



Public Protector Adv. Thuli Madonsela's address during the 9th Annual Peace, Safety and Human Rights Memorial Lecture held at the University of South Africa (UNISA), Florida Campus on 10 May 2014.

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Your Excellencies, Ambassadors and High Commissioners;

Members of Unisa Management;

Mrs Farieda Omar, Widow of the late Dullah Omar and other members of the Omar family members

Ms Zanele Twala and accompanying family members of the Moabi Family

Other Distinguished guests;

The media;

Ladies and Gentlemen

It is a great honour join to the UNISA community on this important occasion of the UNISA Annual Peace, Safety and Human Rights Memorial Lecture. I am grateful to the leadership of the College of Graduate Studies and Institute for Social and Health Sciences, University of South Africa (UNISA) for the privilege.

As you have heard this lecture is dedicated to the human rights legacies of the late former Minister of Justice Dr Dullah Omar and Mr Joe Moabi.

Firstly, I must say that I am humbled and grateful for the opportunity to be associated with these great human beings. When I was informed that I was invited to this lecture, one of the things that made me rejoice in the privilege was the prospect and honour of re-establishing my

acquaintance with the Omar family, particularly Dr Dullah Omar.

A great human being and a person that I personally regard as one of my mentors, it was him who recruited me to the Department of Justice and guided my colleagues and I for many years as we engaged in efforts seeking to transform the justice system and the Department of Justice itself.

I am also grateful to make an acquaintance with the Johannes “Joe” Moabi legacy, another great human being who fought for justice, peace and security in our country.

Mrs Farieda Omar will agree with me that it would have pleased the late Dullah Omar to be honoured together with Joe Moabi, a comrade in the fight for a democratic and inclusive South Africa, who happens to come from a different political background. This was because Dullah Omar cherished human diversity and respected colleagues even when he differed with them regarding how to take our country forward.

A quintessential human rights activist, my recollection of Dullah Omar is that of a great human being who gave all he had to ensure that all enjoy all human rights and access to justice. Passionate about the transformation of the justice system, it was important to him that the system be transformed to ensure access to justice for all and that it plays a critical role in institutionalising human rights.

I recall one of the things he used to talk about was that the justice system would never be respected or considered legitimate by the average person until the system achieves a situation where every person enjoys the right to understand and to be understood. It would be interesting to find out from those who study the justice system as to how far we have come with regard to ensuring that an ordinary person regarded as “Gogo Dlamini” at the Public Protector South Africa honestly feels that when she or he engages with the justice system through the courts and related structures, he or she understands and is understood by the justice system.

What about peace? What does that have to do with the legacies of Dullah Omar and Joe Moabi? At the core of the struggle for democracy was the quest for an inclusive and peaceful society. Justice and human solidarity with human rights at the core of human existence was what Dullah Omar and his contemporaries fought for.

Dullah Omar knew that without justice and inclusiveness, there could be no peace. Not only did he fight for a democratic and human rights centred society after being appointed the first Minister of Justice in a democratic South Africa, he had devoted his entire life to this course. A safe and peaceful South Africa is also what Joe Moabi fought for.

The human rights they fought for transcend the traditional civil and political rights and incorporate social and economic rights. The right to access to health care services, for example, is part of the human rights we have entrenched in the Constitution. It is one of the rights in section 27.

The Constitution talks culminated in a consensus that the new society should deliver the freed potential of every person and improved quality of life for every person. This is reflected in the preamble to the constitution. Surely we cannot have a freed potential as our Constitution promises without basic human needs such as health and safety.

As I prepared for my address under the topic “Citizenship and the Protection of South Africa’s

Constitutional Democracy”, my attention was drawn to the court’s pronouncement in a case called **Gerber and Others v Member of the Executive Council for Development Planning and Local Government**, Gauteng and Another 2003(2) SA 344(SCA). The court stated that:

“The Republic of South Africa is a constitutional state. Local and other state institutions may act only in accordance with powers conferred on them by the law. This is the principle of legality, an incident of the rule of law.”

Justice Sandile Ngcobo , who later became the chief Justice of South Africa shared further insights on the Constitution and the principle of legality in the case known as **Affordable Medicines Trust and Others v Minister of Health and others 2006(3) SA 247 (CC)**, where he said:

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law...”

The doctrine of legality, which is an incidence of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained in the principle that they may exercise no power and perform no function beyond that conferred upon them by the law. In this sense the Constitution entrenches the principle of legality and provides for the control of public power.”

Perhaps before elaborating on these judicial insights from the two most senior courts in our land, the Supreme Court of Appeal and the Constitutional Court, we need to briefly interrogate the notion of protecting constitutional democracy.

Incidentally, as the Public Protector, I head an institution that belongs to a group of constitutional institutions established under Chapter 9 of our Constitution, specifically to support and strengthen constitutional democracy.

One of the key indicators of democracy, whether constitutional or parliamentary, is the holding of periodic free and fair elections. This incidentally, is something we have just accomplished three days ago. Free and fair elections constitute a traditional hallmark of democracy, which as we know entails the government of the people by the people or, as one country puts it in its constitution, “the government of women and men by women and men.”

Through participation in free and fair elections, citizens of a democracy elect among themselves women and men they trust enough to surrender their power and collective resources to so as to manage such power and resources on their behalf. Such power and resources are off course entrusted on the basis of good faith, with the understanding that both the exercise of public power and control over the collective resources will be done within the parameters of the terms on which such power has been granted and in the best interest of the citizens.

This brings me to the notion of constitutional democracy. Is there a difference between ordinary democracy and constitutional democracy?

There certainly is. In the **Gerber** case, mentioned during my opening remarks, the SCA made it clear that in a constitutional state, organs of state may only act in accordance with powers conferred to them by law. In the **Affordable Medicines** case Ngcobo J, clearly states that the exercise of public power must comply with the Constitution. It is clear in the extract I quoted

earlier that both the SCA and the Constitutional Court view the principle of legality as being at the core of constitutional democracy.

In other words in government you cannot do something because you feel it must be done or needs to be done. You cannot do it because you think you need it. There must be a law that allows you to do it. Sometimes people in government don't understand that. If you think you need it or you think it must be done, create a law that must be debated transparently to give you that right. Once you have that right then you can have it.

It is further worth noting that Justice Ngcobo further makes it clear that in a constitutional democracy *"the exercise of public power is regulated by the Constitution"*. The difference between a constitutional and a parliamentary democracy is that in a constitutional democracy, the final say lies with the courts and ultimately, the Constitutional Court.

Justice Ngcobo states in the *Affordable Medicines* case, that organs of state or state actors *"may exercise no power and perform no function beyond that conferred upon them by law"*.

In the *Gerber* and *Affordable Medicines* cases, the judiciary sheds some light on the nature of constitutional democracy. The essence of constitutional democracy we can glean from the two cases and others is that the Constitution is supreme. Indeed the supremacy of the Constitution and the Rule of Law are part of the foundational principles of our democracy as can be noted in section 1 thereof.

What is meant by protecting constitutional democracy and by whom and from what, must constitutional democracy be protected and from whom?

Former President Nelson Mandela once said:

"Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace".

The administrative conduct of government and authorities are subject to the scrutiny by independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order.

An essential part of that constitutional architecture is those state institutions supporting constitutional democracy. Amongst those are the Public Protector, the Human Rights Commission, the Auditor-General, the Independent Electoral Commission, the Commission on Gender Equality, the Constitutional Court and others."

We may safely conclude from former President Nelson Mandela's remarks that constitutional democracy often has to be protected from state actors in government or organs of state. We can also conclude from him that it is not always an issue of malice, bad faith or ill intentions. Improper conduct or bad governance often amounting to constitutional violations happens when state actors believe they are doing the right thing. For example in the Treatment Action Campaign (TAC) case, government felt it needed to prolong ARV trials before rolling these out to the broader population infected by the HIV virus. It took the Constitutional Court exercising its judicial scrutiny powers to override the Executive, deciding that the right to access to health care enshrined in section 27 of the Constitution demanded more speedy action to save lives while

improving the quality of life. Today we know that the Constitutional Court was right and lives have indeed been improved and saved because of the decision it took which effectively amounted to overruling the Executive.

As Minister of Justice, Hon Dullah Omar was one of those that advised President Mandela regarding compliance with the decisions of courts and Chapter 9 institutions. I do not recall Minister Omar advising any President that a Task Team has the same authority as a constitutional institution. He could have, if he believed in expediency. But he believed that constitutional democracy was important for peace and stability in our country and the world because we have become a global village.

The TAC case was dealing with a case of injustice perpetrated with good intentions. But are there cases where the protection of constitutional democracy targets acts that cannot be attributed to good faith?

The history of democracy, from separation of powers and diffused state power to constitutional democracy tells the story of state actors who tend to abuse their powers or even, as indicated in the cases I referred to earlier, acting *ultra vires* or beyond their powers. Indeed when the doctrine of judicial scrutiny was introduced in the American case of *Marbury versus Madison*, it was in the context where executive action was inconsistent with the spirit of the constitution and caused injustice.

Lord Aton once said "*Power tends to corrupt and absolute power tends to corrupt absolutely*". A friend of mine usually says that "*Power intoxicates*". I believe this is true. Power does tend to intoxicate and unchecked power tends to breed power drunkards.

It was to curb excesses in the exercise of public power that democratic innovations such as separation of powers and other elements of diffused state power were introduced.

In the original architecture of democracy, diffused state power involved fragmenting state power into three branches of government, the Executive, the Legislature and the Judiciary. This is often referred to as the "*trias politica*." Over time it the checks and balances offered under the *trias politica* architecture were not enough. Diffused state power was expanded to include decentralisation which in other countries entails total federalism. The idea is to ensure that one person or institution should not be self sufficient to the point where or it can decide everything and check itself because of the tendency to gravitate towards self interest.

We are reminded of the old apartheid state on how unchecked power was used excessively. I had hoped I would talk to you about how unchecked power was used by politicians then to even interfere with judicial scrutiny. But perhaps that is a story for another day.

In modern democracies, they have introduced a new institution or as it is the case in South Africa, a set of new additional institutions to strengthen constitutional democracy. In other words, to the traditional *trias politica* arrangement involving the Executive, Legislature, they have added an additional layer of institutions often referred to as constitutional institutions to further check power so that one state institution is not able to take all decisions without another institution second-guessing whether the decision was made within the law and the Constitution.

The institution which I am part of, the Public Protector, is one such institution. Instead of judicial scrutiny, its job is to scrutinise the exercise of state power from the administrative point of view. Former President Nelson Mandela recognised the powers of these institutions and he

mentioned them by name, being the Public Protector, Human Rights Commission, Auditor-General, Independent Electoral Commission, Commission for Gender Equality and others.

The purpose of constitutional democracy in South Africa is to deliver the society envisioned in the Constitution. In other words constitutional democracy seeks to deliver the South African dream of improved quality of life with a freed potential of every person, marked by equal enjoyment of all human rights and freedoms. As indicated earlier, those human rights enshrined in Chapter 3 of the Constitution include civil, political, socio-economic rights, which include the right to access healthcare.

Going back to the case I spoke about earlier, the TAC case, if it were up to the Executive it would have taken longer to roll out the provision of ARVs. Thanks to the TAC case the roll out was fasttracked.

Madiba's remark about benevolent states is apposite here because it shows that the Executive erred because it thought it knew better. There was no malice but through constitutional democracy in action the Constitutional Court had a final say in the TAC case, overruled the Executive and the roll out was expedited and lives were saved and improved.

This brings me to the hierarchy of constitutional scrutiny. If we are talking about strengthening democracy, safeguarding constitutional democracy and protecting it, this involves a hierarchy of institutions. I indicated earlier that the persons that are elected are so elected on the basis of trust because citizens will not always be there to see what they do with the entrusted power and resources.

The first level of scrutiny is self-scrutiny and self-checking. Ethical conduct means doing the right thing and honouring the trust placed on you by the people on your own. If we go back to Minister Omar, I knew a person who would do the right thing not because he was afraid of being arrested and taken to court. He would do the right thing because he thought it was the right thing to do. While doing the right thing or trying to do the right thing you may err and that is why we have other levels of scrutiny.

The second level of scrutiny is the administrative scrutiny provided by internal institutions. These include the Integrity Committee, Internal Audit, the Audit committee and related structures in your own institution. From there you have statutory bodies some may be created by yourself. If we take for example the Special Investigation Unit (SIU), it is a creature of statute and acts in accordance with the Act that establishes it. It is not established by the Constitution. It is a good structure created by the Executive for self-assessment and scrutiny. In terms of the Special Investigation Unit (SIU) Act, in fact SIUs are to be established for each case. The SIU as it sits at the moment it does not have any power to do anything other than the power conferred to by the President through each proclamation tasking it with a matter.

The President would decide "*on this case I give you these terms of reference*". The SIU was meant to be an internal body, assisting and facilitating decisions internally. That is a good thing because, as I said earlier, there are different levels of scrutiny.

At the external level of scrutiny we have constitutional bodies. They are independent and not part of the Executive. They cannot be told by the Executive what to do and what not to do and they report to Parliament on their activities, at least once a year. Many of those are Chapter 9 institutions.

The levels of scrutiny go up from a lower to a higher level. Ultimately Parliament has a role to play because these institutions work with it. However, Parliament cannot second-guess them in terms of findings on their constitutional scrutiny. Parliament got a legal opinion recently in the IEC case, where it was said that Parliament cannot review the decision of the Public Protector but it can deal with the remedial action. It cannot say your findings are right or wrong. If the findings have to be contested the next hierarchy of scrutiny is a court of law.

That is how our integrity system in South Africa is. All of these are meant to protect constitutional democracy with the understanding that we are given trust on the basis of good faith but may err by mistake or in the pursuit of self-interest. Whatever the case may be, there needs to be someone who is independent, who will check whether what you did was ill advised as in the cases I referred to earlier. That structure scrutinising your action will determine if what you did was within the confines of the Constitution and the law.

I would like to refer you to the SCA case referred to as *Public Protector v Mail and Guardia and Others (Mail and Guardian case)*. The case is about the role of the Public Protector regarding administrative scrutiny in state affairs. The *Mail and Guardian* case involved questions regarding the standard applied by the Public Protector in investigating alleged maladministration, including corruption in the procurement of oil. Key to the court's decision was a fact that it was said that the Public Protector has the powers of an ombudsman plus more.

I reflected on this recently when I had to deal with a Deputy Minister who is supposed to have advise government insisted that the Public Protector is simply an Ombudsman and has superficial powers which exclude investigating corruption. This could not be further from the truth. In the *Mail and Guardian* Case the judge says on p 4:

"The office of the Public Protector is an important institution. It provides what will be the last defence against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously destroying the nation. If that institution falters, or is itself undermined, the nation loses an indispensable constitutional guarantee."

It is important that these pillars of constitutional democracy are used to the fullest to prevent instability. When people feel that the pillars of constitutional democracy are not enabling them to engage in constant dialogue with those entrusted with public power they may resort to extra-judicial means.

Indeed democracy is a dialogue between the people and the state. On the issue of peace, legitimacy and satisfaction in terms of service delivery and proper use of state resources are important for peace. We know about the so called Arab Spring and other domestic conflicts where people found mechanisms for exacting accountability from state actors unhelpful and, a revolution ensued. We are not going to go there because our constitutional democracy has multiple levers for the people to exact accountability against state actors.

However, when people feel that state resources are abused and or are not distributed evenly, some then think that the best way to protect themselves is to ensure that they themselves acquire proximity to the resources. We cannot all have proximity to the resources as that will be a recipe for disaster. I have said that democracy is a dialogue and institutions such as the Public Protector are part of mechanisms that have been created to strengthen that on-going dialogue between the state and the citizens. When the dialogue seems to fail, these institutions are supposed to help.

As the Public Protector, we are the eyes and ears of the state and we give people a voice. The Public Protector or an ombudsman in Sweden has ears on the stairs just to show the people that if nobody else listens the Ombudsman will. This strengthens the dialogue between citizens and the state machinery. However, for these institutions to function, they must be understood, supported, allowed to strengthen that dialogue between state and the citizens.

But at times the space required is not provided. I've observed something I refer to as the paradox of the Public Protector's powers. Often as the Public Protector we are told: *"You are not a court, therefore you cannot expect your decisions to be implemented."* Section 182 of the Constitution says the Public Protector has the power to investigate, report and take appropriate remedial action. What does take appropriate remedial action mean?

I find it confusing. Why I call it a paradox is that when my office engages with the people after a report in pursuit of moral suasion, specifically to strengthen constitutional democracy by ensuring that the public participates in the dialogue, we are often told *"Why can't you be like judges, make your decision and leave it."* We know we are not a court of law, and were never meant to be a court of law. We are there to strengthen constitutional democracy through dialogue.

In other words we make a decision and throw it back to society for dialogue. Moral suasion is about people talking and demanding that something has to be done. Being told you are not a court of law and then stop talking to the people and be like judges is not only confusing but that is what encourages a situation where people have to dialogue in the dark.

An average person does not read the full report. Keeping the dialogue going is the only way we can ensure that people participate and hold the state accountable. The Public Protector should investigate, make a findings and rope in people to then hold those entrusted with public power accountable. In any event making an issue of the Public Protector being not a court of law is pre-constitution thinking because Chapter 9 is a chapter in our Constitution. It is not a sub-chapter of Chapter 8 which is for the Courts. It is a chapter on its own and is meant to serve its own purpose. The courts themselves do strengthen constitutional democracy in the traditional way. Furthermore being asked "why don't you be like judges?" is disingenuous.

We have now established the difference between constitutional democracy and ordinary democracy. I have indicated that in what is referred to as ordinary democracy or in a parliamentary democracy is once Parliament has spoken that is it. In a constitutional democracy Parliament can speak and if its view is inconsistent with the Constitution, a court of law can tell Parliament that.

Constitutional bodies such as the Public Protector may not have the power to scrutinise legislation. However, they have the power to scrutinise all administrative actions. I have already indicated what we do as the Public Protector. We are established under Section 181 and conferred power under Section 182 of the Constitution, to investigate any conduct of the state affairs or public administration and many sphere of government that is alleged or suspected to be improper or likely to result in impropriety, prejudice; to report on that conduct and take appropriate remedial action.

What do these words mean? Conduct means acts or omission, which usually amount to conduct or service failure; state affairs means all spheres of government. Nothing is excluded. The courts are only excluded to the extent that they perform judicial functions. If the Constitutional Court were to procure its new building and in the process, it was alleged that it violated the

procurement laws, the Public Protector would have powers to scrutinise. Nobody is above administrative scrutiny in that regard. But if the Constitutional Court or any court or even the CCMA makes a decision, in its exercise of its core functions, we do not enter or second guess their decisions- the Constitution and the Public Protector Act prohibits it.

What is improper or prejudicial conduct?

I have heard some people in the legal community saying “*how can you make a judgement on the basis of morality and not on the basis of the law?*” Improper conduct transcends legality or lawfulness; it incorporates ethical considerations and policy transgressions. That is why the Public Protector is given the power to enforce the Executive Members Ethics Act.

How does prejudicial conduct link with Human Rights?

We are not a human rights body but the work we do has an impact on human rights. However, you cannot come to us and say your human rights have been violated. You may come to us and say an organ of state did something that it was not supposed to do or failed to do what it was supposed to do and because of that you suffered prejudice or an injustice. The prejudice often results in human rights violations. If your RDP house is given to someone else because of wrongful administrative action we call that maladministration. However, the impact of that is that your right to access to housing is affected.

Going back to one of the issues we are discussing today, safety and security, you would come to us and say somebody failed to do what they were supposed to do. You could say, the police station failed to patrol a particular place as required in the normal administrative instruments. If they fail to do that, that would be maladministration. The same applies to human rights such as health. The impact would be your human rights have been violated. We recently undertook a huge health enquiry which involved public hearings. Again the issue would be that a hospital or an ambulance or doctor failed to do what they were supposed to do or did what they were not supposed to do, and because of that somebody’s right was affected. That is what we refer to as improper conduct.

What does alleged or suspected mean? This means that an investigation may be initiated on the basis of a complaint or on own initiative or a combination of both. At the end of the process we have the power to report

In pursuit of this power we prepare formal and informal reports. Majority of reports are informal. Between 20 and 40 formal reports are issued per year. Most of the disputes or complaints are resolved through engaging organs of state informally with no formal reports produced. We call our work whispering truth to power. We do not scream, we quietly whisper to the powers that may be and ask them to fix whatever we consider to be broken. Most of them fix it. The difference between us and the courts is that we are not restricted to pleadings, information brought by the complainants or his or her understanding of the law. All the complainant has to say is that something has been done the way it was not supposed to be done.

At the end of the process, the Constitution confers the power to take Appropriate Remedial Action: Clearly the power to take remedial action differs from recommending, which is the phrase for traditional Ombudsman offices. Appropriate remedial action entails discretionary power to determine appropriate remedies. This is often mistakenly reduced to making recommendations. Even findings are often reduced to recommendations in terms of some people’s dialogue. The reality is that findings are legally binding. It is true though that the

remedial action cannot be implemented the same way as a court of law. Our remedial action relies on good faith and many people in government have that faith and they implement. Where that fails the public is roped in for moral suasion. Parliament and the courts may also be approached.

Going back to the people we are remembering today, they are part of a group of people in our country who gave up a lot and interrupted their family lives to ensure that we have constitutional democracy. That constitutional democracy, the Constitution says, must deliver an improved quality of life for every person.

To do so, the Constitution has designed a particular character of the state. I have already spoken about the levels of scrutiny of checking whether powers are exercised appropriately. That is part of the architecture of our state. Part of that architecture of the state includes provisions that clearly define the character of the state. Section 1 for example, talks about a democratic state, the rule of law and constitutional supremacy. That is part of the character of the state.

Section 96 talks about Executive Ethics which tells us how Members of the Executive have to behave. Expected conduct includes avoiding self-interest and honouring the duty to ensure that everything is done in the interest of the public.

Section 195 outlines principles of public administration that includes economic use of state resources. This section was invoked in the SASSA case that has just been decided by the Constitutional Court.

Section 237 is a part of the constitutional provisions that clearly define the character of the state. It requires putting the Constitution first. It says constitutional obligations must be implemented diligently and with speed. That means before we undertake things such as changing street names we have to ensure that basic needs of the people are catered for. This talks to be issue of balancing a basic needs approach and global competitiveness in our governance processes. This is to comply with Section 195 and 237 of the Constitution. Incidentally, balancing the meeting of people's basic needs with the quest for global competitiveness is one of the things Dullah Omar was passionate about.

Where do we go from here?

All we need to do as citizens of this country and residents is to play our part in strengthening constitutional democracy. How do we do that? People can strengthen constitutional democracy by understanding the Constitution, sharing the Constitution and its provisions with fellow other persons. If we do so, when people in Alexandra are not happy with what happened, they are not going to take to streets. They will understand that there are mechanisms that can be trusted to assess the matter, adjudicate and if there was wrongdoing handle it in their favour.

But it means that when we speak about these institutions, we must watch what we say. When we persistently make pronouncements that make people doubt the power and legitimacy of these institutions, we are increasing the possibility of people taking to the streets when they are not happy with how the state is advancing their human rights.

In honour of Dullah Omar, Joe Moabi and all others who gave up their comforts and sacrificed a beautiful family life to bring us where we are, all we need to play our small parts in strengthening constitutional democracy. If we do so we will speed up the delivery of our constitutional dream.

We have to ensure that we continue to build a state that is accountable, operates with integrity at all times and is responsive to all the needs of our people.

Adv. Thuli Madonsela

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