCPR-OP1 was opened for signature by the UN General Assembly on 19 December 1966. South Africa, however, accepted the ICCPR-OP1 as recent as 28 August 2002.

723 Concluding observations on the initial report of South Africa: Human Rights Committee https://digitallibrary.un.org/record/1317444?ln=en (accessed on 23 July 2021).

recommendations, Tait[724] suggests that South Africa reviews and revises the statutory framework for arrest and police detention, and puts in place alternative measures, to ensure that the deprivation of liberty is truly treated as a measure of last resort. In such an instance, the researcher refers to the arguments set forth in paragraph 2.3.3. in which the comments in *Sekhoto* and *Raduvha* are critically analysed. Furthermore, the suggestions laid down by Tshehla[725] are relevant because despite the suggestion that the legislature amend the existing legislation to prescribe the manner in which a discretion must be used, no attempts have yet been made by the legislature and there is no evidence to indicate that South Africa has taken the initiative to implement these recommendations. The important link between the discussion in 2.3.3 and the discussion in *4.2.1.2* is that preference ought to be given to the constitutional and human rights of suspects as opposed to providing wide powers of discretion to peace officers when making an arrest without a warrant. A restriction of the powers of peace officers to exerciaw a discretion will be considered due compliance with international law and human rights instruments.[726] The researcher is therefore of the view that the rejection of the fifth jurisdictional fact by the court in *Raduvha* is not in line with the obligations established by the human rights instruments because human rights instruments promote the human rights of suspects and do not make any provision for widening the powers vested in peace officers.

The UDHR and the ICCPR are the relevant international human rights instruments that pertain to an arrest without a warrant, detention and the human rights of suspects. The relevant provisions of these human rights instruments have been discussed and critically analysed. Furthermore, the concluding observations and recommendations of the UN Human Rights Committee are important in determining whether South Africa is compliant with its international obligations. The recommendations of the Committee assist in determining what measures South Africa can introduce to develop its

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724 Tait https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23066_E.pdf (accessed on 7 August 2021).

725 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at [95].

726 UDHR; ICCPR. The international instruments, in a nutshell, proscribe arbitrary detention. In *Le Roux v Minister of Safety and Security* 2009 (4) SA 491 (NPD), the court interpreted the instruments as entailing that it is not sufficient to focus on the lawfulness or otherwise of the arrest and detention. In other words, while an arrest may be lawful in the sense that it complies with the national law, it may still be found to be arbitrary.

domestic law to bring it in line with international law. Despite the critical analysis of the literature on the human rights instruments and the concerns and recommendations of the UN Human Rights Committee, it appears that South Africa is far from attaining and achieving full compliance with international standards as reflected in the UDHR and the ICCPR. This chapter not only focuses on international human rights with regard to arrest without a warrant and detention, but also deals with an important aspect of human rights which is the use of force on suspects. The relevant international human rights instruments that deal with the use of force will be critically analysed in the South African context to determine whether South Africa is complying with international standards.

4.2.2 International legal instruments with regard to the use of force in relation to human rights

The use of force directly relates to the international prohibition on torture and the protection against cruel, inhuman or degrading punishment or treatment. Therefore, the discussion on the use of force below will commence with the definition of torture in international law and thereafter the discussion will move onto the relationship between domestic legal provisions and international law on the use of force. Klayman[727] and Cherubin-Doumbia[728] define torture as a serious abuse of human rights which is strictly forbidden by international law and freedom from torture, cruel, inhuman or degrading punishment or treatment is a fundamental right that must be protected if human security is to be achieved in society, which includes the security of suspects. According to Keightley,[729] torture amounts to a violation and the denial of the right to human dignity. In addition to the fundamental right to human dignity, Rodley and Pollard[730] state that the acts of torture and other forms of ill-treatment may violate the

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727 Klayman 1978 *Temple Law Quarterly* Volume 51 Issue 3 at 455. See also Human Rights Education Associates "Torture, Inhumane or degrading treatment" http://www.hrea.org/index.php?base_id=134); Cherubin-Doumbia 2014 at 43 http://www.sahrc.org.za/home/index.hph?ipkContentID=109&ipkMenuID=91 (accessed 9 August 2018).

728 Cherubin-Doumbia http://www.sahrc.org.za/home/index.hph?ipkContentID=109&ipkMenuID=91 (accessed 9 August 2018).

729 Keightley 1995 *SAJHR* Volume 11 Issue 3 at 379.

730 Rodley and Pollard *The Treatment of Prisoners* at 18, uses this as a collective term to cover acts of cruel, inhuman or degrading treatment or punishment. See also *Aksoy v Turkey*, judgment of 18 December 1996 at [64]; *Rehbock v Slovenia*, judgment of 28 November 2000.

rights to security of person, equality and life.[731] Nowak and Suntinger[732] explain that the prohibition against the act of torture has become part of customary international law and has been incorporated in several international instruments. In this regard, Rodley and Pollard[733] state that the prohibition against torture is a general principle of international law and that it constitutes a norm of *jus cogens*. Keightley[734] also explains that this means that States are bound by this principle irrespective of whether or not those States have ratified any of the instruments that prohibit the act of torture. According to the Association for the Prevention of Torture,[735] an abuse of the power when force is used on a suspect can occur when peace officers take undue advantage of their powers by using excessive force to intimidate or extort information from suspects. Section 12(1)(d) and (e) of the South African Constitution deals with the prohibition of torture, cruel, inhuman or degrading punishment or treatment. Chapter 2 entailed a detailed discussion of section 12 in the South African context on the use of force. It must be determined whether or not the provisions of section 12(1)(d) and (e) of the South African Constitution and section 49 of the CPA are sufficient to ensure compliance with international obligations, especially with regard to the protection of the rights of suspects. Furthermore, it must be determined whether there are legislative provisions in domestic law which emanate from international instruments that are specifically aimed at peace officers and the execution of their powers. According to Tait[736] from the African Policing Civilian Oversight Forum, in its current form, section 49 of the CPA permits the use of deadly force against a suspect of a crime involving actual or attempted infliction of serious bodily harm; further, there is no

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731 The judgment of Chaskalson P in the South African Constitutional Court's decision in *S v Makwanyane & Mchunu* (CCT/3/94, 1995 (3) SA 391 (CC)) at 10, where, in considering the constitutionality of the death penalty, various rights in the South African interim Constitution are identified as being relevant, including the right to be protected from cruel, inhuman or degrading punishment (s 11(2)); the right to life (s 9); the right to equality (s 8); and the right to dignity (s 10).

732 Nowak & Suntinger *International Mechanisms* at 145. See also Dugard *International Law: A South African Perspective* (1994) at 45 for reference to the United States case of *Filartiga v Pena-Irala* 630F 2 ed 876 (1980) in which it was held that, based on the Universal Declaration of Human Rights, the prohibition against torture had become part of customary international law.

733 Rodley and Pollard *The Treatment of Prisoners* at 70.

734 Keightley 1995 *SAJHR* Volume 11 Issue 3 at 380.

735 Association for the Prevention of Torture https://policehumanrightsresources.org/content/uploads/2013/01/Association-for-the-prevention-of-torture-APT-Monitoring-police-custody-%E2%80%93-a-practical-guide.pdf?x96812 (accessed 7 August 2021) at page 6.

736 Tait https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23066_E.pdf (accessed on 7 August 2021).

requirement that the suspect should pose an imminent threat of death or serious bodily harm to the police officer or anyone in the vicinity to justify the use of deadly force. Accordingly, Tait[737] is of the view that, in its current form, section 49 of the CPA permitting the use of force is inconsistent with standards of international human rights law and with the Constitution. There is no evidence that these suggestions and amendments to section 49 of the CPA have been considered or implemented. The researcher submits that steps must be taken to rectify the inconsistency between section 49 of the CPA and international standards by making the necessary amendment to section 49 of the CPA. Apart from the relationship between domestic legal provisions and international law, the human rights instruments such as the UDHR, ICCPR and UNCAT are important to South Africa in relation to the use of force.

4.2.2.1 UDHR with regard to the prohibition of torture or cruel, inhuman or degrading punishment or treatment

The UDHR is an important document that prohibits any act of force that is excessive and which violates the international prohibition on torture or cruel, inhuman or degrading punishment or treatment. Article 5 of the UDHR makes a clear prohibition on the use of excessive force.

Article 5 of the UDHR

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"

According to Klayman,[738] international law dictates that no person must suffer from torture, cruel, inhuman or degrading treatment or punishment and the United Nations Committee continue to develop international covenants which aim to clarify, improve and implement the objectives of article 5 of the UDHR. Although Klayman[739] promotes the efforts of the UN Committee with regard to developments in the international arena,

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737 Tait https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23066_E.pdf (accessed on 7 August 2021).

738 Klayman 1978 *Temple Law Quarterly* Volume 51 Issue 3 at 456.

739 Klayman 1978 *Temple Law Quarterly* Volume 51 Issue 3 at 456.

the issue is whether South Africa has developed its own legal system to fully accommodate the aims and obligations of the UDHR and other international instruments. It is imperative that peace officers act in accordance with the laws and rules that govern the use of force because the use of force during an arrest is directly related to the violation or infringement of the human rights of a suspect.[740] The wording of article 5 of the UDHR is similar to the wording of section 12(1)(d) and (e) of the South African Constitution. Although these provisions of the Constitution are similarly worded, the researcher submits that these constitutional provisions are insufficient to alleviate the unlawful actions of peace officers and the violations of the rights of suspects. Therefore, there is uncertainty about whether South Africa is completely and practically compliant with its obligation in terms of the UDHR to prohibit torture, cruel, inhuman or degrading punishment or treatment. The aims of the UDHR are indeed reflected in the provisions of the South African Constitution, however, the researcher submits that there is a lack of domestic legislative provisions in South Africa that are directed mainly at peace officers that embody the aims of the UDHR and more importantly, strengthen the prohibition on the use of excessive force. Indeed, it may be argued that the provisions of the ICCPR and UNCAT (which emanate from the provisions of the UDHR) may be appropriate in ensuring that South Africa as a State adheres to its international obligation to prohibit the use of excessive force, however, this aspect is questionable and is dealt with hereunder.

4.2.2.2 ICCPR with regard to torture or cruel, inhuman or degrading punishment or treatment

The ICCPR was adopted in 1966 following the provisions of the UDHR in respect of the prohibition of the use of excessive force. Both the UDHR and the ICCPR have similar wording with regard to torture, cruel, inhuman or degrading punishment or treatment. The provisions of article 7 of the ICCPR deals specifically with the use of force and this article is critically analysed in the South African context. Furthermore, the concluding observations and recommendations of the UN Human Rights Committee is important in the discussion because the concerns and recommendations raised by the Committee relate directly to the lack of legislation in South Africa to

740 UDHR.

promote the human rights of suspects and prevent the use of excessive force. However, the important issue that is addressed is whether South Africa has implemented the recommendations of the Committee and as a consequence, whether South Africa is complying with its international obligation to prohibit all forms of excessive force.

Article 7 of the ICCPR

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

With regard to human rights protection, the guarantee of personal liberty is to be distinguished from the treatment of those deprived of their liberty.[741] Article 7 of the ICCPR contains no definition on the right against cruel, inhuman or degrading treatment. In addition, the Human Rights Committee (HRC) did not draw a list of prohibited acts or establish a distinction between the various forms of punishment or treatment.[742] However, the HRC states that the test that determines inhuman or degrading treatment depends on the circumstances of a case, such as the duration and the manner of the treatment, its physical or mental effects, as well as the gender, age and state of health of the suspect.[743] It should be noted that the provisions of article 5 of the UDHR and article 7 of the ICCPR are similar. Since South Africa ratified the ICCPR, it is committed to submitting periodic reports to the UN Human Rights Committee. Following South Africa's first submission of the report in 2016, the committee made the following recommendations with regard to the use of force in South Africa:[744]

> "27. The State party should:
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> (a) Expedite the work of the Task Team and the Panel of International Experts established by the Ministry of Police in implementing the recommendations of the

741 Dorr *Arbitrary Detention* at [2].

742 General Comment No. 20 *United Nations Compilation of General Comments* page 139 at [4].

743 Communication No. 265/1987, *A. Vuolanne v. Finland* (Views adopted on 7 April 1989), in UN doc. *GAOR*, A/44/40 page 256 at [9.2].

744 Concluding observations on the initial report of South Africa: Human Rights Committee https://digitallibrary.un.org/record/1317444?ln=en (accessed on 23 July 2021).

> Marikana Commission of Inquiry, revise laws and policies regarding public order policing and the use of force, including lethal force by law enforcement officials, to ensure that all policing laws, policies and guidelines are consistent with article 6 of the Covenant and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
> (b) Take all measures necessary, particularly in terms of training and equipment, to prevent law enforcement and security forces from using excessive force or using lethal weapons in situations that do not warrant recourse to such force;
> (c) Ensure that prompt, thorough, effective, independent and impartial investigations are launched into all incidents involving the use of firearms and all allegations of excessive use of force by law enforcement officers, as well as the potential liability of the Lonmin Mining Company for the Marikana incident, prosecute and punish perpetrators of illegal killings and provide effective remedies to victims;"

The recommendations of the UN Human Rights Committee were made in 2016 and South Africa was given until 31 March 2020 to submit its next periodic report and to include in the report specific information on the implementation of the recommendations made in the 2016 concluding observations.[745] However, there is no indication that South Africa has adhered to the 31 March 2020 deadline for the submission of the periodic report. The researcher submits that the failure to submit the periodic report as requested by the UN Human Rights Committee is an indication that South Africa is failing in its duty to comply with international obligations. Furthermore, in response to the recommendations of the UN Human Rights Committee, Tait[746] suggested that South Africa review and revise police training materials and curriculum, and adopt a comprehensive National Instruction on the use of force to ensure that peace officers are adequately trained, capacitated and supported to use force that is proportionate to the circumstances, and at the minimal level necessary, and that appropriate protocols are in place to review use of force incidents. Tait[747] also suggested that South Africa review and revise its PSO to align the role and the function

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745 Concluding observations on the initial report of South Africa: Human Rights Committee https://digitallibrary.un.org/record/1317444?ln=en (accessed on 23 July 2021).

746 Tait https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23066_E.pdf (accessed on 7 August 2021).

747 Tait https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23066_E.pdf (accessed on 7 August 2021).

of the South African Police Service to the standards provided for in the international human rights framework as well as its own Constitution, and in a manner which responds to the evidence-based challenges of taking a rights-based approach to policing. The researcher argues that despite these suggestions that are made in response to the recommendation of the UN Human Rights Committee, the suggestions have not materialised as yet. It is important to note that South Africa did not yet formally respond to the recommendations of the UN Human Rights Committee as requested. This act of non-compliance is an indication that South Africa is doing very little to ensure that peace officers do not continue to violate the human rights of suspects as a result of the use of excessive force. The provisions of the UDHR and the ICCPR have been discussed and analysed. The UNCAT is another important human rights provision that directly applies to South Africa with regard to the use of force.

4.2.2.3 UNCAT with regard to the use of force and torture

The UNCAT is an important human rights instrument which prohibits the use of excessive force internationally. As a result of the ratification by South Africa of UNCAT, domestic legislation such as the PCTPA was enacted. However, the effectiveness of the provisions of the PCTPA with regard to the training on the use of force and the acts of excessive force by peace officers in South Africa is questionable. The text of the UNCAT was adopted by the United Nations General Assembly on 10 December 1984. It came into force on 26 June 1987 and South Africa ratified it in 1998.[748] According to Burgers and Danelius,[749] the UNCAT is an international human rights treaty, under the review of the United Nations, that aims to prevent torture, and other acts of cruel, inhuman or degrading punishment or treatment under international law. Since the convention's entry into force, the absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment have become accepted as a principle of customary international law.[750] The UNCAT follows the

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748 Fernandez 2005 *J Afr Law* Volume 9 Issue No 1 at 133-136.

749 Burgers and Danelius *The United Nations Convention against Torture: a handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* at 1.

750 Committee against Torture https://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4_en.pdf (25 February 2021) at page 2.

structure of the UDHR and the ICCPR. Article 1 of UNCAT is of particular importance in the examination of the use of force in international law.

Article 1 of UNCAT

> "1. For the purposes of this Convention, the term "torture" means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

According to Fernandez and Muntingh,[751] the objective elements of the crime of torture under UNCAT are:[752] the conduct must result in severe physical or mental suffering; the harm must be inflicted intentionally, the conduct must have a certain purpose; the perpetrator must be a public official or someone acting in an official capacity, and the torture excludes pain and suffering arising only from or inherent in acts which are lawfully sanctioned. However, the interpretation of the lawful sanctions' clause leaves no scope of application and is widely debated by authors.[753] The aspect with regard to the lawful sanctions is not only a debatable issue in light of article 1 of UNCAT, but would also amount to being vague in the South African aspect with regard to section 3 of the PCTPA (as discussed hereunder). Nowak[754] clarifies the requirement of *mens rea* or criminal intent by explaining that negligent conduct cannot be considered torture, although it can constitute cruel and inhuman conduct. Fernandez[755] explains that in order for an act to be regarded as torture, the conduct must result in 'severe pain and suffering'. The definition of torture that is contained in UNCAT excludes "pain or suffering arising from, inherent in or incidental to lawful actions".[756] According to

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751 Fernandez and Muntingh 2016 *Journal of African Law* Volume 60 Issue 1 at 83 – 109.

752 Keller 2005 *American University International Law Review* Volume 20 issue 3 at 521, 569.

753 Sifris *Reproductive Freedom* at page 145.

754 Nowak 2006 *Human Rights* Quarterly Volume 28 Issue 4 at 830. See also De Than C and Shorts E *International Criminal Law and Human Rights* (2003) at 87.

755 Fernandez 2005 *J Afr Law* Volume 9 Issue No 1 at 133-136.

756 Fernandez and Muntingh 2016 *Journal of African Law* Volume 60 Issue 1 at pages 83 – 109.

Boulesbaa,[757] this exception remains the most controversial and problematic element in the definition of torture. The researcher submits that despite the comments and criticism by the authors,[758] South Africa incorporated the wording of article 1 of UNCAT into section 3 of the PCTPA. Evidently, the drafters of the PCTPA failed to take into account the flaws in article 1 of UNCAT and thereby failed to develop or enhance the provisions of section 3 of the PCTPA so that it is devoid of flaws, vagueness and criticism. In support of the researcher's argument, Muntingh and Fernandez,[759] explain that despite the constitutional safeguards against the physical and psychological abuse of persons who are deprived of their liberty, conduct which would otherwise amount to torture or to cruel, inhuman or degrading treatment or punishment continues to occur, especially in police stations. The researcher submits further that the ineffective and poorly drafted legislation may be an issue that hinders the promotion of the rights of suspects and does little to assist in alleviating the use of excessive force by peace officers. There ought to be more stringent forms of law and legislation, perhaps aimed specifically at peace officers which also includes stringent penalty clauses for non-compliance or breach of the provisions of existing and new legislation. Although the criticism of the authors[760] did not make much of a difference to the current situation with regard to the use of excessive force, their comments are relevant in respect of the development of domestic law to bring it in line with (or perhaps make it better than) the provisions of UNCAT. Articles 4 and 16 of UNCAT are also relevant with regard to the international obligation of a State Party such as South Africa to prohibit the use of excessive force. In this regard, articles 4 and 16 of UNCAT requests State Parties to implement legislation to prohibit acts of torture.

Article 4:

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757 Boulesbaa A *The UN Convention on Torture* at 31.

758 Sifris *Reproductive Freedom* at page 145*;* Nowak 2006 *Human Rights* Quarterly Volume 28 Issue 4 at 830; De Than C and Shorts E *International Criminal Law and Human Rights* (2003) at 87; Boulesbaa A *The UN Convention on Torture* at 31.

759 Muntingh and Fernandez 2008 24 *SAJHR* at 123. See also Muntingh L *Guide to the UN Convention Against Torture in South* Africa (2011, Civil Society Prison Reform Initiative-Community Law Centre, University of the Western Cape) at 45-52; T Ramagaga 'The problem of torture in South African prisons' (2011, Institute of Security Studies) (https://www.issaflica.org/iss-today/the-problem-oftorture- in-south-african-prisons).

760 Sifris *Reproductive Freedom* at page 145*;* Nowak 2006 *Human Rights* Quarterly Volume 28 Issue 4 at 830; De Than C and Shorts E *International Criminal Law and Human Rights* (2003) at 87; Boulesbaa A *The UN Convention on Torture* at 31.

> "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

Article 16:

> "1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

UNCAT distinguishes itself from other human rights treaties in that it compels States to criminalise torture, including any attempts to commit torture as well as complicity or participation in torture.[761] State parties are required to make acts of torture punishable by penalties that reflect the gravity of the crime.[762] While UNCAT does not prescribe a minimum penalty, Ingelse[763] considers a term of imprisonment between six and twenty years appropriate.[764] According to Rodley and Pollard,[765] UNCAT has over the years shifted from urging States to enact a separate and distinct crime of torture to the point of requiring that they do so, including instances where national law criminalises the physical abuse of a suspect by peace officers.[766] Sections 12(1)(d) and (e) of the South African Constitution prohibit torture and cruel, inhuman or degrading punishment or treatment.[767] In addition, Mujuzi[768] states that South Africa has

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761 UNCAT, article 4(1); Fernnandez and Muntingh 2016 *Journal of African Law* Volume 60 Issue 1.
762 UNCAT, article 4(2); Fernandez and Muntingh 2016 *Journal of African Law* Volume 60 Issue 1.
763 Ingelse *The UN Committee Against Torture* at 342.
764 Fernandez and Muntingh 2016 *Journal of African Law* Volume 60 Issue 1 at 83-109.
765 Rodley and Pollard 2006 *EHRLR* Issue 2 at 119.
766 UNCAT's concluding observations on the report submitted by Germany at 3 http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.DEU.CO.5-en.pdf (accessed on 22 February 2021).
767 Section 12(1)(d) and (e) of the Constitution ensures freedom and security or person, including the right not to be tortured.
768 Mujuzi 2015 *AHRLG* at 89-109

complied with its international obligation in terms of UNCAT through its implementation of the PCTPA in 2013 which criminalises the act of torture. In *Mthembu* the SCA cited the definition of torture as contained in UNCAT and emphasised that the absolute prohibition against torture is a peremptory norm of international law that the South African Constitution follows, and it extended the non-derogation principle to cruel, inhuman or degrading punishment or treatment. Indeed, the researcher argues that Mujuzi[769] and the court in the *Mthembu* may be correct, to an extent, in stating that South Africa has complied with its international obligation to criminalise torture with regard to the PTCPA and the Constitution. However, the relevant issue that they have not dealt with is whether the PTCPA and the provisions of the Constitution are sufficient in achieving the aims of the international community. A further issue is whether the existing legislation or constitutional provisions are effective in ensuring that peace officers do not use excessive force under any circumstances and that the human rights of suspects ought to be given priority. Section 3 of the PCTPA defines torture as:

> "any act or omission, by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as to (i) obtain information or a confession from him or her or any other person; or (ii) punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or (iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; 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, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"

As stated earlier, the provisions of section 3 of the PCTPA with regard to the definition of torture is identical to the provisions of article 1 of the UNCAT. However, what is regrettable about the PCTPA is that it does not criminalise cruel, inhuman or degrading punishment or treatment in accordance with article 16 of UNCAT.[770] The omission reflects a narrow understanding of UNCAT, the drafters of which clearly intended liability for torture to attach not only to the torturer, but also to any other person whose

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769 Mujuzi 2015 *AHRLG* at 89-109.

770 Fernandez and Muntingh 2016 *Journal of African Law* Volume 60 Issue 1 at 83-109.

conduct might well exclude the cumulative elements of the crime of torture, but whose acts or omissions still amount to cruel, inhuman or degrading punishment or treatment.[771] It is precisely for this reason that UNCAT has been fortified with the Optional Protocol to the Torture Convention (OPCAT),[772] which provides for a system of regular visits by independent bodies to places where people are involuntarily deprived of their liberty, to prevent torture or other cruel, inhuman or degrading punishment or treatment.[773] South Africa signed the OPCAT on 20 September 2006 and ratified it on 19 and 29 March 2019, respectively. The OPCAT came into effect for South Africa on 20 July 2019. As a result, the SAHRC adopted the National Preventive Mechanism (NPM) which allows for regular visits to places where persons are deprived of their liberty such as at police stations.[774] The idea is that a system of regular, independent visits to places of deprivation of liberty can serve as an important safeguard against abuses and prevent torture and cruel, inhuman or degrading punishment or treatment in places that by their very nature fall outside the public scrutiny.[775] Although the SAHRC adopted the NPM, its effectiveness and progress are yet to be determined.

In 2019, South Africa submitted its second periodic report to the UN Committee against torture some eight years after the due date and the Committee noted that it did not receive any response from South Africa, to its previous concluding observations that were made in respect of South Africa's first periodic report.[776] The

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771 Article 1 of OPCAT, which was adopted by the UN General Assembly on 18 December 2002 (A/RES/57/199).

772 United Nations General Assembly, Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment https://www.refworld.org/docid/3de6490b9.html (accessed on 8 August 2021).

773 Fernandez and Muntingh 2016 *Journal of African Law* Volume 60 Issue 1 at 83-109.

774 South Africa's National Preventive Mechanism https://www.sahrc.org.za/home/21/files/NPM%20Fact%20Sheet%20for%20ONLINE.pdf (accessed on 8 August 2021).

775 South Africa's National Preventive Mechanism https://www.sahrc.org.za/home/21/files/NPM%20Fact%20Sheet%20for%20ONLINE.pdf (accessed on 8 August 2021).

776 Concluding observations on the second periodic report of South Africa: Committee against Torture https://www.justice.gov.za/ilr/docs/2019-CAT-SA-ConcludingObservations-SecondPeriodicReport-May2019.pdf (accessed on 25 July 2021).

Committee against Torture made the following recommendations as a result of its concluding observations:[777]

> "7. The State party should:
> (a) Consider amending the Prevention and Combating of Torture of Persons Act with a view to introducing mandatory minimum or graduated penalties leading up to the maximum penalty for acts of torture, including by citing aggravating factors, which take into account the gravity of their nature, as set out in article 4 (2) of the Convention
> (b) In order to operationalize the Act, consider introducing procedural provisions to ensure the documentation, effective and independent investigation and prosecution of acts of torture and cruel, inhuman or degrading treatment or punishment, including of persons employed by private institutions or organizations that are contracted to carry out work on behalf of the State as well as other non-state actors;
> (c) In order to further operationalize the Act and provide full reparation to victims of torture, consider amending it in order to include specific provisions relating to the right of victims of torture to seek civil redress and remedy under the Act and access all five forms of reparation;
> (d) Inform the Committee about the number of torture cases prosecuted under the Act during the period under review and on the number of cases of torture prosecuted under section the Independent Police Investigative Directorate Act relating to "complaints of torture or assault against a police officer in the execution of his or her duties", by the Judicial Inspectorate for Correctional Services and under any other legislation;"

It is apparent from the remarks by the Committee that it was not pleased with the fact the South Africa submitted its periodic report about eight years after the due date and further that South Africa failed to respond to the concerns and recommendations of its initial concluding observations. The researcher submits that this is an indication that South Africa is failing in its obligation to comply with international standards and the act of non-compliance places South Africa in a negative position internationally. The situation is worsened by the fact that South Africa did not take any steps to address these negative remarks. Upon a proper reading and understanding of the recommendations, it is apparent that the Committee against Torture was not satisfied

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777 Concluding observations on the second periodic report of South Africa: Committee against Torture https://www.justice.gov.za/ilr/docs/2019-CAT-SA-ConcludingObservations-SecondPeriodicReport-May2019.pdf (accessed on 25 July 2021).

with the provisions of the PTCPA and it was of the opinion that the PTCPA should be amended to include a provision for more stringent penalties for transgressors of the prohibition on torture, a provision for the proper documentation and investigation of cases of torture and an appropriate procedure for redress of victims of torture. Furthermore, the Committee was of the opinion that South Africa should provide statistical data on the incidents of torture. The Committee commented further with regard to police brutality and the use of excessive force and set out the following concerns:

> "Police brutality and excessive use of force
> 32. The Committee is concerned:
> (a) At numerous reports of acts of torture committed by police officials, including the report by the Independent Police Investigative Directorate (IPID) of 217 cases of torture and 3661 cases of assault during the period 2017/2018; as well as reports of 112 rapes committed by police officers, 35 of which while they were on duty;
> (b) That such acts have resulted in a significant increase in the number of deaths in police custody, including 394 deaths as a result of police action and 302 deaths in police custody for the 2016/2017 period, while less than half are investigated;
> (c) At the absence of recommendations made by IPID, which has the legal mandate to receive, log and investigate complaints against assault or torture by the police, for prosecution to the National Prosecuting Authority, to institute criminal proceedings (arts. 2, 4, 10- 14 and 16);"

With regard to the concerns by the Committee on police brutality and the use of excessive force, it is evident that the use of excessive force by peace officers continues and that no further efforts are being made to criminalise the acts of excessive force as recommended by the Committee. In addition to the concerns raised by the Committee against torture, the following recommendations were made to South Africa:[778]

> "33. The State party should:
> (a) Ensure that all law enforcement officials cooperate with and notify the Independent Police Investigative Directorate regarding all allegations of torture

[778] Concluding observations on the second periodic report of South Africa: Committee against Torture https://www.justice.gov.za/ilr/docs/2019-CAT-SA-ConcludingObservations-SecondPeriodicReport-May2019.pdf (accessed on 25 July 2021).

> by its officials, recommend disciplinary actions to the Police Service and ensure that the Independent Police Investigative Directorate refers all criminal cases to the National Prosecuting Authority;
> (b) Ensure that all allegations of torture, excessive use of force and ill-treatment by law enforcement officials are investigated promptly, effectively and impartially by mechanisms that are structurally and operationally independent and with no institutional or hierarchical connection between the investigators and the alleged perpetrators;
> (c) Ensure that all persons under investigation for having committed acts of torture or ill-treatment are suspended immediately from their duties and remain so throughout the investigation, while ensuring that the principle of presumption of innocence is observed;
> (d) Increase its efforts to systematically provide training to all law enforcement officials on the use of force, especially in the context of crowd control, taking due account of the Basic Principles on the Use of Firearms by Law Enforcement Officials."

Once again, the Committee recommends that the investigation and criminalisation of acts of excessive force ought to be promoted and enforced. It is also interesting to note that the Committee recommended that efforts should be made with regard to the training of peace officers on the use of force. Despite the fact that the important recommendations were made by the Committee against Torture in 2019, there is no evidence to indicate that post 2019, South Africa has successfully acted upon the recommendations of the Committee against Torture. The researcher submits that South Africa's defiance in successfully adhering to the important recommendations of the Committee against Torture is an indication that South Africa is failing to comply with its international obligations. Furthermore, if South Africa pays no heed to these recommendations, it means that the incidents of police brutality and the use of excessive force will continue to impact negatively on suspects and violate the constitutional and human rights of suspects and peace officers will continue to act unlawfully in the exercise of their powers because no efforts are being made to alleviate these issues.

International law and international human rights instruments have been discussed and analysed in relation to an arrest without a warrant, detention, the use of force and the human rights of suspects. The reason why the international instruments such as the

UDHR, ICCPR and UNCAT were discussed is that South Africa is bound by these instruments by ratification and because of customary law. Another important dimension to human rights law and arrest without a warrant and detention is the regional human rights instrument such as the AChHPR. South Africa is also bound by its provisions as it contains clear guarantees and protection of human rights.

4.3 Regional law and an arrest without a warrant, detention and the use of force under the AChHPR

Regional law and regional human rights are relevant to South Africa and the AChHPR is therefore binding on South Africa. The discussion commences with an explanation of regional law and the importance of regional human rights law. Articles 5 and 6 of the AChHPR will be critically analysed with regard to an arrest without a warrant, detention and the use of force. Furthermore, the concluding observations and recommendations of the African Commission to South Africa is an important aspect that is critically discussed because an analysis will assist in determining whether South Africa is complying with its regional obligations to protect the human rights of suspects. According to O'Boyle,[779] regional human rights have been heralded as one of the greatest innovations of international law of the twentieth century. Forteau[780] defines regional law as any set of rules with which a region endows itself because of the distinctive values shared by its members, it encompasses any rule having a regional scope of application. The AChHPR is an important regional human rights instrument within the African continent and it is therefore relevant to South Africa.[781] According to the Africa Criminal Justice Reform,[782] peace officers are entrusted with the power to arrest a person without a warrant and whilst it is necessary for peace officers to have this power in order to execute their duties, the deprivation of liberty is a serious intervention in a person's life and the authority to arrest without a warrant must therefore be used in a lawful manner and not to intimidate, scare or punish people.

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779 O'Boyle 2008 1 *EUR. HUM. RTS. L. REV*. 1. See also Huneeus A & Madsen M R 'Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems' *International Journal of Constitutional Law* Volume 16 Issue 1 (January 2018) at pages 136–160.

780 Forteau *Regional International Law* at [1].

781 African Commission on Human and Peoples' Rights http://www.refworld.org/docid/54cb3c8f4.html (accessed on 17 February 2021) (hereinafter referred to as the "ACommHPR").

782 Africa Criminal Justice Reform March 2019.

4.3.1 AChHPR with regard to the human rights of an arrested and detained suspect

The AChHPR was adopted in June 1981 and entered into force in October 1986.[783] South Africa ratified the AChHPR on 9 July 1996. Alternatively, referred to as the 'Banjul Charter', Adjovi[784] states that it is a regional human rights instrument that was created to protect human rights and basic freedoms of people in the African continent. However, Olaniyan[785] argues that the AChHPR provides strong grounds for scepticism as to its true value to the development and protection of human rights and that among the failings that are readily imputable to the provisions of the AChHPR are the vagueness of the drafting of articles 4 and 6. The African Commission on Human and Peoples' Rights (ACommHPR)[786] and the African Court on Human and Peoples' Rights (ACHPR)[787] are the main human rights organs of the region.[788] Despite the criticism of articles 4 and 6, the ACommHPR stated that the criticisms against the AChHPR may have been overstated or mistaken. The system of protection established under the AChHPR has significantly expanded, with the adoption in June 1998 of the Protocol to the African Charter on Human and Peoples' Rights which established the AfCtHPR and its entry into force in January 2004. Although the authority of the ACHPR to hand down binding decisions was applauded as a significant improvement in the protection and promotion of human rights, Olaniyan[789] argues that the ACHPR is not effective in enforcing the human rights of suspects. Although Olaniyan[790] criticises the effectiveness of the AChHPR, the issue that ought

783 Adjovi *Understanding the African Charter*.

784 Adjovi *Understanding the African Charter*.

785 Olaniyan *African Charter on Human and Peoples' Rights* at 213-243.

786 ACommHPR.

787 Organisation of African Unity (OAU) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an Africa Court on Human and Peoples' Rights https://www,refworld.org/docid/3f4b19c14.html (accessed on 15January 2022) (hereinafter referred to as "ACHPR").

788 Nmehielle *The African human rights system* at 170-183; Essien U 'The African Commission on Human and Peoples' Rights: Eleven years after' (2000) 6 *Buffalo Human Rights Law Review* 93; A Lloyd & R Murray 'Institutions with responsibility for human rights protection under the African Union' (2004) 48 *Journal of African Law* 165; Naldi G J 'The role of the human and peoples' rights section of the African Court of Justice and Human Rights' in A Abass (ed) *Protecting human security in Africa* (2010) 286.

789 Olaniyan *African Charter on Human and Peoples' Rights* at 213-243.

790 Olaniyan *African Charter on Human and Peoples' Rights* at 213-243.

to be dealt with is whether South Africa complies with the regional standards as reflected in the AChHPR for the promotion and protection of human rights.

Article 6 of the AChHPR

> "Every individual shall have the right to liberty and to security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily deprived of this right."

According to Okpaluba,[791] article 6 is phrased as 'every individual shall have the right to liberty and the security of his person, which could be read as limiting the right to liberty to 'personal liberty'. Murray[792] states that a deprivation of liberty that is not in accordance with the AChHPR and international human rights law standards will be considered to be arbitrary by the ACommHPR. This means that both the arrest and subsequent detention can be arbitrary.[793] Murray[794] argues that article 6 is meant to be interpreted in such a way so as to permit an arrest without a warrant only in the exercise of powers that are normally granted to peace officers in a democratic State. Accordingly, it can be argued that detention should be used as 'a measure of last resort…only where necessary and where no other alternatives are available'[795] and for the 'shortest possible time'.[796] Therefore, detention cannot be indefinite[797] and the time in police custody should be no greater than 48 hours.[798] If the length of the detention is beyond that set out in domestic law, there may also be a violation of article 6 of the

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791 Okpaluba 2014 *AHRLJ* Chapter 13 Volume 2 at 580–608.

792 Murray *The African Charter on Human and Peoples' Rights* at 184-187.

793 African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, section M(1)(b).

794 Murray *The African Charter on Human and Peoples' Rights* at 184-187.

795 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, April 2015 at [10(a)].

796 Kampala Declaration on Prisons Conditions in Africa 'Remand prisoners' at [2] and 'Alternative sentencing' at [1]–[7].

797 Communication 292/04, *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, 28 May 2008; Communications 25/89-47/90-56/91-100/93 Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v DRC, 4 April 1996, para 42. See also A. A. An-Na'im, 'Detention without trial in the Sudan: The use and abuse of legal powers', 17 Colum. Hum. Rts. L. Rev. (1985–1986) 159–187.

798 Ougadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reform in Africa, 20 September 2002, Plan of Action at [1]; Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, April 2015 at [4].

AChHPR.[799] In the 2016 concluding observations and recommendations, the African Commission made recommendations as follows:[800]

> "Due Process and Conditions of Detention
>
> 54. The Commission recommends that South Africa should:
> vii. continue to ensure human rights training for the police and other law enforcement officers and promote the presence of female Police Officers within the police services;
> viii. make use of the Commission's Guidelines on Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (Luanda Guidelines) to deal with the challenges of arbitrary arrests and pre-trial detention."

It is evident from the recommendations by the African Commission, that South Africa should place more effort into promoting the training of peace officers and ensure that regional guidelines[801] that deal with arbitrary arrest and detention are dealt with. Despite the fact that the recommendations of the Commission were made in 2016, there is no evidence that indicates that South Africa has made any efforts to successfully implement the recommendations of the African Commission. Accordingly, the researcher argues that the lack of effort in implementing these recommendations is a sign that South Africa is failing to ensure compliance with its regional obligation to promote the human rights of suspects. Therefore, South Africa ought to comply with paragraph 59[802] of the concluding observations and recommendations of the Commission in which it requests that South Africa provide a report on the measures taken to address the concerns and the effective implementation of the recommendations.

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799 Ougadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reform in Africa, 20 September 2002, Plan of Action at [1]; Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, April 2015 at [4].

800 Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' https://www.achpr.org/public/Document/file/English/co_combined_2nd_periodic_republic_of_south_africa.pdf (accessed on 27 July 2021).

801 African Commission on Human and People's Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa https://www.refworld.org/docid/5799fac04.html (accessed on 7 August 2021).

802 Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights https://www.achpr.org/public/Document/file/English/co_combined_2nd_periodic_republic_of_south_africa.pdf (accessed on 27 July 2021).

4.3.2 AChHPR with regard to torture, cruel, inhuman or degrading punishment and treatment

In many circumstances force will not be legally permissible and non-violent means should be used in order to ensure compliance.[803] Force must never be used vindictively or as a form of extrajudicial punishment.[804] In a 2014 report, Heyns[805] correctly explains that if some form of force is required, no more than the minimum force that is reasonably necessary in the circumstances is to be used. Article 5 of the AChHPR deals specifically with the prohibition on torture, cruel, inhuman and degrading punishment or treatment and this aspect is discussed in the South African context.

Article 5 of the AChHPR

> "Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel or degrading punishment and treatment shall be prohibited."

According to Petersen,[806] the AChHPR is the only instrument which contains a general guarantee of human dignity. Petersen[807] argues that the guarantee of human dignity has no independent meaning, but is only a symbolic foundation of the subsequent guarantees and prohibitions, for example the prohibition of torture, cruel or degrading punishment or treatment. Ibrahim[808] argues that the AChHPR and the ACommHPR do not seem to have much impact on the practice of human rights on the African continent. In the 2016 concluding observations and recommendations, the African

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803 Academy of International Humanitarian Law and Human Rights 2016 Graduate Institute Geneva November at page 7.

804 Academy of International Humanitarian Law and Human Rights 2016 Graduate Institute Geneva November at page 7.

805 Heyns United Nations Human Rights Council, Report of the Special Rapporteur on extrajudicial summary or arbitrary executions https://www.refworld.org/docid/53981a550.html (accessed on 04 January 2022) at 59.

806 Petersen *International Protection: Human Dignity* at [13].

807 Petersen *International Protection: Human Dignity* at [13].

808 Ibrahim 2012 *AHRLJ* Volume 12 Issue 1 at 30-69.

Commission raised concerns with regard to the prohibition of torture, cruel, inhuman and degrading treatment as follows:[809]

> "Prohibition of Torture, Cruel, Inhumane and Degrading Treatment
>
> 37. The Commission is concerned about the:
> i. lack of statistical data in the Report relevant to the prohibition of torture and ill-treatment, including disaggregated data on complaints, investigations, prosecutions and convictions in cases of torture and ill treatment;
> ii. lack of measures to provide reparations for victims of torture irrespective of whether a successful criminal prosecution or other judicial remedy can or has been brought; and
> iii. non-ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and the establishment of the National Preventive Mechanism as envisaged under OPCAT."

The African Commission was concerned about the fact that South Africa did not have sufficient statistical information to enable the Commission to evaluate the incidents, investigations and measures for reparations with regard to the use of excessive force. The Commission was also concerned about the fact that (at the time) South Africa did not sign and ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).[810] As a result, the Commission made the following recommendations to South Africa:[811]

> "Prohibition of Torture, Cruel, Inhumane and Degrading Treatment
>
> 53.The Commission recommends that South Africa should:

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809 Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights https://www.achpr.org/public/Document/file/English/co_combined_2nd_periodic_republic_of_south_africa.pdf (accessed on 27 July 2021).

810 United Nations Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment https://www.refworld.org/docid/3de6490.html (accessed on 7 August 2021).

811 Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights https://www.achpr.org/public/Document/file/English/co_combined_2nd_periodic_republic_of_south_africa.pdf (accessed on 27 July 2021).

> i. provide statistical data in its next Periodic Report relevant to the prohibition of torture and ill-treatment, including data on complaints, investigations, prosecutions and convictions in cases of torture and ill treatment;
> ii. take measures to provide reparations for victims of torture irrespective of whether a successful criminal prosecution or other judicial remedy can or has been brought;
> iii. ratify Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and establish the National Preventive Mechanism envisaged under OPCAT; and
> iv. fully comply with the Commission's Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhumane or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)."

No report or recorded statistics have been formulated post 2016 to indicate that South Africa has made any attempts to implement the recommendations of the Commission with regard to the incidents, investigations and measures for reparations in relation to the use of excessive force. However, South Africa positively responded to the Commission's recommendation by signing the OPCAT and ratifying it on 19 and 28 March 2019 respectively. The OPCAT came into effect in South Africa on 20 July 2019. Despite the fact that OPCAT came into effect in 2019, there is no evidence to conclude that any of the provisions of the UNCAT or the OPCAT have been successfully implemented. This aspect must be addressed nationally.

It is evident that regional law and the AChHPR are important aspects of human rights both regionally and within the South African context. Articles 5 and 6 deal specifically with the human right to liberty and security of person and the use of excessive force. The important aspect which requires attention is the recommendations of the African Commission with regard to the training of peace officers in the proper execution of their powers. The researcher submits that it is the lack of training on the legal aspects of the powers that peace officers hold which results in unlawful acts of arrest without a warrant, detention and the use of excessive force. This problem has been pointed out by the African Commission which means that South Africa is not only failing to protect the human rights of suspects nationally, but it is failing in its regional obligation to comply with regional law and the provisions of the AChHPR. It is therefore relevant to discuss the relationship between international and regional human rights

instruments and the legal provisions in South Africa and understand the importance of international law as an interpretive source of fundamental rights.

4.4 The relationship between international and regional human rights instruments and South Africa's legal provisions

According to Dupuy,[812] the existence of the relationship between international law and national law is closely related to the concept of law in general on the one hand and, on the other hand, with the structure of the international legal community and the sources of law. The researcher submits that an evaluation and analysis of the principles encapsulated in the international and regional human rights instruments clearly illustrates their importance in South African law that relates to an arrest without a warrant, detention and the use of force with regard to the human rights of a suspect. The international and regional instruments provide a set of standards against which national law, legislative programs, decisions, policies and all other government actions and inactions that relate to an arrest without a warrant, detention and the use of force can be measured. South Africa has ratified the ICCPR, UNCAT and the AChHPR. Furthermore, the provisions of the UDHR form an important source of customary international law in South Africa. The protection of the human rights of suspects from unlawful arrest without a warrant, unlawful detention and the use of excessive force have gained importance in domestic law through the provisions of the Constitution and legislation such as the CPA and the PCTPA. However, the important aspects that ought to be addressed are whether the domestic implementations of the international and regional instruments have yielded any significant results in the promotion of the rights of suspects, the alleviation of the unlawful actions of peace officers and the proper training of peace officers so that they exercise their powers appropriately. Furthermore, an important aspect is whether any developments can be introduced into domestic law which will fully comply with international and regional standards. The relevance of international law in the interpretation of fundamental rights is important because South Africa has an obligation to abide by the provisions of human rights instruments. Therefore, international law as an interpretive source of fundamental rights is important and is discussed hereunder in detail.

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812 Dupuy *International Law and Domestic (Municipal) Law* at [1].

4.4.1 International law as an interpretive source of fundamental rights

Pillay[813] explains that international law plays an important role in guiding and shaping state policy and domestic law and promoting the protection of human rights. De Villiers[814] also reiterates section 39 of the Constitution which states that when a court, tribunal or forum is interpreting the Bill of Rights, there must be promotion of the values that underlie an open and democratic society based on human dignity, equality and freedom. Furthermore, section 39 provides that there must be consideration of international law and foreign law may be considered.[815] In addition, Hoffman and Topulos[816] explain that foreign law, or national law, defines the role of a government to the people and controls relationships between people and it may regulate foreign persons and entities, but does not apply to the outer boundaries of a country. The Constitution makes it peremptory for South African courts to consider international law when interpreting the Bill of Rights.[817] Therefore, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[818] Furthermore, Pillay[819] explains that there is also a growth in international criminal law which places emphasis on the criminal responsibility of a person. Therefore, Pillay[820] argues that international law is important as it sets a platform for clear standards of equality, freedom from discrimination and human dignity for every human being. It is also precise in circumstances where a citizen is not protected by the State against violations of human rights, and when there is a violation, the international community steps in to protect a citizen by using international

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813 Pillay 2016 *AYIHL* 1 at 1.

814 De Villiers 2019 *JEMIE* Volume 18 Issue 1 at 3; section 39 of the Constitution.

815 Section 39 of the Constitution; De Villiers 2019 *JEMIE* Volume 18 Issue 1 at page 3.

816 Hoffman and Topulos 2015 'International Legal Research Tutorial' at 1.

817 Section 39 of the Constitution. In the following cases the Constitutional Court considered binding as well as non-binding international law when interpreting the Bill of Rights: *S v Williams and Others* 1995 (7) BCLR 861 (CC); 1995 3 SA 632 (CC); *Ferreira v Levin*; *Vryenhoek v Powell* 1996 1 BCLR 1 (CC); 1996 1 SA 984 (CC); *S v Rens* 1996 2 BCLR 155 (CC); 1996 1 SA 1218 (CC); *Coetzee v Government of the RSA*, *Matiso v Commanding Officer*, *Port Elizabeth Prison* 1995 10 BCLR 1382 (CC); 1995 4 SA 631 (CC); *Bernstein v Bester* 1996 4 BCLR 449 (CC); 1996 2 SA 751 (CC); *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) at [26]; *Makwanyane*; Strydom and Hopkins in S Woolman *et al Constitutional Law of South Africa* 30-6.

818 Section 233 of the Constitution.

819 Pillay 2016 *AYIHL* 1 at 1.

820 Pillay 2016 *AYIHL* 1 at 1.

provisions.[821] However, the court in *Government of RSA v Grootboom*[822] held that although a court must take international law into consideration, it is not bound to follow international law. In the recent case of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*[823] the Constitutional Court set out differing opinions with regard to the importance and relevance of international law and the ICCPR in South Africa. In their dissenting judgment, Jafta J (Theron J concurring) argued that a claim under the ICCPR may succeed even if a national court had acted within national law, including a national constitution.[824] Therefore, if what has been done by the national court is inconsistent with the ICCPR, the claim by the citizen would be successful.[825] This is the genesis of the injunction imposed by section 39(1) of the Constitution to the extent that it obliges our courts when interpreting the Bill of Rights, to consider international law and prefer a meaning consistent with that law. Jafta J also argued that a court is under an obligation to interpret provisions of the Bill, to the extent that its language reasonably permits, in a manner that is consistent with the relevant international law.[826] This is the purpose for considering international law and it is done in order to avoid divergence between the Constitution and international law instruments that are binding on South Africa.[827] However, in the majority judgment,[828] it is argued that an international treaty not incorporated into South African law has no place being invoked in a national court, and litigants cannot purport to rely on section 39(1)(b) of the Constitution as the basis upon which to attempt to invoke its provisions and the court held that it is not possible to resort to the direct application of international treaty law, namely certain of the provisions of the

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821 For example, the Charter of the United Nations of 1945.

822 *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC) at [26] where the court held that relevant international law may be a guide towards the process of interpretation but the weight that is attached to a particular principle of international law will vary. However, there may be instances where a particular principle of international law binds South Africa, then such principle will be directly applicable. See also *Prince v President of the Law Society*, *Cape of Good Hope* 1998 8 BCLR 976 (C) at [984]–[986], [988]–[989].

823 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28 (hereinafter referred to as "*Zuma*").

824 *Zuma* at [246].

825 *Zuma* at [246].

826 *Zuma* at [186].

827 *Zuma* at [186].

828 Khampepe J (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring).

ICCPR.[829] If one had to concede with the comments set out by the majority judgment, one would mean that the Constitutional Court has very little regard to the importance of international law in South Africa. The researcher submits that it would mean that the Constitutional Court disregards the provisions of international instruments to South Africa. Hence, South Africa is failing in its obligation to comply with the recommendations of the UN Human Rights Committee. The researcher further submits that if the Constitutional Court were to interpret the Bill of Rights in light of the provisions of the ICCPR, it would not only fulfil the aims of domestic law but would also be fulfil the aims of international law. However, the approach of the Constitutional Court appears to side-line international law and international human rights instruments while limiting the interpretation of law in domestic law only.

4.5 SAHRC in light of international and regional human rights law

The SAHRC was inaugurated in October 1995 as an independent institution in terms of chapter 9 of the Constitution. It draws its mandate from the South African Constitution by way of the Human Rights Commission Act.[830] As the primary guardian of constitutional rights in the Constitution to promote respect for and a culture of human rights, the SAHRC plays an important role in monitoring the protection of all human rights and ensuring that state action does not unduly infringe on the ambit of these rights.[831] Although the South African government has pledged itself to the protection and realisation of human rights in terms of domestic law, challenges remain in the actual implementation of the protection of the rights.[832] The SAHRC is obligated to monitor not only the attainment of human rights towards their full realisation in South Africa, but also the government's duty to adhere to its regional and international obligations in the protection of human rights.[833] The SAHRC raised the issue of the inability of crucial oversight and monitoring bodies[834] established to protect human

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829 *Zuma* at [109].

830 South African Human Rights Commission Act 40 of 2013.

831 Klaaren May 2005 *Human Rights Quarterly* Volume 27 Issue 2 at pages 539-561.

832 Tissington and Adeleke https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/740-op-ed-the-state-of-civil-and-political-rights-in-south-africa (accessed on 27 July 2021).

833 Report of the South African Human Rights Commission https://www.justice.gov.za/ilr/docs/2019-20-NPM-AnnualReport-SAHRC.pdf (accessed on 26 December 2020).

834 The Judicial Inspectorate for Correctional Services (JICS) and the Independent Police Investigative Directorate (IPID).

rights. The result is that mistreatment, torture and deaths of suspects who are detained in police station holding cells or deaths as a result of police action, are not being properly investigated and prosecuted.[835] There is no doubt that South Africa has complied with the obligation to enact legislation to ensure the protection of human rights of suspects. However, as can be deduced from the argument by Tissington,[836] it appears that the aims and objectives of the SAHRC are not being properly fulfilled. The author is silent on any suggestions that may be put forward to ensure that the SAHRC properly protects the human rights of suspects.

4.6 Chapter conclusion

The chapter commenced with a discussion of international law and proceeded with a critical analysis of international human right instruments such as the UDHR, ICCPR and UNCAT as well as regional law and the regional human rights instrument such as the AChHPR, and its importance to the South African principles of an arrest without a warrant, detention, the use of force and human rights. The concluding observations and recommendations of the United Nations Human Rights Committee, the Committee against Torture and the African Commission were discussed and the failure to implement certain recommendations were highlighted. As a result of the discussions of the international and regional aspects, the researcher argues that South Africa is not fully compliant with its international and regional obligations and more should be done to ensure better compliance. When reference is made to better compliance, it means that South Africa should implement the recommendations of the relevant Committees and amend its existing legislation and enact new legislation to ensure that the human rights of suspects are protected and promoted. Furthermore, an improved police force with improved training is required and this can only be done if the relevant state departments take the initiative to ensure that their peace officers have not only the relevant physical training when using force on suspects, but also the relevant legal knowledge on the aspects of an arrest without a warrant, detention and the use of force, as set out in the provisions of the international and regional instruments.

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835 Tissington and Adeleke https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/740-op-ed-the-state-of-civil-and-political-rights-in-south-africa (accessed on 27 July 2021).

836 Tissington and Adeleke https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/740-op-ed-the-state-of-civil-and-political-rights-in-south-africa (accessed on 27 July 2021).

Therefore, chapter 5 deals with a comparative analysis of the principles and practices in Canada and the United Kingdom and South Africa to determine what South Africa can learn from these two jurisdictions.

CHAPTER FIVE

A COMPARATIVE ANALYSIS OF A PEACE OFFICER'S UNLAWFUL ACTIONS AND THE CONSTITUTIONAL IMPLICATIONS THEREOF WITH REFERENCE TO CANADA AND THE UNITED KINGDOM

5.1 Introduction

This chapter focuses on a comparative review of a peace officer's act of unlawful arrest without a warrant, unlawful detention and the use of excessive force on suspects and the constitutional implications thereof. The comparative analysis includes a discussion of two foreign jurisdictions namely Canada and the United Kingdom. The United Kingdom consists of three jurisdictions, namely England and Wales, Scotland and Northern Ireland. However, the comparative analysis will be limited to the legal system in England and Wales because the law applied in this jurisdiction is similar to the law applied in South Africa. An analysis of the constitutional violations which occur as a result of an unlawful arrest without a warrant and unlawful detention in Canada and the United Kingdom are also important. Furthermore, the principles that relate to the use of excessive force and the constitutional violations thereof are important aspects that will be analysed in Canada and the United Kingdom. The first part of the chapter includes a critical analysis and comparison of these aspects in Canada with South Africa and the second part of the chapter will include a critical analysis and comparison of these aspects in the United Kingdom with South Africa. The chapter also includes a comparative analysis of international human rights instruments such as the UDHR, ICCPR and UNCAT in Canada and the United Kingdom and South Africa. Prior to commencing with these discussions, it is important to note the objectives of this chapter (as set out in chapter 1).

The first objective of this chapter is to compare and analyse the position of the criminal justice system in South Africa with regard to a peace officer's power to arrest without a warrant, detain and use force on a suspect, with that of the criminal justice systems in Canada and the United Kingdom, respectively. Furthermore, the second objective of this chapter is to determine whether the legal position on an arrest without a warrant, detention and the use of force in South Africa is better developed and enhanced as

compared to the legal positions in Canada and the United Kingdom respectively. The third objective of this chapter is to examine the legal position in South Africa and Canada and the United Kingdom with the aim of highlighting and proposing ways to enhance and develop South African law by learning from the legal position or practices in Canada and the United Kingdom respectively.

The important aspects that will be compared and contrasted are the legal systems of South Africa with Canada and the United Kingdom respectively. The criminal procedural aspect and the constitutional rights aspect of the respective jurisdictions will be compared and contrasted. Furthermore, the legal principles that relate to an arrest without a warrant, detention and the use of force fall under the category of the laws of criminal procedure. These aspects are compared between the two jurisdictions so that the researcher is in a position to determine whether the legal systems in Canada and the United Kingdom are more advanced and developed as compared to the legal system in South Africa and to introduce ways in which the South African legal system can develop and enhance its legal system by learning from best practices and legislation in Canada and the United Kingdom. The acts of unlawful arrest without a warrant, unlawful detention and the use of excessive force have constitutional implications on the rights of suspects. This aspect was discussed in chapter 2. However, the objective of this chapter is to compare and contrast the legal position with regard to the constitutional rights of suspects and the implications thereof, with the legal position in Canada and the United Kingdom respectively.

Canada is one of the foreign jurisdictions that were chosen because it has a Constitution and criminal legal provisions that establish rights in a substantially similar way to South Africa. Furthermore, both South Africa and Canada have similar common law origins[837] and are commonwealth countries[838] and both jurisdictions are democratic in nature. Similarities exist between South Africa and Canada with regard to the entrenched fundamental rights in the Constitution and the Charter of Rights and Freedoms respectively. According to Smithey,[839] courts in South Africa and Canada

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837 Jansen Van Vuuren *A Legal Comparison between South African, Canadian and Australian Workmen's Compensation Law* at 15.

838 'The Commonwealth' http://thecommonwealth.org/member-countries (accessed on 23 May 2021).

839 Smithey 2001 *Sage Publications* Volume 34 Issue 10 at 1188-1211.

adopted new constitutional provisions that included broadly phrased civil rights and liberties provisions. Whereas neither South African nor Canadian courts have treated foreign precedent as authoritative, they have given extensive consideration to the reasoning of foreign courts while developing their own civil rights case law. Just as Canada adopted the Charter of Rights and Freedoms in 1982, the South African government adopted a series of constitutional principles that were later codified into the Constitution of South Africa in 1996. Both these constitutional documents entrenched the constitutional protection of a long list of civil liberties, including the rights to freedom and security of person and human dignity. Prior to the adoption of these constitutions, South Africa and Canada relied on the constitutional norm of parliamentary sovereignty, which meant that legislatures could always have the final say about a policy even if courts disagreed with the human rights impact thereof.[840] The new constitutions changed this for courts in both South Africa and Canada by granting courts the authority to devise appropriate remedies for constitutional violations. Despite the apparent similarities between South Africa and Canada, the researcher aims to highlight flaws in the South African legal system in light of developments in the Canadian legal system so that South Africa can perhaps, emulate the Canadian legal system in order to enhance and develop its own legal system in order to promote the constitutional rights of suspects.

The reason why the United Kingdom is the other chosen foreign jurisdiction is that the system of law and justice, which include the law of criminal procedure in the United Kingdom and South Africa are very similar.[841] English law, which is the common law legal system of the United Kingdom (England and Wales) comprises mainly criminal law which has its own courts and procedures.[842] Similarly, South African criminal procedure comprises English law and both jurisdictions are unitary states. With regard to criminal procedural law, just as sections 40(1) and 50 of the CPA of South Africa include provisions that regulate the powers of peace officers to arrest and detain suspects, so does sections 24 and 41 of the Police and Criminal Evidence Act[843]

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840 Before the Charter's adoption, Canadian judicial officers had the power to strike down policies enacted by the inappropriate level of government. However, this was not the final veto because one level of government could enact a policy after it had been forbidden to the other level.

841 Weimar & Vines 2011 'UK-South Africa Relations and the Bilateral Forum'.

842 Criminal Procedure and Investigations Act 1996.

843 Police and Criminal Evidence Act 1984 (hereinafter referred to as 'PACE').

(PACE). Furthermore, just as section 49 of the CPA of South Africa deals with the use of force, the Criminal Law Act[844] (CLA) makes provision for the powers of peace officers to use force on suspects. In light of the similarities in the legal systems of South Africa and the United Kingdom, the researcher has chosen the legal system of the United Kingdom to compare and contrast with the legal system of South Africa in order to establish whether the South African legal system can adopt best practices from the United Kingdom so that its legal system can improve and protect the rights of suspects.

5.2 An arrest without a warrant, detention and the use of force in Canada

The principles of an arrest without a warrant, detention and the use of force are the main aspects that fall within a discussion of Canada as a foreign law jurisdiction. Within the context of the principles that relate to an arrest without a warrant, is the determination of the lawfulness of an arrest without a warrant and the requirement of reasonable suspicion. A discussion of the principles that relate to the lawfulness of an arrest without a warrant and the requirement of reasonable suspicion are important because they lead to a determination on whether a peace officer has acted unlawfully and has thereby violated the fundamental rights of a suspect. These aspects were discussed in chapter 2 in the South African context. Therefore, the principles with regard to unlawful detention in Canada also form part of the discussion. Once it is established that an unlawful arrest and detention have occurred, the next aspect is the analysis of the violations of fundamental rights in Canada. The rights to life, liberty and security of person are the main constitutional rights that relate to an unlawful arrest without a warrant and unlawful detention. In addition to the principles that relate to an arrest without a warrant and detention are the principles in Canada that emanate from the powers of a peace officer to use force. With regard to the use of force, the aspects that deal with excessive force are important because excessive force impacts on the constitutional rights of suspects. These principles are discussed in detail hereunder with reference to literature by various authors and comments by several Canadian courts. This discussion will also include a critical analysis of these principles in comparison with the South African context. A comparison between the principles in

844 Criminal Law Act 1967 (hereinafter referred to as 'CLA').

Canada and the principles in South Africa can assist in determining how South Africa fares with regard to the protection of the fundamental rights of suspects and the position with regard to the unlawful actions of peace officers. Furthermore, a comparison and critical analysis on the best practices and legislation in Canada is necessary to determine whether South Africa can learn best practices and introduce legislation in order to enhance and develop its own legal position. The discussion commences with a background to the Canadian legal system with regard to its criminal procedural law and constitutional rights. The discussion continues thereafter with an analysis of the requirement of reasonable suspicion in Canada which will include a comparison of the South African context (as discussed in chapter 2).

5.2.1 The federal system in Canada and its criminal procedural law and fundamental rights in comparison with the South African system

In order to deal with the legal principles in Canada and South Africa, it is necessary to highlight the type of systems in the government of Canada as opposed to the government of South Africa because the type of system provides an understanding about where the legal principles emanate. Canada's eleven components[845] derive their authority from the Constitution of Canada. Banting and Simoen[846] explain that each jurisdiction is generally independent from the others in its realm of legislative authority. According to Common,[847] this means that the division of powers between the federal government and the provincial governments is based on the principle of exhaustive distribution whereby all legal issues are assigned to either the federal parliament or the provincial legislatures. The division of powers set out in the Constitution Act, 1867 is a key document in the Constitution of Canada. Common[848] states further that the Canadian parliament is given exclusive jurisdiction with regard to criminal law and procedure in criminal matters. While criminal law is enacted by the parliament of Canada for the whole of Canada, the administration of justice, including the enforcement of criminal law, is in the hands of the provinces. According to Yates, Yates and Bain,[849] it is important to understand that the protection of fundamental rights that

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845 The eleven components consist of the national government of Canada and ten provincial components.

846 Banting & Simeon *And no one cheered: federalism, democracy, and the Constitution Act* at 14, 16.

847 Common 1952 *JCL* Volume 43 Issue 1 at 2.

848 Common 1952 *JCL* Volume 43 Issue 1 at 2.

849 Yates, Yates & Bain *Introduction to Law in Canada* at 291.

is set out in the statutes that are passed by the federal or the provincial governments may not protect suspects from abuses by the State. The first attempt at limiting the federal government's power to pass legislation that violates the fundamental rights of a suspect was the introduction of the Canadian Bill of Rights in 1960.[850] Yates, Yates and Bain[851] argue that since the Canadian Bill of Rights was not entrenched in the Constitution of Canada, Canadian courts viewed the Canadian Bill of Rights as just another statute that could be repealed, amended or overridden by any subsequent federal statute. Therefore, if any subsequent federal legislation was found to be in conflict with the provisions of the Canadian Bill of Rights, instead of applying the provisions of the Bill of Rights and limiting the operation of the new legislation, the courts would treat the new legislation as overriding the old and would disregard the provisions that conflicted with the new legislation.[852] As a result, this defeated the purpose of the Canadian Bill of Rights and while it is still considered law in Canada, its effectiveness is limited.[853]

A constitutional guarantee of fundamental rights was introduced through the Constitution Act 1982.[854] As a result of this enactment, was the addition to the Constitution of Canada in the form of the Canadian Charter of Rights and Freedoms.[855] The effect of including the Charter in the Constitution is that neither the federal government nor the provinces have the power to modify or interfere with the fundamental rights set out in the Charter except through constitutional amendment.[856] This means that the Charter and the rights protected by the Charter take preference.[857] Furthermore, the burden of protecting the rights enshrined in the Charter shifted from politicians to judicial officers.[858] Therefore, a person whose rights have been interfered with by legislation, can rely on the courts and use the provisions of the Charter.[859] Whereas the legal system in Canada is based on a federal system, the South African

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850 S.C. 1960, c. 44.

851 Yates, Yates & Bain *Introduction to Law in Canada* at 291.

852 Driedger 1977 *Ottawa Law Review* Volume 9 at 315-316.

853 Yates, Yates & Bain *Introduction to Law in Canada* at 291.

854 Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

855 Black-Branch *Rights and Realities: the judicial impact of the Canadian Charter of Rights and Freedoms on education, case law, and political jurisprudence* at 2.

856 Yates, Yates & Bain *Introduction to Law in Canada* at 291.

857 Gledhill *Human Rights acts: the mechanisms compared* at 2-3.

858 Hennigar 2007 *Law and Society Review* Volume 41 Issue 1 at pages 225-250.

859 Odujirin 2003 *Common Law World Review* Volume 32 Issue 2 at 161-178.

system is based on a unitary system with a centralised government where the national government holds all power.

5.2.2 Unlawful arrest without a warrant and its legal principles in Canada and a comparative analysis with the South African position

In *R v Waterfield*[860] the court dealt with the ancillary powers doctrine in which courts are allowed to create powers for peace officers by according a power that is not expressly provided for in the statute.[861] As a result, Canadian courts have acknowledged that a certain amount of police powers stems from the scope of their duties rather than directly from the law itself.[862] In contrast, the South African context is different in that the powers of peace officers are derived from legislation such as the CPA and the Constitution provides protection of the rights of suspects. South African courts are only empowered to interpret the law and ensure that the rights of suspects have not been violated as a result of the unlawful actions of peace officers. However, South African courts are not empowered to make law or give powers to peace officers. The difference between the Canadian and South African positions with regard to powers of peace officers is that peace officers in Canada are given a broader range of powers to arrest and detain, whereas peace officers in South Africa are empowered to act within the prescripts of the powers provided for in legislation. The researcher submits that the Canadian legal system is more likely to experience unlawful arrests without a warrant and unlawful detentions. However, despite the limited legislation that regulate the powers of peace officers to arrest without a warrant and detain, South Africa is still experiencing problems with regard to unlawful arrest and detention by peace officers (as discussed in chapter 2). The researcher submits that the possible reason behind the incidents of unlawful arrests and detention is that there is insufficient legislation to regulate the powers of peace officers.

In Canada, a peace officer has the power to arrest without a warrant (a) a suspect who has committed or who, on reasonable and probable grounds he believes has

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860 *R v Waterfield* [1963] 3 All E.R. 659, [1964] 1 Q.B. 164; [1963] 3 W.L.R. 946; (1964) 48 Cr. App. R. 42; (1964) 128 J.P. 48; (1963) 107 S.J. 833 (hereinafter referred to as "*Waterfield"*).

861 Coughlan S & Luther G *Detention and Arrest* at page 10.

862 *Dedman v The Queen* [1985] 2 SCR 2 at [66] (hereinafter referred to as "*Dedman*").

committed or is about to commit an indicatable offence; or (b) a suspect whom he finds committing a criminal offence.[863] Section 435 of the Criminal Code of Canada gives peace officers more powers than that conferred by common law.[864] In Canada, the power to arrest one whom he on reasonable and probable grounds believes to be about to commit an indictable offence obviously enables the peace officer to intervene at a stage prior to the commission of an attempt.[865] This means that a peace officer may arrest a suspect[866] where he believes that the suspect is about to commit an indictable offence although he has no basis for charging him with the commission of any offence.[867] While a peace officer's belief in the commission of an offence must be based on reasonable and probable grounds, such grounds of arrest[868] cannot exist if it is found that the offence was in fact not committed.[869] However, in South Africa, the legal position is somewhat different in that the term "reasonable suspicion" is used to determine the circumstances under which the arrest becomes either lawful or unlawful. Furthermore, although the terms reasonable suspicion and reasonable grounds to believe have been used in Canadian law for many years,[870] the two standards initially developed separately with little discussion or analysis of their relationship or differences.[871] Since Canadian legislation offered no definition of these standards, their respective developments are principally attributable to judicial interpretation.[872] In Canadian law, attempts to articulate what constituted the respective standards of reasonable suspicion and reasonable grounds to believe only occurred in the early 1990s.[873] In the case of *R v Chehil*[874] the court held that while reasonable grounds to

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863 Canada: Criminal Code, section 435.

864 Martin 1960 *J. C. L. & Criminology* Volume 51 Issue 4 at 409.

865 Pelvin April 2019 *Canadian Journal of Criminology and Criminal Justice* Volume 61 Issue 2 at page 71; Martin 1960 *J. C. L. & Criminology* Volume 51 Issue 4 at 410.

866 Canada: Criminal Code, section 435.

867 Martin 1960 *J. C. L. & Criminology* Volume 51 Issue 4 at 410.

868 Canada: Criminal Code, section 450.

869 *Roberge v The Queen* 1983 (1) S.C.R 312.

870 *Liquor Licence Act,* RSO 1960, c 218, s. 53 (6) cited in *Jordan House Ltd v Menow* [1974] SCR 239 at 245, 38 DLR (3d) 195; *MacDonald v R,* [1947] SCR *90,* [1947] 2 DLR 625 [cited to SCR].

871 Skolnik 2016 *Ottawa Law Review* Volume 47 Issue 1 at 231.

872 Leonard *Police Powers in England and Wales* at 80; *Hussien* v *Kam* [1969] 3 ALL ER 1626 (PC).

873 Certain Canadian cases analysed whether or not the threshold of reasonable suspicion was met without elaborating further on the standard's characteristics. For example, certain SCC decisions involving driving while impaired offences, and whether the threshold was met in order to permit officers to demand a breath sample from a roadside alcohol screening device; *Dedman* case at 321; *R v Hufsky,* [1988] 1 SCR 621,40 CCC (3d) 398; see the current provision in the *Criminal Code,* RSC 1985, c C-46, s *495*, s 254(2). The standard was also analysed in cases involving the defence of entrapment. See *R v Mack,* [1988] 2 SCR 903,44 CCC (3d) 513.

874 *R v Chehil* 2013 SCC 49 at [27], [32] [2013] 3 SCR 220 (hereinafter referred to as "*Chehil*").

suspect and reasonable and probable grounds to believe are similar in that they both derive from objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than the probability, of an offence. As a result, when applying the reasonable suspicion standard, courts must be cautious not to cover it up with a more demanding reasonable and probable grounds standard.[875] In contrast, section 40(1)(b) of the CPA provides for only one of the two grounds, that being the reasonable suspicion test. If one has to accept the argument by the Canadian court in *Chehil*, one can come to the conclusion that the reasonable suspicion test that is used in South Africa is of a lower standard when compared to the legal position in Canada. The incorporation of the test used in Canada with regard to reasonable grounds into South Africa law has not yet been suggested in South African literature. Perhaps, South Africa can learn from this Canadian principle and take steps to develop South African law accordingly. The development of South African law in this regard may assist in alleviating the incidents of unlawful arrests and detention because a higher standard will regulate the discretion of peace officers in the execution of their powers. Furthermore, the procedure which follows after an arrest without a warrant is the detention of the suspect and this aspect also requires attention with regard to the lawfulness of detention in Canada, together with a comparative analysis of the South African position.

5.2.3 Unlawful detention in Canada and a comparative analysis with the South African position

In Canada a peace officer is required to bring a suspect before a Justice of the Peace within 24 hours, if one is available within that period, and if a Justice of the Peace is not available within the 24-hour period, the peace officer must bring the suspect before the Justice as soon as possible.[876] Contrary to this Canadian principle, in the South

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875 *Chehil* at [27] and [32].

876 Section 438(1) of the Criminal Code of Canada; section 503 of the Criminal Code of Canada; *R v Poirier* (2016) ONCA 582, the Ontario Court of Appeal found that the peace officers acted in violation of the rule that a suspect is to be taken to court within twenty-four hours after arrest, without unreasonable delay. Instead, the peace officers arrested and detained the suspect for about thirty hours before being taken to court. In the thirty-hour period, the peace officers kept the suspect in a police holding cell so that he has a bowel movement and excretes drugs that the peace officers suspected to have been swallowed by the suspect. Once the drugs were excreted, the peace officers took the suspect to a Justice of the Peace for bail; Izadi *LawNow* Volume 41 Issue 4 (March/April 2017) at page 1-3.

African context, sections 35(1)(d)(ii) of the Constitution and 50(1)(c) of the CPA provide for a period of 48 hours as the maximum period in which a suspect can legally be detained after an arrest. Clearly the legal position in South Africa permits a longer period than that permitted in Canada. However, the reason for the different time periods in Canada and South Africa respectively, are not exactly clear. The Canadian position, however, allows a shorter period in which the right to freedom and liberty is compromised, as opposed to the South African position. It can be argued that Canada seems to use the shorter period to reduce or alleviate the incidents of unlawful detention and the violation of the rights to freedom and liberty. However, it can be argued that the different time periods in Canada and South Africa respectively, may have an impact on the fundamental rights of suspects who are in detention because if a suspect is detained unlawfully, then the time period in which the unlawful detention will be calculated in Canada is shorter than the time period for an unlawful detention in South Africa. The researcher submits that South Africa should learn from Canada with regard to the principles for the time period of detention by amending the provisions of the Constitution and legislation such as section 50(1)(c) of the CPA from 48 hours to 24 hours so as to reduce the period of unlawful acts of detention and reduce the incidents of the deprivation of liberty of suspects. It is not only in South Africa that the rights of suspects are violated but this is an occurrence in Canada as well. With regard to the discussion on the constitutional rights of a suspect, the rights to life, liberty and security of person in Canada and an analysis thereof in the South African context are important rights that ought to be analysed and compared.

5.2.4 The constitutional rights of a suspect in Canada and a comparative analysis with the South African position

The Canadian Charter of Rights and Freedoms[877] provides significant constitutional protection to suspects who are suspected of committing an offence.[878] In the case of *Charkaoui v Canada*,[879] the Canadian court held that section 7 of the Charter requires that laws or state actions that interfere with life, liberty and security of a person must

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877 *Canada: Constitution Acts, 1867 to 1982*. Chapter 1 sections 7-15, 24 (hereinafter referred to as 'the Charter').

878 Pye 1982 *Law and Contemporary Problems* Volume 45 Issue 4 at 221.

879 *Charkaoui v Canada* (Citizenship and Immigration) (2007) 1 S.C.R 350 at [19] (hereinafter referred to as "*Charkaoui*").

conform to the principles of fundamental justice and these are considered the basic principles that underlie the notions of justice and fair process. These fundamental rights also form part of the South African legal system (as discussed in chapter 2). The right to life is guaranteed by section 11 of the Constitution of South Africa and the right to liberty and freedom and security of person is guaranteed by section 12(1) of the Constitution of South Africa. However, it should be noted that the right to human dignity, as guaranteed by section 10 of the Constitution of South Africa is excluded from the fundamental rights that are established in section 7 of the Charter. According to the court in *R v Pontes*,[880] there can be no violation of section 7 of the Charter if there is no deprivation of life, liberty and security of the person. The rights to life, liberty and security of person are firmly entrenched in the Canadian legal context, however, the position in South Africa is different because it is only the South African Constitution that provides a guarantee to these fundamental rights. There are no legislative provisions aimed specifically at peace officers which strictly guard against the abuse and violation of the rights of suspects and prescribe strict penalties for non-compliance with legislation. Not only are the principles of an arrest without a warrant and detention pertinent aspects of the comparative review, but the principles that relate to the use of force and excessive force are also part of the aspects that violate the constitutional rights of a suspect. The aspect that deals with the use of force and excessive force are analysed and criticised and compared within the Canadian and South African context.

5.2.5 A comparative analysis of the use of excessive force and the constitutional violations thereof in Canada and South Africa

In Canada, the legal principle is that as long as the peace officer has reasonable grounds for his belief that the arrest without a warrant or detention was correct, the use of force that is subsequently used is regarded as necessary.[881] Contrary to this Canadian principle, the South African legal system does not justify the use of force with the reasonable suspicion requirement that is linked to an arrest without a warrant and detention. Furthermore, the researcher disagrees with the Canadian legal

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880 *R v Pontes* (1995) 3 S.C.R 44 at [47].

881 Scott February 2008 *Criminal Law Quarterly* Volume 53 Issue 3 pages 331-359.

principle because it would mean that in all cases where arrests and detentions are found to be lawful, the use of force that would have been used is lawful. However, there may be instances where the arrest and detention are lawful but the subsequent act of force used on a suspect would amount to being unnecessary and excessive. Therefore, it would be inappropriate to equate the lawfulness of an arrest and detention with the use of force. Although the Canadian legal system is lacking with regard to solutions to the use of excessive force, there have been developments with regard to the protection of the fundamental rights of a suspect and the use of deadly force. With regard to the use of deadly force, the only statutory provisions that protects against the use of excessive force are found in sections 25(4)[882] and 25(5) of the Code. These sections are the result of amendments to the Code as a legislative response to a Crown-initiated Charter challenge to the former "fleeing felon" rule in *R v Lines*.[883] Prior to the amendments, a peace officer had the power to use force under any circumstances where a suspect attempted to flee, unless the escape could have been prevented by reasonable means in a less violent manner.[884] When the Toronto Police Constable Douglas Lines was charged by the polices' Special Investigations Unit with attempted murder for shooting a fleeing suspect, the Crown brought a Charter application, arguing that the former Code section 25(4) was unconstitutional and a violation of the rights to protection from arbitrary detention[885] and protection against cruel and unusual punishment.[886] The court granted the Crown's application and held that the former section 25(4) violated the right to life and security of person.[887] As a result, the current section 35(4) reads as follows:

> "A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested if:

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882 Section 25(4)(d) of the Canadian Criminal Code provides that lethal force will be justified if the "suspect is reasonably suspected of having committed a crime involving serious physical harm." In *Her Majesty the Queen v Magiskan* 2003 CanLII 859 (ON S.C.) at [21] the court held that a peace officer is justified in using force likely to cause death or grievous bodily harm if the peace officer is either lawfully arresting a person with or without a warrant or "the offence for which the person is to be arrested is one for which he or she may be arrested without warrant".

883 The section was amended by R.S.C. 1985, c. C-34, s. 25; 1994, c. 12, s. 1; *R. v. Lines,* [1993] O.J. No. 3284 (QL) (Gen. Div.).

884 Former Code: R.S.C. 1985, c. C-46, s. 25.

885 Section 9 of the Charter.

886 Section 12 of the Charter.

887 Section 7 of the Charter.

(a) the peace officer is proceeding lawfully to arrest, with or without a warrant, the person to be arrested;
(b) the offence for which the person is to be arrested is one for which that person may be arrested without a warrant;
(c) the person to be arrested takes flight to avoid arrest;
(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
(e) the flight cannot be prevented by reasonable means in a less violent manner."

The effect of this amendment was to restrict the use of deadly force against a suspect to circumstances where the peace officer has reasonable grounds to believe that the suspect's escape may cause 'imminent or future death or grievous bodily harm to anyone' and the suspect's flight cannot be prevented in a less violent manner.[888] The essential difference between the new subsection and the previous subsection is the introduction of the concept of reasonable grounds to believe that imminent or future harm exists if the suspect escapes.[889] In the case of *R v Asante-Mensah*[890] the SCC stated that 'reasonable force' may have regard not only to the force that is necessary to accomplish the arrest, but also whether the use of force in all circumstances was a reasonable course of action in the first place. In certain instances, the use of force that is found to be necessary and proportionate to the specific circumstances may not be lawful, however, the underlying requirement is whether a peace officer's action which leads to the use of force is unlawful.[891] In analysing and comparing the legal position in Canada with South Africa, it can be argued that Canada made efforts to develop its legal position with regard to the use of force by amending its legislative provisions to protect the rights of suspects. This amendment took effect as early as 1985 as evident in the *Lines* case. However, even though South Africa amended section 49 of the CPA several times, the section currently fails to meet the required standard to provide full protection to suspects (as discussed in chapter 2). It is not only important for the legal

888 Scott February 2008 *Criminal Law Quarterly* Volume 53 Issue 3 pages 331-359.
889 Scott February 2008 *Criminal Law Quarterly* Volume 53 Issue 3 pages 331-359.
890 *R v Asante-Mensah* (2001), 204 DLR (4th) 51 at [51] aff'd 2003 SCC 38, [2003] 2 SCR 3 at [74] (hereinafter referred to as "*Asante-Mensah*").
891 Cyr 2016 *Alberta Law Review* Volume 53 Issue 3 at pages 663 – 679.

principles that relate to an arrest without a warrant, detention and the use of force to be critically compared. It is important to discuss the practices and legislation that exist in Canada which South Africa can learn from to enhance and develop its own legal system. These practices are discussed hereunder in detail.

5.2.6 Reforms and implementations to the legal system in Canada that can be used as best practices in South Africa

The principles of an arrest without a warrant, detention and the use of force by peace officers in Canada and South Africa have been critically discussed at length. However, it is not enough to merely make a comparison between two jurisdictions without an evaluation of the efficacy and positive legal aspects in Canada which can assist in developing the legal system in South Africa. The aim is to establish best practices or legislative enactments in Canada which may be implemented in South Africa to promote the constitutional rights of suspects and alleviate unlawful acts by peace officers in the execution of their powers. It is therefore important to examine the best practices in Canada with regard to an arrest without a warrant, detention and the use of force on a suspect. In this regard, best practices in Canada with regard to the training of peace officers in making arrests, detaining suspects and using force is relevant with a view to its possible implementation in South Africa.

By 2017 almost half of peace officers in Canada completed college, CEGEP or some type of diploma or certificate program and this number increased to sixty percent for recruits.[892] As retiring officers are replaced, the number of peace officers with post-secondary education increases.[893] The nature of police work has been fundamentally altered as a result of the ever-increasing array of challenges the police force faces.[894] Peace officers work within complex task and decision-making environments that may require them to have an understanding of changes in criminal legislation and judicial decision-making.[895] Therefore police agencies in Canada increasingly recruit college

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892 Hutchins http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14146-eng.htm (accessed on 17 August 2021).

893 Huey, Kalyal and Peladeau Sociology Publications 37.

894 Wilson, Dalton, Scheer and Grammich *Police Recruitment and Retention for the New Millennium*.

895 Huey, Kalyal and Peladeau Sociology Publications 37.

and university graduates.[896] In Canada, potential peace officers can take courses at colleges and universities featuring classes with policing and criminal justice content[897] which are typically offered in the form of two-year diploma to four-year degree programs.[898] In order to prepare new recruits for the challenges of policing, Flanagan[899] and Neyroud[900] favor pre-entry programs. These programs require students to earn an undergraduate degree along with acquiring the basic and practical knowledge of policing.[901] The courses do not only provide adequate educational and practical exposure to the recruits but also reduces the cost of future police training.[902] Police education for potential police recruits is primarily provided by public universities, public colleges and career colleges.[903] Cordner and Shain[904] state that in light of how much importance is placed on education and training within policing, and how expensive it can be, it seems advisable that police leaders and researchers should begin placing more emphasis on developing scientific evidence about what works in the sphere of policing.

The Canadian Association of Chiefs of Police (CACP) focuses on projects and initiatives that address and provide leadership on strategic policing issues and improve Canadian policing and the criminal justice system. The year 2020 marked the introduction of the CACP Police Executive Mentorship Program[905] which is designed to enhance the knowledge, skills and ability of senior level officers in the police force. The CACP was actively involved in a project led by the Canadian Police Knowledge Network to modernise police leadership competencies to ensure improved consistency and to promote the sharing of best practices in the training of police in

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896 Hutchins http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14146-eng.htm (accessed on 17 August 2021).

897 Chappell 'Police Training in America' in P. Stanislas (ed.) *International Perspectives on Policing Education and Training* at pages 274-288.

898 Huey, Kalyal and Peladeau Sociology Publications 37.

899 Flanagan 2008 'The Review of Policing' at 4-6.

900 Neyroud 2011 'Review of Police Leadership and Training' at 11.

901 Huey, Kalyal and Peladeau Sociology Publications 37.

902 Christopher *Policing*, 99(4): 388–404; Carter D and Sapp A 1992 'College education and policing: Coming of Age' FBI Law Enforcement Bulletin January 8-14.

903 Huey, Kalyal and Peladeau Sociology Publications 37.

904 Cordner and Shain The changing Landscape of Police Education and Training' in P Kratcoski and M Edlebacher (eds.) *Collaborative Policing: Police, Academics, professionals, and communities Working Together for Education, Training, and Program Implementation* at pages 51-62.

905 'CACP Police Executive Mentorship Program' https://cacp.ca/cacp-police-executive-mentorship-program.html?mid=519 (accessed on 16 August 2021).

Canada.[906] As a result, a leadership education program for peace officers which consists of police-related online training modules was introduced during 2020.[907] The Canadian Police Knowledge Network is working alongside the Canadian Association of Chiefs of Police, the Canadian Police Association, the Canadian Association of Police Governance and the Canadian Police College on a national campaign for greater integration of competency-based practice and nationally consistent policing standards.[908]

It is clear that Canada has introduced measures to enhance and develop the police system through police training. Associations and colleges have united to ensure that new police recruits are provided maximum training on the legislative and legal aspects of their powers. By contrast, the Basic Police Development Learning Programme (BPDLP)[909] in South Africa aims to train peace officers to protect the members of the community (victims) and ensure community satisfaction by creating a safe environment. However, the researcher submits that there is no course that specifically deals with the training of police in the legal aspects of an arrest without a warrant, detention, the use of force and the importance of the protection of the human and constitutional rights of suspects. Instead, these courses and programs aim to promote and protect the rights of victims.[910]

The principles in Canada have been analysed and criticised and compared with that of South Africa. It would appear that the South African legal system may have regard to the principles and developments from the Canadian legal system with regard to the principles on arrest without a warrant, detention and the protection of the rights of suspects when force is used. As explained earlier, Canada is a foreign jurisdiction, however, in order to obtain a more objective overview, the legal position in the United

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906 'CACP Police Executive Mentorship Program' https://cacp.ca/cacp-police-executive-mentorship-program.html?mid=519 (accessed on 16 August 2021).

907 Canadian Police Knowledge Network 'Canadian Credible Leaders Series' https://www.cpkn.ca/en/canadian-credible-leadership-series/ (accessed on 16 August 2021).

908 Sweet https://journalcswb.ca/index.php/cswb/article/view/196/531 (accessed on 19 August 2021).

909 South African Police Service 'Basic Police Development Training Programme' https://www.saps.gov.za/careers/basic_police_program.php (accessed on 05 September 2021).

910 South African Police Service https://www.saps.gov.za/about/stratframework/strategic_plan/2020_2021/saps_strategic_plan_2020to2025.pdf (accessed on 05 September 2021).

Kingdom will also be compared with that of South Africa. Furthermore, the South African legal principles are similar to the legal position in the United Kingdom and therefore a comparison of the legal positions in both jurisdictions is required in order to determine whether South Africa can learn from legislation or from the best practices in the United Kingdom in order to develop its legal system. These principles are discussed in detail hereunder.

5.3 The legal position in the United Kingdom (England and Wales) and its criminal and procedural law in relation to the South African system

According to Carter,[911] the United Kingdom was established in 1801 and consists of a union of England, Wales, Scotland and Northern Ireland. However, Jones[912] states that there is no single legal system that covers the entire area. Both Scotland and Northern Ireland have their own systems of law and courts.[913] Therefore, the English legal system is only concerned with England and Wales.[914] The Westminster model, under which the United Kingdom operates, follows a system of parliamentary sovereignty. Furthermore, the "Constitution" of the United Kingdom comprises the written and unwritten arrangements that establish the United Kingdom as a political body and no attempt has been made to codify such arrangements into a single document. The "Constitution" of the United Kingdom comprises a variety of sources, some of which are written (such as statutes) and others, such as constitutional conventions, which are unwritten.[915] The "Constitution" is unitary in that the Westminster parliament is the supreme law-making authority. During the constitutional conflicts of the 17th century, the Petition of Rights[916] relied on the Magna Carta[917] for its legal basis, setting out rights and liberties of a suspect from arbitrary arrest and detention. The Bill of Rights[918] then settled the primacy of parliament over the

911 Carter https://www.nyulawglobal.org/globalex/United_Kingdom.html (accessed on 14 June 2021).

912 Jones *Legal Systems of the United Kingdom: The Western Europe (A) E.E.C Countries – Part 1: Country Studies – Chapter Seven* at page 5.

913 Jones *Legal Systems of the United Kingdom: The Western Europe (A) E.E.C Countries – Part 1: Country Studies – Chapter Seven* at page 5.

914 Slapper & Kelly *The English Legal System*.

915 Blackburn https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution (accessed 30 January 2022).

916 Petition of Right 1628.

917 Magna Carta 1215.

918 The Bill of Rights 1689.

monarch's prerogatives with regard to basic human rights, especially freedom from cruel or unusual punishment. In contrast, although the South African legal system is unitary in nature, its legal system is based on constitutional supremacy where the laws and rights are established in the Constitution.

With regard to international human rights instruments, the United Kingdom became a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[919] in 1951. However, it was only after the enactment of the Human Rights Act[920] in 1998 that the ECHR became part of the domestic law of the United Kingdom. The United Kingdom is subject to international law obligations and is a signatory to numerous international treaties and conventions, notably the UDHR, ICCPR, UNCAT and the ECHR. Similarly, South Africa is also subject to international law obligations of the UDHR, ICCPR and the UNCAT. However, the mere fact that the United Kingdom accepts treaty obligations does not have any effect on parliamentary supremacy, as treaties are made by the State and therefore do not change the law. If the United Kingdom signs a treaty that requires a change in domestic law, it is for parliament to authorise such a change by legislation. In *Blackburn v Attorney-General*[921] Lord Denning stated that "we take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us". In this regard, the position is the same in South Africa. Therefore, it is important to ensure that a state party fully conforms to the aims of international instruments through the enactment of domestic law. It is for this reason that the researcher draws a link between international law and human rights instruments with Canada and the United Kingdom and South Africa (as discussed in chapter 4).

5.3.1 The legal position in the United Kingdom with regard to the powers of peace officers in comparison with the legal position in South Africa

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919 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms https://www.refworld.org/docid/3ae6b3b04.html (accessed 20 January 2019) (hereinafter referred to as "ECHR").

920 Human Rights Act 1998 (hereinafter referred to as the 'HRA').

921 *Blackburn v Attorney-General* [1971] 2 All ER 1380.

The legal position in the United Kingdom with regard to an arrest without a warrant, detention and the use of force will be compared with the legal position in South Africa in order to determine whether the South African legal system is more advanced or developed than the legal system in the United Kingdom. Once a comparison of the two jurisdictions has been examined, these aspects could help South Africa to amend its laws or exert an influence on South African laws in order to enhance and develop the existing position and promote the constitutional rights of suspects. According to Brown,[922] the core duty of the police force in the United Kingdom is to protect the public by detecting and preventing crime. Whereas in the United Kingdom, this duty is established by common law (precedents set by decisions of the courts) and peace officers have both common law and legislative powers to execute it,[923] the legal position in South Africa is different in that peace officers derive their powers from legislation and not the common law. It is interesting to note that the legal position in the United Kingdom is similar to the position in Canada where peace officers derive their powers to arrest without a warrant and detain from both common law and statutory law. Furthermore, peace officers in the United Kingdom are individually responsible for using their powers in accordance with the law.[924] Peace officers receive training and guidance on the lawful and effective use of their powers and authority, however, they have a discretion to make decisions.[925]

PACE came into force on 1 January 1986 and remains one of the most significant developments in modern policing in the United Kingdom which represents the dominant legal framework within which policing should be conducted in England and Wales.[926] According to Zander,[927] not only does PACE engage in the practicalities of policing, it also relates to the relationship between the police force in the investigation of crime and the human rights of suspects. Section 24 of the PACE authorises peace officers to arrest, without a warrant, anyone who they suspect has committed or is committing a criminal offence when it is necessary. An arrest is necessary if it is

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922 Brown 2020 'Police powers: an introduction' at 10.

923 Halsbury's Laws of England *Police and Investigatory Powers* at [1] and [40]; *Rice v Connolly* [1966] 2 Q.B. 414.

924 College of Policing, Code of Ethics July 2014 at page 6; Card, R & English J, Police Law, fifteenth edition at page 35.

925 College of Policing, Code of Ethics July 2014 at [5.5].

926 Zander *Zander on PACE: The Police and Criminal Evidence Act 1984* at 139.

927 Zander *Zander on PACE: The Police and Criminal Evidence Act 1984* t 139.

required to ascertain the name and address of a suspect, protect vulnerable people, prevent injury or damage to property or support the prompt investigation or prosecution of an offence.[928] An arrest without a warrant in terms of section 24 of PACE means that the arrest could be lawfully made even if the peace officer did not have reasonable grounds for suspicion to arrest without a warrant.[929] According to Cape,[930] a necessity requirement, but not a proportionality requirement was incorporated into the power to detain an arrested suspect for the purpose of further investigations and the proportionality was reflected in the rules governing the maximum length of detention prior to being charged (in that detention beyond 24 hours was only possible where a suspect was detained in respect of a serious arrestable offence).

The Royal Commission of Criminal Procedure (RCCP)[931] concluded in respect of the then existing powers of arrest, that there was a lack of clarity and an uneasy and confused mixture of common law and statutory powers.[932] The RCCP's proposals aimed to clarify and rationalise those powers, and having regard to the overriding principles that it had established, to restrict the circumstances in which peace officers can exercise the power to deprive a suspect of his liberty to those in which it is genuinely necessary to enable them to execute their duty to prevent the commission of offences, to investigate crime and to bring the suspects to court.[933] Despite these proposals that aimed to protect the rights of suspects and limit the powers of peace officers, the legislature introduced an amendment to the existing law which had the effect of broadening the powers of peace officers to arrest without a warrant. In 2005, section 24 of PACE was amended by the Serious Organised Crime and Police Act[934] (SOCP Act). The latter Act removed the requirement on peace officers to consider the seriousness of the alleged offence before making an arrest without a warrant.[935] Brown[936] states that prior to 2005 peace officers could only make an arrest without a

928 PACE, section 24(5).

929 Anyone who is in the act of committing an arrestable offence or could be guilty of committing the offence could lawfully be arrested.

930 Cape and Young *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future: PACE Then and Now: Twenty-one Years of 'Re-balancing'*.

931 The Royal Commission on Criminal Procedure (Phillips Commission) 1978-1981.

932 RCCP Report Cmnd 8092 (London HMSO 1981) page 10 at 5-7.

933 RCCP Report Cmnd 8092 (London HMSO 1981) page 10 at 5-7.

934 Serious Organised Crime and Police Act 2005 (hereinafter referred to as 'SOCP Act').

935 Brown 2020 'Police powers: an introduction' at 12.

936 Brown 2020 'Police powers: an introduction' at 12.

warrant if they suspected a person of committing a serious offence, however, SOCP Act amended section 24 of PACE so that peace officers can arrest without a warrant, persons who they suspect of committing any crime when it is necessary.

Sections 41 and 42 of PACE regulates the powers of peace officers in the United Kingdom to detain suspects. However, the detention of suspects under PACE is subject to strict limits. Peace officers should deal with suspects expeditiously and release them as soon as the need for detention no longer exists.[937] The pertinent aspect of the principle that relates to the detention of suspects is the role played by the custody officer, that is a peace officer with at least the rank of sergeant who must be unconnected with the investigation of the case.[938] The custody officer authorises the initial detention of the suspect if he has reasonable grounds to believe that the detention of the suspect is necessary to secure or preserve evidence that relates to an offence for which he is under arrest and the custody officer must review the grounds for detention of the suspect after six hours and then at nine hourly intervals.[939] The reasonableness of belief is a question of degree in the circumstances of what information the arresting officer provides to the custody officer.[940] However, the custody officer need not do anything more than merely recite the grounds.[941] Choongh[942] explains that there are instances where a custody officer authorised the detention of a suspect despite the test not being met. Furthermore, Mylonaki and Burton[943] argue that such occurring incidents indicate that the principles that govern the decision to detain are unregulated. Choongh[944] also criticises the efficacy of the rights of suspects and states that at the police station, detainees are 'locked into' a process that is controlled by the police, where their rights have to be negotiated. Mylonaki and Burton[945] argue that PACE legitimises action but rule observance does not necessarily regulate police powers and this deficiency relates not just to the regulation of treatment in police detention but also the use of power to detain a

937 Home Office, PACE Code C, August 2019 at [1.1].
938 Hodgson 2004 *European Journal of Criminology* Volume 1(2) at pages 168-169; PACE, section 37(2).
939 Hodgson 2004 *European Journal of Criminology* Volume 1(2) at pages 168-169; PACE, section 40.
940 *Al Fayed v Metropolitan Police Commissioner* (2004) EWCA Civ 1579.
941 Zander *Zander on PACE: The Police and Criminal Evidence Act 1984* at 139.
942 Choongh 1998 *British Journal of Criminology* Volume 38 Issue 4 at 230.
943 Mylonaki & Burton 2010 *The Police Journal* Volume 83 Issue 1 at 61-79.
944 Choongh 1998 *British Journal of Criminology* Volume 38 Issue 4 at 230.
945 Mylonaki & Burton 2010 *The Police Journal* Volume 83 Issue 1 at 61-79.

suspect. According to Britton,[946] the provisions of PACE were presented by custody officers as an ideal which they uphold but this exposed the fact that the officers were blind to the rights of detainees. Suspects can only be detained without being charged for a period of up to 24 hours.[947] Newburn and Reiner[948] elaborate on this aspect and state that this fundamental deficiency does not give any effect to the function of PACE to safeguard the rights and regulate the police detention procedure. An example of the deficiency of the detention procedure according to PACE is illustrated in the case of *Roberts v Chief Constable of Cheshire*[949] where as a result of a mistaken belief by the custody officer that the suspect's detention was calculated from the later time at the station to which the suspect was transferred and a failure to review his detention within the statutory time limit,[950] the suspect's detention was unlawful because of the limiting provision in PACE.[951] In dismissing the Chief Constable's appeal, the court in *Roberts v Chief Constable of Cheshire* held that the duty to review the detention of a suspect within six hours is absolute and a failure to review the continued detention constitutes unlawful detention until the defect is remedied. The researcher argues that the emphasis placed by the court in *Roberts v Chief Constable of Cheshire* indicates the importance of due compliance with PACE so that the rights of a suspect are protected. Therefore, in light of the strict time frames in Canada which ensure the protection of the constitutional rights of suspects in detention, the researcher emphasises the need for the period of detention in South Africa to be amended from 48 hours to 24 hours, with regular checks and reviews within the 24-hour period. According to Dixon,[952] compliance with PACE is 'largely presentational' within the 24-hour period in which peace officers have without application to a superintendent for an extension, and it is noted that early extensions are routinely granted because there is little requirement to justify the need for continued detention to a higher authority. Should further detention be required, a superintendent at the police station may authorise the further detention of a suspect for a period expiring at or before 36 hours after the relevant time.[953] If

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946 Britton 2000 *British Journal of Criminology* Volume 40 Issue 4 at 639-658.

947 PACE, section 41.

948 Newburn and Reiner 2004 *Crim LR* 601.

949 *Roberts v Chief Constable of Cheshire* (1992) 2 ALL ER 326 (hereinafter referred to as "*Roberts v Chief Constable of Cheshsire*").

950 PACE, section 40(3).

951 PACE, section 34.

952 Dixon *Law in Policing Legal Regulation and Police Practices* at 134.

953 PACE, section 42.

detention beyond the period of 36 hours is required, the authority of a judicial officer must be obtained.[954]

As stated earlier and as part of the objectives of this chapter, it is important to compare the principles that relate to the detention of a suspect in the United Kingdom with the legal position in South Africa in order to determine whether the legal position in South Africa is more advanced than in the United Kingdom. When regard is had to the principles of detention in South Africa (as discussed in detail in chapter 2), detention of a suspect must not last more than a period of 48 hours before the suspect is either charged and taken to court or released without being charged.[955] Furthermore, the period between the actual arrest and the expiry of the period of maximum detention (48 hours), is not regulated by any checks or reviews at intervals for further detention within the 48-hour period as compared to the legal system in the United Kingdom where regular reviews on further detention are conducted. Whereas in South Africa, the decision to investigate, charge the suspect or release the suspect rests solely with the investigating officer who also has possession of the docket and insight into the case, in the United Kingdom the legal position is that the officer who is charged with the power to detain is not the same as the arresting officer or the investigating officer. The investigating officer usually takes the entire 48-hour period to investigate and charge the suspect and in certain instances in South Africa, suspects are detained for periods that are longer than 48 hours (as discussed in chapter 2). Therefore, despite the critical analysis by the authors[956] with regard to the legal position in the United Kingdom and its efficacy thereof, the researcher is of the view that the legal position in the United Kingdom is far better than the legal position in South Africa with regard to the detention of a suspect and the constitutional rights thereof because the United Kingdom has practices that control any abuse of powers by peace officers and protects the rights of suspects. The legal position in the United Kingdom also aims to limit the period of detention and unlawful detention of a suspect to the maximum period of detention of 24 hours at the discretion of a custody officer. This is contrary to the

954 PACE, section 43 and 44.

955 Section 50(1)(c) of the CPA.

956 Choongh 1998 *British Journal of Criminology* Volume 38 Issue 4 at 230; Mylonaki & Burton 2010 *The Police Journal* Volume 83 Issue 1 at 61-79; Britton 2000 *British Journal of Criminology* Volume 40 Issue 4 at 639-658; Newburn and Reiner (2004) *Criminal Law Review* (August): 601; Dixon *Law in Policing Legal Regulation and Police Practices* at 134.

principle in South Africa where a double time period for detention of a suspect is permitted. The researcher submits that South Africa can perhaps learn from the practices and principles in the United Kingdom in so far as the period of detention is concerned, by reducing the period from 48 hours to 24 hours so as to prevent incidents of lengthy and unlawful detention and the deprivation of the rights of suspects. Furthermore, the researcher submits that South Africa can implement the practices used in the United Kingdom with regard to the process of checks and reviews for further detention within the period of detention so that deprivation of liberty is not excessively and unlawfully used during detention. As indicated earlier, not only are an arrest without a warrant and detention pertinent aspects that ought to be compared between the two jurisdictions, but also the aspect that relates to the use of force.

The United Kingdom has ratified the UNCAT and has implemented its provisions through the enactment of the Criminal Justice Act (CJA).[957] The United Kingdom ratified UNCAT in 1988. The United Kingdom has inserted into its codes of criminal procedure specific provisions that are geared to prosecuting acts of torture and has opted for the specific implementation of article 5(2) of UNCAT.[958] As a result, universal jurisdiction over crimes of torture is codified in the CJA which makes it a crime under English law if:

> "[a] public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."[959]

What is interesting about section 134 of the CJA is that it directly links substantive torture law to universal jurisdiction.[960] A detailed discussion of the provisions of UNCAT and its implementation in the United Kingdom follows in 5.5 below. According to Brown,[961] peace officers can use proportionate and necessary force in the course of their duties. The principles that relate to the use of force by peace officers are

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957 Criminal Justice Act 1988 (hereinafter referred to as the 'CJA').

958 Ryngaert 2005 *Netherlands Quarterly of Human Rights* 23(4) at 571-612.

959 Section 134.

960 Ryngaert 2005 *Netherlands Quarterly of Human Rights* 23(4) at 571-612.

961 Brown 2020 'Police powers: an introduction' at 21.

contained in statutory instruments and in the common law. The Criminal Law Act[962] provides that a peace officer may use force as is reasonable in the circumstances in order to prevent crime or when making an arrest of a suspect. Furthermore, section 117 of PACE authorises peace officers to use reasonable force to exercise their powers to arrest without a warrant and detain in terms of the provisions of PACE. The College of Policing[963] has provided guidance on the use of force and it reiterates the provisions of PACE in that peace officers must only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances. Furthermore, it reiterates that peace officers must use the minimum amount of force necessary to achieve the required result and peace officers must be able to account for their use of force.[964] According to the Prison Service Policy the use of force by one person on another person without consent is unlawful unless it is justified. According to the Policy,[965] the use of force is justified and lawful: a) if it is reasonable in the circumstances; b) it is reasonable; c) no more force than is necessary is used and; d) it is proportionate to the seriousness of the circumstances. As discussed in chapter 2, despite the developments to the provisions of section 49 of the CPA, it is argued that further developments are required in order to protect the rights of suspects. It is evident that the United Kingdom introduced strict measures to ensure that peace officers use force only in terms of the prescribed legal principles as provided for in the Criminal Law Act and PACE. However, the South African principles that relate to the use of force require attention because the current legislative provisions do not prove to be sufficient in alleviating the use of excessive force. Therefore, the researcher submits that existing legislation or new legislation ought to be introduced in South Africa by using the principles in the United Kingdom by way of example.

Many cases, investigations and reports have sought to address the unlawful use of force on suspects in the United Kingdom. In 2011, the Independent Police Complaints Commission[966] (IPCC) concluded that a peace officer used excessive force in

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962 Criminal Law Act 1967, section 3.

963 The Police (Conduct) Regulations 2012, schedule 2.

964 College of Policing, Code of Ethics July 2014 at [4.3] & [4.4].

965 Her Majesty's Prison and Probation Service 'Use of force in prison: Prison Service Order No. 1600' 31 August 2005.

966 National Legislative Bodies / National Authorities, United Kingdom www.refworld.org/docid/54aba64c4.html (accessed on 07 July 2021).

dragging a protestor in a wheelchair across a road and that the Metropolitan Police Service was wrong not to recommend criminal charges against the peace officer. The IPCC criticised the internal inquiry into the incident and called on the Metropolitan Police Service to apologise to the victim. In addition, the IPCC recommended that the peace officer becomes subject to management action. Again in 2012, the IPCC urged the police force to reduce the acts of excessive force on suspects following further complaints. In 2015 it was reported that 3000 peace officers were under investigation for the use of excessive force in England and Wales. According to Mawby and Wright,[967] human rights issues continue to challenge the legal system in the United Kingdom with regard to the shooting of suspects by peace officers and the death of suspects in police detention. Between 2011 and 2015, there were incidents of the use of excessive force by peace officers and this was condemned by the IPCC. It is evident that the situation in the United Kingdom with regard to the use of excessive force is as prevalent as it is in South Africa (the South African position was discussed in chapter 2). However, it has to be established whether or not the United Kingdom has implemented any practices or legislation to curb the constant use of excessive force on suspects and whether South Africa has made any efforts to also implement practices or legislation to curb the use of excessive force. A comparative analysis between South Africa and the United Kingdom also includes a discussion on the best practices and legislative implementations in the United Kingdom so that South Africa can perhaps learn from practices to ensure better protection of the rights of suspects.

5.3.2 Reforms and implementations to the legal system in the United Kingdom that can be used as best practices in South Africa

A comparison between the legal position in the United Kingdom and that of South Africa with regard to arrest without a warrant, detention and the use of force and the constitutional implications thereof have been dealt with. However, it is not enough to merely make a comparison between two jurisdictions without an evaluation of the efficacy and positive legal aspects of the United Kingdom which can assist in developing the legal system in South Africa. The aim is to establish best practices or legislative enactments in the United Kingdom which may be implemented in South

967 Mawby and Wright 2005 'Police Accountability in the United Kingdom' at 10.

Africa to promote the constitutional rights of suspects and alleviate unlawful acts by peace officers in the execution of their powers. It is therefore important to examine the best practices in the United Kingdom with regard to an arrest without a warrant, detention and the use of force on a suspect. In this regard, best practices in the United Kingdom with regard to the training of peace officers in making arrests, detaining suspects and using force is relevant with a view to its possible implementation in South Africa.

In the United Kingdom, the idea of the police as a profession is not new.[968] Professionalisation has become a critical discourse for the development of police forces in the United Kingdom.[969] As a result, Paterson[970] states that the shift away from the traditional training programs towards more formal higher education programs has been seen as a way of progress to develop professionalism within the police force. The changing nature of policing and the complexity of police work became an integral part of the police studies discourse.[971] According to Brown[972] and Patterson[973] having a higher education degree tends to have a more significant impact on police officers' knowledge and appreciation of the values and lifestyles of various types of people. Christopher[974] also states that the professional academic education program has been suggested as a vital tool for the development of police forces in the United Kingdom. In February 2016, the College of Policing,[975] the National Professional Body for Policing in England and Wales, introduced the Policing Education Qualifications

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968 Holdaway 2017 *Criminology and Criminal Justice* Volume 17 Issue 5 at 588-604.

969 Tong & Hallenberg *Education and the police professionalisation agenda: A perspective from England and Wales.* In: Rogers C & Frevel B (editors) at pages 17-34; Simmill-Binning C & Towers J (2017) *Education, training and learning in policing in England and Wales*. In: N8 Policing Research Partnership. Lancaster: Lancaster University; Green T & Gates A Understanding the process of professionalisation in the police organisation' Police Journal: Theory, Practice and Principles (2014) 87:75-91; Martin D & Wooff A 'Treading the front-line: Tartanisation and police academic partnerships Policing: A Journal of Policy and Practice 2020;14(2): 325-336.

970 Paterson *Police Practice and Research* 2011; 12(4): 286-297.

971 Ramshaw & Soppitt 2008 *International Journal of Police Science and Management* Volume 20 Issue 2 at 243-250; Cordner & Shain 'The changing landscape of police education and training' Police Practice and Research 2011; 12(4): 281.

972 Brown 2020 'Police powers: an introduction' at 9-30.

973 Patterson *Higher Education, police training, and police reform: A review of police-academic educational collaborations* at pages 119-136.

974 Christopher 2015 *Policing Journal of Policy and Practice* Volume 9 Issue 4 at 326-339.

975 College of Policing http://www.college.police.uk/What-we-do/Learning/Policing-Education-Qualifications-Framework/Pages/Policing-Education-Qualifications-Framework.aspx (accessed on 30 June 2021).

Framework (PEQF) for developing academic programs for the 43 police forces in England and Wales. The PEQF proposed different routes for providing education, namely Police Constable Degree Apprenticeship (PCDA), Degree Holder Entry Program (DHEP) and Pre-Join Degree (PJD) in professional policing practice.[976] Student officers are recruited by the forces for the PCDA and DHEP routes on a salaried full-time 40 hours per week contract. Within their contract hours, they have to engage 20 percent of their time for off-the-job learning with a partner university, being students of an enrolled program.[977] Several police forces have already launched the PCDA program in partnership with other universities. On 7 September 2018, Nottinghamshire Police nationally pioneered the PCDA program with the first cohort in partnership with the University of Derby. The initiative was followed by Derbyshire Police who then ran their first cohort of the PCDA program with the same university. Subsequently, throughout the year in 2019, some other forces[978] started running the PCDA program.[979] The primary mission for drastically changing police education and training is to make policing a graduate level occupation.[980] It is not only to replace the Initial Police Learning and Development Program (IPLDP) or give all peace officers a university degree, but also to make peace officers academically and professionally sound for the execution of the powers vested in them.

The policing professionalisation agenda of the College of Policing and the 'Policing Vision 2025' recognise policing as a graduate level occupation similar to those professions requiring specialist degrees in the relevant subjects such as doctors, social workers and teachers.[981] The 'Policing Vision 2025' has been developed by the Association of Police and Crime Commissioners (APCC) and the National Police

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976 Strong 2019 'Policing education qualifications framework (PEQF) implementation: Frequently asked questions'.

977 College of Policing https://www.college.police.uk/News/College-news/Pages/PEQF-Judicial-Review-Outcome-December-2019.aspx (accessed on 30 June 2021).

978 Forces such as Leicestershire, Northamptonshire, South Wales, Gwent, Dyfed-Powys, West Midlands, Northumbria, Avon and Somerset, Staffordshire, Merseyside and Sussex.

979 College of Policing https://www.college.police.uk/What-we-do/Learning/Policing-Education-Qualifications Framework/Entry-routes-for-police-constables/Pages/Entry-routes-for-police-constables.aspx (accessed on 30 June 2021).

980 College of Policing https://www.college.police.uk/What-we-do/Learning/Policing-Education-Qualifications Framework/Entry-routes-for-police-constables/Pages/Entry-routes-for-police-constables.aspx (accessed on 30 June 2021).

981 National Police Chief's Council (NPCC) https://www.npcc.police.uk/documents/Policing%20Vision.pdf (accessed on 02 July 2021).

Chief's Council (NPCC) in consultation with the College of Policing, National Crime Agency, staff associations and other policing and community partners. In 2016, the College of Policing announced that new peace officers in England and Wales would be educated to degree level from 2020 onwards[982] as the 'Policing Vision 2025' recognises policing as a graduate level occupation. A formal possession of specialised knowledge credentials is considered as a key characteristic for the enclosure of the profession.[983] According to Stone,[984] a college or university degree (or comparable university qualification) ought to be adopted as the basic educational requirement of a professional peace officer. Stone[985] states further that by 2025 British policing will have risen effectively to new challenges and will continue to be highly regarded by both the British public and internationally as a model for other states.

In light of the discussion and analysis of the police training programs in the United Kingdom, it can be understood that the United Kingdom has implemented practices into their legal system in order to enhance and develop the legal knowledge which peace officers require in order to properly exercise their powers.[986] As it has been argued in chapters 2 and 3, the principles and laws with regard to the powers of peace officers remain in place, however, the important issue is that peace officers do not have sufficient training and legal knowledge so that they can properly execute their powers of arrest, detention and the use of force in South Africa. In contrast with the position in the United Kingdom, the current situation in South Africa is that the entry requirements for a person to be employed as a peace officer excludes any form of academic or professional requirements that specifically pertain to the legal aspects of an arrest without a warrant, detention, the use of force and the constitutional rights of suspects. The entry requirements are confined to general aspects with regard to age, citizenship, having a higher education certificate and that the candidate should

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982 Bekhradnia & Beech 2018 'Demand for Higher Education to 2030' at 12.

983 Derber, Schwartz & Magrass *Power in the Highest Degree: Professionals and the Rise of a New Mandarin Order* at 88.

984 Stone *The Stephen Lawrence review: An independent commentary to mark the 10th anniversary of the Stephen Lawrence Inquiry* at 5.

985 Stone *The Stephen Lawrence review: An independent commentary to mark the 10th anniversary of the Stephen Lawrence Inquiry* at 5.

986 College of Policing http://www.college.police.uk/What-we-do/Learning/Policing-Education-Qualifications-Framework/Pages/Policing-Education-Qualifications-Framework.aspx (accessed on 30 June 2021); National Police Chief's Council (NPCC) https://www.npcc.police.uk/documents/Policing%20Vision.pdf (accessed on 02 July 2021).

undertake and successfully complete a physical training program which would confirm their fitness to be employed as a peace officer.[987] Furthermore, the draft South African Police Service Amendment Bill[988] was published for comment and proposes additional requirements before a person is allowed to become a police officer, which relates to an integrity test. The researcher submits that these general requirements are insufficient to satisfy the higher level of knowledge and education that is required in the legal field in order for a peace officer to lawfully arrest, detain and use force. It is important to note that South Africa has not yet established and introduced any form of policing vision or academic training policy for peace officers to successfully complete before they become peace officers. Therefore, in light of the position in the United Kingdom (as discussed above), it can be argued that the United Kingdom is more advanced in this regard and South Africa may find it beneficial to learn from the practices in the United Kingdom to allow peace officers to educate themselves on the legal aspects of an arrest without a warrant, detention and the use of force. Furthermore, the proposed education and training for peace officers will not only broaden their criminal and procedural knowledge, but will also broaden their knowledge on the human rights and the constitutional rights of suspects. The various aspects of the legal principles in South Africa and Canada and the United Kingdom have been critically analysed and compared. It is also important to discuss the importance of the use of foreign law to South Africa.

5.4 The importance of the use of foreign law to South Africa

The Constitution provides for the use of foreign law by South African courts.[989] According to the court in *Makwanyane*, a court can use Public International Law and foreign law as guidance only, but courts are not forced to follow the principles of foreign law. However, Devenish[990] argues that the importance and influence of foreign law may go beyond the interpretations of the provisions of the Bill of Rights in the

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987 South African Police Service, Department of Police http://www.saps.gov.za (accessed on 04 July 2021).

988 South African Police Service Bill 2020.

989 Section 39(1) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law. The concept of the use of foreign jurisdictions was first introduced in the interim Constitution of 1993 under section 35(1) of the interim Constitution of 1993.

990 Currie & De Waal *Commentary of the South African Bill of Rights* at 620.

Constitution. There are reasons why foreign law is suitable enough to be considered in South African courts. According to Devenish,[991] one of the reasons is that South Africa was considered to have insufficient domestic precedents to find solutions to jurisprudential issues that emanated from the interpretation of the provisions of the Bill of Rights. Lolini[992] also states that South Africa's past era of apartheid made it difficult for courts to find domestic jurisprudence to support the interpretation of the South African Constitution. Furthermore, De Ville[993] explains that the justification for the use of foreign law in South Africa is also attributed to the fact that the Bill of Rights was highly influenced by the Constitutions of countries such as Canada, Germany and Namibia. Therefore, it is impossible to identify any sections of the Constitution as free from foreign law influence and the most important provisions which aim to strengthen the Rule of Law and supporting multi-party democracy are those that are contained in the Bill of Rights, which were greatly influenced by Germany and Canada.[994] Du Bois and Visser[995] also explain that South African constitutional law inherited a comparative method of interpretation from the consultation of foreign constitutional law during the drafting of the Constitution. According to Lolini,[996] the Constitutional Courts[997] that are most active in applying foreign law include the established jurisprudence of the SCC. Therefore, section 39[998] of the Constitution empowers courts to incorporate extra-systematic legal information for interpreting the post-apartheid Bill of Rights.[999]

As discussed in chapter 4, the international human rights instruments such as the UDHR, ICCPR and the UNCAT play a very important role because South Africa is

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991 Devenish *Constitutional Law in the Law of South Africa* at 202.

992 Lolini *Legal Argumentation based on Foreign Law: An Example of Case Law of the South African Constitutional Court* at 60, 65.

993 De Ville *Constitutional and Statutory Interpretation* at 241.

994 Du Bois & Visser 2003 *Transnational Law and Contemporary Problems* Volume 13 Issue 2 at 633.

995 Du Bois & Visser 2003 *Transnational Law and Contemporary Problems* Volume 13 Issue 2 at 633. See also *Shelly v Kraemer* 334 U.S 1 (1948); *Du Plessis v De Klerk* 1996 (3) SA [850], [875] [E-F] (CC) where the Court held that both Canada and Germany have developed a strong culture of individual human rights, which finds expression in the decision of their respective courts.

996 Lollini May 2012 *ULR* Volume 8 Issue 2 at 55.

997 Lollini May 2012 *ULR* Volume 8 Issue 2 at 55: Israel and the frequent reference that constitutional court judges in Latin American countries, such as Argentina, Brazil and Columbia make to the Supreme Court of the United States. The Indian Supreme Court as well as the constitutional courts of Central and Eastern Europe are interesting examples of courts systematically using foreign inferences when interpreting national constitutions or in resolving national legal disputes.

998 Section 39(1)(c) of the Constitution provides that a Court may consider foreign law when interpreting the provisions of the Bill of Rights.

999 Lollini May 2012 *ULR* Volume 8 Issue 2 at 55.

obligated to adhere to international human rights instruments. Chapter 4 dealt with international law and international human rights instruments in South Africa and it is therefore relevant to discuss the international human rights instruments in Canada and the United Kingdom.

5.5 A comparison between international human rights instruments and the jurisdictions of Canada and the United Kingdom

Chapter 4 dealt with international human rights instruments and its importance to South Africa and it was established that South Africa is failing to comply with its international obligations, especially with regard to compliance with the concluding observations and recommendations of the UN Human Rights Committee and the Committee against Torture. The researcher submits that it is also important to establish whether the jurisdictions of Canada and the United Kingdom are complying with their international obligations so as to compare the findings with the findings in chapter 4 so that perhaps South Africa can learn best practices in making efforts to comply with international obligations. The UDHR, ICCPR and the UNCAT and compliance in Canada and the United Kingdom are discussed hereunder.

According to Norman and Eliadis,[1000] Canada signed the UDHR and as a result it ratified international human rights treaties such as the ICCPR and the UNCAT. Schabas[1001] states that the UDHR played a seminal role in the development of human rights law in Canada. As a result of the drafting and subsequent adoption of the UDHR, the parliament of Canada implemented domestic legislation such as the Canadian Bill of Rights[1002] in 1960 and subsequently, the Canadian Charter of Rights and Freedoms which was proclaimed in 1982.[1003] Similarly, the United Kingdom also signed the UDHR and consequently ratified the ECHR in 1951, the ICCPR in 1976 and UNCAT in 1988 respectively. The provisions of the UDHR and the ECHR also led to the enactment of domestic legislation such as the Human Rights Act[1004] which makes provision for the protection of persons who have been arrested and detained and

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1000 Norman & Eliadis www.thecanadianencyclopedia.ca (accessed on 19 July 2021).
1001 Schabas 1998 *McGill Law Journal* Volume 43 Issue 3 at 17, 22.
1002 S.C. 1960, c. 44.
1003 Canada: Constitution Acts, 1867 to 1982.
1004 Human Rights Act 1998.

protects the rights to life and security of person. It is evident that Canada and the United Kingdom adhered to the provisions of the UDHR by ratifying human rights instruments and enacting domestic legislation to promote the rights of suspects. In light of the fact that Canada and the United Kingdom have introduced legislation to comply with the provisions of the UDHR, it is important to note that South Africa complied with the provisions of the UDHR mainly through its constitutional provisions. The researcher submits that the South African legal system in this respect lacks the relevant legislation that should be aimed specifically at peace officers to ensure that the rights of suspects are protected and promoted as provided for in the UDHR. Furthermore, legislation that pertains to the development and training of peace officers for the improved exercise of their powers ought to be implemented in South Africa. Not only is article 5 of the UDHR relevant to South Africa, but it is also relevant to the jurisdictions of Canada and the United Kingdom with regard to the use of force. In addition to the discussion of the provisions of the UDHR with regard to the use of force, it is also relevant to highlight the relationship between the provisions of the UDHR with the foreign jurisdictions of Canada and the United so that a comparison can be made on whether South Africa fully complies with the human rights obligations as set out in the UDHR as compared to the position in Canada and the United Kingdom. As stated earlier, Canada signed the UDHR and as a result Canada has ratified international human rights treaties such as the ICCPR and the UNCAT.[1005] As a result of the drafting and subsequent adoption of the UDHR, the parliament of Canada implemented domestic legislation such as the Canadian Bill of Rights[1006] in 1960 and subsequently, the Canadian Charter of Rights and Freedoms which was proclaimed in 1982.[1007] The Charter makes provision for the aims of the UDHR with regard to the prohibition on torture as reflected in section 12 of the Charter.[1008] The United Kingdom also signed the UDHR and consequently ratified the ECHR in 1951, the ICCPR in 1976 and UNCAT in 1988 respectively, which also contain provisions that explicitly prohibit the use of torture and excessive force. The provisions of the UDHR and the ECHR also led to the enactment of domestic legislation such as the Human Rights Act[1009] which

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1005 Norman & Eliadis www.thecanadianencyclopedia.ca (accessed on 19 July 2021).

1006 S.C. 1960, c. 44.

1007 Canada: Constitution Acts, 1867 to 1982.

1008 Section 12 states that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

1009 Human Rights Act 1998.

also makes provision for the prohibition on torture. In light of the fact that Canada and the United Kingdom enacted laws to explicitly prohibit the use of excessive force and consequently give effect to the aims of the UDHR, the efforts that South Africa made in this regard are questionable. In South Africa, only the Constitution and the PTCPA prohibit the use of excessive force. However, there are no other legislative enactments that specifically deal with peace officers and their use of excessive force, the violation of the human rights of suspects and the penalties for violations of the law. In the absence of strict measures, the acts of excessive force and violations of human rights will not only continue but South Africa will also continue to fail in its customary duty to adhere to the provisions of the UDHR (this aspect was discussed at length in chapter 4). Since chapter 4 dealt with a discussion of the ICCPR and South Africa's obligation to comply with its provisions, the researcher will also deal with the provisions of the ICCPR and compliance in Canada and the United Kingdom.

Attention is drawn to the domestic implementations and developments of the legal system in the jurisdictions of Canada and the United Kingdom with regard to the provisions of the ICCPR. The ICCPR was opened for signature by the UN General Assembly on 19 December 1966 and entered into force on 23 March 1976, the same year that Canada became a party to the ICCPR. Canada is required under the ICCPR to submit periodic reports to the UN Human Rights Committee and it has consistently submitted these reports since it ratified the covenant.[1010] In response to its sixth report in 2015, the UN Human Rights Committee commended Canada for the implementation of various laws as recommended by the Committee.[1011] Similarly, with regard to the position in the United Kingdom, the UN Human Rights Committee welcomed the timely submission of the seventh periodic report and the information presented therein.[1012] The researcher submits that in both the concluding observations of Canada and the United Kingdom, respectively, the Committee found no reason to set out any concerns with regard to the implementation of international law into the

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1010 Government of Canada https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/reports-united-nations-treaties.html (accessed on 22 July 2021).

1011 United Nations Human Rights Committee (HRC), Concluding observations on the sixth periodic report of Canada https://www.refworld.org/docid/5645a16f4.html (accessed on 23 July 2021).

1012 United Nations Human Rights Committee (HRC), Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland https://www.refworld.org/docid/5645a59c4.html (accessed on 23 July 2021).

domestic law of the state by way of enacting legislation. However, the position is different in South Africa (as discussed in chapter 4) and it can therefore be argued that Canada and the United Kingdom are making efforts to comply with their international obligations, as opposed to the position in South Africa. Chapter 4 also dealt with the UNCAT in relation to the use of force and compliance in South Africa. It is therefore relevant to compare the adherence of the provisions of the UNCAT in Canada and the United Kingdom so as to establish whether Canada and the United Kingdom are compliant as opposed to South Africa.

Following the submission of Canada's seventh periodic report, the UN Committee against Torture made concluding observations on 5 December 2018. The Committee against Torture commended Canada on its initiatives to amend policies and procedures in order to afford greater protection of human rights and to comply with the aims of the convention and it welcomed the first meeting that Canada held in 2017 that dealt with important priorities that relate to Canada's international human rights obligations.[1013] Similarly, in May 2019, the UN Committee against Torture made concluding observations with regard to the sixth periodic report of the United Kingdom and commended the United Kingdom in its initiatives to amend its policies and procedures in order to afford greater human rights protection and to apply the UNCAT.[1014] The Equality and Human Rights Commission (EHRC)[1015] is an independent body which covers equality and human rights which was established by the government of the United Kingdom through the Equality Act.[1016] The EHRC compiled a follow-up submission to the 2019 concluding observations of the UN Committee against Torture in response to the Committee's request for plans on the implementation of some or all of the recommendations of the concluding

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1013 United Nations Committee against Torture Concluding observations on the seventh periodic report of Canada https://atlas-of-torture.org/en/document/dwlks (accessed on 30 July 2021).

1014 United Nations Committee against Torture Concluding observations on the 6th periodic report of the United Kingdom and Britain and Northern Ireland https://digitallibrary.un.org/record/3859788?ln=en (accessed on 31 July 2021).

1015 United Kingdom: Parliament, Joint Committee on Human Rights, Equality and Human Rights Commission https://www.refworld/org/docid/4b9e030e2.html (accessed on 12 August 2021).

1016 Equality Act 2006.

observations.[1017] The EHRC has made efforts to establish greater accountability mechanisms by focusing on three main areas:[1018]

- Human rights tracker[1019] which is an online tool which compiles all UN recommendations to the United Kingdom in a searchable and accessible format. The tracker raises awareness of the United Kingdom's human rights obligations and helps users monitor how well they are being implemented.
- A treaty monitoring working group which brings together the United Kingdom government officials responsible for treaty reporting and implementation from across different departments. This includes representatives from the Joint Committee on Human Rights and the National Preventive Mechanism. The group meets quarterly to share best practice, discuss upcoming reporting obligations and discuss progress towards implementation.
- Identifying opportunities to engage the United Kingdom and devolved governments and parliaments around the calls for National Mechanisms for Implementation, Reporting and Follow-up (NMIRF) and influencing United Nations bodies to reiterate this in their recommendations.

The position in South Africa (as discussed in chapter 4) is different to the position in the United Kingdom (as discussed above). In this regard the UN Human Rights Committee commended Canada and the United Kingdom for their efforts in improving the human rights of suspects. This means that Canada and the United Kingdom acknowledged the concerns of the Committee. Furthermore, the United Kingdom took a step further by establishing the EHRC to ensure that the United Kingdom implements the recommendations of the Committee against Torture and complies with its international obligations. It is clear that Canada and the United Kingdom are complying with their international obligations and are making efforts to show that they are complying with the recommendations of the UN Human Rights Committee. However, the position in South Africa is different (as discussed in chapter 4) in that South Africa

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1017 Equality and Human Rights Commission https://www.equalityhumanrights.com/en (accessed on 12 August 2021).

1018 Equality and Human Rights Commission https://www.equalityhumanrights.com/en (accessed on 12 August 2021).

1019 Equality and Human Rights Commission https://www.equalityhumanrights.com/en (accessed on 12 August 2021).

is failing to comply with its international obligations in terms of UNCAT. The researcher submits that South Africa can emulate the practices and efforts made by Canada and the United Kingdom in order to improve its own legal system and most importantly, to promote and protect the human rights of suspects.

5.6 Chapter conclusion

This chapter entailed a comparative review of the legal position with regard to an arrest without a warrant, detention, the use of force and the constitutional implications thereof in Canada and the United Kingdom with that of South Africa. Canada and the United Kingdom were the chosen jurisdictions because their legal principles are similar to that of South Africa. The legal background and history of the legal systems of Canada and the United Kingdom were also discussed. The comparative review dealt with the legal position in Canada which thereafter followed with a comparative review on the United Kingdom. The international legal principles that South Africa, Canada and the United Kingdom are bound to comply with have also been discussed and compared. As a result of the comparative analysis of the legal position in Canada with that of South Africa, it can be argued that the relevant aspects of Canadian law are better than the South African legal position with regard to the principles of arrest without a warrant and detention. With regard to an arrest without a warrant in Canada, the test that determines the lawfulness of an arrest without a warrant are reasonable and probable grounds, which, as argued, are stricter than the South African test of reasonable suspicion. It is suggested that South Africa could learn from Canada by amending its own principle from reasonable suspicion to reasonable and probable grounds. With regard to detention of suspects, the Canadian principles provide for a maximum period of 24 hours of detention which aims to reduce the length of detention and possibly aims to reduce the rate of unlawful detention and the violation of human and constitutional rights. Perhaps South Africa could amend the time period of detention from 48 hours to 24 hours so as to alleviate unlawful detentions and the prolonged deprivation of liberty. Canada also boasts some good practices and improved legislation which promotes the rights of suspects and develop the training of peace officers with regard to an arrest without a warrant, detention and the use of force. South Africa could learn from these best practices by implementing the practices in South Africa. With regard to the comparative review of the legal position in the United

Kingdom with that of South Africa, it can be argued that the principles that relate to detention of suspects and the developments with regard to the improved education of peace officers are far better in the United Kingdom than in South Africa. With regard to detention in the United Kingdom, the maximum period of detention is 24 hours and there are constant reviews for further detention at various intervals prior to the expiry of the 24 hours. Furthermore, the arresting peace officer is not the same as the detaining officer, which may be useful in alleviating any abuse of powers. In addition to these aspects, the United Kingdom has made efforts to develop and enhance the training and education of peace officers to professionalise the field and ensure that peace officers have the required education and legal knowledge to be able to lawfully execute their powers. Therefore, the best practices and developed principles in Canada and the United Kingdom respectively, must be introduced into the South African legal system so that the constitutional rights of suspects are duly protected. This chapter also dealt with international compliance with the provisions of the UDHR, ICCPR and UNCAT in Canada and the United Kingdom. A comparison was made of the steps taken by these two jurisdictions in response to the UN Committee on Human Rights and the Committee against Torture and it transpired that these jurisdictions have made progress in addressing the concerns and ensuring better compliance with international law as compared to South Africa. South Africa could emulate the efforts made by these two jurisdictions in ensuring better compliance with international obligations.

With this in mind, the researcher will proceed to the next chapter which includes the conclusions and recommendations that incorporate the objectives and the primary research questions, whilst taking into consideration the existing literature and comments by judicial officers as discussed in chapters 2 to 5. Chapter 6 will include recommendations on how South Africa and its peace officers can take steps to lessen the rate of unlawful arrests without a warrant, detention and the use of excessive force, whilst at the same time, promoting and protecting the constitutional and human rights of suspects.

CHAPTER SIX

SUMMARY, RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

This chapter commences with a critical analysis of the findings of each chapter and demonstrates the manner in which the objectives and primary research questions of each chapter have been answered. As a result of the findings of the study, it is imperative to also set out recommendations of the study in which the gaps or flaws that emanated throughout the research are used to contribute to a change to or introduction of a new or amended legal principle or practice in the area of study. Furthermore, recommendations for further research in the study are also required in order to demonstrate the usefulness and importance of the study for future researchers. The conclusions of the study are drawn from the statement of problem that was set out in chapter 1. The chapter then ends with a conclusion.

6.2 Summary of the findings

Chapter 1 dealt with the introductory aspects of the study. It commenced with a brief discussion of the background to the study which was thereafter followed with a discussion of the statement of the problem in the study. This chapter also included a brief discussion of the purpose and the significance of the study. The most important aspect of the study is the objectives and primary research questions. Both the objectives and the primary research questions specifically highlighted and identified the areas that the researcher intended to deal with in the study. The scope and delimitations of the study were discussed and the researcher noted aspects that limited or restricted the study. A critical analysis formed the basis of a discussion on the contributions to the body of knowledge in the area of study which highlighted the gaps in the existing literature and laid the basis for the manner in which the study will contribute or fill gaps in the existing literature. Furthermore, the literature and comparative review formed the research methodology of the study and this section dealt with a brief summary of the critical aspects of the study. This was followed by the definition of terms or concepts that are used throughout the study. The contents of

each chapter were set out which reflected the structure of the study from chapters 1 to 6.

Chapter 2 reviewed the literature with regard to the powers of peace officers to arrest without a warrant, detain and use force in relation to the constitutional rights of suspects. The requirement of reasonable suspicion was an important aspect that formed part of the critical analysis with regard to an arrest without a warrant. Reference was made to the *Ralekwa* case and Swanepoel, Lotter and Karels *et al*[1020] in paragraph 2.2.1.2 with regard to a peace officer not having a reasonable suspicion and the result that an arrest without a warrant violates the constitutional rights of a suspect. It was found that if a peace officer did not hold a reasonable suspicion, based on the test of an objective standard, then the arrest without a warrant is unlawful. As a result, the constitutional rights of the suspect are violated. The comments by the court in *Glisson*[1021] as well as the comments by Botha and Visser[1022] and Du Toit *et al*[1023] were discussed in paragraph 2.2.1.3 where preference was given to the constitutional rights of a suspect as opposed to the avoidance of unnecessary restriction of the powers of peace officers. Despite these comments, it was found that the courts and the authors omitted to deal with a peace officer's lack of knowledge on the constitutional provisions that relate to the arrest of a suspect without a warrant. The constitutional rights such as the rights to freedom and human dignity were discussed in detail because these rights are directly affected, and reference was made to *Ferreira*[1024] in which the court condemned the violations of the rights to freedom and security of person and human dignity that took place as a result of the unlawful actions of peace officers. Despite the comments by Freedman[1025] and Cheadle, Davis and Haysom[1026] that the right to freedom and security of person is of utmost importance, the study found that the authors have not dealt with the issues pertaining to the violations of the constitutional rights of suspects and solutions to alleviate these

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1020 Swanepoel, Lotter & Karels *Policing and the Law* 178.
1021 *Glisson* at [134].
1022 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 1.
1023 Du Toit *et al Commentary on Criminal Procedure* 5 - 9.
1024 *Ferreira* at [49].
1025 Freedman 2012 *LAWSA* Volume 5 Part 4 at 1-348.
1026 Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights*.

problems. Similarly, De Vos[1027] and Cheadle, Davis and Haysom[1028] explain that the unlawful actions of peace officers violate the right to human dignity of suspects. However, the study found that the existing literature fails to provide solutions to the violation of rights. Paragraph 2.2.2 dealt with unlawful detention and the violation of the constitutional rights of suspects. Joubert,[1029] Steytler[1030] and Kruger[1031] quite correctly argue that the detention of a suspect for longer than 48-hours is unlawful and a violation of the constitutional rights of a suspect. Although it has been established that the incidents of unlawful detention are prevalent and the violation of the constitutional rights are the result of such unlawful acts, the existing literature fails to critically discuss whether peace officers have knowledge of the legal principles that govern the detention of suspects in order for them to execute their powers in accordance with the law. The researcher agrees with the comments made by Mokoena[1032] where the reasons for the unlawful acts of detention and the violation of the rights of a suspect have been the result of a lack of knowledge of peace officers in properly performing their powers. Therefore, the study found that, in light of the comments made by Mokoena,[1033] steps must be taken to alleviate unlawful detention and promote the constitutional rights of suspects. The use of force on suspects was critically analysed in paragraph 2.2.3. There is no doubt that force can be used by peace officers only in accordance with the law and there are strict limitations on the use of force. However, Joubert[1034] and the Centre for the Study of Violence and Reconciliation[1035] correctly argue that the use of excessive force that is contrary to the legal principles on the use of force, will not only be unlawful but also unconstitutional. The study found that incidents of excessive force are evident in South Africa and as a result, the constitutional rights of suspects continue to be violated. Furthermore, the discussions that relate to the amendments to section 49 of the CPA established that despite several amendments by the legislature to amend section 49 of the CPA to ensure compliance with constitutional provisions, such efforts were in vain because

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1027 De Vos *South African Constitutional Law in Context* at 457.

1028 Cheadle, Davis and Haysom (eds) *South African Constitutional Law: The Bill of Rights at* 131.

1029 Joubert *Applied Law* 264.

1030 Steytler *Constitutional Criminal Procedure* 126.

1031 Kruger Hiemstra's Criminal Procedure at 5-29.

1032 Mokoena *A Guide to Bail Applications* 15.

1033 Mokoena *A Guide to Bail Applications* 15.

1034 Joubert *et a*l *Criminal Procedure Handbook* at 134.

1035 Centre for the Study of Violence and Reconciliation https://www.csvr.org.za/docs/Anewapproachtotheuseofforcebrochure.pdf (accessed on 6 May 2017).

the amendments improved and broadened the powers of peace officers rather than promoting and protecting the rights of suspects. This aspect was critically analysed and discussed in paragraph 2.2.3.2 and it was found that the latest amendment to section 49 of the CPA in 2012 gave peace officers wider powers to use force at the expense of the constitutional rights of suspects. The researcher agrees with the comments made by Botha and Visser[1036] in which it is suggested that a further amendment to section 49(2) of the CPA should be made so that the constitutional rights of suspects are duly protected.

The study also examined the legal position of the fifth jurisdictional fact as an alternative method to an arrest without a warrant and detention and a discussion on its place in South African law as a means to promote the fundamental rights of suspects. As discussed in paragraph 2.3, the position before 1994 was that compliance by a peace officer with the four legal requirements for an arrest without a warrant would make such arrest lawful which meant that suspects could be arrested without a warrant, without the need to consider alternative and less invasive means. This aspect was critically analysed in the leading case of *Tsose*.[1037] Although Hiemstra and Kruger[1038] argue that peace officers should only use their powers to arrest without a warrant when a summons or a written notice is insufficient to ensure that a suspect attends court, the existing legal principles that govern the power to arrest do not attempt to reduce the number of arrests without a warrant. The researcher is therefore in agreement with the comments made by the court in *Motsei*[1039] where it was held that the law should prescribe that peace officers must use alternative methods other than arrest to ensure that a suspect attends court. Therefore, the study found that there is a need for an amendment to the existing legal principles to provide that peace officers use alternative methods other than arrest to ensure that a suspect attends court. Paragraph 2.3.3 dealt with the introduction of the fifth jurisdictional fact to the existing four requirements for a lawful arrest without a warrant. The researcher disagrees with the comments made by the court in the *Charles* and the *Sekhoto* cases where it was held that peace officers should be allowed to use their wide discretionary

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1036 Botha & Visser 2012 *PELJ* 15 Issue 2 at 346-569.

1037 *Tsose* at [17G-H].

1038 Kruger *Hiemstra's Criminal Procedure* at page 5-2.

1039 *Motsei* at [35].

powers and that the existing legal principles should protect peace officers in the performance of their powers. This would mean that the powers of peace officers should outweigh the constitutional rights of suspects which would be contrary to the aims of the Constitution. Furthermore, the Constitutional Court in *Raduvha* expressed its views on two important aspects. First, that the rejection of the fifth jurisdictional fact and the approval of the comments in *Sekhoto* that peace officers must use their discretionary powers to decide whether to use alternative methods other than an arrest to ensure that a suspect attend court, and second, that those discretionary powers must incorporate the aims of section 28(2) of the Constitution when a peace officer decides to arrest a child. The researcher disagrees with the views expressed in *Raduvha* with regard to the rejection of the fifth jurisdictional fact. In essence, it would mean that the powers of peace officers outweigh the importance of the constitutional rights of suspects. Furthermore, the researcher argues that many peace officers do not know that they are vested with discretionary powers but rather believe that their only option is that of arrest. The researcher, however, agrees with Tshehla[1040] who argues that the comments made in *Sekhoto* and *Raduvha* are meaningless, without the intervention of the legislature to amend existing legislation in regard to restricting discretionary powers. The researcher also concurs with the court in the *Louw* case and with Msaule[1041] to promote the use of less invasive methods other than an arrest of a suspect. In light of the critical analysis on this aspect, the study found that the introduction of the fifth jurisdictional fact will reduce the acts of unlawful arrest without a warrant, unlawful detention, the use of excessive force and the violation of the constitutional rights of suspects. A failure to introduce this fact is an impediment in the promotion and the protection of the constitutional rights of suspects. The researcher therefore agrees with the comment by Du Toit *et al*[1042] in which the authors argue that the fifth jurisdictional fact should be added to the existing requirements for a lawful arrest. Alternatively, the researcher argues that the legislature should intervene and create restricted discretionary powers for peace officers that would prescribe the better option of using alternative methods other than an arrest.

1040 Tshehla 2021 *Journal for Juridical Science* Volume 46 Issue 2 at 99-100.

1041 Msaule 2015 *De Jure* Volume 48 Issue 1 at page 244.

1042 Du Toit *et al Commentary on Criminal Procedure* at ch5-p12B – ch5-12E.

Chapter 3 examined the requirements for delictual liability and the infringement of the right to personal liberty as a consequence of the unlawful actions of peace officers. As discussed in paragraph 3.2, although Neethling[1043] and Millner[1044] correctly explain the link between the duty of care with the actions of peace officers, and the court in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*[1045] correctly stated that peace officers have a legal duty to ensure that the rights of suspects are protected in accordance with the Constitution, the study found that the existing literature does not deal with whether peace officers know the legal principles of delict in order to correctly act upon their powers. Furthermore, Neethling, Potgieter and Visser[1046] correctly explain the principles relating to causation as a requirement in delict and its importance to peace officers in the execution of their powers. The researcher concurs with the comments by Swanepoel, Lotter and Karels,[1047] in which the authors critically argue that peace officers do not understand their unlawful acts and do not rectify their unlawful acts because no liability is imputed to them directly. However, the literature does not extend beyond the arguments by the authors. The study therefore found that the existing literature does not deal with the reasons why peace officers fail to act in accordance with the legal principles and peace officers do not have the required knowledge of the delictual principles to duly act upon their powers. Coupled with the aspects of delictual liability are the legal principles governing the right to personal liberty of a suspect. As discussed in paragraph 3.3, Nkosi[1048] and the court in *Zealand*[1049] correctly point out that an interference with the right to personal liberty of a suspect is unlawful. Furthermore, the court in *Woji*[1050] stated that a peace officer has a duty to ensure that a suspect enjoys full protection of his constitutional rights and the right to personal liberty. Therefore, the study found that the reasons for the unlawful actions and the violations of the right to personal

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1043 Neethling 2005 *SALJ* Volume 122 Issue 3 at 579.

1044 Millner *Negligence in Modern Law* at page 230. See also *Ramushi v Minister of Safety and Security* at [7].

1045 *Carmichele v Minister of Safety and Security And Another (Centre for Applied Legal Studies Intervening)* at [956]–[957] and [970].

1046 Neethling, Potgieter & Visser *Law of Delict* at 588.

1047 Swanepoel, Lotter & Karels *Policing and the Law* at 178.

1048 Nkosi 'Balancing deprivation of liberty & quantum of damages' at [13]. See also *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC), 2014 3 SA 394 (CC) at [53].

1049 *Zealand* at [11]-[12].

1050 *Woji* at [418b]-[418f].

liberty are that peace officers do not possess the required knowledge to properly perform their powers.

Furthermore, chapter 3 examined the extent of poor conditions and overcrowding in police holding cells as a consequence of the unlawful actions of peace officers. In paragraph 3.4.1, the researcher referred to the comments in the case of *Black* where it was quite correctly argued that the introduction of the fifth requirement which would alleviate the number of arrests without a warrant and would consequently reduce overcrowding and poor conditions in police station holding cells. In addition, the researcher referred to the argument by Muntingh[1051] which criticises the PSO for failing to provide solutions to the problems associated with the safety of suspects in detention, including the death of suspects. Reference in paragraph 3.4.1 was made to the 2019/2020 report of the SAHRC which provides statistics of several police stations that are affected by overcrowding. Despite the arguments evident in the existing literature, the study established that the acts of unlawful detention play a role in the poor conditions and overcrowding in police station holding cells. The study also highlighted that a suspect who is subjected to poor conditions and overcrowding in a police station holding cell also has his rights violated because his rights to freedom of movement, freedom and security of person and human dignity are infringed. Furthermore, due to poor conditions and overcrowding, deaths of suspects occur in police custody. It may therefore be argued that the introduction of the fifth jurisdictional fact may alleviate these problems. As a result of the unlawful actions and the poor conditions of detention, damages are awarded to suspects for the infringement of the right to personal liberty. Therefore, chapter 3 also examined the possible introduction of a mathematical approach to calculate the award of damages for unlawful arrest, unlawful detention and the use of excessive force as a fair and reasonable method, as opposed to using awards in previous cases. The study dealt with the existing method of calculating damages by using the awards in previous cases as a guide. As discussed in paragraph 3.5.1, although the court in the *Seymour*, *Tyulu* and *Samanithan* cases have widely accepted the use of this method, the courts also argue that this method may be misguiding and the study therefore highlighted disadvantages of the continued use of the current method. The researcher however, argued that

[1051] Muntingh Chapter 12, at page 165.

despite the analysis of the current method used to award damages, the existing literature has failed to propose a new method that is fair and reasonable. The researcher drew a comparison of the method used to award damages by various courts in several cases in the years 2018, 2019 and 2020 as evident in the detailed discussion in paragraph 3.5.2. The conclusions derived by the courts in each case were used as examples to establish whether the awards in cases were fair and reasonable and the result was that the amounts awarded in cases with similar facts were disproportionate in relation to awards in other cases with similar facts. Hence the argument that a mathematical calculation should be used based on the calculation that is explained in chapter 3. In paragraph 3.5.3, the researcher proposed a mathematical calculation of damages that is fair and reasonable, with a detailed explanation of how the award should be mathematically calculated. The researcher proposes that this mathematical method ought to be the uniform method that it utilised in all South African courts.

Chapter 4 examined and critically analysed the South African legal principles governing an arrest without a warrant, detention and the use of force with international and regional human rights law and instruments in order to determine whether South Africa is complying with its international and regional obligations and to also determine how South Africa can amend its legislation or introduce new legislation to ensure better protection and the promotion of the human rights of suspects. The study analysed the importance of the provisions of the UDHR, ICCPR, UNCAT and the AChHPR in relation to the provisions of the Constitution. In paragraph 4.2.1.1, the researcher referred to and agreed with the argument set out by Petersen[1052] and Scheinin[1053] that the provisions of sections 11 and 12 of the Constitution do not effectively comply with articles 3, and 9 of the UDHR. The study critically examined the recommendations of the UN Human Rights Committee[1054] and the Committee against Torture[1055] with regard to compliance by South Africa and it transpired that South Africa has failed to

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1052 Petersen *International Protection: Right to Life* at [1].

1053 Scheinin *International Protection: Rights to Security* at [13].

1054 Concluding observations on the initial report of South Africa: Human Rights Committee https://digitallibrary.un.org/record/1317444?ln=en (accessed on 23 July 2021).

1055 Concluding observations on the second periodic report of South Africa: Committee against Torture https://www.justice.gov.za/ilr/docs/2019-CAT-SA-ConcludingObservations-SecondPeriodicReport-May2019.pdf (accessed on 25 July 2021).

comply and implement the recommendations of the Committees. The researcher referred to Tait[1056] who suggested that South Africa should introduce new legislation to curb unlawful arrests and detention and propose alternative methods to ensure that a suspect attends court, without resorting to a violation of human rights. Despite the fact that this proposition was made in 2016, the study found that nothing has been done to develop the law in this regard. With regard to the use of force, Tait[1057] suggested that section 49 of the CPA should be amended in line with the recommendations of the Committee against Torture to fully protect and promote the human rights of suspects. Despite the fact that Tait's argument is in line with that of Botha and Visser[1058] as discussed in paragraph 2.2.3.2, the study found that no amendments to section 49 have as yet been effected. The researcher agrees with Muntingh and Fernandez[1059] who argue that despite the provisions that safeguard against the use of excessive force, acts of torture or cruel, inhumane or degrading punishment or treatment continue to exist in police station holding cells. Reference was made to Fernandez and Muntingh[1060] in paragraph 4.2.2.3 in which the authors argued that the PCTPA does not criminalise cruel, inhuman, or degrading punishment or treatment in accordance with article 16 of UNCAT. Therefore, the study has established that an amendment to the PCTPA is necessary to ensure that the unlawful acts of cruel, inhumane, or degrading punishment or treatment are completely prohibited through domestic legislation that is directed mainly at peace officers. As discussed in paragraph 4.3, South Africa is also obligated to comply with the provisions of the AChHPR and the recommendations of the African Commission.[1061]

1056 Tait https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23066_E.pdf (accessed on 7 August 2021).

1057 Tait https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23066_E.pdf (accessed on 7 August 2021).

1058 Botha & Visser 2012 *PELJ* 15 Issue No.2 at 1.

1059 Muntingh and Fernandez 2008 24 *SAJHR* at 123. See also Muntingh L *Guide to the UN Convention Against Torture in South* Africa (2011, Civil Society Prison Reform Initiative-Community Law Centre, University of the Western Cape) at 45-52; T Ramagaga 'The problem of torture in South African prisons' (2011, Institute of Security Studies) (https://www.issaflica.org/iss-today/the-problem-oftorture- in-south-african-prisons).

1060 Fernandez and Muntingh 2016 *Journal of African Law* Volume 60 Issue 1 at 83-109.

1061 Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights https://www.achpr.org/public/Document/file/English/co_combined_2nd_periodic_republic_of_south_africa.pdf (accessed on 27 July 2021) (hereinafter referred to as the "African Commission").

In paragraph 4.3.1, the researcher critically analysed the 2016 concluding observations and recommendations of the African Commission which stated that South Africa should make efforts to train peace officers to avoid unlawful arrests and detention and to protect the human rights of suspects. Furthermore, in paragraph 4.3.2, the researcher also critically analysed the 2016 concluding observations and recommendations with regard to the use of force which stated that South Africa should take the necessary steps to ensure that proper statistics and records are kept of the incidents of excessive force. Consequently, the study has established that South Africa is not fully complying with the provisions of the AChHPR and furthermore, South Africa is failing to comply with the recommendations of the African Commission. The international Committees and the African Commission raised concerns about South Africa's efforts to ensure the protection and promotion of the human rights of suspects. The study therefore found that South Africa is failing in its international and regional obligations to ensure the due protection and promotion of the human rights of suspects.

Chapter 5 dealt with a critical and comparative analysis and review of the legal position in South Africa, Canada and the United Kingdom. A comparative review was conducted on the laws governing unlawful arrest without a warrant, unlawful detention and the use of excessive force and the constitutional violations thereof in South Africa, Canada and the United Kingdom to determine whether the South African legal system is more developed and advanced as compared to the legal systems in Canada and the United Kingdom respectively. Furthermore, the best practices and legislative enactments in Canada and the United Kingdom that aim to enhance and develop the human and constitutional rights of suspects were discussed and a comparison was made to establish whether South Africa can emulate the practices of these two jurisdictions. Despite the presence of similarities in the legal systems, the study has established that there are principles in Canada and the United Kingdom that are more advanced and developed than the legal principles in South Africa. The researcher concurs with the court in the *Chehil* case, who favoured the strict reasonable and probable grounds as opposed to the lower standard of reasonable suspicion. The researcher therefore argues that the result of using the lower standard in South Africa is that peace officers have wider powers and the incidents of unlawful arrest without a warrant are therefore more prevalent. After a critical analysis of the legal principles

that relate to the detention of a suspect in paragraph 5.2.3, it was established that the legal position in Canada with regard to the maximum period of detention is 24 hours is preferred as opposed to the maximum period of 48 hours detention in South Africa because the incidents of unlawful detention can therefore be substantially reduced. Paragraph 5.2.5 dealt with the use of force and the constitutional implications thereof. The researcher referred to the 1985 *Lines* case which resulted in amendments to the Canadian legal principles on the use of force. Furthermore, the researcher agrees with the comments by Scott[1062] and the court in *Asante-Mensah*[1063] and a comparison with section 49 of the CPA of South Africa established that the South African legal principles do not promote the constitutional rights of suspects even in its amended form. Reference was made to the comments by Cordner and Shain[1064] and the researcher concurs with the argument that emphasis should be placed on developing the training of peace officers in the legal framework. Furthermore, an analysis of the best practices in Canada with regard to effective and advanced legal education of peace officers established that, in light of the position in Canada, South Africa is not as advanced and developed and South Africa can make greater efforts to emulate the practices in Canada in order to ensure complete protection and promotion of the rights of suspects.

Similar to the position in Canada, in the United Kingdom the maximum period of detention is 24 hours as opposed to the maximum period of 48 hours in South Africa. Despite the critical arguments by Choongh[1065] and Mylonaki and Burton[1066] that were discussed in paragraph 5.3.1 against the practices in the United Kingdom with regard to detention and checks and reviews, the researcher favours the practice in the United Kingdom with regard to the 24-hour period of detention and regular checks and reviews for further detention by an independent peace officer. After comparing the position in the United Kingdom with South Africa, the study has shown that the principles in the United Kingdom with regard to detention are advanced and effective

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1062 Scott February 2008 *Criminal Law Quarterly* Volume 53 Issue 3 pages 331-359.

1063 *Asante-Mensah* at [74].

1064 Cordner and Shain The changing Landscape of Police Education and Training' in P Kratcoski and M Edlebacher (eds.) *Collaborative Policing: Police, Academics, professionals, and communities Working Together for Education, Training, and Program Implementation* at pages 51-62.

1065 Choongh 1998 *British Journal of Criminology* Volume 38 Issue 4 at 230.

1066 Mylonaki & Burton 2010 *The Police Journal* Volume 83 Issue 1 at 61-79.

as opposed to the principles in South Africa. The provisions of the Criminal Law Act and PACE were developed to the extent that it protects the rights to life and human dignity of suspects. The research analysed the report and statistics by the IPCC[1067] and the argument by Mawby and Wright,[1068] that the use of excessive force by peace officers is a problem in the United Kingdom. However, the study highlighted the difference in the responses to such incidents of excessive force in the United Kingdom and South Africa. Reference was made in paragraph 5.3.2 to the arguments by Paterson,[1069] Brown[1070] and Patterson[1071] in which the authors argued in favour of thorough police training for peace officers in relation to the legal principles of an arrest without a warrant, detention and the use of force. The 'Policing Vision 2025' that is used in the United Kingdom is a good example that South Africa may consider following in order professionalise its police force and educate its peace officers. Stone[1072] makes an interesting comment when he stated that the police force in the United Kingdom will be a highly recommended model for international states. Therefore, the study established that South Africa should emulate the practices in the United Kingdom to develop its police force and educate its peace officers on the legal aspects of an arrest, detention and the use of force. The use of the comparative review in chapter 5 was appropriate in dealing with the objectives of the study because the results of the findings in the comparative review established that South Africa needs to make greater efforts to ensure the protection and the promotion of the rights of suspects.

6.3 Recommendations

The recommendations below stem from the conclusions that were drawn from the objectives and primary research questions of the study. It was concluded that several aspects of the South African legal system must be amended and new legislation and

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1067 National Legislative Bodies / National Authorities, United Kingdom www.refworld.org/docid/54aba64c4.html (accessed on 07 July 2021).

1068 Mawby and Wright 2005 'Police Accountability in the United Kingdom' at 10.

1069 Paterson *Police Practice and Research* 2011 Volume 12 Issue 4 286-297.

1070 Brown 2020 'Police powers: an introduction' 9-30.

1071 Patterson *Higher Education, police training, and police reform: A review of police-academic educational collaborations* at pages 119-136.

1072 Stone *The Stephen Lawrence review: An independent commentary to mark the 10th anniversary of the Stephen Lawrence Inquiry* at page 5.

practices ought to be introduced in order to ensure that the human and constitutional rights of suspects are fully protected. The researcher therefore recommends the following:

6.3.1 Training and educating peace officers on the legal principles that govern an arrest without a warrant, detention, the use of force and the constitutional rights of suspects

The important aspect that must be given due attention is the training and education of peace officers on the relevant aspects of the law of criminal procedure and the law of delict that deal with an arrest without a warrant, detention and the use of force. A method of ensuring the proper legal education of peace officers is for the South African Police Service (or a department within the service) to collaborate with universities and colleges so that a specific syllabus or curriculum can be drafted. This method has already been adopted in the United Kingdom (as discussed in chapter 5). Canada also implemented practices that aim to professionalise the police force and educate peace officers on the legal aspects that govern their powers. The physical training of peace officers is not sufficient to ensure that the rights of suspects are duly protected. Furthermore, once peace officers are better equipped with the necessary legal knowledge and background, it may assist in alleviating the unlawful acts by peace officers. According to the National Development Plan Vision for 2030,[1073] a professional police service is essential for a strong criminal justice system and it proposes linking the police code of conduct and a code of professionalism to promotion and disciplinary regulations. The Vision also states that the recruitment of peace officers should attract competent and skilled professionals.[1074]

6.3.2 Further amendments to section 49(2) of the CPA to ensure the constitutional protection of suspects

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[1073] National Planning Commission: National Development Plan Vision 2030 https://www.nationalplanningcommission.org.za/assets/Documents/NDP_Chapters/devplan_ch12_0.pdf (accessed on 05 September 2021).

[1074] National Planning Commission: National Development Plan Vision 2030 https://www.nationalplanningcommission.org.za/assets/Documents/NDP_Chapters/devplan_ch12_0.pdf (accessed on 05 September 2021).

In order to ensure that the constitutional rights of suspects are given due recognition, section 49 of the CPA must be further amended. This means that the legislature would need to redraft section 49(2)(b) of the CPA to state that peace officers can only use force in cases where the offence is listed in schedule one of the CPA, rather than using force in respect of any offence. The wide powers that currently exist must be narrowed so that the use of excessive force and the violations of the constitutional rights of suspects are duly protected. Furthermore, the reference to 'future death' and 'threat' poses a constitutional challenge which calls for an amendment to section 49(2)(a). In order to effect these amendments, the legislature would need to properly consider the arguments set forth in existing literature[1075] and further arguments that have been set out in this study, and reword the provisions of section 49(2)(a) and (b) to ensure the constitutionality of the effect of this section. The researcher proposes the following model of how the amended section 49(2)(a) and (b) of the CPA should read:

> 49(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt 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, but, in addition to the requirement that force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if (a) the suspect **initiates an act** of serious violence to the arrestor or any other person; or (b) the suspect is suspected on reasonable grounds of having committed **an offence which caused or attempted to cause the death of any person** and there are no other reasonable means of effecting the arrest, whether at that time or later.

The highlighted portions of the text set out above are a model of the recommended amendments to section 49(2)(a) and (b) of the CPA. The recommended amendments explicitly deal with the criticism raised in the existing literature with regard to the unconstitutionality of section 49(2) of the CPA. This model makes two important changes to the current section 49(2) of the CPA. The first recommended amendment is the deletion of the words "poses a threat" and the addition of the words "initiates an act". The difference between the former words and the latter words is that the former

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1075 Botha & Visser 2012 *PELJ* Volume 15 Issue 2 at 346-569.

words imply a future event (as in the case with the previous wording of section 49(2)(a)) but the latter wording means that an act of violence is already set in motion by the suspect and in order for the act not to continue or worsen, a peace officer may then be lawfully empowered to use deadly force. In such an instance, the act that is set in motion by the suspect and the use of deadly force by a peace officer will be proportionate to each other and therefore be justified. The second recommended amendment to section 49(2)(b) of the CPA is the deletion of the words “a crime involving the infliction or threatened infliction of serious bodily harm” and the addition of the words “an offence which caused or attempted to cause the death of any person”. The former words mean that deadly force can be used by a peace officer in instances where a suspect commits any crime (as criticised in the existing literature) but the latter words mean that a peace officer may only use deadly force in instances where the suspect has committed an offence that involves the death or potential death of any person. The reason that the researcher includes acts of death or attempted death in instances where deadly force may be used, is to apply the proportionality requirement that is set out in the wording of section 49(2) of the CPA. It is imperative, in the promotion and the protection of the constitutional rights of suspects, that the use of deadly force is only used where an equal violation of the right to life is an issue. The researcher submits that the violation of the constitutional rights of a suspect should only be justified when an equal right of any other person is violated. Hence, the use of deadly force on a suspect ought to be justified only if such a suspect causes death or attempts to cause the death of any other person.

6.3.3 The introduction of the fifth jurisdictional fact as an alternative to an arrest without a warrant and detention, alternatively, enactment/amendment to legislation on discretionary powers of peace officers

The introduction of the fifth jurisdictional fact as an alternative method to an arrest without a warrant will have several positive consequences. This would include reducing overcrowding and poor conditions in police station holding cells and reducing the rate of unlawful arrests without a warrant and unlawful detention. Furthermore, if peace officers use less invasive means other than an arrest without a warrant, the protection and promotion of the constitutional rights of suspects will be ensured. As a

step forward in introducing the fifth jurisdictional fact, the legal principles must be amended and furthermore, peace officers must be taught and trained on making use of the fifth jurisdictional fact as opposed to arresting suspects without a warrant. The recommendations for the training of peace officers on this aspect falls within the recommendations set out in 6.5.1 above. The introduction of the fifth jurisdictional fact should be explicitly endorsed as being part of the existing four jurisdictional facts. The endorsement can be made by the legislature by either incorporating the five jurisdictional facts in section 40(1) of the CPA, alternatively, new legislation can be enacted to deal specifically with the five jurisdictional facts which will be aimed specifically at peace officers. Should new legislation be enacted, a penalty clause would be included for peace officers who contravene the provisions of the new legislation. As an alternative to introducing the fifth jurisdictional fact, it is recommended that the legislature enact new legislation that deals with discretionary powers of peace officers. The recommended new legislation would explicitly provide those alternative methods other than an arrest “must” or “shall” be used when using a discretion to arrest without a warrant. In essence, the penalty clause would be available to punish those peace officers who could have used alternative methods other than an arrest, but chose to arrest without a warrant. In instances where either of the alternative recommendations are effected, courts will be bound to express views and make judgments in accordance with the new principle that alternative methods other than an arrest “must” or “shall” be used by a peace officer. As a result, constant debates and confusion by several courts will be alleviated.

6.3.4 The introduction of a mathematical approach to the calculation of damages for the unlawful acts of peace officers as opposed to the use of awards in previous cases

As discussed in chapter 3, the existing method of awarding damages based on the awards in previous cases is inaccurate and inconsistent in cases with similar facts. South African law must be developed to the extent that presiding officers and legal practitioners are fully equipped with the knowledge and expertise in adopting a mathematical calculation of damages for the unlawful acts by peace officers and the violations of the constitutional rights of suspects. The proposed new formula to calculate the quantification of damages should lay the basis from which courts and

legal practitioners can work. As a result, courts will be in a position to implement the mathematical approach and set a precedent (in an initial case) for use in subsequent cases for damages. It will also be prudent for presiding officers to attend training and seminars with regard to the formula and calculation of the damages as explained in chapter 3. This is important to ensure uniformity and consistency in the calculation of damages throughout all courts in South Africa.

6.3.5 The introduction of new legislation aimed specifically at peace officers

Although the SAPS Act and the CPA makes provision for the powers of peace officers, it has been concluded that there is insufficient legislation that strictly prohibits and penalises the unlawful acts of peace officers and the violations of the constitutional rights of suspects. Once the legislature takes steps to prohibit and penalise the unlawful actions of peace officers, there is a likelihood that the rate of unlawful arrests without a warrant, unlawful detention and the use of excessive force will diminish. The researcher recommends that legislation should be enacted in the following areas.

6.3.5.1 Enact legislation or amend existing legislation to penalise the unlawful acts of peace officers

It is recommended that legislation should be enacted to strictly and explicitly prohibit unlawful acts of arrest without a warrant, detention and the use of excessive force on suspects. A penalty clause ought to be included in such legislation so that transgressors are legally punished. This will set an example to new peace officers and peace officers who continue to act unlawfully, despite being reprimanded by their superiors. If these recommendations are effected, they are likely to reduce violations of the constitutional rights of suspects because peace officers will be restricted by the new legislation in acting unlawfully. In conjunction with this recommendation, it is imperative that the recommendation set out in 6.5.1 be implemented because peace officers must first be trained and educated on the legal aspects of their powers for them to be in a position to understand what constitutes unlawful acts and violations of the constitutional rights of suspects. Once they have acquired the relevant training and education, the recommended legislation will be more effective.

The effect of the recommended new legislation for peace officers would be a criminal charge for contravening the legislative provision. The recommended legislation could be entitled “Unlawful actions of peace officers Act”. As a consequence of the Act being a criminal charge, the peace officer who is found guilty of unlawful arrest without a warrant, detention and the use of force, will hold a criminal record to his name. In addition, the guilty peace officer would receive either a fine or term of imprisonment (maximum amount of the fine and term of imprisonment to be determined). Furthermore, in order to alleviate the constant unlawful acts of peace officers, a strict punishment should be imposed beyond just a fine or term of imprisonment. It is recommended that the guilty peace officer be removed as a member of the South African Police Service. This will not only remove peace officers who continue with unlawful acts, but will also deter and prevent peace officers from embarking on such unlawful acts and violating the constitutional rights of suspects. Alternatively, should the latter recommendation be too harsh, it is recommended that the guilty peace officer be automatically suspended for a period of time (determined by the relevant department) without internal disciplinary procedures being followed. In addition to the aforementioned recommendations, it is further recommended that all guilty peace officers undergo a rehabilitation program for a specified period of time where they are taught about the unlawfulness of their acts, the consequences of their unlawful acts and the importance of the constitutional rights of suspects (this is a separate program than the recommendation suggested in 6.5.1 above).

With regard to existing legislation, the researcher recommends that Section 3 of the PTCPA should be amended by the legislature so as to include in the definition of torture, the element of severe pain and suffering. Although this element is not contained in article 1 of UNCAT, the legislature should amend its domestic legislation to ensure compliance with the prohibition of torture and protect the human rights of suspects. Furthermore, the fact that the act of torture is criminalised is not sufficient in fully protecting the human rights of suspects and amendments to the PCTPA should therefore be made with regard to the criminalisation of cruel, inhuman or degrading punishment or treatment.

6.3.5.2 Enact legislation to ensure timely submission of reports and compliance with recommendations of the UN Human Rights

Committee, the Committee against Torture and the African Commission

Although South Africa is bound by its international and regional obligations and is therefore expected to comply with the recommendations of the UN Human Rights Committee, the Committee against Torture and the African Commission, it has been concluded that South Africa is failing to comply with international and regional recommendations to improve the human rights of suspects. Therefore, there is a need for the legislature to implement legislation that domesticates due compliance with any recommendations made by the relevant Committees. Furthermore, if legislation exists domestically, South Africa will be bound to submit timely reports to the Committees when it is required to do so. In addition to the recommended legislation, it will also be necessary to establish an independent committee in South Africa which deals specifically with the interpretation, regulation and due compliance of the international and regional recommendations and the legislation that this study recommends. Once these recommendations are set in motion, not only will South Africa be compliant with its international and regional obligations, but suspects will also be further protected from violations of their human rights.

6.3.6 Replace the reasonable suspicion test with the test of reasonable and probable grounds to arrest without a warrant

It has been established that the reasonable suspicion test used in South Africa is of a lower standard as compared to the test of reasonable and probable grounds that is used in Canada. As previously discussed, this would mean that South African peace officers are given a broader discretion to arrest without a warrant. It is recommended that the legal principles should be amended by replacing the test of reasonable suspicion with reasonable and probable grounds to arrest without a warrant. As a result of such amendment, the constitutional rights of suspects will be better protected and peace officers will be restricted from acting unlawfully.

6.3.7 Reduce the maximum period of detention from 48-hours to 24-hours and introduce checks and reviews by independent peace

officers (who are not tasked with investigating the case) with regard to further detention within the maximum period

Canada and the United Kingdom allow for a maximum period of 24 hours of detention. The United Kingdom also has checks and reviews to establish the need for further detention within the 24-hour period. It is therefore recommended that the CPA and the Constitution should be amended to reduce the maximum period of detention from 48 hours to 24 hours. This is likely to reduce the period in which suspects are unlawfully detained and will also reduce the period in which the constitutional rights of suspects are likely to be violated through prolonged deprivation of liberty. Furthermore, the reduction in the period of detention is likely to reduce overcrowding and poor conditions in police station holding cells.

Furthermore, it is recommended that the CPA should be amended to cater for independent checks and reviews for further detention within the maximum period of detention. As opposed to the current position where the investigating officer who deals with the docket and charging of the suspect, also decides the period of detention, it is recommended that an independent peace officer who is not tasked with the merits of the case, consider the rights of the suspect and the need for continued detention. If this recommendation is effected, there is a likelihood that suspects will not be detained beyond the maximum period of detention which is automatically unlawful. In this way, the constitutional rights of suspects are protected and promoted. The recommendations that the study introduced are as important as recommendations for further research in the area of study. The recommendations for further research in the study are discussed hereunder.

6.4 Recommendations for further research

There are two aspects of the study that may be helpful in promoting further research in the field. The first aspect is the mathematical approach to the calculation of damages for the unlawful actions of peace officers. Since this approach has not been recommended in existing literature, it would be necessary for further research and exploration into the effectiveness of the new approach. The practice of this approach

would have to be phased in with new cases for damages. Obviously, the approach would be new to presiding officers and legal practitioners and further research may assist in determining possible flaws in this approach.

The second aspect that may be helpful in promoting further research in the field is the training and education of peace officers on the legal aspects of an arrest without a warrant, detention, the use of force and the constitutional and human rights of suspects. This study dealt with these aspects based on a comparative review of the training and education of peace officers in Canada and the United Kingdom. However, since it has been established that South Africa has not taken any initiatives towards the legal education and professionalisation of the police force, the recommendations in this study may require further research into further or advanced training and education of peace officers.

6.5 Conclusions of the study

The study on the powers of a peace officer to arrest without a warrant, detain and use force on a suspect aimed to answer the research questions that were raised in chapter 1. A comparative evaluation was employed intending to provide more and different perspectives on the legal principles that relate to arrest without a warrant, detention, the use of force and the constitutional implications thereof in order to appropriately appreciate its interpretation and application in South African criminal procedure. In conclusion, it can be stated that the research questions of this thesis have been answered, and the hypothesis proved:

- The unlawful acts of peace officers violate the constitutional rights of suspects and such incidents are an ongoing problem in South Africa.

- The fifth jurisdictional fact, which promotes alternatives other than an arrest without a warrant, does not form part of the existing legal principles and is a reason for the continuous incidents of unlawful arrests without a warrant and unlawful detention.

- A lack of knowledge of the legal principles governing an arrest without a warrant, detention and the use of force by peace officers result in unlawful actions by peace officers and the violations of the constitutional rights of suspects.

- The continuous incidents of unlawful arrest without a warrant and detention are the root cause of the poor conditions and overcrowding in police station holding cells. As mentioned earlier, if the legal principles are amended to include a fifth requirement that alternative methods other than an arrest be used, the conditions and overcrowding in police station holding cells will be substantially reduced.

- Suspects should be fairly and reasonably compensated for the unlawful actions of peace officers and it can therefore be concluded that the consideration of awards in previous cases as a method to calculate damages is ineffective, unfair and unreasonable. The mathematical calculation of damages is proposed to be fair and reasonable and should be the uniform model for the calculation of damages throughout all South African courts.

- South Africa is failing to ensure due compliance with the recommendations of the UN Human Rights Committee, the UN Committee against Torture and the African Commission. It can therefore be concluded that South Africa is failing to comply with its international and regional obligations.

- Domestic legislation such as the PCTPA and the SAHRC Act that were enacted as a result of the provisions of the international instruments are not effective in promoting and protecting the human rights of suspects and amendments to such legislation ought to be made to promote and protect the rights of suspects.

- The South African laws which govern an arrest without a warrant, detention, the use of force and the professionalisation of the police force are not as advanced as the legal principles and practices in Canada and the United Kingdom. South Africa should therefore make greater efforts to emulate the legal principles and

best practices in Canada and the United Kingdom to ensure that the laws and practices that govern an arrest without a warrant, detention and the use of force are developed and enhanced to protect and promote the rights of suspects.

6.6 Conclusion

This chapter dealt with a critical analysis of the findings of the study and the conclusions drawn from the objectives and primary research questions of the study. Furthermore, the researcher presented the recommendations of the study which can be implemented in South Africa to ensure complete protection of the constitutional and human rights of suspects. Furthermore, the researcher recommended further research in the field with regard to the mathematical approach to the calculation of damages for the unlawful actions of peace officers and further research on the training and education of peace officers on the legal aspects that govern their powers. The researcher hopes that the flaws in the existing legal principles that have been critically discussed throughout the study and the recommendations of the study will assist in promoting the constitutional and human rights of suspects whose lives are in the hands of peace officers.

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