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**“PRIVATISATION OF BASIC SERVICES, DEMOCRACY AND  
HUMAN RIGHTS”**

**Co-hosted by the Local Government project and the Socio-Economic  
Rights Project of the Community Law Centre, University of the  
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***Keynote Address by: Dr. Sihaka TSEMO, UNHCHR Regional  
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**Introduction:**

Privatisation has become an integral part of the globalisation process, as part and parcel of the prescription by the major international financial institutions and donors. Although traditionally conceived as an economic phenomenon, globalisation has significant implications for the social, political and cultural evolution of humankind. Moreover, the human rights implications of the phenomenon are only just beginning to be critically engaged and comprehensively understood. The ends of the Cold War also led most

countries to embrace the market economy with the triad of liberalisation, privatisation and globalisation as the main development paradigm. Yet, we might legitimately question the validity of such a vision, for the majority of peoples. This questioning is particularly relevant in our continent today where Africans are more determined than ever to avail themselves with means to overcome conflict, poverty and to achieve peace, democracy and sustainable development. The developments we are witnessing with the African Union and its main programme, the New Partnership for Africa's Development (NEPAD) are a clear sign of this common will.

It is obvious that privatisation has become more important now than ever before. In fact, those of us in this part of the world need more investments to redress the many problems that confront us, i.e. joblessness and mounting poverty. In this regard, we are striving to look more into how to protect the socio-economic and cultural Rights of our people.

Private capital is both crucial and unavoidable. Privatisation and globalisation brings a lot of benefits, which can be tapped to help in our development agendas. As United Nations Secretary General Kofi Annan has pointed out: "Globalisation has an immense potential to improve people's lives, but it can disrupt-and destroy-them as well. Those who do not accept its pervasive, all-encompassing ways are often left behind."<sup>1</sup>

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<sup>1</sup> Joseph Oloka-Onyango, Human Development Report 2000 Background Paper HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT IN CONTEMPORARY AFRICA: A NEW DAWN, OR RETREATING HORIZONS? Human Development Report 2000 Background Paper.

Private investment has become a key component in the provision of many social services lately. The work ethics, especially efficiency in management is also very positive.

Effectively, private sector has become a key non-state actor in the process of development.

### **Where do Human rights stand as regards to privatisation?**

Contrary to what some people assume, Human rights law does not dictate who or what should provide essential services. However, human rights law concerns itself with two key questions:

- the question of the process of service delivery - the “how” – was the tendering process (in the case of privatization) transparent, was there public discussion on the privatization process?, was there adequate dissemination of information, is there public consultation on the standard of service delivery (whether publicly or privately provided and so on)?. This is in the realm of civil and political rights eg article 25(a) of the International Covenant on Civil and Political Rights – the right to take part in the conduct of public affairs, directly or through freely chosen representatives – and article 19 – the freedom to seek, receive and impart information as part of the freedom of expression.
- The question of outcome of service delivery – is service delivery discriminatory? Are customers being cut-off from service delivery without due process? Is service delivery adequate, affordable, adaptable, available, accessible etc.? These are more economic, social and cultural rights questions – particularly, the right to water, the right to health, the

right to adequate housing, the right to education. Thus for example, privatization that leads to overall better service delivery but static or worse service delivery for the poor is not a good human rights outcome.

It would also be relevant to emphasize that much focus is currently being put on private sector failures in service provision – however, there are also public sector failures and the public sector can often be as negligent as the private sector when it comes to providing essential services to the poor.

Privatization might work in some cases and not in others – compare disastrous public water provision in Tanzania and effective public provision in Porto Alegre (Brazil) – similarly, relatively effective private participation in water services in Uganda as opposed to disastrous private sector participation in water services in Bolivia.

Particular human rights concerns with regard to privatization could, roughly, be summarized as follows:

- The establishment of a two-tiered supply with a corporate sector focused on healthy and wealthy and an underfinanced public sector focused on the poor and sick.
- Brain drain, with better trained medical practitioners and educators being drawn towards the private sector by higher pay scales and better infrastructures.
- An overemphasis on commercial objectives at the expense of social objectives (socially driven service delivery might be more focused on the

provision of quality health, water and education services for those that cannot afford them at commercial rates)

- An increasingly large and powerful private sector that can threaten the role of the Government as the primary duty bearer for human rights by subverting regulatory systems through political pressure or the co-opting of regulators.

However, sight must not be lost of the potential danger privatisation poses to human rights, good governance and popular participation in public affairs.

Most governments in Africa have adopted policies which profit western multinationals and banks above all. Some governments have abdicated their legitimate responsibilities to the private sector. **Private sector is supposed to be a development partner and not an end in itself.**

In this part of the world where poverty is very rife, it is very prudent for governments to make strategic interventions to alleviate the plight of the people. In South Africa there is a direct chain of events leading (from the 1996 adoption of the GEAR (SAPs) programme), to the subsequent removal of subsidies for public utilities from local governments, to the now privatisation of water supply. For instance, access to water and electricity has become a key struggle in South Africa's townships. One study conducted through the Government's Human Sciences Research Council found that an estimated 10 million people have suffered water cutoffs and electricity disconnection under privatization, mostly because they couldn't afford new, higher rates. Millions of South Africans, especially in the rural areas, have no access to water utilities at all. As a result the country's cholera epidemic continues, with more than 140,000 cases since August

2000. Millions of people – especially children – get diarrhoea each year as a result of people having to drink and wash, and children to play, in unsanitary and polluted water. Moreover, 2 million people have been evicted for non-payment of debts including water bills. Women's burden of work, caring and worry are increased.

Tuberculosis and other respiratory diseases are also rampant since, without electricity, women are forced to cook and heat with coal or wood.<sup>2</sup>

The tendencies on the parts of some governments to ignore human rights violations perpetrated by the private sector are alarming. I believe that **the quest to attract more investors must not override our commitment in both international and domestic laws.** Internationally acceptable standards must be respected. Standards laid down in international conventions such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Right of the Child (CRC), the Convention on Elimination of All forms of discrimination against Women (CEDAW), the African Charter on Human and Peoples' Rights (ACHPR), whose articles 21 and 22 provide for the socio-economic rights of the people and impose duties on government to respect, promote and protect these rights and others, such as the right to development. Article 26 of the Vienna Convention on the Law of Treaties of 1969 provides that “every treaty in force is binding upon the parties to the treaty and must be performed by

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<sup>2</sup> Patrick Bond. The new apartheid South Africa's trade unions loudly oppose the Government's sell-off of basic services. But the ANC isn't listening.  
<http://www.newint.org/issue355/new.htm>.

them in good faith”. We can also refer to NEPAD and the African Union, which approaches the issue of Human rights from both a holistic (structural) as well as from a more explicit perspectives; and whose Constitutive Act contains, throughout its Preamble as well as in its declared objectives and principles, a strong statement on sustainable development, together with a deep commitment to good governance and social justice (cf: principles, alinea n), and to the principle of Gender balance and equality (article 4). Hence the need to create the adequate conditions in order to “promote the economic development of Africa and to face more effectively the challenges posed by globalization”.

Therefore, like others, **African Governments also have obligation to respect their international commitments, towards the protection, defense and promotion of all Human rights..**

Happily, the 1996 Constitution of South African provides for enforceable Socio-Economic Rights. Sections 22, 23, 24, 25, 26, 27, 28, and 29 provides for rights ranging from freedom of trade, occupation, profession, labour relations, environment, property, housing, health care, food, water, social security, children’s rights and education. The celebrated Grootboom Case of the Republic of South Africa has confirmed that the socio-economic rights in the Bill of Rights of the Constitution place both a duty on the State and other role players to respect these rights. A positive duty is also on the State to protect, promote and fulfil them. This is a welcome development in the sense that the decision has given meaning to view that “human rights are universal, indivisible, interdependent and interrelated.” The decision is even more relevant as it seeks to address the deep-seated inequalities left behind by the apartheid regime. According to some analysts, it can be said that

South Africa's struggle for freedom before the watershed elections of 1994 was predominantly a struggle for civil and political rights. After 1996 with the adoption of the country's Constitution and Bill of Rights, the struggle for freedom has largely shifted to a struggle for socio-economic rights.<sup>3</sup>

Of course, National liberation and Nation building also played and continue to play, a major role in that same process, as a whole.

It must be acknowledged that mostly, the private sectors' main interest tends to be profit making. This can override other legitimate interests. The consequences of this may lead to the destruction of the environment, abuse of workers rights, capital flight etc.

### **The issue of privatization and human rights from the perspective of the OHCHR**

How the OHCHR has been handling the issue of privatization and human rights?

We, at the Office of the High Commissioner for Human Rights (OHCHR) view this project and other initiatives on socio-economic rights to be very crucial and of utmost importance. We have always held the views that

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<sup>3</sup> Satish Roopa, Human Rights, Transformation and Local Economic Development in South Africa.  
<http://www.kas.org.za/Publications/SeminarReports/Constitution%20and%20Law%20iv/roopa.pdf>



human rights are “universal, indivisible, interdependent and interrelated.” Every woman, every man, every youth and every child has the right to a secure home and community in which to live in peace and dignity. Such a right has received global recognition and is firmly established in a number of international human rights instruments as noted above. Any discussion and efforts which aims are to bring to the fore the upliftment of such values must be encouraged.

As we experience the overwhelming influence of globalisation, its dehumanising aspects as it brings in its wake more exclusion and greater marginalisation of the developing countries, we must also pause to ask ourselves **what are their effects and implications on the enjoyment of human rights, good governance and popular participation in matters affecting our lives.**

Even though privatisation and globalisation cannot be stopped - it may even not be wise to do that at this point in time of our history - we can work together in our various capacities to make it more useful to humanity.

Our role is to recall to those concerned that Governments must not abdicate their obligations both under international and domestic law in the name of privatisation, although it is admitted that effective and socially responsible private sector participation in essential service delivery might be a real alternative for many governments unable to cope with service provision. In other words, privatisation appears to be a potentially attractive choice, in some cases.

- Thus governments should not be locked into privatization (eg through bilateral, regional trade and investment agreements and the WTO's General Agreement on Trade in Services) but human rights professionals should promote a human rights approach to privatization when that choice is being made or considered by governments.
- If possible, governments should undertake a human rights assessment of service delivery prior to a decision on privatization and some time thereafter.
- Governments and civil society should ensure that companies engaged in privatization have an effective corporate social responsibility strategy.
- Governments should ensure that effective monitoring and complaints mechanisms are available in the context of privatisation – these could range from consumer complaints tribunals to auditing mechanisms to the justiciability of economic, social and cultural rights through the judiciary.

### **The way forward**

After a four year consultative and drafting process involving private sector, academic institutions, Human Rights NGOs, intergovernmental bodies and governments, the Sub-Commission on the Promotion of human rights adopted on 13 August 2003, by resolution 2003/16, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (the Norms) (document E/CN.4/Sub.2/2003/12/Rev.1).

The Norms, together with a Commentary on the Norms, form the major part of the work of the Sub-Commission's Working Group on the Working Methods and Activities of Transnational Corporations.

**The Norms attempt to clarify that business enterprises have obligations with regard to human rights.** In drafting the Norms, the Sub-Commission working group stated that it based its work on existing standards. Thus, the Norms state clearly in article 1 that States have the primary responsibility in relation to human rights. However, the Norms also state that business enterprises have responsibilities with regard to human rights.

**The Norms set out those obligations:** They include: the right to equal opportunity and non-discriminatory treatment; the right to security of persons; the rights of workers; respect for national sovereignty and human rights; consumer protection; and, environmental protection.

**The Norms also set out provisions for implementation.** These include the possibility of establishing periodic monitoring and verification by the UN of business enterprises and the encouragement of States to set up and reinforce the necessary legal and administrative framework to implement the Norms. Business enterprises should also provide adequate reparation to people adversely affected by their activities.

After adoption of the Norms, the most significant step in resolution 2003/16 is the transmission of the Norms to the Commission on Human Rights for its next session in March/April 2004. The Sub-Commission recommends that the Commission seek the views of stakeholders and encourages the establishment of a Commission working group to consider the Norms

Civil Society is encouraged to be more vigilant and pro active in its role as the watchdog of the political leadership and people in responsible positions.

In this light, we must help in creating a society of active citizenry which does not only see itself as recipients of rights but also as bearers of responsibility to ensure that rights are enjoyed.

The necessary networking can be established and strengthened, to create a broader platform for advocacy, human rights education and equal access to justice.

The Office of the High Commissioner for Human Rights (OHCHR) commends the Community Law Center for bringing us together to deliberate on such an important topic. We pledge our full support and urge all to work together to ensure that human rights are promoted and protected at all time.

Thank you for your kind attention.