



**Address by Public Protector Adv. Thuli Madonsela on the occasion of  
The 5<sup>th</sup> Desmond Tutu International Peace Lecture at the University of the  
Western Cape, Cape Town on 08 October 2015**

***Programme Director, Ms Redi Tlhabi***

***Arch Bishop Emeritus Desmond Tutu and Dear Wife Mam Leah Tutu***

***His Grace Arch Bishop Thabo Makgoba***

***Rev Mpho Tutu, Tutu Family and Foundation***

***Vice Chancellor of the University of the Western Cape, Professor Tyrone***

***Pretorius and Team***

***All Esteemed Guests***

Greetings from the Public Protector SA Team!

I cannot express what an honour it is to stand before you and deliver the 5<sup>th</sup> Desmond Tutu International Annual Peace Lecture. This year's lecture is themed *Peace and Democracy: What's law got to do with it?*

Incidentally the dialogue is in line with Goal16 of the recently adopted UN Sustainable Development Goals (SDGs), which is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels.

Following on the footsteps of giants such as His Holiness the Dalai Lama, Former UN Sec Gen Kofi Anan, Former Ireland President Mary Robinson and Elder, Ms Grace Machel, is a singular honour. But the greatest honour for me is the opportunity presented by the lecture to be associated with Bishop Tutu, a quintessential servant leader and iconic global crusader for justice, peace and general human goodness or Ubuntu, I've admired since I was a child.

Happy Birthday Arch! Blessings, good health and many more birthdays!

I'm deeply grateful to the Desmond and Lea Tutu foundation, particularly Rev Mpho Tutu for this cherished honour. On my first direct contact with Arch, he unintentionally gave us a practical lesson in servant leadership. It was in the early 90s in his office where a Swedish colleague, Allan Gustavson, and I interviewed him on the impact of European Union (EU) funding on Human Rights during the apartheid years.

His warmth and respect for fellow human beings was amazing. But for me it was the act of stepping up and serving us tea that left us in awe of him. Incidentally we did not respect him less for serving us. That simple act of servant leadership left us more awe of him as a leader. Little did I know then that two decades later, I'd have the honour of giving a lecture celebrating his legacy.

### ***Can we learn from a poem titled *The Cold Within*?***

The central point I want to make today is that law can be a healing and transformative and healing force that fosters peace in a democratic society and global community by promoting social justice, human solidarity and accountability. But there are certain conditions that must prevail for law to be a healing and transformative force and one of those conditions is the rule of law. A related and equally important condition is that law and justice should be on the same side.

I am deeply encouraged to note that the room is full of the young and old from diverse human backgrounds. This gives me and my team, from the Public Protector SA, hope that we are all joined like ancient societies in the pursuit of the same cause of optimising conditions for our collective survival as a people or human race and optimal enjoyment of life for all of us.

Like Arch Bishop Tutu, Mam Lea Tutu and their Legacy Foundation, we are here because of our collective concern for our common fate as a country, continent and world.

Can we reflect for a moment on what would be the outcome if we were not concerned or doing something about our shared fate.

James Patrick Kinney's Poem, titled "The Cold Within" may have an answer for us. Written in the 60s, the poem tells the story of 6 humans trapped by happenstance on a bitterly cold dark night. They were all sitting around a dying fire with each having a log in their possession that could revive the fire.

The first person looked across and noted a person from a different racial group than his and decided to withhold his log from reviving the dying fire. The second person looked across and saw someone from a different church than hers and decided not to benefit that person from her log. A poor person saw a rich person on the other side and decided he would not benefit the filthy rich while the rich man saw the poor man and decided he wasn't going to benefit the lazy poor. A historically disadvantaged person noted members of a historically advantaged group and decided it was time for revenge and withheld his log. The 6<sup>th</sup> person, a person who had never done anything except for gain, decided to withhold his log on account of his companions not being in a position to pay him for his service.

The poem ends by stating what we already know that they did not die from the cold without, they died from the cold within.

When James Patrick Kinney wrote the poem about half a century ago, he sought to discourage apathy in the face of injustice and wrong-doing. He was alerting us to something I believe primitive societies knew all along, that ensuring human solidarity and social justice is not an act of charity but an act of sustainable self-preservation. Most societies have a proverb to the effect that *"it is impossible to light your companion's path without brightening your own"*. Another says: *"As long as there is injustice somewhere there can't be sustainable peace anywhere."*

In this country we call this *Ubuntu*, *"I am because you are"*. *Ubuntu* is a value that the Constitutional court said, in *State v Makwanyane*, is one of the values underpinning our constitutional democracy and which value is embodied in the constitutional value of "Human Dignity"

We know that James Patrick Kinney's selfish and parochial humans died because they failed to appreciate the interconnectedness of humanity. They failed to appreciate that to save themselves or for self-preservation, they had to prevent the suffering of others, share what they had with and perhaps extend social justice to their companions.

***What does self-preservation and James Patrick Kinney's poem have to do with our conversation on law, peace and democracy today?***

Firstly, I believe there is a link and that the conversation on law's relevance to peace and democracy is a timely conversation as we navigate a deeply troubled world, desperately searching for peace and inclusive development.

You will agree with me that other than the two world wars at the beginning of the 20<sup>th</sup> century, the world has never been in so much turmoil. As humanity we've never found ourselves in such a desperate search for peace regardless of where we are whether we're dealing with violent crime and or civil wars domestically, global terrorism and on-going conflict between some states, peace is something the world is desperately searching for right now.

As we reflect more than half a century since James Patrick Kinney's poem was penned can we say we are doing better regarding sharing our collective habitat, planet earth, as a human race? Are we not perhaps where we are because somehow as we progressed we began to behave like all or some of James Patrick Kinney's people?

If indeed we did lose our way regarding social justice and human solidarity, can the way forward lie in our conversation on law's relevance to peace and democracy?

My answer is yes to both questions. My proposition is that peace is illusive in our common habitat as humanity because we have failed on the values of social justice and human solidarity. I believe that social injustice, compounded by impunity or lack of accountability, is a key threat to peace and stability within nations and between nations.

I also respectfully believe that as country too we are not where we should be in regard to the values of social justice and human solidarity despite our collective commitment to these values as reflected in the Constitution we adopted as our lodestar and roadmap to the South Africa we want to become. It is also my belief that because of these failures sustainable peace is out of our grasp at the moment.

### ***How do law and democracy fit in?***

I'm certain you'll agree with my assertion that the South Africa we have today, with its globally admired ground breaking Constitution, is founded on faith in the transformative power of the law. Our constitutional democracy is also anchored in belief in importance of the rule of law and democracy in ensuring sustainable peace.

You're probably already thinking quietly, but law's not everything. With society being a system, there are no single causal factors and/or silver bullets for any social problem or issue. That is true.

You are probably also thinking, that law does not necessarily foster peace. That too is true, particularly if you believe, as the African Union does, in its roadmap for “*Silencing the Guns in Africa by 2020*”, that “*Peace is more than the absence of war*”.

As a country emerging from years of legalised oppression and discrimination under apartheid and colonialism, we are well aware that law can be a key instrument of oppression. Apartheid was essentially about using the law to institutionalise inequality and oppression. The end result was a certain level of order but no peace. State institutions such as the police were part of the machinery keeping alive structural inequality as they enforced the Group Areas Act, Immorality Act and Black Administration Act, among others. Through an endeavour to legitimise the state some of these institutions played some role, though, in ensuring a limited amount of justice or a semblance thereof.

### ***What does it take then for the law to facilitate peace and democracy?***

I believe the architects of constitutional democracy had the appropriate foresight on what it takes for law to foster democracy and peace. They also appear to have been aware of the symbiotic relationship between law and democracy. I will return to this point shortly when I briefly touch on Chapter 9 of the Constitution which creates innovative administrative accountability institutions to support and strengthen constitutional democracy.

It is my considered view that the single most important factor that makes law an important contributor to peace and democracy is the rule of law. It is important to note that the existence of laws that are enforced no matter how rigorously *per se* does not mean the existence of the rule of law. The apartheid state and some of the oppressive regimes in the world today are exemplary in this regard. It's often said that under apartheid there was rule by law as opposed to the rule of law.

### ***What is the difference?***

The key difference is that in a rule of law state law and justice are on the same side.

The rule of law generally refers to a state of affairs where people are governed by rules rather than arbitrary decisions of those exercising state or public power. The rules must be general and certain, known by all affected and uniformly or equally applied to all. The World Justice Project, identifies the following four universal principles as needing to be upheld for the rule of law to be in place:

- “1. The government and its officials and agents as well as individuals and private entities are accountable under the law.*
- 2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.*
- 3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.*
- 4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”*

You will note that aspects of democratic governance are built into the rule of law principles. For example, people need to participate meaningfully in the making of laws and those that deliver justice have to be competent, ethical and deliver services expeditiously.

### ***Why is the rule of law important for peaceful coexistence?***

The rule of law’s importance to peaceful coexistence lies in the fact that we become part of the collective so that our fortunes are improved or our fate is better than when we are alone. If the collective is governed unjustly and we are treated unfairly or excluded from collective resources or benefits, we cannot be happy or peaceful.

Arch Bishop Desmond Tutu once said:

*“The rule of law matters to all of us, to the entire human family....Strengthening the rule of law is an essential ingredient to enhance justice, peace and economic and social progress. It underpins functional societies and drives development.”*

It is for this reason that I believe that social justice, human solidarity and accountability have to be promoted by the law if it is to meaningfully foster peace. I believe this is part of the vision and architecture of our constitutional democracy. In *City Council of Pretoria v Walker (1998)*, the Constitutional Court said the Constitution is a bridge from our past.

Part of the impact expected from the Constitution as the basic law, from which all laws are to be rooted or benchmarked is transformation of society to achieve equality and other aspects of social justice. According to then Chief Justice Pius Langa during his Harvard address on the 50<sup>th</sup> Anniversary of the Freedom Charter in 2005, that expected transformation, incorporates the elimination of poverty. I fully agree. In his address,

Chief Justice Langa lamented the lack of meaningful progress regarding the elimination of poverty. Today things are worse. We've become a leader among the most unequal societies in the world.

The constitutional preamble clearly promotes human solidarity and social justice. It promises to "*Improve the quality of life of all citizens and free the potential of every person*".

But we also know that laws on their own do not change lives. They need to be honestly and consistently implemented make the difference they were made to make. In this regard it is important that the majority of citizens or residents ethically comply with the laws and that when that fails, those affected by the failure know their rights and have access to credible institutions to address alleged injustices or wrongs. In this regard the World Justice project's rule of law principles are instructive.

Also important is the implementation of laws. Good laws sitting in shelves do not change human lives. An example in this regard is chapter 5 of the Promotion of Equality and Prevention of Unfair Discrimination Act, which remains unimplemented 15 years later. This is despite a constitutional commitment to the achievement of equality as a value and section 9(2) of the Constitution anticipating legislative measures to redress the imbalances of apartheid, patriarchy, colonialism and other historical injustices.

Again failure to implement laws cannot be said to be consistent with the rule of law. In this regard who is to say that our rising inequalities cannot be attributed to this inexplicable lapse?

### ***What happens when compliance with the law, including the Constitution fails?***

Firstly, it is important to note that in contemporary democracies the Constitution as part of the law, is a powerful instrument to foster democracy.

Contemporary democracies, like South Africa, are constitutional democracies based on the supremacy of the Constitution as opposed to the supremacy of Parliament as was the case under apartheid and is in some of the old democracies. In constitutional democracies the constitution as interpreted by the courts has the final say on all matters.

Here I must indicate though that modern constitutions such as ours can only yield the transformative outcomes the architects of democracy sought for them to achieve if we do not blindly use jurisprudence from old democracies to interpret innovative provisions

of such constitutions. In this regard our Constitutional court has excelled especially in ground breaking jurisprudence on the justifiability of socio-economic rights.

***What about the fact that courts are not always accessible and the dialogue there is an exclusive domain of lawyers?***

The architects of our democracy and other modern democracies were alive to access to justice obstacles in the. In this regard Alternative or Appropriate Dispute Resolution (ADR) Structures have become part of the modern state. ADR structures are critical, particularly for access to justice for the poor. In South Africa such structures include the Commission for Conciliation Mediation and arbitration, which handles employment and labour law disputes. Small Claims Courts are equally critical for the poor as an avenue for civil dispute involving small amounts of money.

***What about access to justice and accountability when the alleged wrongdoer is the state?***

The question of access to justice and accountability for state wrongs is particularly important in the complex modern state. In the face of large powerful and often oppressive or indifferent bureaucracies, the traditional checks and balances for accountability are not enough. Sweden already made the world aware about 206 years ago that the checks and balances involved in the classical *trias politica* are not always enough. An administrative oversight body known as an Ombudsman with extensive powers was introduced in Sweden to augment and close gaps the traditional checks and balances for public accountability in democracy. Many democracies have introduced diverse administrative accountability or oversight bodies for various matters. Among these are Anticorruption and Malfeasance Commissions, Ethics /Integrity Watchdogs, Supreme Audit bodies, Human Rights Commissions and Maladministration Watchdogs similar but with varying powers to the Swedish Ombudsman.

These are crucial institutions but can only make a difference where there is overall respect for the rule of law, their powers understood and accepted and where complementary integrity institutions, including the courts, media and civil society watchdogs are functional. The key rule of law aspect in the value of administrative accountability bodies in the equation on law, democracy and peace, is respect for horizontal accountability. Administrative scrutiny must be embraced as a legitimate exercise of constitutional and/or legal power for administrative oversight bodies to make a difference.

In this regard, I wish to draw attention to the powers of my office, the Public Protector South Africa.

In the case of *Public Protector versus the Mail and Guardian* (2012) the Supreme Court of Appeal said the following about the Public Protector:

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

This is in line with the understanding of former President Nelson Mandela who said the following:

*“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 scrutiny of 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...*

*It was to me never reason for irritation but rather a source of comfort when these bodies were asked to adjudicate on actions of my government and office and judged against it. One of the first judgments of our Constitutional Court, for example, found that I, as President, administratively acted in a manner they would not condone. From that judgment my government and I drew reassurance that the ordinary citizens of our country would be protected against abuse, no matter from which quarters it would emanate. Similarly, the Public Protector [Ombudsman] had on more than one occasion been required to adjudicate in such matters.”*

### ***What really is the nature of the Public Protector?***

The Public Protector is established by the Constitution under Chapter 9 as one of six (6) Independent institutions that support and strengthen constitutional democracy. Section 181 establishes these institutions in the following order

- a) The Public Protector;
- b) The South African Human Rights Commission;
- c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
- d) The Commission for Gender Equality;
- e) The Auditor-General; and
- f) The Electoral Commission.

Section 181(2) specifically states that these institutions are subject only to the Constitution and the law in addition to asserting their independence and impartiality. My understanding is that their decision cannot be second guessed by anyone, including the Executive and the Legislature and that only a court of law may review their decisions.

It is important to note that other organs of state are enjoined by subsection 3 to respect and support them to ensure *inter alia*, their dignity and effectiveness. You must agree with me that the starting point for unpacking these institutions is their common genesis in section 181. You will agree with me that the next step is the constitutional wording giving them specific powers and clarifying their unique role in supporting and strengthening constitutional democracy.

***What then are the specific powers of the Public Protector?***

The specific powers of the Public Protector are outlined in section 182 of the Constitution. Section 182 (1) states that:

***(1) The Public Protector has the power, as regulated by national legislation –***

- (a) To investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;***
- (b) To report on that conduct; and***
- (c) To take appropriate remedial action.***

***(2) The Public Protector has the additional powers and functions prescribed by national legislation.***

***(3) The Public Protector may not investigate court decisions.***

***(4) The Public Protector must be accessible to all persons and communities.***

***(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.”***

It is important to note that the power to take appropriate remedial action is a unique power that the Public Protector did not have when it was first established under the interim Constitution and before then when it existed as the Advocate General from 1979 and the Ombudsman from 1991 to 1993.

It is also worth noting that the Public Protector has more powers given to her/him by legislation in pursuit of section 182(3) of the Constitution.

The laws that give the Public Protector additional powers have added the following mandates:

- a) Power to investigate, conciliate, mediate, negotiate, advise or do anything necessary to resolve disputes and rectify maladministration in state affairs and related matters, including abuse of power, abuse of state resources, unethical conduct and corruption on own initiative or complaints under the Public Protector Act;
- b) Sole power to investigate and report on violations of the Executive Ethics Code under the Executive Members' Ethics Act;
- c) Shared power to investigate allegations of corrupt activities as envisaged under the Prevention and Combating of Corrupt Activities Act;
- d) Shared power to receive protected disclosures and serve as a Safe Harbour under the Protected Disclosures Act;
- e) Sole power to review the decisions of the National Home Builders Registration Council under the Housing Protection Measures Act;
- f) An alternative forum under the Promotion of Equality and Prevention of Unfair Discrimination Act; and
- g) Information regulation under the Promotion of Access to Information Act.

The establishment of this office 20 years ago was a ground-breaking invention in so far as levelling the playing field between ordinary citizens and those exercising public power and control over state resources. It was an out of the box solution to our unique

challenges. In this regard, interpretation of the powers should be informed by out of the box or critical legal reasoning and not wholesale borrowing from old democracies.

### ***What does the Public Protector have to do with Law, Peace & Democracy?***

The Public Protector is a buffer between the people and government meant to repair disrupted dialogue between the people and those exercising public power. In this regard, the Public Protector is one of the levers of constitutional democracy that enable the people, as the owners of public power and resources, to exact accountability from those entrusted with public power when the traditional public accountability mechanisms fail or encounter limitations. In many circumstances, that accountability involves seeking answers regarding service failure impacting on the rights given by the Constitution.

We also step in to help people vindicate their rights as citizens against excesses in the exercise of public power that involve conduct failure such as abusing resources meant for delivering public services through incompetence, negligence, malfeasance, self-interest and corruption.

The beauty of an avenue such as the Public Protector is the authority and ability to mediate power and resource imbalances between the people and government. Naturally there is a massive power imbalance between an ordinary Gogo Dlamini and state actors, whoever they may be.

However, without respect for the rule of law our office cannot be a meaningful buffer between government and the people. One of the needs in this regard is a paradigm shift from pre-Constitution thinking which is anchored in Parliamentary supremacy and the notion that some authorities are above the law. In this regard I recall President Kruger saying judicial scrutiny is a principle of the devil. We need a situation where decision-makers fully submit to constitutional supremacy, including scrutiny by whatever structure is given power by the Constitution to hold them accountable regardless of rank of such structure in the government hierarchy.

You will agree with me that at the heart of respect of the role of the Public Protector is submission to horizontal accountability. We also need lawyers that are original thinkers who think out of the box like the Constitutional Court judges.

### ***Conclusion***

The goals we seek in pursuit of accelerated inclusive development in the the next 21 years of democracy assisted by the NDP will not be achieved without the rule of law, anchored in constitutional supremacy.

Our efforts in joining the rest of Africa and the global family in the pursuit of Agenda 2063 and the Sustainable Development Goals (SDGs), are also pipe dreams without the rule of law. If we do not achieve these goals, which include social justice, human solidarity and accountability, peace will continue to elude us. In fact if these are not achieved in all nation states and between nation states, peace will remain a distant goal for another half a century. In that regard, we would not have learned James Patrick Kinney's lesson at our own peril.

Unlike James Kinney's people, though, I'm certain that we will continue to throw our logs into the struggling flame of democracy to safeguard our common good through ensuring, among others, that the state is always accountable, operates with integrity at all times and is responsive to all. An unaddressed legacy of inequality perpetrates and exacerbates inequality. Let us ensure that none of our people are left behind. The starting point is respect and promotion of the rule of law by all of us. This includes ensuring faithful implementation and compliance with the letter and spirit of the Constitution and the transformative laws we have domestically. We must respect all accountability institutions. We must also respect international laws we have voluntarily accepted and customary international law. That would be the best way to honour the legacy of Archbishop Tutu and others that have crusaded for justice, democracy and peace.

Thank you

**Adv. Thuli Madonsela**  
**Public Protector of South Africa**  
**Cape Town, 08 October 2015**