



Sean Baker

# The Sydney and Felicia Kentridge Award 2018

by **Craig Watt-Pringle SC**

The Sydney and Felicia Kentridge award is made annually by the GCB to a person or institution in recognition of dedication and excellence in service to law in Southern Africa, worthy of public recognition.

I have a somewhat unusual assignment this evening. It is my privilege to introduce our guest of honour and recipient of this year's award, Justice Kate O'Regan, in her absence. You will nevertheless hear from Justice O'Regan this evening thanks to the wonders of modern technology, a subject close to her heart.

This time last year our AGM gala dinner was being hosted by the Eastern Cape Bar in Nelson Mandela Bay. The Kentridge Award went to the Late Justice Essa Moosa. Also in attendance as a special guest speaker was retired Constitutional Court Justice Zak Yacoob.

Ever unpredictable, Justice Yacoob had us all choking on our cocktails when he announced "Tonight I want to talk about SEX!"

From then on he had our attention and I hope that in relating that story, I have yours.

The reason why Justice Yacoob raised a topic which I can safely say has not featured in the official program of many, if any, GCB formal dinners, was because the plight of sex workers is a matter close to his heart.

In relating to us how he views sex workers as one of the most vulnerable members of society, Justice Yacoob also demonstrated how it is possible for a judge with the right instincts to be able to empathise with a group far removed from his own peer group. This is an attribute which is particularly appropriate to judges presiding in our apex court who must interpret the Bill of Rights

and ensure that our law properly protects those most in need of protection.

This anecdote leads nicely into my introduction of Justice Kate O'Regan, whom we are here to honour tonight. Judge O'Regan was one of two dissenting judges in the *Jordan*<sup>1</sup> decision, which concerned the criminalisation of sex workers. The majority judgment, penned by Justice Ngcobo, found that the criminalisation of prostitution (but not the use of the sex workers services) did not constitute gender discrimination, because it criminalised both male and female prostitution, and because under the common law, the customer (or John) is liable to prosecution as an accomplice to the crime of prostitution and liable to the same judgment.

In a sensitive and well-crafted dissent, Judges O'Regan and Sachs held that the criminalisation of prostitution constitutes unfair discrimination on the basis of gender because it makes the sex worker the primary offender and regards the patron as, at worst, an accomplice. Hence the law reinforces sexual double standards and perpetuates gender stereotypes in a manner impermissible in a society committed to advancing gender equality.

For me, this dissenting judgment epitomises Judge O'Regan: fearless, principled, willing to stand up for the unpopular causes and, above all, concerned with the plight of the most weak and vulnerable in our society.

Justice O'Regan has had an extraordinary career in law, one which from the onset displayed an uncompromising dedication towards achieving an open and democratic society where all South Africans, especially the most disadvantaged, would

enjoy the full set of civil, political and economic rights. Her contribution to the subject of women's rights and her contribution to the rights of the most marginalised have been particularly remarkable.

Equally impressive is Justice O'Regan's CV, which I will have to abridge, because as impressive as it is, reading such a long list of appointments and achievements is not the stuff of after-dinner speaking.

Justice O'Regan was appointed as a judge of the newly established Constitutional Court of South Africa in 1994. She served the maximum term of office of 15 years before retiring in 2009. At the Constitutional Court she acted as Deputy Chief Justice in the absence of Justice Moseneke from February to May 2008.

She is currently president of the International Monetary Fund Administrative Tribunal, a member of the Sanctions Board of the World Bank, and an ad hoc judge of the Namibian Supreme Court.

From 2008-2012, she served as the inaugural chairperson of the United Nations Internal Justice Council and continues to fulfil a public service function in her work on the Khayelitsha commission into police services.

Since 1997, she has been an honorary consulting editor of the South African Law Reports and serves on the editorial board of many South African legal publications. She was closely involved with the establishment of the South African Legal Information Institute, a web-based law reporting system that reports judgments from fifteen southern and eastern African jurisdictions based on the principle of free access to law. She also serves in different capacities on the boards of several non-governmental organizations in the field of human rights, constitutionalism and the rule of law.

She is an honorary professor at the University of Cape Town, a visiting professor at the University of Oxford, and was a Hauser Global Visiting Professor at New York University.

She holds a B.A. and LL.B (cum laude) from the University of Cape Town, an LL.M. from the University of Sydney, and a Ph.D. from the London School of Economics and Political Science.

For four years in the 1980s she practised as an attorney in Johannesburg specialising in labour law and land rights law. During this period she acted for a wide range of trade unions, anti-apartheid organisations and several communities facing the threat of evictions under apartheid land policy.

In 1988, she joined the University of Cape Town Labour Law Unit as a researcher. In 1990, she became a senior lecturer in the Faculty of Law at UCT. At UCT Justice O'Regan taught civil procedure, evidence, labour law and initiated a course entitled "Women in the Legal System".

Over the following five years, she was a founder member of both the Law, Race and Gender Research project and the Institute for Development Law at UCT.

She was an advisor to the African National Congress on land



claims legislation and to the National Manpower Commission on gender equality law. She served as a trustee of the Legal Resources Trust.

In this period she edited (with Christina Murray) a book on forced removals and the law entitled *No Place to Rest*; as well as the IMSSA *Arbitration Digest*, a digest of labour arbitration decisions. She is one of the authors of *A Charter for Social Justice*, a contribution to the South African Bill of Rights debate. She has written numerous articles published in academic journals.

Her judgments espouse an acute awareness of the entrenched social inequalities that exist in South African society, as well as a deep commitment towards eradicating them.

During her tenure as a Constitutional Court judge, Justice O'Regan delivered many profound judgments.

In *S v Bhulwana*; *S v Gwadiiso*, a unanimous judgment written by Justice O'Regan, the Court held that a reverse onus provision in the Drugs and Drug Trafficking Act, in terms of which any person found in possession of more than 115 grams of dagga would be presumed to be dealing in dagga, was unconstitutional because it violated the presumption of innocence.

In *Volks v Robinson and Others* the Court held that the law providing benefits to widows was "incapable of being interpreted so as to include permanent life partners" and distinguished between marriage and other cohabiting relationships. The joint dissenting judgment by Justices O'Regan and Mokgoro, (recipient in Johannesburg of this same award in 2014) instead of pointing to the differences between marriage and other cohabiting

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relationships, stresses the commonalities. They held that “[N]ot every family is founded on a marriage recognised as such in law. Yet members of such families often play the same roles as in families which are founded on marriage and provide companionship, support and security to one another”.

The dissent also points to the historical failure to recognise marriages solemnised by customary law and by the principles of Islam or Hinduism and asserts the “constitutional prescript that families that are established outside of civilly recognised marriages should not be subjected to unfair discrimination”.

Justice O’Regan has also played an instrumental role in furthering the cause of private arbitration in South Africa. In the landmark *Mphaphuli* judgment, with which the majority of the justices concurred, Acting Deputy Chief Justice O’Regan held that the value of the Constitution would not necessarily best be served by interpreting section 33(1) of the Arbitration Act in a manner that enhances the power of courts to set aside private arbitration awards. She held that the contrary seems to be the case: “The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently.”

Justice O’Regan has openly expressed her views on issues that South Africa faces, such as corruption and freedom of the press. As a board member of Corruption Watch she has said that:

Corruption is antithetical to the deep values of our Constitution: that public power should be exercised in the interests of all South Africans and not for the enrichment of a few. Corruption breeds distrust and disaffection and has the capacity to destroy all that our Constitution seeks to build. The best way to stop corruption is for civil society to stand firm and make clear that our shared public values deplore corruption and that it is not acceptable and for anyone ever to give or take bribes in either public or private sphere.

Regarding freedom of the press she has said that:

Democracies are noisy places where deep conflicts are audible. Indeed, this is so because of freedom of expression. Amid the noise and as a key participant in the democratic process, the press, like all institutions, needs continually to reflect upon its own role and responsibilities. It needs to be honest of expression. It needs to be conscientious and scrupulous in exercising that freedom fairly and to be fierce in defending it against improper diminution.

Justice O’Regan is committed to justice and peace. She is committed to the Constitution. She has contributed enormously to the development of the law in South Africa and has been recognised for this internationally. She delivered the Judge Jon O. Newman Lecture at Yale University in the United States in September 2012. The Newman lecture is an annual lecture in global justice, public international, human rights or comparative law, by a distinguished individual who is not a citizen of, and does not reside in, the United States.

Finally, I should mention that I have spoken to a number of her former clerks at the Constitutional Court. In addition to praising her intellect and her principled commitment to the values of constitutionalism, many of them, particularly the women, said that she was a role model to them: a fellow woman lawyer to whom they could turn to for advice – both professional and personal – even years after they had completed their stint at the Court. She is also a mother to two wonderful children – and her ability to balance her remarkable career and family life is an inspiration to us all.

Thank you for your attention ladies and gentlemen.

I call upon the outgoing Chair of the GCB symbolically to present the award. **A**

**Endnotes**

- 1 S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).



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