

On the record

with Judge Kate O'Regan

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In August 2012 Kate O'Regan, a former judge of the South African Constitutional Court, was appointed by the premier of the Western Cape to head the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha. Two years later, on 25 August 2014, the commission submitted its final report and recommendations.

In this exchange O'Regan reflects from the inside out on some aspects of the public inquiry into policing in Khayelitsha. Here one finds reference to judicial independence and organisational autonomy of commissions of inquiry; the value of comparative lesson drawing for process design; the importance of creating safe spaces for all participants; and honouring the contributions of participants. Policing, O'Regan concludes, is a truly challenging enterprise. Both political and police leadership carry a moral responsibility to engage systemic and other challenges as identified in both of the Marikana and Khayelitsha reports. Not to do so would imply the abdication of responsibility to address the safety and security concerns of South African citizens.

Elrena van der Spuy (EvdS): In April 2012 when you were approached to lead the Khayelitsha Commission of Inquiry, what were your initial thoughts about the prospects of doing so?

Kate O'Regan (KO'R): I felt ambivalent. Ambivalent because of the uses to which commissions of inquiry have been put in South Africa. There have been some outstanding commissions of inquiry but there have also been commissions of inquiry that could be considered to be forms of glorified 'executive kicking for touch'. During my time at the Constitutional Court we heard several cases concerning the role of judges in extra-curial work – the appointment of Judge Heath to head the Special Investigating Unit¹ and the Rugby Commission that President Mandela appointed.² So, in the light of those judgements I knew that as a judge I needed to look very carefully at the nature of the commission and whether it was a fitting task in light of the requirements of judicial independence. As I often do when faced with issues of this sort, I discussed the matter with a range of my colleagues. Some thought it would be difficult

to avoid very high levels of political contestation in relation to the commission. Nobody, however, thought it was improper from the perspective of judicial independence to do it. And then in deciding whether I should accept it or not, I took into account that the commission could potentially play a role in promoting safety and security, which is essential to people's sense of wellbeing and so central to the rights of civilians in a constitutional democracy.

EvdS: Once you made the decision to accept the appointment, how did you envisage the commission would have to function?

KO'R: There was no doubt in my mind that the commission would want to be completely autonomous in the way it approached its tasks, in the way it managed its hearings and processes and in the way it presented its report. I told the premier that we would want to be organisationally completely autonomous and she had no hesitation in accepting (and supporting) that condition. I was not involved in identifying the other members of the team, but I was informed early on by the premier's office of the people they had in mind. I was really encouraged by the prospect of working with a very independent, competent and diverse team.

* Elrena van der Spuy is attached to the Centre of Criminology, Faculty of Law at the University of Cape Town.

EvdS: In preparing for the task at hand, did you draw inspiration from other examples of commissions here or elsewhere in the world?

KO'R: Yes, very much. I was initially approached to consider undertaking the commission in April 2012 but the commission was only appointed in late August 2012. Between April and August I read widely, spoke to a lot of people and thought about the approach the commission should adopt. The first thing I did was to look at the Western Cape Commissions Act, which is slightly different from the national commissions Act, and I also read the case law on commissions. Then I did quite a bit of comparative reading about commissions in different jurisdictions. Commissions are used very widely in a range of Commonwealth countries. There is a rich literature. I read on current thinking about commissions in various jurisdictions and also looked very closely at the more modern practices around commissions. I particularly found some of the models that had been adopted in New Zealand useful. They all had very good websites. New Zealand, interestingly enough, has a standing commissions Secretariat. Every commission that is appointed is serviced by the same secretariat, they have a standing website, and publish all their procedures and reports on the website so that you can follow any particular commission in great detail.

EvdS: All commissions are provided with terms of reference. How much room for manoeuvre is there in interpreting the terms of reference more widely or more narrowly?

KO'R: In the case of the Khayelitsha Commission the terms of reference effectively came straight from the Constitution, but at a point of intersection in the Constitution that distinguishes the role of national and provincial government in relation to policing services. So it was very important to have a clear understanding of the terms of reference. We spent some time thinking about what the terms of reference could mean, given that this was a provincial commission of inquiry exercising provincial powers of oversight over the SAPS, and what that would mean for the way in which we designed our processes. And of course in one sense these were the questions that the High Court judgement and the Constitutional Court judgement explored. Clearly one of the

reasons why the commission's establishment as well as its subpoenas were challenged was because the commission's terms of reference rested on this point of intersection between national and provincial powers.

EvdS: What would you describe as key features of this commission?

KO'R: From the start we worked as a team of effectively six, a pared-down team. Compared to most commissions of inquiry that's a small group of people, but it had the great advantage that we could work as one team.

From the outset we identified our task as clearly as possible. In the very first meeting we decided what our process should look like. We thought it would be ideal to drive the process by issuing notices, outlining the manner in which the commission would work, its timeframes, and what was required of those who wished to appear before the commission. The notices were published on the commission's website, and so would be available to everybody, including the parties. We also decided that we would publish the record of proceedings on the website, as well as all the documents we received. Our approach to using notices to direct the process, and to publish them electronically, has some similarities to the processes followed in the Constitutional Court. A web-based model suited the commission's team because of the fact that Adv. Pikoli was based in Pretoria and Amanda Dissel in Johannesburg. So we were not based in one city, and technology made it easier for us to communicate. We used Skype and Dropbox, which were invaluable. We tried to try to keep the costs of the commission as low as possible and again we realised that electronic communication and electronic publication of the materials of the commission would be the most cost effective.

We were also very committed to holding all our hearings in Khayelitsha and that they would be open to the public. We wanted people to feel welcome in the hearing space. We did not want it to be an intimidating space but a safe one. We wanted the commission to sit on the same level as the community and not higher than it. We wanted participants to have a sense that the commission was facilitating a conversation in which people could genuinely speak and hear one another. When there is social conflict, people get silenced. In

such contexts people are fearful. In situations of conflict people don't listen to one another. So the idea was to create a space in which listening and speaking could take place, that didn't look hierarchical or as if it privileged either side or the commission unduly, but would nevertheless run with a clear set of principles, which would allow people to say what they wanted to say. So we were very committed to finding a suitable space in Khayelitsha, a hall, and spent a lot of time looking for an appropriate place. We wanted to ensure that the way in which the hearings were conducted would not feel too daunting, especially for the witnesses, given that testifying is, for most witnesses, an anxiety-filled experience.

EvdS: In the early period of your engagement, what did you anticipate as challenges?

KO'R: I think right from the start we realised that the commission's work was only going to be a success if we could get buy-in from and participation by the SAPS, as we recognised that at the end of the day policing is the SAPS's area of competence and expertise, and their constitutional mandate. After all, nobody else is going to provide policing services to the community of Khayelitsha. We sought to make plain that our task was to investigate inefficiencies and the breakdown in trust, but in a forward-looking way so as to identify solutions, both small and large, that might facilitate the work of the SAPS. We had to acknowledge the particular difficulty of providing social services, like policing, in a community with such scant resources.

EvdS: What was the underlying role that you envisaged for the commission?

KO'R: It is very important for a commission of inquiry to identify the nature of the inquiry or the exercise it is engaged in. In our case we wanted to identify whether there were systemic failures, or inefficiencies in policing, or a breakdown in trust between the SAPS and the community, and if so, why, and whether there were ways to address the problems. There was a very clear distinction between what we were engaged in and the terms of reference of the Marikana Commission, which were to investigate an incident, or set of incidents that took place at a specific time and place to determine what went wrong in those incidents. That was very different to

what we were doing. We were not engaged in the task of determining civil or criminal liability for any particular incidents. We did not consider it necessary to make findings of fact on particular incidents where conflicts of fact arose. We needed to identify patterns of failures and weakness and find solutions to those. It meant that we saw our role as effectively investigative and not adversarial, although it took some time for that penny to drop both with the SAPS and the complainant organisations.

EvdS: Were there differences of opinion about any particular issues within the commission?

KO'R: Not really. It might seem surprising. I mean, from time to time we would have differences of approach but I really can't remember any major arguments. I personally very much enjoyed working with the team. People brought a wide range of experiences and strengths. It's my usual experience with working with a diverse group of people. Diversity enriches processes where reasonable conditions of equality operate, because everybody can speak. People brought great insight from their different backgrounds. I learnt an enormous amount from my colleagues and from the process generally, despite the fact that we had to work very hard and under tight time schedules, and in spaces that lacked the usual office facilities.

EvdS: Looking in from the outside, the commission produced a wealth of information of relevance to those interested in policing. What did you personally learn about the job of police and policing during this time?

KO'R: An enormous amount. The work of policing was not something I had thought about extensively. We realised that there was a wealth of expertise both in South Africa and beyond in policing, and our decision to divide the work of the commission into two phases was a very constructive move because it enabled us to obtain an invaluable collection of expert reports. We also got a mountain of information from the SAPS. And working through those documents was very informative. We appointed two police experts, very senior retired members of the SAPS in the Western Cape, who were very helpful. We consulted with quite a wide range of people who were either experienced reservists or experienced retired SAPS members. I have to say that we avoided consulting people who

were still in the SAPS, because of the sense that the SAPS was represented and wanted to manage its own evidence and witnesses, so we didn't consult directly with any existing SAPS members. But we learnt an enormous amount about how the SAPS works on a daily basis, what happens in a community service centre, the various registers that have to be kept, what is required. It became clear to us that policing is heavily administrative in nature and we also learnt a lot about police culture. And we realised that a lot of the challenges around policing culture that we face in South Africa are reproduced in police services all over the democratic world.

EvdS: Can you tell us a bit about the thinking that informed your decisions about the structure and content of the report? Why it looks like it does?

KO'R: Initially we planned to do a short report, focusing on our findings and our recommendations. But then it just seemed that we needed to record what witnesses had said. So many witnesses were brave in coming to testify about events that were painful to them. This was true of both SAPS witnesses and community witnesses. We had to find a respectful way of recording that testimony, and so a large section of the report is really a summary of the witness statements. Then there was a feeling that we had to tell the history of the establishment and processes of the commission. In future others may be interested in that history and the kinds of decisions we took. We also felt the report had to have a section on the history of Khayelitsha, embedded as it is in the spatial divides of apartheid. The police's role in enforcing apartheid meant that the police have a particularly difficult challenge in winning the trust of the community. That's a burden members of the SAPS, many of whom were not members of the SAP in the 1980s, face today, and it is something they need to know and recognise as it impacts on how they work today in Khayelitsha.

EvdS: What were your expectations about the possible impact the work of the commission and the report would have?

KO'R: Well, as we say in a couple of places in the report, our hope was that when responding to the report, people in the SAPS, in the community and in government would respond to it by assessing whether our recommendations for improvement would in fact

make the lives of people in Khayelitsha safer, and not on the basis of what you might describe as party political squabbling. And unfortunately at least some of the responses to the report have been the latter. This is unfortunate. What I think is encouraging, is that the SAPS on the ground in Khayelitsha and the community wanted to find a way of working together. What is most distressing is that some of the most harmful findings we made about the failures of policing are not being addressed; they appear to be either defended or denied. So, for example, the fact that the SAPS seems to have no prescripts on how to provide visible policing in densely populated, informal neighbourhoods – in a country with high numbers of people living in dense urban neighbourhoods in cities as we do, and given the very high levels of crime and violence in those neighbourhoods – is a major failure. Almost every community witness said that 'we never see SAPS in informal settlements'.

It is not easy to provide visible policing in densely packed informal neighbourhoods, but it is not impossible – as several witnesses told the commission. It will affect questions of how staffing is allocated to police stations where there are high levels of informal neighbourhoods, and it is something that the SAPS should pay urgent attention to, so as to not continue to overlook the needs of the poorest of our urban communities. So that upsets me. And secondly, I am also dismayed by the fact that an entirely inequitable and arguably racially discriminatory allocation of policing resources and personnel is not being addressed. I cannot understand why senior leadership in the SAPS would not seek to address this issue, given the clarity with which the problem was illustrated before the commission.

EvdS: What, if any, has your engagement with the office of the Commissioner of Police been, during the Inquiry or thereafter?

KO'R: We wrote to the commissioner and offered to meet with her once the report was published, but we have not had a response to that letter. Obviously I have seen the 17-page document that the premier made public, which was followed by a press statement on 11 August. I have not seen any suggestion so far that there has been a careful consideration of how the shortcomings we identified can be addressed.

It is distressing to see that there isn't a serious commitment to thinking about what could be done to make policing work better for local communities like Khayelitsha.

[Editor's note: about a week after the interview was held with Justice O'Regan, the Western Cape Department of Community Safety and the SAPS national leadership announced they had appointed a task team to investigate the recommendations of the commission.]

EvdS: In your view, is there a commitment to engage the challenges that confront the police organisation at the present time?

KO'R: I think there is a commitment from leadership at the SAPS local level who work with communities every day. I am not saying that all members of the SAPS are committed, but certainly on the evidence before us, the tenor of the testimony of many of the SAPS witnesses from the three Khayelitsha police stations and the cluster suggested a real concern about service delivery. The question may be raised as to why there is not sufficient commitment higher up? There are two considerations: one is that policing organisations everywhere find it hard to accept independent mechanisms of accountability. Police are doing a tough job and they tend to think that they are the only people who know how to do the job, and therefore discount analyses by others of their work. I am sympathetic to the difficulties of the work that policing institutions undertake and the tasks that they have to perform. But I do think that the ways in which they operate render them less than receptive to accountability. Secondly, I think that there is a complicating factor here that lies in the separate roles that provincial and national government perform in relation to policing, and the fact that the Western Cape is governed by one party and the country is governed by another. That added a political sensitivity to the work of the commission, which is apparent from the manner in which its report has been received. But section 199 of the Constitution makes it plain that the SAPS must ignore such political sensitivities. Section 199 imposes a duty on the police service not to favour or prejudice any political party but to remain as far as possible even-handed in its dealings with political parties.

EvdS: Looking back, is there anything that the commission should have done differently?

KO'R: There is one thing that I wish we had done, though it might have been difficult to do, and that is to have tried to get some understanding of how the lower ranks of SAPS members who work in the three Khayelitsha police stations felt about the work they do, and about the mandate of the commission. Getting their input was difficult for us because the SAPS was resistant to cooperating with the commission, especially at the outset. As a result we felt that the environment was hostile. We could probably have asked the SAPS for permission to do some kind of a study with ordinary members of the SAPS, and we didn't. Whether junior members of the SAPS would have felt free to speak openly to the commission is another question. Nevertheless, I would have liked the commission to have heard from ordinary SAPS members from the lower ranks who work in Khayelitsha. But beyond that there is nothing that I feel was a material omission, although we may have overlooked something.

EvdS: You spent the best part of two years working for the commission. During that time it must have been an all-consuming engagement. Is there a sense of loss when it all comes to an end?

KO'R: Not really. Somehow a lot of lawyering is like that, even when you are in practice and you are appearing for a client and you have a huge case and you walk away. And you know, writing a judgement is very much like writing a Commission Report – you might be really invested in it and spend months on it, find it terribly difficult and burdensome and then you go to court one morning, you deliver it, and that's it. There is no post mortem for it. You just deliver it and that's it. So I am sort of used to letting go. In some ways it's a relief. Although you never completely let go, in the sense that you continue to be interested in what's happening. I do follow the story when I see it. I have certainly become interested in policing in poor communities, especially.

Notes

- 1 *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC).
- 2 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).