

Initiative for Social and Economic Rights (ISER) v. Attorney General, Civil Suit No. 353 of 2016

The High Court of Uganda declared that the government policy on public financing of secondary education infringes on the right to; education¹; equality² and freedom from discrimination³ as provided for under the Constitution. It directed the government to ensure equity for all children in the design and implementation of education programs, to take its lead position in regulation of private actors' involvement in education in order to ensure that minimum standards are always adhered to by those private actors and sanction defaulters. Justice Lydia Mugambe held that in so doing, the Government should seek guidance from the Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education in designing education programs in the country.

The background to the judgement is that in 2016, the Initiative for Social and Economic Rights (ISER) filed a public interest case in the High Court of Uganda challenging the Government policy on financing for Universal Secondary Education. ISER argued that the financing policy that was partly done through Public Private Partnerships (PPPs) infringes on the right to quality education, equality and freedom from discrimination guaranteed under the Constitution.

The Universal Secondary Education (USE) program was introduced in 2007 by the Government of Uganda and implemented through; Public; Government Grant Aided schools; Private for Profit Public Private Partnership (PPP) schools; private not for Profit PPPs - mainly community schools. By 2014, there were a total of 1795 schools implementing the USE program, of these 943 schools were government grant aided schools and 852 schools were Public Private Partnership schools (PPPs), majority of which were for profit "low-fee" schools.

The case followed research⁴ conducted by ISER which found several weaknesses in the implementation of the PPP program that resulted in the violation of the right to education for the children attending those schools. In the case, ISER argued that the government policy of paying UGX 47,000 per student enrolled in USE per term in PPP Schools as opposed to approximately UGX 230,000/= per student enrolled in Government aided schools was discriminatory and infringes the right to quality education for children attending the PPP schools. ISER explained that the UGX 230,000/= for government aided schools is contributed towards paying staff salaries, providing science and laboratory equipment while the UGX 47,000/- constituted the entire contribution per student enrolled a Public Private Partnership School. ISER argued that the limited financing coupled with the profit motive of the PPP schools resulted in various practices that compromised the quality of the education accessed by the

¹ Article 30 of the Constitution of the Republic of Uganda

² Article 34(2) of the Constitution of the Republic of Uganda

³ Article 21 of the Constitution of the Republic of Uganda

⁴ Initiative for Social and Economic Rights (ISER), A Threat or Opportunity? Public-Private Partnerships in Education in Uganda, 2016 accessed at <https://www.iser-uganda.org/publications/reports/296-opportunity-or-threat-public-private-partnerships-in-education-in-uganda>

children in the PPP schools. For example ISER pointed out that many teachers in the schools are unqualified and did not meet certification requirements to teach in secondary schools. That this practice especially affected science subjects contrary to the Government policy that makes science subjects compulsory and prioritises science students for government loans to acquire tertiary education. It was also brought to the court's attention that PPP schools charge exorbitant non-tuition fees that limited access for disadvantaged children including girls, children with disabilities and children from poor backgrounds. ISER therefore submitted that the inequity, discrimination and poor-quality education that students obtained at USE in Public Private Partnership schools negatively impacts their ability to compete on equal footing with students in Government grant-aided schools and non-USE schools.

In response, the Government of Uganda sought to absolve itself of the actions of the private schools. The state argued that it is the responsibility of proprietors of private schools to ensure the recruitment of qualified staff that can deliver the secondary school curriculum and to meet other basic requirements and minimum standards set. It also contended that its partnership with the private schools is on the basis that private schools shall provide basic infrastructure including laboratories, library and instructional materials and that it was incumbent upon private schools to fulfil their obligations agreed upon in the memorandum of understanding entered into between the Government and Private Schools. The state further argued that it can't be held responsible for alleged omissions of private secondary schools which are in any event private profit-making bodies and concluded that there was no cause of action against the state.

Judgement

In her judgement, Justice Lydia Mugambe referred to the National and International legal framework on the right to quality education, equality and non-discrimination.⁵ The court held that the state is responsible for infringements of children's rights caused or contributed to by business enterprises where it has failed to undertake necessary, appropriate and reasonable measures to prevent and remedy such infringements or otherwise collaborated with or tolerated the infringements. Specifically, the judge stated that "the sense I get from the government averments is that beyond the policy guidelines and the memorandum of understanding, the government has not effectively or satisfactorily continuously monitored the implementation of the policy guidelines and memorandum of understanding in the PPP Schools. This points to an abdication of the government's obligation to protect the right to education as envisaged in the legal provisions above."

⁵ Article 13 of the ICESCR, Para 14 of the General Comment No. 24 on states obligations under the ICESCR, Para 13 of the ICESCR of General Comment 13, Article 28(1) of the CRC, Para 25 of the CRC General Comment No. 16, Para 28 & 29 of the CRC General Comment 16, Regulation 50, 51 of the Abidjan Principles. ⁵ Paragraph 25 of the (CRC) General Comment No. 16, "states are not relieved of their obligations under the Convention and the Optional Protocols thereto when their functions are delegated or outsourced to a private business or non – profit organization. A state will thereby be in breach of its obligations under the Convention where it fails to respect, protect, and fulfill children's rights in relation to business activities and operation that impact on children..."

Quoting the Abidjan Principles⁶, the court held that where private provision of education is as a result of lack of availability of free, quality, public education, States must take all effective measures to develop or restore universal access to free, quality, public education as effectively and expeditiously as possible. This must be done parallel with the role of requiring private institutions of learning to meet minimum standards set by the State, and bring them into compliance, or following due process, close down those private educational institutions that fall below the standards. This requires the adoption and enforcement of the effective regulatory measures to ensure the realisation of the right to education where there is private involvement in provision of education.

Finally, court resolved that nothing in the memorandum of understanding or policy guidelines can take away the Government's obligation to regulate private actors in education as a measure of protecting the right to education for all Ugandans. And there is lack of demonstration that the state fulfilled its obligations to regulate and ensure that the private actors met the minimum standards and basic infrastructure in the USE – PPPs.

In its orders, the High Court tasked the Government of Uganda to ensure equity for all children in the design and implementation of education programs. Court also ordered that the Ministry of Education and Sports take its lead position in regulating private involvement in education to ensure compliance and adherence to minimum standards.

The significance of the court judgement in the realisation of the right to education

It remains to be seen how the court orders will be implemented by the Ministry of Education and Sports especially by its Directorates of Basic and Secondary Education and Education Standards and the Planning Department. However, the judgment is significant in various ways.

First, the court re-affirmed the established principle that the State is the primary duty bearer for provision of education. It elaborated the three types of obligations of States in regards to provision of education under international human rights law; to respect, to protect, and to fulfill human rights. These obligations recognize the fact that states are not relieved from their obligations even where their functions of delivering education are outsourced or delegated to a private business or non – profit organization. The State bears the primary duty of ensuring that these private entities are effectively and efficiently supervised to ensure compliance to the set minimum education standards. Otherwise, failure to exercise its supervisory and regulatory role on the private education learning institutions, the state will be in breach of its obligations and for that matter liable for the breaches occasioned by the private involvement in education.

The court also took cognizance of the fact that much as the State may rely on the private sector to deliver education, this should be a temporary measure and the State must take steps to put in place its own public schools to provide education.

⁶ Abidjan Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education, Adopted on 13 February, 2019 in Cote D'Ivoire.



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The judgment is also groundbreaking because it is the first time that the court has required the state to seek guidance from the Abidjan Principles during policy development.