

# Law and order

## — a legal perspective

Police action in South Africa's black townships is frequently justified on the basis that the police are maintaining 'law and order'. But what is 'law and order'? In this article, ALEC FREUND, an attorney in the Law Department at the University of the Witwatersrand analyses what is meant by this concept, with particular reference to the South African context.



Alec Freund

photo: H Mabuza

### How the laws use it

Section 5 of the Police Act, No 7 of 1958 provides that the functions of the South African Police shall be *inter alia* —

- a) the preservation of the internal security of the Republic;
- b) the maintenance of law and order;
- c) the investigation of any offence or alleged offence; and
- d) the prevention of crime.

The phrase 'maintenance of law and order' is also encountered in much of our security legislation. For example, Section 4 of the Internal Security Act, No 74 of 1982, gives the Minister of Law and Order the power to declare an organisation to be an unlawful organisation if he is satisfied, *inter alia*, that the organisation 'engages in activities which endanger or are calculated to endanger . . . the maintenance of law and order'. Similarly, in terms of Section 5 of the Act, the Minister has the power to prohibit publications expressing views which 'are calculated to endanger . . . the maintenance of law and order'.

### What the courts say about it

Given the extent to which use is made of the term it is perhaps surprising that 'law and order' has received little judicial consideration. There is one case, however, in which the meaning of the term was expressly considered. In *S v Cooper and others* 1976 (2) SA 875 (T) the accused were charged in terms of the 1967 Terrorism Act with participation in 'terroristic activities'. In order to secure a conviction the State had to prove that the accused had acted 'with intent to endanger the maintenance of law and order in the Republic. It was in this context that Mr Justice Boshoff commented:

'In its ordinary sense the phrase 'law and order' refers to the law-abiding state of society, that is to say, the absence of riot, turbulence and violent crime and the prevalence of constituted authority . . . There are therefore two sides to the concept "law and order"; the constituted authority responsible for its existence and the general body of law-abiding members of society in which it exists.

To endanger the maintenance of law and order, an

act has therefore to be directed either at the constituted authority or the general body of law-abiding members of the society in the Republic or portion thereof or both'.

We can see from this that 'law and order' refers to two inter-related but distinct concepts, the preservation of the 'constituted authority' and the protection of the general community from violence. It is the connection between law and order and the preservation of the 'constituted authority' which raises problems in the South African context.

### The main purpose of law is to maintain order

It is widely held that

'The first and foremost purpose of law is to maintain peace and order in the community' (Hahlo & Kahn, *The South African Legal System and its Background*, p 26).

### But unjust laws break down order

This consensual view of law may have some validity in societies where the law is regarded by the community as a source of protection for all. But this does not appear to be the situation in South Africa, where a large part of the community regard many of the laws as unjust and the constituted authority as illegitimate. In such a situation we can anticipate that some may feel compelled to challenge the authorities in a manner declared illegal by those authorities. The police in turn are required to take whatever action is necessary to suppress this challenge, and the stage is set for escalating conflict and violence.

### The Rule of Law is not law and order

It is important not to confuse the concepts of 'law and order' and 'the Rule of Law'. As John Dugard has commented:

'Many white South Africans who value the status quo above all else have come to equate the Rule of Law with the rule of law and order and have invoked it to support repression of those who seek to disturb the comfortable (for whites) prevailing social order'.

(*Human Rights and the South African Legal Order*, p 42)

One of the difficulties with the Rule of Law is the vagueness of the concept. Some lawyers have restricted it to

a procedural restraint on governmental action, whilst others have tried to infuse it with political, economic and social values. Liberal South African lawyers tend to confine it to a procedural concept, and are critical of those laws which empower the government to detain or otherwise restrict individuals without a fair trial. Arbitrary government powers are regarded as inimical to the Rule of Law. As Mr Justice Hiemstra once wrote:

‘If Parliament should grant to the executive unlimited powers, then all the actions of the executive would be legal, but the rule of law could yet be grossly violated’.

*(Constitutions of Liberty, (1971) 88 SALJ 45 at 46)*

### **The Rule of Law concerns the quality of laws**

This statement points to the difference between ‘the Rule of Law’ and ‘law and order’. As we have seen ‘law and order’ requires obedience to the laws passed by the constituted authority, irrespective of the community’s perceptions regarding the legitimacy of the authority. The Rule of Law, on the other hand, is a yardstick according to which a given law may be attacked for its failure to meet certain requirements. It is accordingly incorrect to use the Rule of Law as a basis to require compliance with unjust laws, as those seeking to entrench the prevailing order sometimes do.

### **Repression cannot be used to maintain law and order**

I wish to make clear that I am not suggesting that the

concept of ‘law and order’ has no value in the South African context. The second element of the concept referred to by Mr Justice Boshoff in the *Cooper* case that is the protection of the general public, requires particular recognition. Ordinary citizens, including those living in black townships, have real and legitimate fears for their safety and well-being when law and order breaks down. The community requires protection from wanton violence. However, a society based on laws which are perceived to be unjust is unlikely to be able to maintain law and order indefinitely.

In the final analysis a government which cannot claim the support of the people it governs will be unable to maintain law and order except through repression. Repression, however, has not proved itself to be particularly effective as a long term solution to problems of legitimacy.

### **The danger when police fail to protect the general community**

What is to be feared is the possibility that the police are perceived by the black community as concerned with the first component of ‘law and order’, ie the protection of the constituted authority, and not sufficiently concerned with the second component, the protection of the general community from wanton violence.

Recent reports of police turning a blind eye to violent attacks on anyone seen as a political threat to authorities are therefore a source for grave concern.

**In the final analysis a government which cannot claim the support of the people it governs will be unable to maintain law and order except through repression. Repression, however, has not proved itself to be particularly effective as a long term solution to problems of legitimacy.**



## **A child died in police custody**

**O**n July 5 1985, a 12-year-old boy died of head injuries while in police custody. He was Johannes ‘Witbooi’ Spogter.

Johannes was arrested during a demonstration by 150 youths in Steytleville townships over the deaths of Matthew Goniwe, Sparrow Mkhonto, Fort Calata and Sicele Mhlawuli.

In an attempt to draw attention to this diabolical act, two Black Sash members, Cornelia Bullen-Smith and Beverley Runciman, chained themselves to the railings outside Parliament. Placards strapped to their backs read: ‘A child has died in police custody’ and ‘We are horrified at his death’.

They were arrested — but with some difficulty — the police, unable to obtain a key to the padlock had to slip the women’s wrists out of the chains.

The women were subsequently charged in court for ‘wrongfully and unlawfully’ demonstrating. The hearing was adjourned to August 23 for preparation of their defence.