



Education
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United Nations
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01

Working Papers
on Education Policy

OVERVIEW OF THE ROLE OF PRIVATE PROVIDERS IN EDUCATION IN LIGHT OF THE EXISTING INTERNATIONAL LEGAL FRAMEWORK

INVESTMENTS IN PRIVATE EDUCATION: UNDERMINING OR CONTRIBUTING TO THE FULL DEVELOPMENT OF THE HUMAN RIGHT TO EDUCATION?

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UNESCO WORKING PAPERS ON EDUCATION POLICY

Published in 2015 by the United Nations Educational,
Scientific and Cultural Organization
7, place de Fontenoy, 75352 Paris 07 SP, France

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This paper belongs to a series which is designed to nurture the international debate about a wide range of education policy issues.

Please cite this working paper as:

Overview of the role of private providers in education in light of the existing international legal framework. Investments in private education: undermining or contributing to the full development of the human right to education?, *UNESCO Working Papers on Education Policy* N° 1, Mounmé, R. and Saudemont, C. © UNESCO, 2015.

ABSTRACT

This paper aims at giving an overview of private education – notably for-profit private education and the legal issues at the international level. The main question that this paper intends to answer is: how can the commercialization of education be reconciled with internationally recognized human rights?

There is an ongoing debate about private education, notably for-profit education, leading to the commercialization of the education sector despite the fact that it is recognized as a public good. Indeed, United Nations Human Rights Treaty bodies – the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child as well as the Committee on the Elimination of all Forms of Discriminations against Women – have recently recommended that Chile, Ghana, Morocco and Uganda strengthen their regulations on private educational institutions. The United Nations Special Rapporteur on the Right to Education has also devoted his last three reports to raising the alarm on the subject. Against this backdrop, this paper aims at giving an overview of the legal issues arising from the increase of private stakeholders in the education sector while suggesting how a private actor should consider financing or delivering education.

TABLE OF CONTENTS

INTRODUCTION.....	4
I. STATES OBLIGATIONS REGARDING THE RIGHT TO EDUCATION	5
A. OVERVIEW OF THE MAIN STATES OBLIGATIONS (SEE ANNEX I)	
B. THE RIGHT TO EDUCATION IMPLEMENTATION IS THE RESPONSIBILITY OF THE STATE	
C. 'MINIMUM CORE OBLIGATIONS' OF THE STATE	
D. THE FINANCING OF EDUCATION: ADEQUATE RESOURCES MUST BE ALLOCATED AND SUSTAINED	
E. FREEDOM IN EDUCATION MUST BE GUARANTEED BY THE STATE	
F. THE PRINCIPLE OF NON-RETROGRESSION	
II. THE DIFFERENT TYPES OF PRIVATE EDUCATION	8
A. GENERAL DEFINITIONS	
B. THE DIFFERENT TYPES OF PRIVATE INSTITUTIONS	
III. THE NEW CHALLENGES TO THE RIGHT TO EDUCATION: PRIVATISATION AND COMMERCIALISATION OF EDUCATION	12
A. PRIVATISATION OF THE EDUCATION SECTOR	
B. THE COMMERCIALIZATION OF EDUCATION	
IV. POTENTIAL NEGATIVE AND POSITIVE OUTCOMES ⁵⁶	15
A. POSITIVE IMPACTS	
B. POSSIBLE NEGATIVE IMPACTS	
POSSIBLE SOLUTIONS TO THE NEW CHALLENGES	
A. THE TWO NECESSARY STEPS	
B. POSSIBLE LIST OF QUESTIONS FOR INDIRECT AND DIRECT PRIVATE PROVIDERS WHEN INVESTING IN EDUCATION	
ANNEX I	23
ANNEX II	26
ANNEX III	27
ANNEX IV	28
ANNEX V	29
ANNEX VI	30
BIBLIOGRAPHY	31

INTRODUCTION

Context and Trends

Education is recognised as a **fundamental human right** by international standard-setting instruments. Providing education is the **primary responsibility of the state**.¹ Education can also be provided by non-state actors, including religious institutions, non-governmental organisations, community-based groups, trusts, enterprises and individual proprietors.² *Private institutions* are not operated by public authorities but are controlled and managed, whether for profit or not, by private bodies such as non-government organizations (NGOs), religious bodies, special interest groups, foundations and businesses.³ While private education refers to a type of education, *privatisation* is a process that can be defined as 'the transfer of activities, assets and responsibilities from government/public institutions and organizations to private individuals and agencies'.⁴

The privatisation of education occupies an increasingly large place in the educational debate. Many concerns have emerged with the rapid expansion of the process of privatisation since the last decade, especially for developing countries where the public system is often overwhelmed and may be unable to cope with rapidly rising demand.⁵ In many developing countries, this process has resulted in a redefinition of the share of education financing between the states, non-state providers and families.⁶ Besides financing, the issue of privatisation is also deeply connected to parents' freedom to choose their children's education⁷, management flexibility, private regulation and accountability.⁸ Some research has shown that human rights and the right to education have not been the key focus in discussions on privatisation of education.⁹ The Special Rapporteur on the Right to Education has underlined the shift in the delivery of education from a public good to a private service in his

2014 report.¹⁰ Through unregulated private education, there could be risks that access to education may be denied on discriminatory grounds such as social origin, property or economic status, and that the principle of equality of educational opportunities may be overlooked. As a consequence, the principles of social justice and equity, which underpin the right to education, may be jeopardized.

Moreover, some private providers have developed fee-paying institutions called 'for-profit' or 'low-cost' schools, closely linked to a '*de facto*' privatisation of the education sector.¹¹ As previously mentioned, the United Nations Special Rapporteur on the Right to Education has devoted his last report to the subject.¹² Many international organisations, associations, NGOs and other civil society actors have started to look at for-profit institutions from a human rights-based point of view. These studies have shown that for-profit education and a commercialised educational sector can jeopardise the exercise of the right to education. In this context, privatised and commercialised education can have dreadful consequences on the social development of a country if it is not duly regulated, monitored and if private entities cannot be found accountable in case of violations of the right to education.

International law, which is only binding for states, does not explicitly refer to privatisation or commercialisation; therefore, legal issues arise from these problematics. This note intends to clarify these issues by briefly recalling the nature of states' obligations regarding the right to education (I); by presenting private education (II); by underlining the new challenges to the right to education in regard to private providers (III); by pointing out the reported positive and negative impacts on education (IV) and, finally, by suggesting legal solutions to avoid violations of the right to education (V).

1 CESCR, General Comment n°13 para. 48 '*it is clear that article 13 regards States as having principal responsibility of direct provision of education in most circumstances. States parties recognise for example, that the 'development of a system of schools at all levels shall be actively pursued'*'

2 K. SINGH, Report of the Special Rapporteur on the Right to Education (2014) on Privatisation of Education, para. 30

3 UNESCO Education For All Global Monitoring Report 2000-2015 p.93 (2015)

4 *Education privatization: causes, consequences and planning implications*, Belfield and Levin, IIEP, 2002, p. 19.

5 'Education must be protected from the forces of privatization', Special Rapporteur on the Right to Education, 27 October 2014.

6 *Education privatization: causes, consequences and planning implications*, Belfield and Levin, op. cit., p. 10.

7 Article 5 (b) of the Convention against Discriminations in Education; See Also *Annex I*

8 *Education privatization: causes, consequences and planning implications*, Belfield and Levin, op. cit., p. 10.

9 *Privatisation of Education: Global Trends of Human Rights Impacts*, Right to Education Project, 2014, p. 40.

10 K. SINGH, 'Privatisation of the Right to Education', Report of the UN Special Rapporteur for the Right to Education to the United Nations General Assembly Sixty-ninth session, September 24th, 2014

11 Rolleston, CAINE; Adefeso-Olateju, MODUPE 'De Facto Privatisation of Basic Education in Africa: A Market Response to Government Failure? A Comparative Study of the Cases of Ghana and Nigeria'; Open Society Initiative for West Africa (OSIWA), p.7; 2012 available at: <http://www.educationinnovations.org/research-and-evidence/de-facto-privatisation-basic-education-africa-market-response-government>

12 K. SINGH, 'Protecting the Right to Education against commercialization', Report of the UN Special Rapporteur for the Right to Education to the HRC Twenty-ninth session, June 10th, 2015

I. STATES OBLIGATIONS REGARDING THE RIGHT TO EDUCATION

A. Overview of the main states obligations (See Annex I)

International human rights law lays down core provisions regarding the right to education. The legal provisions are developed by a number of international instruments, including the 1948 Universal Declaration on Human Rights (Article 26), the 1960 UNESCO Convention against Discrimination in Education, the 1966 International Covenant on Economic, Social and Cultural Rights (Article 13), as well as other instruments covering specific components of the right to education.

States obligations include, notably, providing free and compulsory primary education, making secondary education generally available and higher education accessible on the basis of individual capacity, while introducing progressively free education at both these levels. Moreover, in the opinion of the CESCR, the state holds 'principal responsibility for the direct provision of education in most circumstances'¹³. The Committee has also stressed that states have an immediate duty to provide primary education for all.¹⁴ The right to education also includes an obligation to provide 'fundamental education' for individuals who have not completed primary education, to set minimum standards and to improve the quality of education as well as to rule out discriminations at all level of educational systems.

The 1960 Convention against Discrimination in Education affirms clearly that the principles of non-discrimination and equality of educational opportunities are central for the full realization of the right to education. The Convention explicitly prohibits any discrimination based on, among others, 'social origin', 'economic condition' or 'birth', so that educational opportunities are truly accessible to all.¹⁵

B. The right to education implementation is the responsibility of the state

The right to education is a fundamental human right and a **primary responsibility for the state** even though it can be provided by non-State actors. According to General Comment No. 13 (21st Session, 1999) on the

Right to Education (Article 13 of the CESCR) of the Committee on Economic, Social and Cultural Rights, there are **three types of obligations on states: to respect, protect and fulfil the right to education**. The obligation to respect requires States to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States Parties to take measures that prevent third parties from interfering with the enjoyment of the right to education **and to protect individuals and groups against abuses, including by private entities**.¹⁶ The obligation to fulfil incorporates both an obligation to provide and to facilitate and requires states to take positive measures to enable and assist individuals and communities to enjoy the right to education.¹⁷

States have obligations to respect, protect and fulfil each of the 'essential features' (the four 'As') of the right to education:

The 'four As'

Availability

Educational institutions and facilities have to be available in sufficient quantity (building, sanitation, facilities for both sexes, safe drinkable water, trained teachers receiving domestically competitive salaries, teaching materials)

Accessibility

Educational institutions have to be accessible to everyone in every circumstance, **without discrimination**, in law and in fact

Acceptability

The form and substance of education have to be acceptable to both students and parents: relevant, culturally appropriate and of good quality

Adaptability

Education has to be flexible to **the needs of changing societies** and respond to the needs of students within their diverse social and cultural settings

¹³ General Comment no. 13, para. 48.

¹⁴ General Comment no. 13, para. 51.

¹⁵ Article 1 (1), 1960 UNESCO Convention against Discrimination in Education.

¹⁶ Refer to *Annex 1: legal grounds of the Right to Education*

¹⁷ UNESCO, *The Right to Education-Law and Policy Review Guidelines*, p.12, 2014

Example of the type of state obligation regarding the 'four As':

- ➡ respect the availability of education by not closing private schools;¹⁸
- ➡ protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school;
- ➡ fulfil (facilitate) the acceptability of education by taking positive measures to ensure that it is culturally appropriate for minorities and indigenous peoples and of good quality for all;
- ➡ fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and
- ➡ fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.¹⁹

C. 'Minimum Core Obligations' of the state

Minimum core obligations are incumbent upon every state party, as provided by the CESCR Committee in its General Comment²⁰ on the nature of states parties' obligations.²¹ In its General Comment 3, the Committee has confirmed that states parties have 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels' of each of the rights enunciated in the Covenant, including 'the most basic forms of education'.

In the context of article 13, the Committee has specified that minimum core obligations include an obligation: 'to ensure the right of access to public educational institutions and programmes on a nondiscriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education;

18 General Comment n°13, para. 50

19 General Comment n°13, para. 50

20 A General Comment is a treaty body's interpretation of the content of human rights provisions, on thematic issues or its methods of work. General Comments often seek to clarify the reporting duties of states parties with respect to certain provisions and suggest approaches to implementing treaty provisions. Also called 'General Recommendation' by other treaty bodies (CERD & CEDAW).

21 General Comment no. 3, para. 10.

and to ensure free choice of education without interference from the State or third parties, subject to conformity with 'minimum educational standards' (Art. 13 (3) and (4)).²²

D. The financing of education: adequate resources must be allocated and sustained

The state must put in place an adequate system of financing of education. It is the responsibility of the state to provide public education funding and support to ensure that international obligations are duly met. As provided by the UN Special Rapporteur, 'The underlying obligation for States to realize the right to education, including through enhanced public investment in education as an essential prerequisite, must be emphasized'²³. (See *Annex I*: Article 2(1) of the International Covenant on Economic, Social and Cultural Rights)

E. Freedom in education must be guaranteed by the state

1. Free parental choice of education

The personal freedom of any person to choose between state-organised and private education **refers to parents' freedom to ensure their children's moral and religious education in conformity with their own convictions**. (See *Annex I*: Article 5(b) of the Convention against Discrimination in Education)

The state has a negative obligation to not interfere in this choice.

2. Freedom to establish educational institutions

The freedom of natural persons or legal entities to establish their own educational institutions refers to the liberty to establish and direct educational institutions, **subject to the requirement that these must conform to minimum standards laid down by the state** (See *Annex I*: Article 2 (c) of the Convention against Discrimination in Education).

The state has the obligation to establish a regulatory framework for private education and to ensure that international minimum standards are met.

22 General Comment no. 13, para. 57.

23 K.SINGH, Report of the Special Rapporteur on the Right to Education 'Protecting the right to education against commercialization' (2015), para. 108.

3. The principle of non-discrimination

The principle of non-discrimination in education is the cornerstone of the right to education. It is firstly established by Article 3 of the Convention against Discrimination in Education (See *Annex I*) and recalled in every international legal instrument promulgating the right to education (See *Annex I*)

The state has the obligation to prevent and eliminate all forms of discrimination in its educational system and to protect individuals from third parties discriminating in the educational system.

F. The principle of non-retrogression

The obligations contained in the International Covenant on Economic, Social and Cultural Rights impose an obligation to move as expeditiously and effectively as possible towards the full realization of the rights. In consequence, **any deliberately retrogressive measures** in that regard would require the **most careful consideration** and **would need to be fully justified** by reference to the totality of the rights provided for in the Covenant and **in the context of the full use of the maximum available resources**.²⁴

This general principle applied to the Right to Education implies that: **'There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education (...)**. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.'²⁵

Failure to comply with all the above-mentioned principles and obligations, as well as the lack of allocations of resources to the education sector, the lack of regulatory frameworks, neoliberal globalisation, and many other factors have contributed to processes challenging the Right to Education which are: privatisation and commercialisation of the education sector.

²⁴ General Comment n°3, para. 9.

²⁵ General Comment n°13, para. 45.

II. THE DIFFERENT TYPES OF PRIVATE EDUCATION

A. General definitions

Public schools²⁶

They are managed by a public education authority or agency.

Private schools²⁷

They are controlled and managed by any type of private entity, a non-government organisation, such as a church, a trade union or a private institution, associations or businesses. Private schools can be either **government-dependent** or **independent of the government**.

They are privately funded for most of their activities and even though they can receive subsidies from the state, their status remains of a private nature. There are many forms of private institution and they can be philanthropic, 'for-profit', 'low cost' or not-for-profit.

Private actors can also be partially linked to the state, which is a common practice, in the form of contractual arrangements or **Public Private Partnerships (PPPs)**.

26 'Private schools: Who benefits?', PISA In Focus no. 7, OECD, 2011, p. 2. Also note that though some countries may use the term Public schools to refer to private institutions, it is not the case in this document.

27 'Private schools: Who benefits?', PISA In Focus no. 7, OECD, 2011, p. 2.

B. The different types of private institutions

1) An overview of private institutions

Types of non-governmental entities	State dependant or independent? (See Annex II)	Some examples
<ul style="list-style-type: none"> Parents Community-based groups 	Usually privately managed and privately funded	Home-schooling, community schools, parents' associations ...
<ul style="list-style-type: none"> Religious institutions 	<p>These institutions can have many different structural organisations. They can be:</p> <ul style="list-style-type: none"> Privately managed and publicly funded (which can take the form of public funds put into the private institution) Privately managed and publicly funded with additional fees (in some cases asking for fees from parents and guardians in addition to the public funds) Publicly managed and privately funded (which can take the form of private funds put into the public system) Privately managed and funded (in some cases asking for fees from parents and guardians) 	<ul style="list-style-type: none"> Catholic schools under 'simple contract', 'association contract' or non-contractual in France Muslim schools under contract with the State or not Jewish schools under contract with the State or not ... Any other kind of cult or faith based institution
<ul style="list-style-type: none"> NGOs and philanthropic foundations 		<ul style="list-style-type: none"> BuildOn NGO provides direct services, indirect services in the US and abroad CARE Education Escuela Nueva
<ul style="list-style-type: none"> - Businesses conducting non-profit, for-profit or/and low fee schools such as: <ul style="list-style-type: none"> Enterprises/ Businesses Corporations Non-philanthropic foundations Private proprietors ... 		<p>Examples of for-profit institutions:</p> <ul style="list-style-type: none"> Omega Schools - a for-profit chain of Low Fee Private Schools operating in Greater Accra and the Central and Eastern Region of Ghana, created by a private entrepreneur from Ghana with the support of Pearson PLC (international education and media company) through their Affordable Learning Fund (ALF) Sparks Schools (South Africa) APEC Schools (Philippines) Bridge International Academies (Kenya)

2) Focus on the specific case of Public-Private Partnerships (PPPs)

a) Definition and nature of PPPs

PPPs²⁸

The term is broad and applies to any type of agreement in any form between the state (including also municipalities, local agencies or other public entities) and a private entity.

They aim at operating public infrastructures or delivering public services by private providers.

*'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.'*²⁹

The content of the contract and legal obligations will depend on national contract law or PPP law.

*'The extension of PPPs into social policy areas such as health and education is recent and is arguably one of the most significant trends in public finance in the past decade. [...], there is a wide range of PPPs in use in the Basic Education sector – each with different characteristics, design features and country contexts.'*³⁰

b) Overview of the main forms of PPPs in education

PPPs can take many different forms including³¹ (see annex III for examples):

Private sector philanthropic initiatives:

One of the most common forms of PPP in education (foundations providing funding to basic education)

Examples:

- Bill and Melinda Gates foundation (USA): donations made to high-quality, high-performing schools and systems

- The Broad Education Foundation (USA): it is a venture philanthropy foundation which has for example provided funding for the New Schools Venture Fund, a not-for profit venture capital firm that raises capital and invests in education entrepreneurs whose initiatives serve minority and low-income students in under-served urban areas.
- Bharti Foundation (India): making donations for the creation of strictly non-for-profit private schools in the nation's poor rural areas.

➔ *Note: Usually non-for profit institutions but there are also a range of innovative ventures that can be both (ex: Orient Global, a Singapore-based private investment institution is investing in private education opportunities in developing countries, including the research and development for a low-cost chain of schools).*

Private management of public schools:

➔ This involves education authorities contracting directly with private providers to operate public schools or certain aspects of public school operations. While these schools are privately managed, they remain publicly owned and publicly funded. (France, US, Colombia, Latin America and Spain, Qatar, Pakistan)

Examples:

- Contract Schools (USA): schools districts or charter boards contract with private providers to manage public schools, the providers are paid a fee to operate the schools and schools remain free to students. This focuses on low-performing and district schools.
- Bogotá Concession Schools (Colombia): private schools and/or education organisations bid in competitive process for management contracts of newly built schools in poor neighbourhoods. The management contracts are for 15 years and are subject to satisfactory performance. The schools receive subsidies from the state per each student and operate with the flexibility and autonomy of private providers.
- Independent Schools (Qatar): government-funded schools with more operational autonomy/flexibility than public schools. They are run by government selected not-for-profit operators for 3 years long contracts and are funded based on enrolment.

28 B-J BRANS 'PPPs in Education: Analysing PPPs as a policy tool for Universal Secondary Education in Uganda', University of Amsterdam, September 2011, p. 16.

29 D. Hall, *Why Public-Private Partnerships Don't Work: The Many Advantages of the Public Alternative*, Public Service International p. 5., 2015

30 N. LaROCQUE, 'Public - Private Partnerships in Basic Education: An International Review', Literature Review, 2008.

31 Summary of N. LaROCQUE, 'Public - Private Partnerships in Basic Education: An International Review', Literature Review, 2008.

Government purchase of education services from private schools:

- Subsidies, sponsorship to students as well as contracting with a private entity on the basis that they enrol students where there is a shortage of places in public schools (Uganda, Philippines, New Zealand, Venezuela, Pakistan)

Examples:

- Government sponsorship of students in private schools (Côte d'Ivoire): government contracts for the purchase of places in private secondary schools with payment varying according to the student's educational level. The school must be chartered and must maintain academic standards to be eligible to enrol sponsored students.
- Financial Assistance per Child Enrolled Basis (Pakistan): subsidies are paid to the private school on a per-child basis if they meet the minimum performance standards.

Voucher and voucher-like programmes:

- A school voucher is a certificate or entitlement that parents can use to pay for the education of their children at a public or private school of their choice, rather than the public school that is closest to them or to which they have been assigned. Vouchers are paid from a public entity either directly to parents or to schools on the parents' behalf. (Colombia, New Zealand, The Netherlands)

Examples

- PACES (Colombia): secondary students from poor households who wish to attend private schools are eligible. The voucher is just over half the cost of the private school fee. Top-up fees are allowed and the vouchers are renewable subject to satisfactory academic performance. The private schools are bound by minimal regulation.
- School Funding System (Netherlands): all primary and secondary school students are entitled to vouchers which can be used at all schools - public, private, religious, secular. There is a special formula for low-income groups and minorities. Top-up fees are not allowed and there are extensive regulations for private schools (ex: only not-for-profit)

Adopt a school programmes:

- These programmes involve setting out goals such as mobilising the private sector, regular school monitoring and feedback, training head teachers and teachers, providing mechanisms that allow the private sector to assist in upgrading and modernising the education system...

Examples:

- Adopt-a-School Programme (Pakistan): operated by the Sindh Education foundation in Sindh district. Private individuals and organisations 'adopt' government schools with established goals for performance and quality.
- Adopt-a-School Programme (The Philippines): private institutions and individuals have the opportunity to become partners in education by providing assistance with the upgrading and modernisation of public schools. It includes tax incentives for adopters.

Capacity-building initiatives:

- Capacity-building initiatives involve a range of activities such as curriculum and pedagogical support, management and administrative training, textbook provision, teacher training, and development of support networks, professional partnerships and linkages. (Pakistan)

Examples

- Cluster Based Training of Teachers through PPP (Pakistan): professional development of private school teachers focusing on primary education.
- Quality Insurance Resource Centre (Pakistan): education development project aimed at categorising and providing quality enhancement support for public, private and community/NGO schools.

Schools infrastructure partnership:

- first, the private sector provides the capital required to finance the project.
- second, the government specifies the contract in terms of 'outputs' or service level requirements, rather than in terms of 'inputs'.
- third, the newly constructed facility is not turned over to the government upon completion. It is operated by the private sector until the end of the contract period.

Examples:

- Private finance initiative (UK): educational infrastructure designed, built, financed and managed by a private sector consortium, under a contract that typically lasts 30 years. Payments to the private sector are subject to performance.
- PPP for New Schools (Egypt): The government provides land, while the private sector designs, constructs, finances and furnishes schools and provides non-educational services under a 15-year agreement.

.....
PPP is perceived as a form of privatisation. '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.'³²

32 H. Taylor, DPhil Candidate, Oxford University (Oxford Human Rights Hub) *The challenges of Public-Private Partnerships in Realising the Right to Education*, Background Paper Oxford hub on PPPs in education, 29 July 2015.

III. THE NEW CHALLENGES TO THE RIGHT TO EDUCATION: PRIVATISATION AND COMMERCIALISATION OF EDUCATION

A. Privatisation of the education sector

1) Definition

Privatisation ...

...is a process that can be defined as 'the transfer of activities, assets and responsibilities from government/public institutions and organizations to private individuals and agencies'.³³

Education privatization usually occurs in one of the following forms: private provision of education (by private entities, generally receiving government subsidies³⁴), private funding (a portion of the total funding covered by families) and private regulation, decision-making and accountability (education services being monitored by those who receive the services directly - i.e. students and their families).³⁵ The process of privatization is very complex as it may involve a diverse range of actors, requiring each form to be addressed particularly, with special attention paid to the level of education concerned.

Privatising effect

The 'privatising effect' occurs where the lack of public schools makes private education the only way for families and students to access education. In that case, families cannot have the opportunities of choosing freely between state-organised and private education - there is a de facto provision of education by private entities in these types of circumstances.³⁶

2) In theory

Full privatisation, the phenomenon through which the state entirely disengaged itself from providing, fulfilling, respecting and protecting the right to education, would constitute an absolute violation of the right to education.³⁷

Indeed, in a hypothetical context of full privatization, the responsibility for providing education is completely transferred to the private sector. When the state does not ensure public education, it fails to comply with its international obligations as the primary duty-bearer. The private sector is entirely free to 'implement' an education system which may comply with requirements under the right to education.

However, partial privatisation can also constitute, to some extent, a violation of the right to education, especially when the state fails to ensure that educational goals and quality standards are properly set and duly met in private delivery of education.

3) In practice: Legal consequences and rationale

The level of risk for the right to education therefore depends on the **degree of privatisation**.

Private education can be established **parallel** to the public system to respect the freedom to establish educational institutions and parental choice. However, when private school systems are built to replace the state and not complement it, it **undermines** the state's responsibility to provide education and places the Right to Education at risk.

On one hand, the state will always hold primary responsibility for the fulfilment, respect and protection of the right to education, on the other, the private sector has to develop in parallel all the while conforming to the Right to Education **minimum standards** set out by the competent authorities.

When the state lacks regulatory framework and starts disengaging in education and lowers investment it **opens the doors** to the private sector which fulfils a need for the population. At the same time, when the private sector starts gaining strength in a territory, it undermines the state's obligations and responsibility which may lead to it **disengaging** in public education.

Research has shown that the process of privatization can be associated with a decrease in state spending on education.³⁸ Thus, expansion of the private sector may lead to a decline in public spending on education

33 *Education privatization: causes, consequences and planning implications*, Belfield and Levin, op. cit., p. 19.

34 Like for instance PPPs.

35 *Education privatization: causes, consequences and planning implications*, Belfield and Levin, op. cit., p. 22.

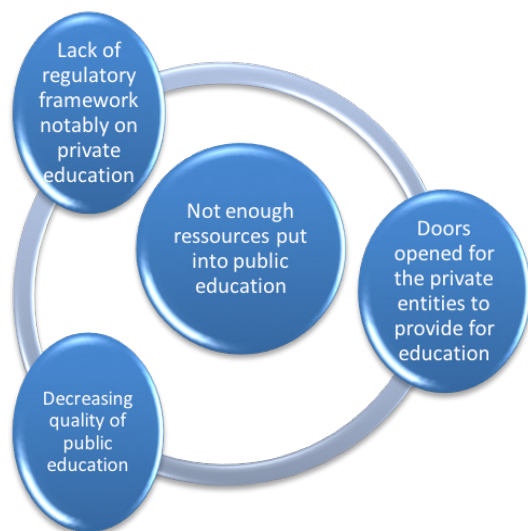
36 *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 14.

37 The closest example would be Chile, though public services have not all been entirely privatised.

38 Sources: Rapport Special Rapporteur on the Right to Education (2014), PERI Studies and Right to Education Project.

which would seem to be the case in countries such as the Philippines, India and Bangladesh.³⁹ However, this correlation between the evolution of public spending and the level of privatization in the country has not yet been clearly established statistically. For example, in Morocco and Chile, where cases of privatization have been recorded, levels of public spending remained relatively unchanged between 1999 and 2011.⁴⁰ Therefore, any generalization or extrapolation from specific cases should be avoided, especially given the importance of the role played by the local context. Further research on the impact of privatization, along with the development of more accurate statistical tools to evaluate the evolution of privatization and the beneficiaries of public spending, are needed.

.....
It is possible to identify some kind of vicious circle:



Indeed, when private schools operate **they may charge schooling fees** even at the pre-university level. This can have a direct impact on access to education with those who cannot afford to pay fees, **excluded**. It can lead to **discrimination** on grounds prohibited by international conventions including 'social origin', 'economic condition' or 'birth'. Therefore, the principles of **equity** and **equality** of educational opportunities may be jeopardized. Stronger educational disparities and exacerbated X **inequalities** may be generated in the system, putting the most disadvantaged groups of the society at risk

39 Countries cited in PERI Studies. See *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 48: 'Negative Effects of Privatization on the Right to Education: 'Likelihood of the State 'exiting the field': States become dependent on private schools to provide education and then neglect the public sector, with low levels of expenditure: Philippines budget the equivalent to 2.9 per cent GDP, 2.4 per cent GDP in Bangladesh, and between 2.2 per cent and 2.6 per cent GDP in India.'

40 In the case of Morocco, 5.5 per cent of the GNP and 25.7 per cent of total government expenditure; for Chile, approx. 4 per cent of the GNP et approx. 17 per cent of total government expenditure. Data: GMR 2013/14.

of being denied their right to education. This may **undermine** one of the roles of education, which is to be '[...] the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities'.⁴¹

Research has shown that privately managed schools tend to attract more advantaged student populations.⁴² As indicated in one of the PISA study, 'If students are sorted into publicly or privately managed schools according to their family's wealth, educational opportunities and outcomes become unequal, undermining social cohesion'.⁴³ Of great concern is that the development of private education, if not supervised and properly accompanied, may generate a dual system (children of poorer households enrolled in public institutions, while children belonging to upper and middle classes are enrolled in private institutions of alleged better quality)⁴⁴ aggravating the marginalization and the exclusion of the more vulnerable groups.⁴⁵

However, in the context of privatisation, it should be remembered that **basic standards of non-discrimination apply to all forms of education, be they public, privatized or private**.⁴⁶ Besides, even though there is no obligation for a state to provide financial support to private educational institutions, if it does so, it should ensure it is provided on a non-discriminatory basis.⁴⁷

As private entities invest in education and make profit from it, it becomes a market and a good. This expending 'market-based education sector' raises additional legal issues.

41 General Comment no. 13, para 1.

42 'Are school vouchers associated with equity in education?', PISA In Focus no. 20, OECD, 2012, p. 1.

43 'Are school vouchers associated with equity in education?', PISA In Focus no. 20, OECD, op. cit., p. 1.

44 Rohen d'AIGLEPIERRE, « *L'enseignement privé, un atout pour l'Afrique subsaharienne ?* », Secteur Privé & Développement (Proparco), December 2014, p. 20.

45 See also the Report of the Special Rapporteur on the right to education (2014), para. 46.

46 F. Coomans and A. Hallo de Wolf, '*Privatisation and Human Rights in the age of Globalisation*', Koen de Feyter Felipe Gomèz Isa eds., p.241, 2005

47 F. Coomans and A. Hallo de Wolf, '*Privatisation and Human Rights in the age of Globalisation*', Koen de Feyter Felipe Gomèz Isa eds., p.236-237, 2005

B. The commercialization of education

1) Definition and scope

Commercialization of education ...

... is the process by which the education sector is increasingly being opened up to profit-making and trade, and to agenda-setting by private, commercial interests that conceptualizes the learner as a consumer and education as a consumer good.⁴⁸

Commercialization of education deals with **for-profit schools** (including low-fee schools) provided by private corporations, businesses, enterprises. Commercialization of education also indirectly deals with **investors in education** enabling those corporations, businesses and enterprises to be actors in the education sector such as investment banks, private funds, etc.,

Commercialization of education could also include every activity that the private sector undertakes in education institutions such as maintenance, infrastructure, building, provision of textbooks and materials

2) The main legal problematic: are for-profit schools contrary to the right to education?

For-profit in education is **not expressly prohibited** in International Human Rights Law⁴⁹. States are bound by international law, which is not the case of private entities. It is therefore a **state responsibility to protect** the Right to Education from potential third party abuses.

The Guiding Principles on Business and Human Rights⁵⁰ emphasize that when states delegate their responsibilities to businesses, they **remain responsible** for ensuring that their human rights obligations are being met by those companies.⁵¹

Full privatisation and full commercialization are contrary to the Right to Education:

Full privatisation: process in which the state does not monitor or regulate the private sector and barely provides public education.

Full commercialization: situation where private providers are only bound by business, competition or trade law (including in situations where the state still has a public education sector and regulates private education but does not have any legal or regulatory framework regarding for-profit institutions)

For-profit schools: aim at making a profit from fees and additional costs paid by families

Low-fee private schools (LFPSs)⁵²: for-profit independent schools targeting families from lower incomes by charging 'low-fees'. However, even these schools are often beyond the average wage of families.⁵³ There are also additional costs (i.e. uniforms, examinations).⁵⁴

The questions that should be asked regarding for-profit institutions are:

Do they comply with state's regulations and monitoring (when those regulations are sufficient)?

Do they contribute to the development of the educational system in general?

Or

Are they creating a double speed education or a shadow system?

Do they disregard the right to education as a human right by creating extreme disparities in the level of education the population is able to receive?

48 I. MACPHERSON, S.ROBERTSON and G. WALFORD, *Education, Privatization and Social Justice: Case Studies from Africa, South Asia and South East Asia* eds., Oxford, Symposium Books Limited, (2014)

49 *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 19.

50 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf#sthash.StgkRJ8K.dpuf.

51 K.SINGH, 'Protecting the right to education against commercialization', Human Right Council, 29th Session, 10 June 2015; para. 53.

52 Also called low-cost private schools (LCPSs)

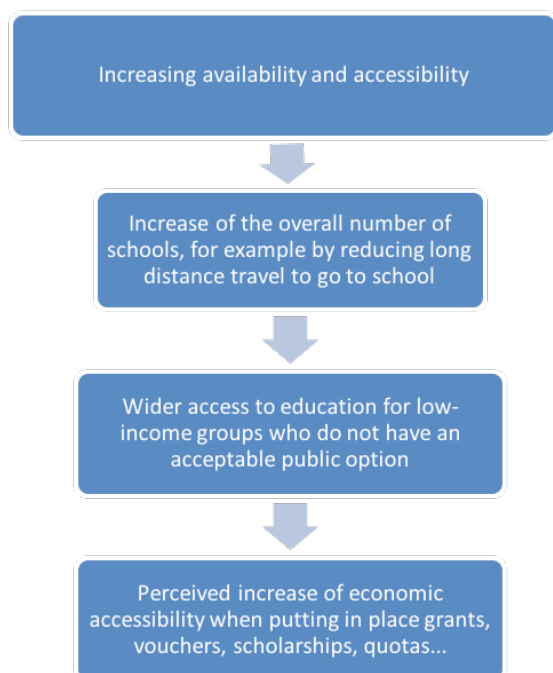
53 GI-ESCR (Uganda, Alternative report submitted to the CESCR, para.21, October 2014 accessible at: <http://ow.ly/REwBw>

54 'Though there is no consistent definition on what constitutes 'Low-Fee' (and thereby differentiates these schools from other private schools), one useful distinction is that LFPSs charge a maximum monthly tuition fee that does not exceed a daily wage (at the elementary level)' P.Srivastava, 'Low-fee private schooling: what do we really know? Prachi Srivastava responds to The Economist', <http://oxfamblogs.org/fp2p/its-complicated-or-low-fee-private-schooling-what-do-we-really-know/>, 11 August 2015 (accessed 28 August 2015).

IV. POTENTIAL NEGATIVE AND POSITIVE OUTCOMES⁵⁶

A. Positive impacts⁵⁶

Private delivery of education can have a **positive impact** if created and brought into an **adequate legal environment**. Among positive impacts are:



Examples

➤ In Boncana's study on Mali, physical accessibility was reported to increase due to madrasas (Islamic religious schools) being set up in local communities that were otherwise not serviced by any schools. Similarly, in Bangladesh, non-government schools funded by the international community through the Bangladesh Rural Advancement Committee, specifically aimed to increase accessibility for

students usually excluded from education due to geographic distance.⁵⁷

- In Pakistan and India 60 per cent of private schools are 'low cost', i.e. charging less than 7 USD per month⁵⁸. This suggests an increase in access options for low-income groups who might not have an acceptable public option to choose from.
- Under the Right to Education Act in India, private schools are mandated to offer 25 per cent of student placements as 'freeships' or scholarships, to ensure that private schools do not exclude students from low-income families. In a recent case the Indian Supreme Court ruled in favour of this quota obligation as it is in the public interest and is a reasonable restriction on the freedom of aided private schools and un-aided, non-minority private schools.⁵⁹

- *Also note the possible negative impact of low-fee schools: Note: even 7 USD per month can be considered as exorbitant in some contexts. 'Low cost' private schools which enhance disparities even when the fees are low, i.e. in Pakistan where the average wage is 119 USD per month which is a very low-wage level.⁶⁰ Hence, 7 USD per student in a household of more than 2 children becomes expensive when set alongside other expenses such as housing, food, health. Moreover, the 7 USD fee does not take into account additional expenditure on school materials, uniforms, examination fees which could double the original amount.*

- *One USAID study defines low-fee schools as 'those with tuition rates less than 50 per cent of the minimum wage', which is clearly still*

55 K. SINGH, 'Protecting the right to education against commercialization', Report of the Special Rapporteur on the right to education, June 2015. See also Private Education Research Initiative (PERI) studies on private education available on their websites and broadly used for the purpose of this paper : <http://www.periglobal.org/>

56 *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 18 to 20.

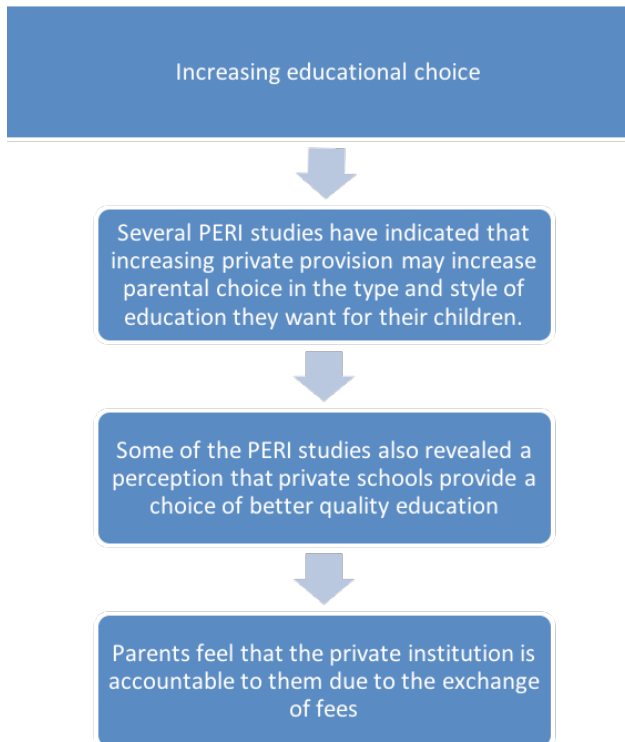
57 Christine Sommers 'Primary Education in Rural Bangladesh: Degrees of Access, Choice, and Participation of the Poorest' (awaiting publication). See Also: *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 18 to 20.

58 Baela R Jamil, Kiran Javaid and Baladevan Rangaraju (2012) 'Investigating Dimensions of the Privatisation of Public Education in South Asia: Case Studies from Pakistan and India' *Education Support Programme Working Paper Series*, No. 43, Open Society Foundation. New York. See Also: *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 18 to 20.

59 Indian Supreme Court, *Society for Unaided Private Schools of Rajasthan v. Union of India & Another*, 2012.

60 ILO Global Wage Report 2014/15: Asia and the Pacific Supplement p. 13. Also See ILO: *Global Wage Report 2012/13*, op. cit., p. 40.

quite high, especially for the many informal workers in low-income countries who live on far less than the minimum wage.⁶¹ This threshold would mean, for example, that fees of up to 85 per cent of the average monthly income per person in Pakistan, or 94 per cent in Benin, would count as 'low'.⁶² Other working definitions benchmark according to household spending, rather than wages, for example, suggesting that school fees should not exceed 4 per cent of the household budget in order to be considered 'low-fee'.⁶³



Examples:

- Parents in Rolleston and Adefeso's report on Ghana and Nigeria complained about the lack of respect, humility and accountability when

engaging with teachers in public schools.⁶⁴ For example, they reported rude and dismissive replies made by public school teachers. Conversely, parents reported that private school teachers were punctual, reliable and were generally more accountable.

- Some of the PERI studies indicated a perception among parents that private schools may place greater emphasis on accountability and openness to criticism and that parents feel empowered through the exchange of fees for education services.⁶⁵
 - Note that choosing your education can only occur when there are **schools that offer a range of teaching philosophies and methodologies, alternate or supplemental curriculum opportunities, or alternative learning environments**, rather than a means of identifying which schools provide better quality and;
 - parental perspectives on quality education alone would not constitute sufficient evidence to measure the quality of education.⁶⁶ Nevertheless, from a human rights perspective both public and private schools must provide quality education which is achieved through assessing the minimum standards that are laid down and enforced by the state for private providers.

61 Dr. Stephen P. Heyneman, Jonathan M.B. Stern and Dr. Thomas M. Smith, *The Search for Effective EFA Policies: The Role of Private Schools for Low-income Children*. (Washington D.C.: The Mitchell Group, Inc., 2011), 2.

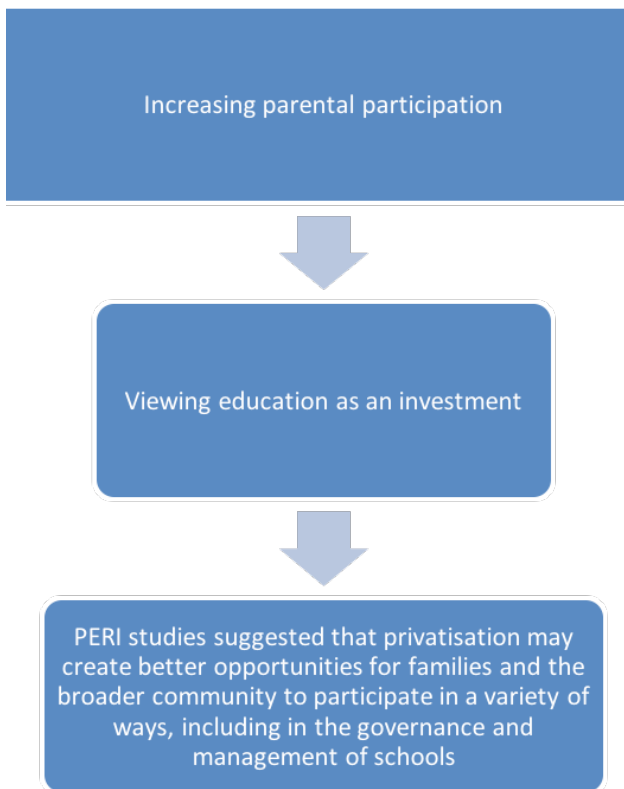
62 Pakistan minimum wage = 10,000 Rupees pcm) (\$97.89 in current USD, September 2014) – Minimum Wage Foundation; Benin minimum wage = 31,625 CFA pcm (\$62.14 in current USD, September 2014) - ILO Global Wage Database. Pakistan GNI per capita = \$1380, current USD. Benin GNI per capita = \$790, current USD. Both from World Bank Data.

63 Barakat, S., Hardman, F., Rohwerder, B., and Rzeszut, K., (2012) *Low-Cost Private Schools in Afghanistan and Pakistan: What evidence to support sustainable scale-up?* Protocol. London: EPPI-Centre, Social Science Research Unit, Institute of Education, University of London

64 For example, Caine Rolleston and Modupe Adefeso-Olateju (2012) 'De Facto Privatisation of Basic Education in Africa: A Market Response to Government Failure? A Comparative Study of the Cases of Ghana and Nigeria' *Education Support Programme Working Paper Series*, No. 44. New York: Open Society Foundation. See Also: *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 18 to 20.

65 Caine Rolleston and Modupe Adefeso-Olateju (2012) 'De Facto Privatisation of Basic Education in Africa: A Market Response to Government Failure? A Comparative Study of the Cases of Ghana and Nigeria' *Education Support Programme Working Paper Series*, No. 44. New York: Open Society Foundation; Monazza Aslam and Paul Atherton (2012) 'The 'Shadow' Education Sector in India and Pakistan: The Determinants, Benefits and Equity Effects of Private Tutoring' *Education Support Programme Working Paper Series*, No. 38, Open Society Foundation, New York; New York; Govind Subedi, Madan Shrestha, Raju Maharjan and Mukti Suvedi 'Dimensions and Implications of Privatisation of Education in Nepal: The Case of Primary and Secondary Schools', PERI, 2013; See Also: *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 18 to 20.

66 *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 20.



Examples:

➡ Viewing private education as an investment in the child whose future entry into the labour market will generate a better return.⁶⁷ When parents see private education as an investment, there may be a strong correlation between the financial investment and perceptions of empowerment and participation. In other words, parents may become more concerned about the education of their children through the value of their financial investment.

- *Note: there is a risk that when education is seen solely as a commodity it may lose its worth as an inherent right, ensuring the realisation of every child's human dignity.⁶⁸ '[T]he importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence'.⁶⁹*

➡ Some of the PERI studies suggested that privatisation may create better opportunities for families and the broader community to participate in a variety of ways, including in the governance and management of schools. Studies of the World Bank policy and lending practice of the IMF indicated that half of the relatively limited number

of IMF education programmes encouraged community involvement in decision-making concerning schools.⁷⁰ In some of the studies, parental participation was also seen in the decision-making process for granting scholarships,⁷¹ and school boards that oversee school activity.⁷²

- *'Indications that parents may increase their interest and participation in their children's education are on the surface a positive step. (...) [However], a more complete and comprehensive analysis of effective participation would need to be explored across a range of public and private schools considering how various models for parental participation are effectively achieved. In other words, it is likely that a number of methods for parental participation may be effective.'⁷³*

.....

Also note the possible positive impact of private education:

.....

- ➡ Perceived wider possibilities for the funding of education systems by harnessing non-state education providers through innovative financing put in place in order to advance the status of education.⁷⁴ (See V.A. Step 1 d))

67 Pramod Bhatta and Shak Budathoki 'Understanding Private Education landscape(s) in Nepal', PERI, 2013.

68 See also Report of the Special Rapporteur on the right to education (2014).

69 General Comment 13, para. 1.

70 Karen Mundy and Francine Menashy (2012) 'The World Bank and the Private Provision of K-12 Education: History, Policies, Practices' *Education Support Programme Working Paper Series*, No. 40, Open Society Foundation, New York.

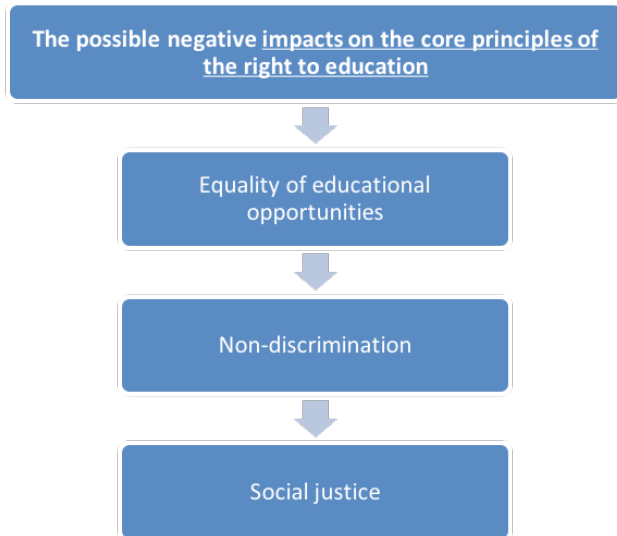
71 *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 20.

72 Christine Sommers 'Primary Education in Rural Bangladesh: Degrees of Access, Choice, and Participation of the Poorest', 2013 ; Govind Subedi, Madan Shrestha, Raju Maharjan and Mukti Suvedi 'Dimensions and Implications of Privatisation of Education in Nepal: The Case of Primary and Secondary Schools', 2013.

73 *Privatisation of Education: Global Trends of Education Impacts*, Right to Education Project, op. cit., p. 20.

74 C. Felsman and D. Dimovska, 'Harnessing non-state education providers through innovative financing', Result for Development Institute (R4D) publication, 2014, available at: <http://r4d.org/knowledge-center/harnessing-non-state-education-providers-through-innovative-financing>.

B. Possible negative impacts⁷⁵



Examples

- Thirty years of market-based policies in education appear to have led to **high levels of school segregation and stratification**. For example, the United Nations Committee on the Rights of the Child (CRC) formally asked the Chilean Government to explain the impact of privatization in education and its measures 'to put an end to segregation in the education system and guarantee the right to equality and non-discrimination in terms of access to education and within schools'⁷⁶ with regard to their voucher system and overall organisation of their educational system. The Supreme Court of Nepal (2012) found that **exorbitant fees** were increasing social and economic disparity and ruled that educational authorities had to **devise reform programmes to regulate private schools by regulating fees, prohibiting the sale of unregistered and overpriced textbooks** and limiting the number of schools being accredited;
- Voucher schemes** purported to provide economically disadvantaged parents with the means to select a private school in fact promote group differentiation (Colombia and Chile)⁷⁷;
- Privatization in education also has repercussions on **girls' right to education**, as families prioritize the education of boys over girls (India, Pakistan, and Uganda)⁷⁸.

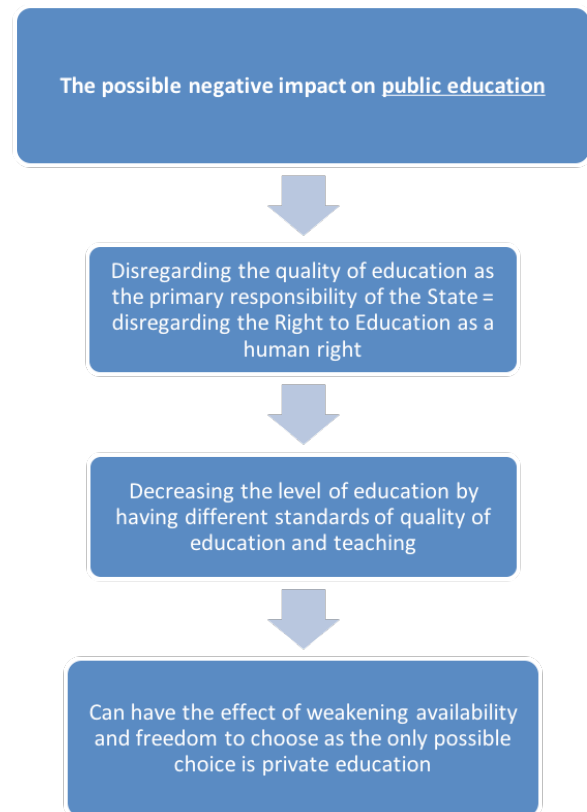
⁷⁵ The negative impacts of private education can be found in: GI-ESCR reports on Morocco; On girl's right to education; On Ghana, Chile and Uganda.

⁷⁶ CRC, List of issues on Chile, CRC/C/CHL/Q/4-5, para. 14, March 5th, 2015

⁷⁷ PERI studies available at: <http://www.periglobal.org/search/node/vouchers>

⁷⁸ http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Submission%20to%20CEDAW_Privatisation_and_RTE_of_Girls_Women_2014.pdf

- Low Fee Schools can be disguised as affordable to low-income families but can, in reality, be very costly which increases disparities⁷⁹.



Examples

- It has been shown that commercialization of education could **exacerbate inequities** at all school levels and thereby **heighten instability and violence** in conflict-affected provinces (Pakistan)
- There exist **sharp disparities in quality** of education provided between private schools, subsidized and public, as well as in infrastructures and teachers' training (Chile); there are also **corrupt practices** concerning private tutoring; commercialization could lead to disinvestment of the state in education or shrinking public investment.
- Private schools may **close institutions at short notice, shortly after opening and/or during the school year**, which incapacitates parents and children and narrows choice in choosing a quality education (Kenya). Businesses are **subject to the economy** and can become bankrupt more easily than a state; if the private system represents the majority, parents are not able to freely choose an education for their children anymore; privatization can also lead to parents not being able to send all of their children to school as previously stated.

⁷⁹ Refer to footnotes n°65,66,67 in the positive impacts

.....
Also note the possible negative impacts of PPPs.⁸⁰

There are two systemic threats to the accountability of PPPs:

- **Accountability for the quality of education:** weak regulation has led to the pursuit of commercial interest at the expense of quality. National minimum standards should be established in respect to quality by clearly setting out the responsibilities of private providers and enforcement mechanisms.
- **Accountability for corruption:** lack of effective monitoring, financial reporting, transparency. There is a need for 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
- The authors of a recent study on Bogota Concession Schools found that both accountability and competition do not work as conceived by charter school proponents (PPPs) which undermines some core principles of the right to education.⁸¹

Possible solutions to the new challenges

For the above mentioned **impairments** of the right to education not to occur and in order for the **positive impacts to develop in a manner consistent with the Right to Education:**

.....
STEP 1: states *have to* regulate and monitor private education and adopt 'minimum standards'

STEP 2: private educational institutions *have to respect* the core obligations of the right to education (outlined below).

⁸⁰ Summary of H. Taylor, DPhil Candidate, Oxford University (Oxford Human Rights Hub) *The challenges of Public-Private Partnerships in Realising the Right to Education*, Background Paper Oxford hub on PPPs in education, 29 July 2015.

⁸¹ D. BRENT EDWARDS Jr. and H. HARTLEY, 'Accountability and Competition for Charter Schools? Theory versus Reality in Concession Schools in Bogotá, Colombia', 2015

A. The two necessary steps

1) STEP 1: state regulation and monitoring
Improvement of the education system by both public and private institutions arises when states have already adopted certain regulations: here are some examples (non-limitative and subject to efficiency and impact assessments):

a) Legislative measures taken to regulate and monitor private education

➤ For example: Adopting prescriptive, prohibitory and punitive obligations⁸²:

➤ **Prescriptive obligations** describe reporting obligations (including performance measures, financial reporting, and required compliance with monitoring and oversight agencies).

➤ **Prohibitory obligations** can **prohibit** the **recruitment of unqualified teachers** or those employed in public schools, the **closure of schools** during an academic year, non-indulgence in false **commercial propaganda** to lure insufficiently informed students and parents, the **charging of capitation fees** and the **extraction from students or parents of any undeclared financial contribution** over and above the approved fee, **false declarations** of profits or salary, tax evasion... Regulations must **prohibit school selection** on the basis of social or ethnic origin or any form of psychometric tests;

- **Punitive obligations control non-compliance** with the regulations and take action against the private provider who indulges in **fraudulent and corrupt practices**

b) Setting out **minimum standards** in education complying with the **obligations** of the Right to Education notably regarding quality (outlined in *Step 2: Non-limitative list of core principles that have to be taken into account when investing in education*)

c) **Contractual arrangements, PPPS (see above and Annex III):** Supporting categories of non-states providers which answer needs most and are the most adequate to the context. When PPPs in education are created in a **viable legal environment** and **contain risk-sharing** they can benefit both the education system, hence

⁸² K. SINGH, 'Protecting the right to education against commercialisation', Report of the Special Rapporteur on the right to education, June 2015.

the population, and businesses. Indeed, private providers can be charged with **penalties** when they do not achieve the fixed contractual terms, but the capital risk is undermined and governments remain ultimately responsible in the case of essential public service, such as education⁸³. **PPP could include elaborated clauses** to ensure that businesses understand that they are also accountable when dealing with human rights. The other advantage of PPPs is that the **notion of public service is, or can be, implicit? in the nature of the contract.**

d) Innovative transparent and monitored financing (See Annex IV): such as:

- **public and private financing** through voucher schemes, cash transfer programmes, PPPs, Social Impact Bonds (SIBs) that leverage results-based financing for educational outcomes;
 - **impact investing** that will have to overcome significant hurdles in identifying investments with the potential for both social impact and financial returns;
 - unlocking local capital such as **Corporate Social Responsibility funds** within middle-income countries: for example, in South Africa, 1 per cent net of profits must be directed to CSR investments activities and these have doubled since 2001 and 2013 (more than 40 per cent of the USD 700 million spend has been put into the education sector).⁸⁴ Nevertheless, most CSR Mandates are carried out at the discretion of the enterprise, so education is not always the sector in which the funds are invested: 'If 2 per cent of the USD 2 billion was applied to education in India, companies could enrol India's 17.8 million out-of-school children (age 5-13) into school. By using 0.14 per cent of available CRS funds, companies could help enrol 50,000 girls in school. Only 16 per cent of CRS funds would be required to enrol 100,000 children at risk of child labour. And by spending 0,25 per cent of available CRS funds, companies could help enrol 100,000 children with disabilities in school.'⁸⁵;
 - **industry taxation** implying taking a contribution of solidarity on economic activities that benefit
- most from globalisation: plane transportation, mobile phones, Internet, financial transactions and extractive resources such as taxing oil production⁸⁶;
 - directing a part of **national lottery sales, other specific products such as alcohol and tobacco** to efforts to provide quality education⁸⁷;
 - **education impact bonds (See Annex V)**, these development impact bonds can provide a source of targeted financing aimed at improving social outcomes. Investors will provide the initial external financing for the service provider. If the pre-agreed outcomes are achieved, investors receive their initial investment back. This investment is often returned through a government or donor agency. Post-intervention, an external evaluator verifies the outcomes to determine its success level. This evaluation determines whether investors gain an additional return on their investment or not;⁸⁸
 - **cancelling debt in exchange for targeted development** (global, bilateral and multilateral agreements). This increases the 'fiscal space' allowing recipient countries the opportunity to provide additional funding towards education. (Detailed analysis of risks and benefits need to be considered);⁸⁹
 - **voluntary schemes** in which blended value schemes incorporate the donation within the price of marketed good to raise funds through retailer arrangements (Ikea soft toy campaign with Save the Children and UNICEF);⁹⁰
 - practices in use in other sectors can be adapted to the education sector: diaspora bonds; value-added tax; public-private incentive (setting out pre-agreed prices); buy now, pay later bonds; airline tickets tax;

83 B-J BRANS 'PPPs in Education: Analysing PPPs as a policy tool for Universal Secondary Education in Uganda', University of Amsterdam, September 2011, p. 22 accessible at:

84 C. Felsman and D. Dimovska, 'Harnessing non-state education providers through innovative financing', Result for Development Institute (R4D) publication, 2014, available at: <http://r4d.org/knowledge-center/harnessing-non-state-education-providers-through-innovative-financing>.

85 UNESCO, 'Innovative Financing for Out of School Children and Youth', Bangkok Office and R4D, 2015, p. 6.

86 UNESCO, 'Innovative Financing for Out of School Children and Youth', Bangkok Office and R4D, 2015, p.7.

87 UNESCO, 'Innovative Financing for Out of School Children and Youth', Bangkok Office and R4D, 2015, p.8.

88 UNESCO, 'Innovative Financing for Out of School Children and Youth', Bangkok Office and R4D, 2015, p.10.

89 UNESCO, 'Innovative Financing for Out of School Children and Youth', Bangkok Office and R4D, 2015, p.12.

90 UNESCO, 'Innovative Financing for Out of School Children and Youth', Bangkok Office and R4D, 2015, p.13.

➡ setting out a **percentage of the profits** which should always be **reinvested back** into the school⁹¹.

e. **Promulgating education as a public good** which serves as a legal basis to implement more specific regulatory frameworks; stating in the legal framework that the right to education is a public or social good (Ecuador, Argentina, Dominican Republic, Brazil)

➡ **Some states have chosen to abolish for-profit education** either by making the right to education a constitutional right or by drawing up legislation expressly prohibiting such commercial practices in education.

.....
The establishment of a robust private education system is to be developed in conjunction and under close control of the state and has to be respectful of the right to education as a human right, notably on core principles that cannot be undermined.

2) STEP 2: **Non-limitative** list of core principles that have to be taken into account when investing in education (Also See *Annex VI*)⁹²

Equality of educational opportunities, non-discrimination and the principle of social justice: economic condition, social origin, birth, wealth, property, gender, disability are often **preponderant factors** in allowing access to private schools. Economic condition becomes the most important criterion in access to education as it creates or reinforces segregation or disparities between different groups. Inevitably it impedes the principle of social justice which is at the core of the global mission of international human right instruments: promoting development and human dignity.

➡ The principle of equality of treatment has to be **promulgated** in national law or has to be a principle **implemented** in the framework of the investment especially when it comes to guaranteeing **girls' right to education** and safeguards such as the prohibition of corporal punishment, sexual abuses, the right for the child to be heard...The principle

91 The government of Sweden intends to bring in a legislation by 2016 that would force private companies to reinvest all profits back into their schools (press article available at: <https://www.tes.co.uk/article.aspx?storyCode=6447747>). In that sense it amounts to abolishing for-profit education but other mechanism can be harnessed such as imposing for-profit institution to reinvest a certain amount of their profit in the education services they provide.

92 This is a work in progress

of equal treatment should include **prohibition of discrimination** based on a non-limitative list of prohibited criteria such as those contained in the Convention against Discrimination in Education (1960): race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth. The **selection of students** on the basis of the characteristics mentioned above or on the basis of intellectual or physical capacity should be forbidden as well as any form of **psychometric** test.

➡ Concrete **measures to prevent and address the risk of exacerbating disparities**, segregation or stratification that the development of private education may lead to.

➡ **Fees should not be exorbitant** (and should not target particular populations. Fees should be calculated in relation to family income and number of children. Particular attention should be given to private institutions already receiving public funding who charge additional fees; the flow of funds should be transparent and monitored.

➡ **Education advertising should be regulated through** measures protecting education as a public good.

The legal standards of quality of education and teaching: privatization can lead to a decrease in education quality through the existence of **different curriculums** which can produce a **two-speed non-inclusive education**. Also, fundamental obligations such as **freedom of religion and beliefs** and **prohibition of corporal punishment** against children may be disregarded.

➡ **Legal standards of quality** have to be adopted and enforced by the relevant national authorities and promulgated in the legal framework for investment.

➡ Concrete measures should be taken to avoid disparities in **quality** of education as well as in the **infrastructure** and **learning environment**.

➡ Measures should be taken to ensure **inclusiveness in education** regarding notably girls, disabled persons, etc.

➡ **Teaching conditions**, status, training, salary and every aspect of the profession must comply with international and national standards.

➡ **Inspections** regarding the quality of education should be strictly planned and legally imposed on private providers as well as making sure that they do not enforce **over examination** or any kind of unstandardized/inappropriate **curriculum**.

- ➡ Authorizations for school registration should be systematically followed by **assessment** and **certification** of **good quality**.
- ➡ There should be a strong **anti-corruption legal safeguards** or highly enforced internal **monitoring safeguards** in the investment plan or by the direct private provider itself.
- ➡ Encouraging **parents' participation**.
- ➡ Allowing **Teachers' Associations**.

The principles of availability and freedom to choose: the increased number of private schools is often not the **result of families and individuals** exercising their **right to choose** but the result of issues in the public system. With time, the development of private education **weakens the public sector** and the freedom to choose. .

- ➡ There should be **safeguards preventing the possibility of schools closing down** in the middle of the year, **private financial safeguards** or **public financial safeguards**. There should also be **sanctions** when all available resources have not been targeted at keeping the school open for the end of the school year.
- ➡ Public education is a priority as it is part of a state's international obligation to provide access to free and compulsory basic education. When it is unable to do so, **the private sector should develop public education** and ensure that every parent or guardian has the right to choose their child's education. It is also enshrined in international law that the private sector has to develop in **parallel** with the public sector.
- ➡ When providing education, public transportation should always be taken into consideration and provided.

B. Possible list of questions for indirect and direct private providers when investing in education⁹³

INDIRECT-ACTOR: INVESTORS	DIRECT-ACTOR: PRIVATE PROVIDERS
Is there legislation expressly recognizing the liberty of individuals and groups to establish and direct educational institutions? (subject to the requirement that the education given in such institutions shall conform to the minimum standards laid down by the state)	
Is there a regulatory framework in the given state concerning private education/institutions? (legislation, decrees, plans...)	
If so, what are the requirements contained in this framework, what is the registration process and what type of minimum standards exist? Does the regulatory framework include non-discrimination principles, anti-corruption safeguards, teaching quality standards, infrastructure quality standards, inspections ...? AND does the regulatory framework provide monitoring and control mechanisms for the implementation of the legislation?	
What type of private providers of education are you investing in? Is your client going to enter into a contract with the relevant national authorities? If so, does the contract include non-discrimination clauses, anti-corruption clauses, teaching quality standards, infrastructure quality standards, quality inspections ...?	Is there an intention to enter into a contract with the relevant national authorities?
Does the state in which your client is based have a regulatory framework for private delivery of education?	If so, what type of contract? Does the contract include non-discrimination clauses, anti-corruption clauses, teaching quality standards, infrastructure quality standards, quality inspections ...?
If there is no regulatory framework or contractual agreement:	If there is no regulatory framework or contractual agreement:
Do both parties agree to include clauses in the investors/private provider contract/agreement concerning the right to education such as obligations of non-discrimination, anti-corruption measures, transparency in investment, prohibition of closing down the school if there is financial difficulty (this requires devising emergency help plans with the investors)...	Does the private provider have any type of internal regulatory policy to ensure respectful behaviour towards the right to education principles such as obligation to non-discrimination in business relations or activity, ethical policies, working conditions standards, quality of business standards, anti-corruption safeguards...

93 This is a work in progress

ANNEX I

The Right to Education legal grounds:

The right to education as a fundamental human right

The Universal Declaration on Human rights (1948)

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

The International Covenant on Economic, Social and Cultural rights (1966)

Article 13

1. The states parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall 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, and further the activities of the United Nations for the maintenance of peace.

The Convention against Discrimination in Education (1960)

Article 5(1)

- (a) Adds that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms

Primary responsibility of the State

The International Covenant on Economic, Social and Cultural Rights (1966)

Article 13

2. The states parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The states parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the state and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, 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.

Regarding the allocation of resources to Education: Article 2 (1) states that:

‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

The UNESCO Convention against Discrimination in Education (1960)

Article 4

Formulates the legally binding clause, but also sanctions the following duties and actions for states parties to implement:

- i. Make primary education free and compulsory;
- ii. Make secondary education in its different forms generally available and accessible to all;
- iii. Make higher education equally accessible to all on the basis of individual capacity;
- iv. Assure compliance by all with the obligation to attend school as prescribed by law;
- v. Ensure that the standards of education⁴ are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent;
- vi. Encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;
- vii. Provide training for the teaching profession without discrimination.

Article 5.1

(b) ‘It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in

a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their convictions’

Extracts from General Comment n°13 of the CESCR:

The state holds ‘principal responsibility for the direct provision of education in most circumstances’

‘States have an immediate duty to provide primary education for all’

The minimum core obligations include an obligation ‘to ensure the right of access to public educational institutions and programmes on a nondiscriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with ‘minimum educational standards’

Extract from General Comment n°3 of the CESCR:

States parties have ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels’ of each of the rights enunciated in the Covenant, including ‘the most basic forms of education’.

Guiding Principles on Business and Human Rights (2011) N.B: non binding instrument

Principle 1

‘States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.’

Non-Discrimination and Equality of educational opportunities

The Convention against Discrimination in Education (1960)

Article 1

Explicitly prohibits discrimination which 'for the purpose of this Convention includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) Of depriving any person or group of persons of access to education of any type

or at any level;

(b) Of limiting any person or group of persons to education of an inferior standard;

(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

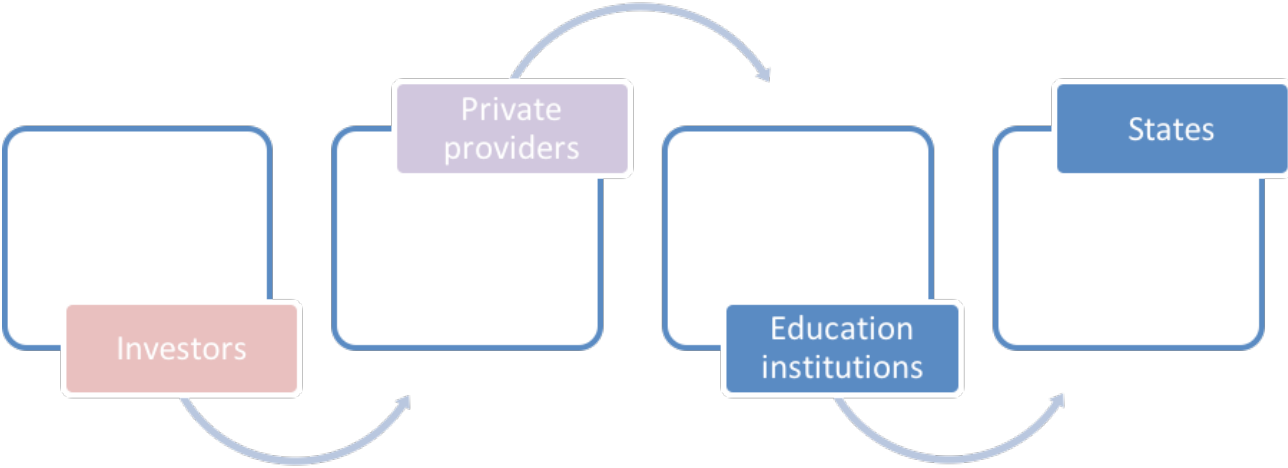
2. For the purposes of this Convention, the term 'education' refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.

Article 2 (c)

'The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level'.

ANNEX II

Actors of the education system:



ANNEX III

TABLE 2: Classification of PPPs at the Basic Education Level

PPP Initiative	Examples
Private Sector Philanthropic Initiatives	<ul style="list-style-type: none"> • Philanthropic Foundations (USA, Philippines) • Academies Programme (UK) • Philanthropic Venture Funds (USA) • World Education Forum's Global Education Initiative (Jordan, Egypt, India, Palestinian National Authority)
School Management Initiatives	<ul style="list-style-type: none"> • Contract Schools (USA) • Charter Schools (USA and Alberta, Canada) • Concession Schools (Bogotá, Colombia) • Independent Schools (Qatar) • Private Management of Railways Schools (Pakistan) • Quality Education for All (Pakistan) • Management of Government Schools (Lahore, Pakistan)
Purchase of Educational Services from Private Schools	<ul style="list-style-type: none"> • Alternative Education (New Zealand) • Government Sponsorship of Students in Private Schools (Côte 'Ivoire) • Educational Service Contracting (The Philippines) • Fe y Alegría (South America/Spain) • Financial Assistance Per Child Enrolled Basis (Punjab, Pakistan) • Universal Post Primary Education and Training (Uganda) • Venezuelan Association of Catholic Education (Venezuela)
Adopt-a-School Programmes	<ul style="list-style-type: none"> • Sindh Education Foundation • Adopt-a-School Programme, Philippines
Vouchers and Voucher-like Programmes	<ul style="list-style-type: none"> • Plan de Ampliación de Cobertura de la Educación Secundaria (Colombia) • School Funding System (The Netherlands) • Targeted Individual Entitlement and Independent School Subsidies (New Zealand) • Milwaukee Parental Choice Program (Milwaukee, USA) • Urban Girls' Fellowship Program (Balochistan, Pakistan)
Capacity Building Initiatives	<ul style="list-style-type: none"> • Cluster Based Training of Teachers Through PPP (Punjab, Pakistan) • Quality Assurance Resource Centre (Sindh, Pakistan) • Quality Advancement and Institutional Development (Sindh, Pakistan) • Teaching in Clusters by Subject Specialists (Punjab, Pakistan)
School Infrastructure Initiatives	<ul style="list-style-type: none"> • P3 New Schools Project (Alberta, Canada) • Private Finance Initiative (United Kingdom) • New Schools' Private Finance Project (New South Wales, Australia) • New Schools' Public-Private Partnership Project (South Australia, Australia) • PPP for New Schools (Egypt) • Public-Private Partnerships for Educational Infrastructure (Nova Scotia, Canada) • Offenbach Schools Project and Cologne Schools Project (Germany) • Montaigne Lyceum (The Hague, The Netherlands) • Leasing of Public School Buildings to Private Operators (Punjab, Pakistan)

Source: N. LAROCQUE, 'Public – Private Partnerships in Basic Education: An International Review', Literature Review, 2008

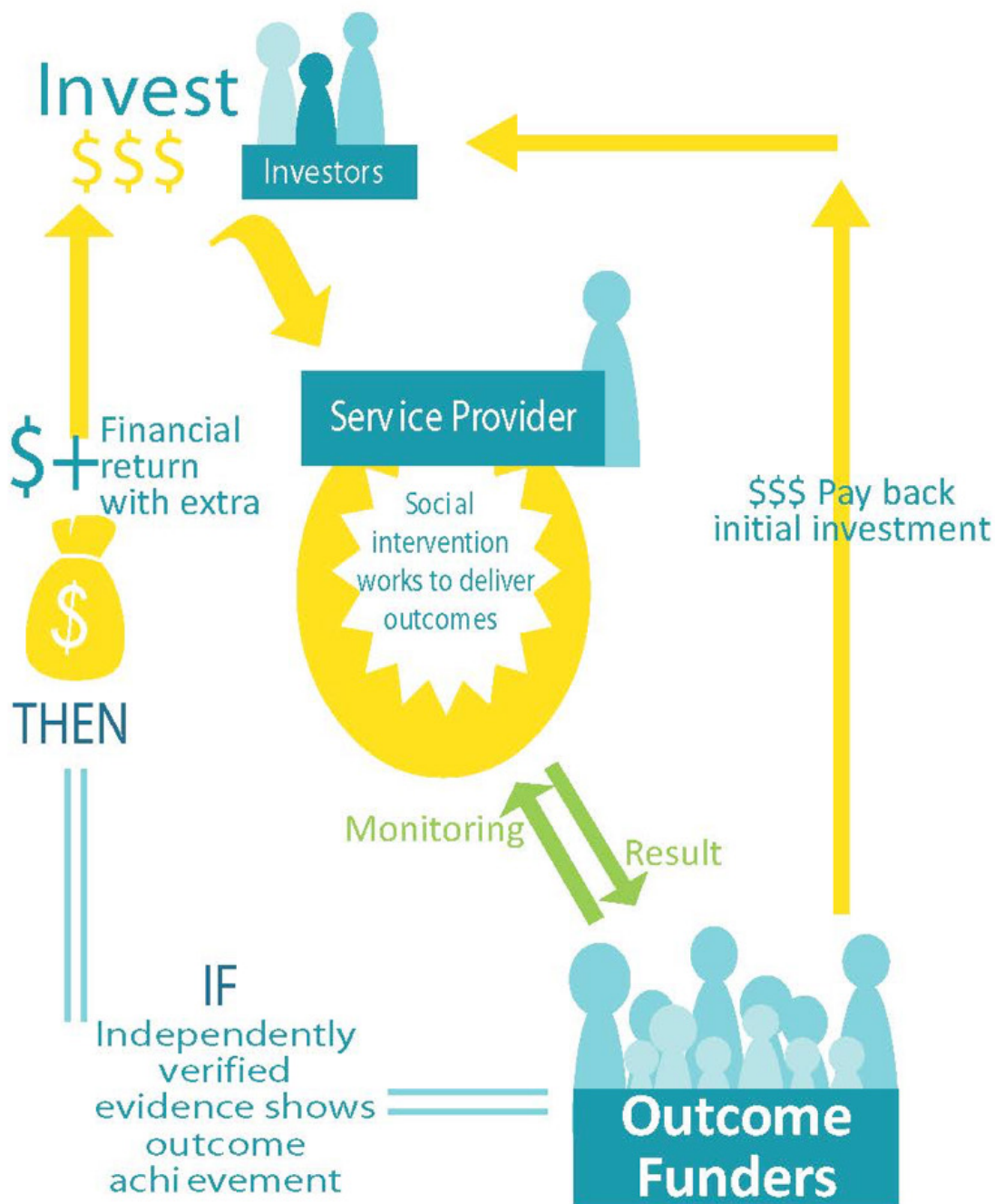
Guiding Questions to Assess Innovative Financing

1. Have innovative financing for education initiatives generated additional resources for disadvantaged children and youth?
2. Have innovative sources of financing delivered concrete results?
3. Which countries have benefited from innovative financing?
 - What lessons can be drawn from their experience?
 - What best practices can be replicated or adapted in your own national context?
4. Have innovative financing initiatives delivered stable and predictable resources?
5. Have innovative financing initiatives strengthened country ownership of the education development process?
6. Have innovative financing initiatives supported capacity development in beneficiary countries?
7. Have innovative financing initiatives accentuated issues related to fragmentation and coordination in education delivery?
8. Is innovative financing sustainable over the longer-term?
9. Can innovative financing be scaled up and/or initiatives replicated in other development areas or regions?

The Paris Declaration of Aid Effectiveness (2005) and the Accra Agenda for Action (2008), accepted by most donors and recipient countries, reflect the consensus that aid should be provided in ways that support national capacity building and the coordination of donors, the government, civil society organisations and other stakeholders.

Source: UNESCO (2011) *Debt Swaps and Debt Conversion Development Bonds for Education*, p64.

Figure 1: Education Impact Bond



Adapted from Investing in Social Outcomes: Development Impact Bonds: The Report of the development Impact Bond Working group (CGD: Social Finance, October 2013)

Checklist for investing in education

BE SMART

Education is a public good. Business can play an important role in developing the public sector's ability to improve education access and learning quality.²⁶

Responsible business engagement in education respects universal principles in human rights in its operations, strategies and policies.²⁷ After making the business case and developing education activities, apply best practices to engage responsibly in education.

The following recommendations guide responsible engagement in education:

- ✓ **Respect and support education as a human right.** Primary education should be free and compulsory for all children, and higher levels of education and training should be accessible to everyone.²⁸ Supporting local and national education and learning systems recognizes that Government has the responsibility to ensure the right to education.
- ✓ **Promote equity and equality.** Companies should include marginalized groups – such as girls, students with physical and learning needs, ethnic minorities, the indigenous and others – in education activities.²⁹ Without focus on these groups to ensure equal access to quality education, inequality can increase, endangering the operational environment and well-being of communities and nations.
- ✓ **Partner with experts.** Business can engage in education through partnerships with Government, the UN, NGOs or other businesses to promote learning opportunities. Good partnerships lead to positive outcomes and avoid duplicating existing efforts. Open dialogue about interests strengthens trust between partners to ensure business needs and social goals are not in conflict.³⁰ In addition to making financial contributions, business can also contribute its functional expertise, including technology, human resources and management skills.³¹
- ✓ **Be outcomes-oriented and results-driven.** Build accountability mechanisms into education programmes.³² In collaboration with education experts, business can develop impact metrics to ensure the effectiveness of education activities. Invest in tested ideas with evidence of impact.³³ Scale projects to levels feasible for the business and of value to society.³⁴
- ✓ **Align with Government needs in education.** Engage with Ministries of Education and Government to align programmes with the broader goals of an education system and local needs of a community.³⁵ Use national education plans and global frameworks to determine education priorities and also consider ways to support populations not covered in Government education plans.
- ✓ **Be sustainable and scalable.** Business should design activities for the long-term, clearly identifying stakeholders, such as the Government, NGOs, communities or other businesses. Short-term, one-off investments raise expectations among stakeholders and could affect communities adversely. Resource allocations should be sizable enough to meet both the business opportunity and education outcome. Engage business leadership actively to ensure buy-in and sustainable resource allocations.

Source: UNESCO, UNICEF, UN Global Compact, UN Special Envoy for Global Education, 'The Smartest Investment: A Framework for Business Engagement in Education' (2013)

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