Reflections on justice

Constitutional Court Justice Kate O'Regan's introductory remarks as a panellist at the World Bar Conference in Dublin in June 2008

The theme of my remarks this morning, 'Law and Justice,' put me in mind of a story told by Ronald Dworkin in one of his most recent books *Justice in Robes*:

'When Oliver Wendell Holmes was an Associate Justice of the United States Supreme Court he gave the young Learned Hand a lift in his carriage as Holmes made his way to the Court. Hand got out at his destination, waved after the departing carriage and called out merrily, "Do Justice, Justice!" Holmes stopped the cab, made the driver turn around and rode back to an astonished Hand. 'That's not my job!' he said, leaning out of the window. Then the carriage turned and departed, taking Holmes back to his job of allegedly not doing justice.'[1]

The relationship between law and justice has been the leitmotif of my career as a lawyer. That career has now spanned nearly three decades. I enrolled as a law student at the University of Cape Town in 1977, only six months after the Soweto uprising by young black students had rocked South Africa. After qualifying as a lawyer in the 1980s, I practised law in Johannesburg representing, amongst others, trade unions and land rights organisations. At the end of the 1980s, I returned to the University of Cape Town as a researcher and academic, although I continued to provide legal advice to a range of organisations opposed to apartheid, including, again, trade unions and land rights organisations. In 1994, I was appointed as a judge to the Constitutional Court. My oath of office which hangs on the wall of my chambers is a constant reminder of the relationship between law and justice. It requires me to

'uphold and protect the Constitution of the Republic of South Africa and the fundamental rights entrenched therein, and in so doing administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.'[2]

My legal career to date has thus spanned two fundamentally different legal regimes: one committed to oligarchy, racism and authoritarianism and the other to democracy, human dignity, equality and freedom. It is strange that both have been committed to law as a primary means of retaining social order. Being both an observer and participant in these two regimes has continually raised questions about the relationship between law and justice; and more importantly what that relationship should mean for lawyers, judges and law makers in the daily praxis of law.

I thought that I would tell two stories to illustrate the importance of the relationship between law and justice in the South African context over the last three decades.

Both stories are about the land. In many post-colonial societies, ownership of and access to land remains a deeply divisive issue. The sense of having been rendered landless in one's own land is a painful and powerful reminder of the colonial past. This was true in Ireland for many years; and is true in many African countries, particularly settler societies, like Kenya, Zimbabwe, Namibia and South Africa.

The Bakwena ba Mogopa

The first story is the story of Bakwena ba Mogopa.[3] It is about the Bakwena people from the place called Mogopa. In 1913 several families sold their cattle in order to buy the farm Zwartrand some kilometres to the north west of the town of Ventersdorp in what was then the western Transvaal. Eighteen years later the same families bought a second farm adjacent to Zwartrand, the farm of Hartebeeslaagte. The farms cost them nearly £15 000, a great fortune in those days - and a particularly great fortune for peasant people and farm workers who had no great store of capital apart from their cattle.

The timing of the first purchase was not accidental. In 1913, the new Union government had passed what was to become the foundation of apartheid land law, the Native Land Act, 1913. It provided the basis for land segregation by identifying specifically those areas of South Africa 10% of the land mass in 1913 and were subsequently increased in 1936 to 13% of the land mass.

One of the immediate devastating effects of the Land Act was that arrangements whereby black farmers who lived on what were white-owned farms but who farmed the land as tenants or share-croppers were rendered illegal. In his book *Native Life in South Africa* Sol Plaatje describes the devastation that erupted, particularly in the Orange Free State, as thousands of tenant farmers were forcibly removed from farms.

I do not know the full history of the Mogopa people, but it is known that some of their ancestors came from the Orange Free State and it is very likely that they had been rendered homeless by

the Land Act. The response to the Land Act would thus have made sense. They no longer had land on which to graze their cattle; and so they sold their cattle to purchase land. By obtaining title deeds, they opted for the colonial system of land tenure, which to this day does not operate in rural traditional communities where land is still held in trust by tribal leaders. In so doing, they sought to obtain security of tenure. As it happened, they could not themselves hold direct title to the land because the farm did not fall within the area that the Land Act reserved for black owners. So a trust was established and the Minister of Native Affairs became the trustee who held the land on behalf of the community.

The small village of Mogopa lies some 250km west of Johannesburg, near the town of Ventersdorp in what is today the North-West province. It is cattle country, natural grassland interspersed with small thorn trees and the flat-topped wild trees of the western part of South Africa.

By the early 1980s, the village consisted of more than 420 families housed in 332 houses of stone, hewn from the local hills. There was a primary school and a secondary school, both built by the community; as well as a health clinic, four churches and several shops. Importantly, in our arid land, it contained a reservoir and several boreholes. The farms owned by the Bakwena ba Mogopa were surrounded by farms owned by white farmers, contrary to the government policy of apartheid, which sought to consolidate rural African communities together and not to have them interspersed through white farming districts.

As early as 1969, the government resolved to move the community, but of course the fact that the community held title to the land made the process more complex from a legal perspective. The government sought to rely on section 5 of the Black Administration Act of 1927, one of the more notorious provisions of apartheid land law. At the relevant time, its material parts provided that:

'The State President may, whenever he deems it expedient in the general public interest without prior notice to any person concerned order that, subject to such conditions as he may determine … any tribe, portion of a tribe, black community or black [person] shall withdraw from any place to any other place … and shall not … return to the place from which the withdrawal is to be made … except with permission …: provided that if a tribe … refuses or neglects to withdraw as aforesaid no such order shall be of any force and effect unless or until a resolution approving of the withdrawal has been adopted by both Houses of Parliament…'.

In 1975, a resolution was passed by both Houses of Parliament accepting a recommendation that a list of African tribes and communities be ordered to withdraw from their current place of abode. The list included scores of communities affecting hundreds of thousands of people; and included on it were the Bakwena ba Mogopa. The resolution did not stipulate to where the communities would move. Nothing happened immediately, but during 1983 government officials started a process to try to encourage the people to move 'voluntarily'. This process included the demolition of the schools, churches and the health clinic, and the termination of the local bus service into Ventersdorp and perhaps most seriously, the removal of the water pumps which provided the community with water.

Although some of the community did move, including an unpopular deposed leader, Jacob More, who had been negotiating with the apartheid government, the majority remained. The government then decided to rely on section 5, and on 18 November 1983 an order in terms of section 5 was served on the community. The order instructed the community to withdraw to Pachsdraai in the arid Groot Marico district some 150 kilometres to the west. The community was informed that if they did not move by 28 November 1983, they would be moved summarily and with violence.

On 25 November, the community launched an application seeking an injunction preventing the removal of the tribe on the basis that the invocation of section 5 was unlawful. The legal basis for the argument was that the resolution, when passed by Parliament in 1975, did not disclose the place to which the community would be removed; and therefore was not a resolution within the contemplation of the section. The court dismissed the application. Leave to appeal was sought and granted in May 1984.

By then it was too late. At 4 am on Valentine's Day 1984, the police arrived at Mogopa with two buses and 85 trucks. They sealed off the village refusing entrance to community workers. That evening the relevant government minister explained that the government was trying to persuade people to move voluntarily. By the end of the following day, people had either been taken to the government's proposed resettlement area, Pachsdraai or had voluntarily moved to Bethanie, a village nearby in the Bantustan of Bophuthatswana. Shortly thereafter, the government expropriated the two farms without notice to the communities (only giving notice to the trustee - the successor Minister to the Minister for Native Affairs).

In September, and again too late, the Appeal Court upheld the appeal,[4] but noted in its conclusion:

'We have been informed by counsel that, save for the question of costs, the dispute between the parties has become academic because the farms in question have, in the meanwhile, been expropriated by the State and vacated by the appellant and members of the tribe who supported his application.'[5]

The story does not end there, the community continued to assert their right to the land; and in 1990, after the unbanning of the liberation movements and as the process of constitutional negotiation began, members of the community returned to Mogopa to tend their ancestors' graves. Finally, I should add that the Bakwena ba Mogopa community was one of the first communities to have their land restored to them after the dawn of democracy under the Restitution of Land Rights Act 22 of 1994.

What lessons does the story of the Bakwena ba Mogopa hold for our understanding of the relationship between law and justice? The first memorable lesson for me is that communities can believe that justice through law is possible, even where that might seem starkly improbable as in apartheid South Africa. Throughout my years as an attorney in the 1980s, I was often surprised and humbled at the insistence of communities facing forced removals, or workers unfairly dismissed, that if they could only tell their stories to a judge, justice would then be done.

I always recall that faith now when I sit on the bench in a matter that affects a rural community or members of a particular group when they come to the court in their hundreds, as they do, and watch the proceedings in court, nearly always conducted in English, a language they may well not understand. And I realise that the first essential requirement for ensuring justice is the belief in the minds of ordinary people that law can be just.

The second lesson is how dangerous law can be when abstraction renders it blind. The manifest unfairness of section 5 of the Black Administration Act was obvious to all. Yet the lower court did not acknowledge that and abstracted the interpretation of the section from its social consequences. The Appeal Court did not. Indeed, Trengove JA noted that:

'The section provides for what in present day parlance is known as a form of social engineering, namely the enforced removal of

people (in this instance, Blacks) [might I add that the section only ever permitted the forced removal of Blacks] from any area to any other area, and for this purpose it confers some quite extraordinary powers on the State President' (at 113 G-H).

The judge continued:

'There can be no doubt that the enforcement of such an order may have grave and far-reaching consequences for the tribe concerned, and it may also impinge on the rights of personal liberty of its members. The instant case provides a striking example of the drastic inroads that such an order could make upon a tribe and its members residing on tribal lands' (at 114 B-C).

Acknowledging the social effect of the law led the Appeal Court to adopt a strict approach to the interpretation of section 5 and was crucial to its conclusion that section 5 had not been properly invoked in this case.

The third lesson, and the hardest for lawyers to accept, is that winning a case does not always mean achieving justice. The achievement of justice is not only dependent upon getting the law right; though often that may be a precondition. As Richard Abel remarks in his fascinating study of the use of law to oppose apartheid:

'Loose coupling between top and bottom – the co-existence of rare conspicuous legalism with pervasive covert illegality – are universal, but [apartheid] South Africa refined this moral division of labour into a high art. Judicial decisions extending [rights to remain in urban areas, denied to many black South Africans during apartheid] (like the US Supreme Court's desegregation decisions) were frustrated by lower bureaucrats, who displayed far more deliberation than speed.'[6]

The cost of using law to ensure that lower echelons in government observe judicial decisions is tremendously high and certainly in a society such as ours, we do not have the resources to achieve it. Achieving justice then requires more than simply winning cases, it requires a commitment to the rule of law at every level of government, and indeed within civil society as well.

Three lessons then from the Bakwena ba Mogopa. What of our second story?

The Gabon informal settlement

The second story tells of the community of the Gabon informal settlement on the eastern urban edge of the sprawling city of Johannesburg, some 25 kilometres from the seat of the Constitutional Court, which is close to the centre of the city. It is the story of the rapid urbanisation of South African society and the desperate poverty of many of the new urban migrants who come to the city in the hope of finding work.

In the late 1990s, overcrowded conditions in the formal black townships of the east Rand led some residents to build informal dwellings on a strip of land between the township of Daveyton and a neighbouring farm, Modderklip. In May 2000, the municipality reacted by evicting these people from the strip of land and destroying their dwellings. About 400 of the evicted residents then moved on to the farm Modderklip. The farmer who owned Modderklip grew fodder seasonally on his fields - but once an informal settlement had been established on the fields that of course became impossible. By October 2000, when the spring planting season began, the number of people living on the fields of Modderklip had grown from 400 to 18000.

The farmer was not certain what to do. He wrote to the local municipality that has the power to evict unlawful residents from land, but they took no action. He laid a charge of trespass at the police station, but by then the community was too large to remove in this fashion. He then approached the court for an order of eviction which was granted in April 2001. By then, however, some 40 000 people comprised the Gabon Informal settlement. A third of this number was estimated to be from countries other than South Africa and the settlement covered 50 hectares of the farm Modderklip. Conditions in the informal settlement were appalling. Although the settlement contained rough streets and house numbers, there was only one tap to provide water for the entire community; and there were only pit toilets.

When the farmer approached the agency responsible for implementing eviction orders, he was informed that it would cost him nearly two million rand (almost more than the farm was worth). He then approached the national government for assistance, who refused to assist. Modderklip then approached the High Court for relief. The essence of the relief was that the state should provide assistance to implement the eviction order. Modderklip based its case on the right to property (section 25 of the Constitution), the right to equality (section 9 of the Constitution) and the right of access to courts (section 34 of the Constitution) as well as on the principle of the rule of law, one of the founding values of the Constitution. It also pointed to the fact that the problem had arisen because of the failure of the state to provide access to adequate housing (one of the socio-economic rights protected in the Constitution).

The state attempted to argue that this was a private matter between private individuals, the farmer on the one hand and the court on the other, and that the rules of private law should govern that relationship.

The Constitutional Court rejected this argument. It reasoned that it was only the state that 'held the key to the solution of Modderklip's problem'.[7] It went on to reason as follows:

'The obligation on the State goes further than the mere provision of mechanisms and institutions [to resolve legal disputes] referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.'[8]

And –

'It is unreasonable for a private entity such as Modderklip to be forced to bear the burden which should be borne by the State of providing the occupiers with accommodation. Land invasions on this scale are a matter that threatens far more than the private rights of a single property owner. Because of their capacity to be socially inflammatory, they have the potential to have serious implications for stability and public peace. Failure by the State to act in an appropriate manner in the circumstances would mean that Modderklip, and others similarly placed, could not look upon the State and its organs to protect them from invasions of their property. This would be a recipe for anarchy.'[9]

The court also noted that moving a community of some 40 000 people was a tremendous task and a potential human catastrophe; and that it could not be undertaken until suitable alternative land had been found for the community. A balance thus had to be struck between the right of the farmer to his land; and the social dislocation and injustice that would be caused by enforcing an eviction order against a large community of people who would be rendered homeless.

Seeking to achieve a balance between these two conflicting considerations, the court declared that the Gabon Informal Settlement could remain on the farm of Modderklip until the state provided them with suitable alternative land; and ordered the state to pay compensation to the farmer in respect of the land occupied by the Gabon Informal Settlement until that date.[10]

What lessons about the relationship between law and justice can be drawn from this example? The first is that often the distinction between public and private law is used to mask social realities and to suggest that there is no direct public interest in the manner in which the relationships of private citizens are regulated. The principle of individual freedom is used to ignore injustices that are operating within the private realm. This lesson is a lesson slowly being learnt around the world in a variety of different circumstances. Violence within the home is not a matter of private law outside of the broader concerns of justice; the relationship between employer and worker is something in which the broader community has an interest in asserting justice; and, as in Modderklip, the manner in which the rights of owners are protected and enforced will also often be of great public importance.

The second lesson is the same lesson learnt from the Bakwena ba Mogopa case - courts need to bear in mind social context in determining cases. This is made possible in the South African context by a Constitution with its panoply of rights and obligations which puts social justice at the heart of the judicial enquiry. It may be more difficult in other jurisdictions.

The third lesson, and the most difficult one to grasp, is to find the proper line between what can loosely be called law and equity. A court needs to be loyal to the law and to the doctrine of precedent (at least in a common law system). If it is not, it undermines democracy and the rule of law itself. Extraordinary cases sometimes require extraordinary remedies, as this case made clear, but a court must not cut adrift from the discipline and doctrine of law.

Conclusion

The relationship between law and justice is a contested one; that has been debated through the centuries. In the short time I have had this morning, I have been able only to illustrate some of its complexity. The lessons I have proposed are that faith in the possibility of justice from the legal system is important; that the abstraction of legal rules can be dangerous; that winning cases is not all that is necessary to bring about justice; that we must be careful of a rigid distinction between private and public law; that we need to understand the context of the cases with which we work and that courts must remain loyal to the law and precedent in the manner in which they seek to perform justice.

I am intensely alive to the dangers of judicial self-deception (though perhaps not as intensely alive to it as a roomful of barristers), but despite that, I conclude by saying that Oliver Wendell Holmes was wrong. The task of a judge, at least under the South African Constitution and in terms of our oath of office is to do justice. That is not an easy task; and it is one which requires that we be ever mindful of the proper role of the judiciary in a democracy.

I would suggest too that it is the task of lawyers as well. Law might not always produce justice; and good laws or judgments are not all that is needed for justice. But, and of this I am sure, a legal system where lawyers say that justice is not my job, is much less likely to be a just legal system than one in which, with all the uncertainties that embracing the task might bring, lawyers say it is our job to seek that justice be done.

Endnotes

[1] Ronald Dworkin ***Justice in Robes*** (2006) 1.

[2] Schedule 2, item 6 Constitution of the Republic of South Africa 1996.

[3] The story of the Bakwena ba Mogopa is told by Richard L Abel in ***Politics by other means: law in the struggle against apartheid 1980 – 1994*** (Routledge 1995) 386 – 431; and G Marcus 'Section 5 of the Black Administration Act: The case of the Bakwena ba Mogopa' in Murray and O'Regan ***No Place to Rest: Forced Removals and the Law in South Africa*** (Oxford 1990) at 13-26. This account draws on both these sources.

[4] ***More v Minister of Co-operation and Development*** 1986 (1) SA 102 (A),

[5] Idem at 117 C–D.

[6] Cited above n 2 at 539.

[7] ***President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others*** 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 42.

[8] Idem at para 43.

[9] Idem at para 45.

[10] Idem at para 68.