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The Challenges of Public-Private Partnerships in Realising the Right to Education¹

Introduction

There has been a rapid growth in recent years of public-private partnerships (PPPs) in the provision of education. This trend is particularly evident from the proliferation of low fee-paying private schools in developing countries, but PPPs are on the rise in many different contexts across the globe. The push towards the privatisation of education in the form of PPPs has not, however, been driven by a concern for realising the right to education. On the contrary, a human rights law perspective has been largely absent from the public discourse around PPPs. This background paper aims to frame the debate about PPPs from a human rights based approach and draw attention to the challenges that PPPs pose to realising the right to education.

Defining Public-Private Partnerships

Privatisation in education, as in the provision of other services like water, energy and health, takes many different forms. PPPs are one form of privatisation, but are distinguishable from full privatisation due the retention of a public element in the provision of education. Loosely speaking, PPPs refer to ‘cooperative institutional arrangements between public and private sector actors’,² but care should be taken to situate any discussion about PPPs within their particular context because there is great diversity among PPPs themselves. This is especially important in light of the common usage of the term PPP as a euphemism to avoid the negative connotations of ‘privatisation’ and ‘contracting out’. The rhetorical allure of the concept of a partnership has been used to great effect by governments, consultants, financial institutions, donors and global bodies to market PPPs in education. The institutional dynamic of a partnership is, however, a crucial feature of PPPs as it distinguishes them from full privatisation and creates the opportunity for the state to hold its private partners accountable for the education they provide.

¹ By Helen Taylor, DPhil Candidate, Oxford University with OxHRH Deputy Directors, Dr Meghan Campbell and Dr Laura Hilly

² GA Hodge and C Greve, ‘Public-Private Partnerships: An International Performance Review’ (2007) *Public Administration Review* 67 545-558 at 545

Given the assortment of institutional arrangements that are referred to as PPPs, the term PPP is best understood as a semantic umbrella that covers a diverse range of contractual relationships between public and private actors. Broadly defined, a PPP is a contractual arrangement between the government and a private company in terms of which the private company finances, builds and operates some aspect of a public service in exchange for payments by the government, users of the public service, or a combination of both.³

Examples of PPPs in education:

- The Chilean educational system has a voucher scheme under which private schools are paid subsidies on a per-student basis to cover its running costs and to act as an incentive for schools to retain students by providing quality education.
- The Program to Improve Learning Outcomes (PILO) in South Africa is a government-led initiative involving collaboration with existing civil society and private partnerships to improve access and quality of education by working within the public system.
- ‘Free Schools’ in the UK are funded by the government but are independently run by private actors on a not-for-profit basis; they are ‘all-ability’ schools so cannot use academic selection processes in admissions, but they have the freedom to set their own terms and conditions for teacher contracts and to choose which curriculum to follow.
- The Indian Right of Children to Free and Compulsory Education Act requires all private schools (except minority private schools) to reserve 25% of places for children from weaker and disadvantaged sections, but makes provision for these schools to be compensated for students admitted under the 25% quota.

Given the contested and multivalent nature of the term PPP, it is imperative that any critical evaluation of a PPP establish the precise details of the institutional arrangement: Who exactly is involved? What is the institutional dynamic of the relationship? What measure of oversight and reporting exists? What political interests and economic incentives motivate the parties? What is the nature, extent and scale of the arrangement? Where do the resources come from?

Education as a Human Right and a Public Good

PPPs involve a radical restructuring of the state’s role in relation to the provision of education, reconstituting a public good as ‘an education services industry to be governed as part of the construction of a market society’.⁴ PPPs, like other forms of privatisation, are usually premised on market models of education that assume competition between private suppliers of education will produce quality outcomes. PPPs hold particular appeal

³ D Hall, *Why Public Private Partnerships Don’t Work: The Many Advantages of the Public Alternative* 2015 Public Services International at 5

⁴ S Robertson and A Verger, ‘Governing Education Through Public Private Partnerships’ in S Robertson, K Mundy, A Verger and F Munashy (eds) (2012) *Public Private Partnerships in Education: New Actors and Modes of Governance in a Globalizing World* Cheltenham: Edward Elgar at 22

in developing countries where the financial constraints and limited capacity of governments are easily exploited, with PPPs being promoted as an expedient solution to the challenges of providing public education.

Dr Kishore Singh, the UN Special Rapporteur on the right to education, has noted that the commodification of education as a good to be purchased upon demand, with parents and children cast as consumers who supposedly enjoy ‘choice’ and the benefits of market efficiency, is fundamentally incompatible with a conception of education as a public service and as a human right for which the state is primarily responsible.⁵ The financial incentives of private providers wishing to capitalise on the profit-making opportunities of the education business are not necessarily consistent with the public interest of ensuring citizens are well-educated. PPPs, in spite of their public component, rely heavily on private self-regulation of the education market to reach efficient and quality outcomes. On the other hand, the conception of education as a public good requires the state to provide free, quality public education.

A human rights based approach provides the normative framework for conceptualising education as a public good. Rather than settling for education as a mere policy goal, a human rights based approach frames education as a legally binding commitment that states have an obligation to realise. It is not limited to a concern with the measurable outcomes that increased aid and investment in education produce in developing countries, but insists on the intrinsic value of the right to education and demands this right be realised for individuals in all countries.

A human rights based approach is premised on education being entrenched in international,⁶ regional⁷ and domestic⁸ legal instruments as a fundamental right imposing binding obligations on states. The framing of the right to education as both an entitlement and an empowerment clearly establishes education as a public good. Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) addresses both of these aspects by requiring that education not only be ‘directed to the full development of the human personality and the sense of its dignity’ but also that it ‘enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups’.

⁵ Report of the Special Rapporteur on the right to education to the UN General Assembly A/69/402 at paragraph 53-54

⁶ See, for instance: Article 26 of the Universal Declaration of Human Rights; Article 13 of the International Covenant on Economic, Social and Cultural Rights

⁷ See, for instance: Article 17 of the African Charter on Human and People’s Rights; Articles 40 and 41 of the Arab Charter on Human Rights; Article 31 of the ASEAN Human Rights Declaration; Article 2 of Protocol 1 to the European Convention for the protection of Human Rights and Fundamental Freedoms; Article 14 of the European Union Charter of Fundamental Rights; Article 13 of the Additional Protocol to the American Convention on Human Rights

⁸ Most written constitutions entrench a right to basic education. For instance, the Article 21A of the Indian Constitution stipulates that ‘The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine’. Section 29 of the South African Constitution states ‘Everyone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible’.

Realising the right to education is therefore not only important for individual development and autonomy, but also for the flourishing of society. General Comment No.13 by the Committee on Economic, Social and Cultural Rights (CESCR) notes that education is both a sound financial investment for states and recognises that education is not just practical but one of the cornerstones of an empowered and meaningful life.⁹

⁹ CESCR General Comment No.13 paragraph 1

The Value of a Human Rights Based Approach to Public-Private Partnerships

At the very least, the importance of education as a public good calls for a cautious approach to PPPs, given the potential for PPPs to subvert the purpose of education from empowerment to profit-making. A human rights perspective on PPPs adds normative force to this concern by drawing attention to the ways in which PPPs could undermine the right to education. As a conceptual framework grounded in a system of rights and corresponding obligations established by international and domestic law, a human rights based approach provides some much-needed guidance for regulating private providers to ensure that the right to education is realised.

Strengthening the Obligations of the State for Education: The Value of a Human Rights Based Approach

KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal & Others [2013] ZACC 10

The dispute in this case arose from a subsidy allocation in terms of a notice issued by the Department of Education, for the subsidization of independent schools. When the Department later reduced the ‘approximate funding levels’ set out in the notice by 30%, the question arose as to whether the notice constituted a promise to pay and whether such a promise was an enforceable obligation. The South African Constitutional Court held that in spite of the absence of any enforceable contractual obligation to pay the subsidies, the notice nevertheless constituted ‘a publicly promulgated promise to pay’¹⁰ which implicates the right to education.

Justice Cameron explained the principle as follows in his resourceful judgment for the majority: ‘While it is correct that the state is not obliged to pay subsidies to independent schools, when it does so in terms of national and provincial legislation it is plainly acting in accordance with its duty under the Constitution in fulfilling the right to a basic education of the learners at the schools that benefit from the subsidy. And once the government promises a subsidy, the negative rights of those learners – the right not to have their right to a basic education impaired – is implicated.’¹¹

This case demonstrates how a human rights based approach strengthens the obligations of the state in respect of education. In spite of the absence of a contractual agreement, the Court’s framing of the question in terms of how the state’s reduction in subsidies impaired the right to education meant that the state’s promise to subsidize independent schools was an obligation enforceable by those learners who would benefit from it.

Workshop Question 1

What is the role of law in structuring a PPP and in conceptualising the purpose of education?

Speaker: Jayna Kothari (Centre for Law & Policy Research, India)

¹⁰ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12 at paragraph 48

¹¹ *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal & Others* [2013] ZACC 10 at paragraph 45

The Human Rights Obligations of the State and Private Providers

A human rights based approach clarifies the obligations on both the state and private providers in respect of the right to education. General Comment No. 13 by the CESCR confirms that States have ‘principal responsibility for the direct provision of education in most circumstances’,¹² thus suggesting that PPPs should at most ‘supplement public education [...] rather than supplant it’.¹³ Furthermore, where PPPs do exist, a human rights based approach prioritises the state’s obligation to ensure such PPPs respect, protect, promote and fulfil the right to education. In other words, PPPs do not absolve the state of its obligations to realise the right to education. The precise nature and extent of the private provider’s obligations is less clear, but the South African Constitutional Court’s ruling in the *Juma Masjid* case¹⁴ provides a useful case study on the way that courts have been willing to see private providers of education as duty bearers. The important ruling by the South African Constitutional Court in the *AllPay* case¹⁵ provides further guidance on the constitutional obligations of private providers of public services, and is also an instructive case study even though it related to the right to social security rather than education. A human rights based approach opposes the commodification of education by upholding education as a fundamental right, characterising the state and private providers not as entrepreneurs but as duty-bearers, and children not as consumers but as rights-holders.

The Constitutional Obligations of Private Providers

Governing Body of the Juma Masjid Primary School & Others v Essay NO and Others Case CCT 29/10 (2011)

This case concerned the obligations of an owner of private property, the Juma Masjid Trust, who sought to evict a public school. For some years, the public school had been conducted on the private property and the Trust had contributed financially to the running costs of the school on the assumption that these payments would be reimbursed to the Trust by the Department of Education. When the relationship between the Trust and the Department of Education broke down, the Trust sought to evict the school from its premises. In considering the eviction order, the South African Constitutional Court held that private providers, like the Trust, are indeed duty-bearers, albeit only of a negative constitutional obligation: ‘It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the MEC [the state] [but] the Trust does have a negative constitutional obligation not to impair the learners’ right to a basic education’.¹⁶

¹² CESCR General Comment No.13 paragraph 48

¹³ Report of the Special Rapporteur on the right to education to the UN General Assembly A/69/402 at paragraph 38

¹⁴ *Governing Body of the Juma Masjid Primary School & Others v Essay NO and Others* Case CCT 29/10 (2011)

¹⁵ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12

¹⁶ *Governing Body of the Juma Masjid Primary School & Others v Essay NO and Others* Case CCT 29/10 (2011) at paragraph 57

The Principles of Non-Discrimination and Equality

The principles of non-discrimination and equality that underlie a human rights based approach require that education be an equalising force. General Comment No.13 states that ‘education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities’.¹⁷ However, PPPs in education run the risk of reinforcing rather than counteracting inequalities because even low fee-paying schools are out of reach for those from the most disadvantaged socio-economic backgrounds. The fact that access to low fee-paying private schools is often based on the ability of parents or guardians to pay the admission fee, rather than the ability of the child or the capacity of the school, is itself a breach of the human rights commitment to free education, however low the fees might be. Furthermore, even if poorer families manage to meet the fee requirements of the lowest fee-paying school in their area, they do not exercise any meaningful choice regarding the quality of education their children receive. In contrast, wealthier families have the buying power to choose the private provider which offers the best quality of education.

Similarly, if education is a scarce commodity rather than an entitlement, poorer families may put their limited funds towards the investment they consider most likely to yield the best returns, namely the education of boys rather than girls. Both the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child have warned that the treatment of education as a commodity rather than a fundamental right has the potential of compounding gender discrimination as it tolerates the continued prioritisation of boys’ education over that of girls.¹⁸

Reservations in Indian Private Schools: Ensuring Education is an Equalising Force

Society for Unaided Private Schools of Rajasthan v Union of India & Another (2012) 6 SCC 1

In the landmark case of *Society for Unaided Private Schools of Rajasthan*, the Indian Supreme Court confirmed the constitutionality of the Right of Children to Free and Compulsory Education Act 2009 (the Act). Several private schools had challenged the Act on the basis that its regulatory framework allegedly violated their constitutional right to practise any profession or occupation as guaranteed by Article 19(1)(g), because it requires that a quota of 25% of school seats in private schools be reserved for children from weaker and disadvantaged sections. Considering the horizontal application of the right to education, the Indian Supreme Court noted that the primary obligation for education lies with the state, but held that the quota obligation is in the public interest and is a reasonable restriction on the freedom of aided private schools and un-aided, non-minority private schools.

¹⁷ CESCR General Comment No.13 paragraph 1

¹⁸ See CEDAW/C/GHA/Q/6-7 and CRC/C/GHA/Q/3-5 in relation to the detrimental effects of private providers of education in Ghana.

The Challenge of Ensuring Accountability in Public-Private Partnerships

One of the well-established principles of a human rights based approach is accountability for the enforcement of rights, which requires that states and other duty-bearers are answerable for their compliance with human rights standards. Ensuring accountability for the realisation of the right to education is one of the biggest human rights challenges in the context of PPPs. Two systemic threats to the accountability of PPPs are worth drawing particular attention to as they expose the need for a comprehensive regulatory framework that includes robust enforcement mechanisms.

1. Accountability for the Quality of Education Provided by Public-Private Partnerships

The first accountability challenge concerns the quality of education provided by PPPs. The human rights discourse on education has, until recently, been predominantly focused on the drive towards universal primary education, with targets such as the ‘Education For All’ framework at the top of the education agenda. Access to education, however, is only the means to achieve the more fundamental objective underlying the right to education, namely equipping people with a range of competencies so that they can live fulfilled lives as productive citizens in society. It is therefore time to shift the focus to ensuring that a certain quality of education is provided by all schools.

While PPPs have arguably helped states reach the target of universal primary education, especially in developing countries struggling with a lack of financial and institutional capacity, accountability for the quality of education being provided through PPPs has been inadequate. The weak regulation of PPPs has allowed private providers to pursue their commercial interests at the expense of quality, cutting corners on everything from facilities to teacher salaries in order to gain profit.

Article 13(4) of the ICESCR clearly stipulates that the freedom to establish private educational institutions is ‘subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State’. States therefore need to establish national minimum standards for education which clearly set out the responsibilities of private providers and enforcement mechanisms for ensuring their accountability for the quality of education provided through PPPs.

Workshop Question 2(a)

How can private providers be held accountable for the quality of education delivered?

Speaker: Angelo Gavrielatos (Education International, Australia)

2. Accountability for Corruption in Public-Private Partnerships

The second accountability challenge concerns the difficulty of ensuring the financial and organisational transparency of PPPs. The negotiation process of forming PPPs is fraught with opportunities for corruption, as consultations are often kept confidential and the stakes so high that private providers will go to great lengths, from false promises to bribery, to secure the contract. This is true even for tender processes which on the face of it require procedural fairness. The potential for corruption in PPPs extends into the provision of education itself, as the lack of effective monitoring and financial reporting contributes to a culture of toleration in which abusive practices and profiteering go unchecked.

A human rights based approach demands greater transparency and public accountability in PPPs to counter corruption. This would involve regular financial reporting subject to freedom of information and public scrutiny of school functioning, performance and management by parents, teachers, community associations and other stakeholders. Furthermore, these stakeholders should have recourse to complaints procedures and the possibility of remedial relief in the case of corrupt or abusive practices in PPPs.

The importance of transparent tenders for ensuring accountability

Section 27 & Others v Minister of Education & Another [2012] 3 All SA 579 (GNP)

The controversy concerning the failure of the Department of Education to ensure delivery of textbooks to schools in Limpopo province, South Africa, illustrates the importance of transparency in tender processes to ensure accountability for the quality of education provided. The tender for the procurement and distribution of textbooks to Limpopo was awarded to EduSolutions in 2010, after the bid adjudication committee disqualified all 22 other bidding companies on technical grounds. Prior to this tender process, the Department had negotiated directly with manufacturers to receive a substantial discount on their bulk ordering. After securing the tender contract, however, EduSolutions pocketed 70% of this discount and billed the government an inflated amount for the textbooks.

The lack of transparency and accountability in this corrupt relationship had dire consequences when combined with systemic maladministration and mismanagement, as the respective responsibilities of EduSolutions and the Department in ensuring the delivery of textbooks were contested. This left schools in Limpopo without textbooks, leading to litigation in which the High Court held that teacher support materials are ‘an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right’.¹⁹ The failure to ensure the delivery of textbooks was therefore found to be a violation of the right to education.

The consequences of striking down corrupt tender processes present further difficulties, however, as it may leave the intended beneficiaries without the necessary learning resources to fulfil the right to education. This predicament was addressed in the subsequent case of *AllPay*,²⁰ albeit not in the context of education tenders.

¹⁹ *Section 27 & Others v Minister of Education & Another* [2012] 3 All SA 579 (GNP)

²⁰ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12

AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12

The difficult question for the South African Constitutional Court in this case concerned what remedy should follow a declaration of constitutional invalidity in respect of the award of a tender for the payment of social grants to beneficiaries. The Court confirmed that the delegation of a public function to a private provider does not absolve the state of its constitutional obligations. On the contrary, the state is responsible for the performance of the private provider in fulfilling its constitutional obligations.

In explaining the obligations of the private provider itself, the Court held that when Cash Paymaster secured the tender, it too became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs.²¹ To ensure Cash Paymaster's accountability in this regard, the commercial part of its organisation 'dependent on, or derived from, the performance of public functions is subject to public scrutiny, both in its operational and financial aspects.'²²

In view of Cash Paymaster's performance of a crucial public function, although the tender was declared invalid, the Court recognised that 'grant beneficiaries would have become increasingly dependent on Cash Paymaster fulfilling its constitutional obligations. For this reason, Cash Paymaster cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational'.²³

Workshop Question 2(b)

How do current accountability mechanisms address the issue of corruption within the public and private relationship?

Speaker: Tembeka Ngcukaitobi (Advocate Group 621, South Africa)

The Need for a Comprehensive Regulatory Framework with Enforcement Measures

These accountability challenges relating to quality of education and the risk of corruption expose the inadequate regulation of PPPs and the need for enforcement mechanisms to ensure the right to education is realised. The UN Special Rapporteur on the right to education, Dr Kishore Singh, has emphasised the need for states to adopt a comprehensive regulatory framework that prevents the risks associated with commercialised education from materialising.²⁴ He suggests that such a framework should incorporate three kinds of regulations:

²¹ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12 at paragraph 59*

²² *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12 at paragraph 59*

²³ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12 at paragraph 66*

²⁴ Report of the Special Rapporteur on the right to education to the UN Human Rights Council A/HRC/29/30

- (1) *prescriptive regulations* that set minimum standards and specify the responsibilities of private providers, including reporting requirements²⁵
- (2) *prohibitive regulations* aimed to counter the commercialisation of education and practices that entrench social and economic inequality²⁶
- (3) *punitive regulations* that provide for sanctions against private providers that engage in fraudulent, corrupt and abusive practices²⁷

A framework of prescriptive, prohibitive and punitive regulations would be most effective when enforced through a range of public bodies and other stakeholders. The UN Special Rapporteur has made the following recommendations in this regard:

- National human rights institutions and ombudspersons should have powers to investigate private providers and make recommendations to the government concerning PPPs;²⁸
- Treaty bodies should monitor the human rights impact of PPPs, drawing attention to any detrimental or discriminatory effects on education;²⁹
- PPPs should consult with local communities and other stakeholders, such as parents and teachers, to encourage their participation in decision-making;³⁰
- The justiciability of the right to education should be fostered by providing for informal complaints procedures and ensuring the accessibility of public interest litigation;³¹
- Parliamentary committees should be mandated to closely monitor private providers;³²

While these recommendations draw on the traditional enforcement mechanisms of a human rights based approach, the question of exactly how these strategies can be tailored to the context of PPPs requires considerable attention. The key feature of PPPs in this regard is the retention of the state as a partner in the provision of education, which distinguishes PPPs from full privatisation and should be exploited to enforce a comprehensive regulatory system.

Importantly, the failure or inadequacy of a regulatory framework does not absolve the state of its obligations to respect, protect, promote and fulfil the right to education. In

²⁵ Report of the Special Rapporteur on the right to education to the UN Human Rights Council A/HRC/29/30 at paragraph 98

²⁶ Report of the Special Rapporteur on the right to education to the UN Human Rights Council A/HRC/29/30 at paragraph 99

²⁷ Report of the Special Rapporteur on the right to education to the UN Human Rights Council A/HRC/29/30 at paragraph 100

²⁸ Report of the Special Rapporteur on the right to education to the UN Human Rights Council A/HRC/29/30 at paragraph 126

²⁹ Report of the Special Rapporteur on the right to education to the UN Human Rights Council A/HRC/29/30 at paragraph 127

³⁰ Report of the Special Rapporteur on the right to education to the UN Human Rights Council A/HRC/29/30 at paragraph 123

³¹ Report of the Special Rapporteur on the right to education to the UN Human Rights Council A/HRC/29/30 at paragraph 129-130

³² Report of the Special Rapporteur on the right to education to the UN Human Rights Council A/HRC/29/30 at paragraph 131

the landmark case of *O’Keeffe v Ireland*,³³ the Grand Chamber of the European Court of Human Rights held that ‘a State cannot absolve itself from its obligation to minors in primary schools by delegating those duties to private bodies or individuals.’³⁴ This means that the state could be held liable for abusive practices by a private provider of education unless ‘the State’s framework of laws, and notably its mechanism of detection and reporting, provided efficient protection’.³⁵ This case illustrates that a comprehensive regulatory framework which includes enforcement measures is not only crucial for ensuring the accountability of private providers of education, but is also constitutive of the state’s obligations under the right to education.

Supreme Court of Nepal Prohibits a Hike in School Fees by Private Providers

Supreme Court Rulings (19 March 2014 and 23 May 2012)

On 19 March 2014, the Supreme Court of Nepal issued an interim order preventing the hike in school fees proposed by the Private and Boarding Schools Organization, Nepal (PABSON). The Court held that the proposed hike contravened both the government’s Education Regulations and the Supreme Court’s previous order issued on 23 May 2012. In its earlier decision, the Court had requested the government to closely monitor private providers of education, observing that its poor regulation raised concerns about the realisation of right to education. It issued an 11-point directive which, amongst other things, prohibited private schools from increasing their fees for three years and requested the government to determine a ceiling for schools fees. In response to this decision by the Supreme Court, the Ministry of Education incorporated the 11-point directive into its Institutional Schools Criteria and Operations Directives for regulating private education providers. The subsequent proposal by PABSON of a fee hike, allegedly due to demands by teachers for increased salaries, contravened these directives and was therefore prohibited by the Supreme Court on 19 March 2014.

Collection of Excess Admission Fees by Private Providers in Bangladesh: Contempt of Court?

Campaign for Popular Education v State of Bangladesh (High Court Ruling 14 November 2013)

In a landmark judgment by a division of the High Court in Bangladesh, the government was directed to tighten up its regulation of private providers of education, particularly in relation to the collection of excessive admission fees. Although the Ministry of Education had prescribed a ceiling on admission fees that could be charged by private providers, the enforcement of the limited admission fees was found to be inadequate. The Court therefore instructed the government to take strict action to prevent private schools charging excessive admission fees.

³³ (2014) 59 EHRR 15

³⁴ *O’Keeffe v Ireland* (2014) 59 EHRR 15 at [150]

³⁵ *O’Keeffe v Ireland* (2014) 59 EHRR 15 at [152]

Drawing on a report submitted on behalf of the government, the Court noted that when the Ministry of Education had issued show cause notices to a few schools in Dhaka that were charging excessive fees, those schools had complied by bringing their fees within the prescribed ceiling and giving assurances that the excess would be adjusted against other dues. The Court therefore did not order further direct action against those schools that had complied with the government's guidelines. Regarding the other private schools that were still collecting excess admission fees, however, the Court issued a continuous mandamus order directing the government to ensure their guidelines were adhered to, warning that non-compliance by any school would render them liable to being held in contempt of court.

Workshop Question 3

What enforceability measures are needed to hold actors in PPPs accountable?

Speakers:

Conor O'Mahoney (University College Cork, Ireland)

Salima Namusoby (Institute for Economic and Social Rights, Uganda)

Conclusion

With the increasing phenomenon of PPPs, it is important that the discourse around the provision of education is focused on the priorities of a human rights based approach, namely that education is conceptualised as a public good and a fundamental right for which both the state and private providers are responsible. PPPs need to conform to minimum standards of quality and be an equalising force rather than the cause of further discrimination. States need to establish comprehensive regulatory frameworks to ensure private providers are held accountable for the fulfilment of their obligations. It is only through the effective regulation of private providers and the development of robust enforcement mechanisms that the right to education can be realised in the context of PPPs.

Key Resources

[D Hall, Why Public Private Partnerships Don't Work: The Many Advantages of the Public Alternative 2015 Public Services International](#)

[GA Hodge and C Greve, 'Public-Private Partnerships: An International Performance Review' \(2007\) Public Administration Review 67 545-558](#)

[S Robertson, K Mundy, A Verger and F Munashy \(eds\) \(2012\) Public Private Partnerships in Education: New Actors and Modes of Governance in a Globalizing World Cheltenham: Edward Elgar](#)

[Report of the Special Rapporteur on the right to education to the UN Human Rights Council A/HRC/29/30 dated 10 June 2015](#)

[Report of the Special Rapporteur on the right to education to the UN General Assembly A/69/402 dated 24 September 2014](#)

[*AllPay Consolidated Investment Holdings \(Pty\) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others \(No 2\) \[2014\] ZACC 12*](#)

[*Governing Body of the Juma Masjid Primary School & Others v Essay NO and Others Case CCT 29/10 \(2011\)*](#)

[*KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal & Others \[2013\] ZACC 10*](#)

[*O'Keefe v Ireland \(2014\) 59 EHRR 15*](#)

[*Section 27 & Others v Minister of Education & Another \[2012\] 3 All SA 579 \(GNP\)*](#)

[*Society for Unaided Private Schools of Rajasthan v Union of India & Another \(2012\) 6 SCC 1*](#)