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Revisiting constitutional review over privatized schooling: the Pridwin case and the protection of constitutional right to education

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Abstract

Our contribution aims to discuss the latest insights of the constitutional case law on the rights of students in private education. For this purpose, the Pridwin judgment of the Constitutional Court of South Africa was chosen, since this decision entailed considerable global resound and invigorated the discussion on the constitutional framework of private schools. Moreover, the Pridwin judgment provided a proper distinction between the rights and interests of the four main actors: students; private school management; parents of students and state authorities. Based on this analysis, we recommend prioritizing the educational rights of students. However, these should be carefully balanced with the legitimate rights and interests of other relevant stakeholders including private school management, parents of students, and state authorities. Although the fact that this topic has rarely been discussed in Central Europe, it will be demonstrated that the rise of private schooling might result in seeking similar constitutional remedies against private school managements in this region. Therefore, it would be worthwhile to integrate Central Europe into this strand of academic scholarship.

Keywords: rights of students; private education; constitutional law; horizontal effect of fundamental rights; due process; social rights

1 Introduction

On June 17 2020, the Constitutional Court of South Africa handed down a landmark ruling in the case of AB and Another v Pridwin Preparatory School and Others (Pridwin 2020), thoroughly examining the constitutional duties of private schools. The case concerned the dismissal of two students from their private school, and highlighted both the obligation of the school as a private entity to respect the main constitutional principles of fair proceedings during its operation, and also to take into account the involvement of the right to education in all of its conduct (Emerson & Lundy, 2013, p. 19). In its reasoning, the Constitutional Court also argued with the sociological background as the increasing role of private educational actors justifies the stricter constitutional scrutiny over them (Ally & Linde, 2021, pp. 277–279).

This decision invigorated the global discourse on the constitutional aspects of emerging private education (White, 2023, p. 24). The recent crises including economic recession, public health concerns, armed conflicts, climate change and migration crisis required even more endeavors from private stakeholders involved in education to provide all essential services for students (Jörgensen et al., 2023), while the necessity of constitutional supervision was also strongly underlined.

The Pridwin case demonstrates the sensitivity of constitutional review as an indicator of the rapidly changing sociological landscape: the increased privatization of education (West & Nikolai, 2017) is still to be systematically contextualized with a constitutional focus, especially in Central Europe, where only the very first steps have been made in this direction. In our view, without sufficiently elaborated constitutional supervision, the greater role of private stakeholders in the field of education would constitute a significant risk factor.

Furthermore, the enforcement of constitutional rights in private legal relationships has been a dubious matter for decades (Barak, 1996). Thus, constitutional courts shall provide convincing justification, as to why the state is entitled to interfere for the protection of the rights of students and/or parents once private educational centres would be involved. Then, further clarification is still to be provided on how far states could go in reviewing private education on constitutional grounds. Our contribution extends this discourse with additional arguments based on the Pridwin judgment.

After the introductory part, the rising weight of private education will be briefly assessed; then, based on this context, in the next section, the Pridwin case will be detailed as well as the discussion surrounding it. Then, such balancing mechanism would be outlined, which could serve as a point of reference for constitutional/supreme courts hearing similar constitutional matters and which might reconsider the role of constitutional review as a potential tool of systematic state monitoring over private education (Kligman, 2014, p. 273). Constitutionally safeguarded fundamental rights of students will be understood as components of private legal relationships such as contracts between private schools and the parents of their students. Amongst these fundamental rights, the right to education will be highlighted (Lundy & Lynn, 2018, p. 261) with special regard to its socio-economic character (Farese, 2020, pp. 105-116) and its strong link with the rights of children, since most students, but not all of them fall under the category of child according to art. 1. of the UN Convention on the Rights of the Child. Our analysis would be attached to basic and secondary education, the arguments might vary considerably as regards private higher education, where universities might enjoy a broader space of maneuver (Rachman et al., 2017).

This experience might be worthy of discussion in Central Europe as well (de Groof, 2016, 13-24). One should keep in mind that the current weight of private education is comparable in this region to South Africa, moreover, as will be demonstrated in the following section, the number of students attending private education grows steadily. As a consequence, invigorated constitutional reflections might be expected once private schools will attract more students in our region. By that time we might be more prepared to tackle the relevant constitutional issues if we could also rely on those constitutional judgments that have already been handed down in the countries with well-elaborated private education systems.

Moreover, the protection of social rights plays a crucial role in safeguarding the right to education, as it creates an enabling environment for individuals to access quality educational opportunities. By ensuring that the social rights of students are upheld regardless of the management of their schools, states can mitigate these barriers, thereby fostering an inclusive educational landscape that empowers all individuals, particularly marginalized groups (Strydom 2019, p. 222). Such implications of the Pridwin ruling would also be paramount, especially for the Central European region, where the social rights of private school students have not been directly addressed by constitutional case law (Fabre 2005, pp. 15–28). These are the main inspirations for us to share this article in an academic journal with a Central European focus.

South Africa operates with a legal system combining the elements of continental- and common law (Fombad 2010, 1–21), however, its constitutional review concept follows mostly the German constitutional tradition similarly to Central European countries (Rautenbah & du Plessis 2013, pp. 1539–1546; Mavčič, 2018, pp. 30–32). Therefore, the forms of constitutional remedies as well as the arguments raised during their hearing show meaningful similarities, which underline the relevance of the Pridwin judgment in our region as well (Venter, 2013, pp. 1579–1589). Similarly to Central Europe, constitutional complaints against second instance judicial rulings; as well as requests of lower courts and individuals for reviewing the constitutionality of a law might be lodged to the South African Constitutional Court (Wolf & Wolf 1996, pp. 267–296). As has happened in South Africa, such remedies could easily bring private education to the forefront of the Central European constitutional discourse in the near future. As a recent concrete example, Russian students sought for remedy against their private school banning any class on Russian language in its curriculum, the controversy was brought before the Latvian Constitutional Court, and then, before the European Court of Human Rights (hereinafter: ECtHR) (Dzibuti, 2023).

2 The emerging social role of private education: the necessity of the constitutional reflections

As for starters, the conceptual scope of private education should be determined. Private schools can be defined either based on their ownership, management or their primary source of funding. According to the definition that the OECD employs, which focuses on the management, the term private school refers to schools managed directly or indirectly by non-governmental organizations, such as churches, businesses or other private institutions. Within the private sector, we can differentiate between two types of private schools, based on their level of public funding. In this context, government-independent private schools and government-dependent private schools should be distinguished. The primary source of funding for government-independent private schools is constituted by student fees and other private contributions, for example donations. Although government-dependent private schools might also be managed by private actors, more than half of their funding comes from government-related sources (OECD, 2018).

In the United States of America, private schools are defined based on their primary sources of funding. According to this approach, private schools are those that are "not

supported primarily by public funds" (Broughman & Swaim, 2013), however, these private entities may also receive public funding for providing educational services (National Centre for Education Statistics, 1997).

The literature refers to private schools as educational institutions that are independently established, owned and managed, and fully dependent on their income. Private schools are either owned by people or organizations, including religious entities, corporations and individuals. (Härmä, 2015, 172)

Private schools can also be defined as „schools maintained by private individuals, a religious organization, or a corporation, not at public expense. Open only to pupils selected and admitted by the proprietors or to pupils of a certain religion or possessing certain qualifications." (FindLaw).

A new strand of private education shall also be mentioned from the developing countries of Asia and Africa. A growing number of parents choose to educate their children in low cost private schools (hereinafter referred to as LCPS) (Tooley, 2009). Such schools typically target students from low-income families, which differentiates them from traditional elite schools (Verger et al., 2016, p. 90). Some definitions consider those private unaided schools low cost that are entirely funded by tuition fees, with the monthly tuition fee not exceeding the daily wage of a labourer (UNICEF, 2021). Tooley defines LCPSs as private schools that a family on or below the poverty line can afford to send all its children without having to restrict their other essential spendings (Tooley, 2014, p. 7). These schools are becoming increasingly popular, due to the poor quality of public education in developing countries and the lack of trust in public educational institutions. Researchers also suggest, that the reason behind the growing popularity of LCPSs can be attributed to the perception that they offer more competitive education compared to public schools with more committed teachers, students and administrative staff (Verger et al., 2016, p. 90). Although the fact that Pridwin does not focus on an LCPS, several conclusions drawn from this judgment might also concern this form of private schooling, as will be demonstrated later.

Notwithstanding the above, there has been a long-going debate among researchers about whether public or private education is more beneficial for students. An emerging number of parents and students are feeling let down by the poor quality of education provided by public schools, and the emergence of private schools within low-income communities has offered those who are willing to pay for education with a means of exit. Private schools are often promoted as a "highly efficient, higher-quality alternative to some 'broken' governments". However, the vast majority of students all over the world still rely on the governmental education system (Härmä, 2015). Furthermore, proponents of private education claim that „thriving private schooling would help the state fulfill its duties in the field of social rights, including the constitutional right to basic education" (Languille, 2016, p. 528).

Those in favor of public schools claim that government-operated schools promote civic values, such as political tolerance and political participation, more effectively than schools in the private sector. Some researchers even argue, that the health of a democratic society depends directly on public schools. On the contrary, other authors opine that "private schooling empowers parents and students and underlines the importance of their own agency", which makes them confident citizens, capable of self-governance (Shakeel et al., 2024). Arguments can be made for both positions, but the primary issue from a fun-

damental rights point of view shall be the prioritization of the right to education as an important social right and its proper balancing with other competing rights and interests, which can be achieved under either model.

As a result of the COVID-19 pandemic, in spring 2020, most countries closed down schools in order to prevent the further spread of the coronavirus (Schubert, 2022, p. 1817). Due to the closures, the learning of 1,7 billion students was disturbed all over the globe (Ullah & Ali, 2021). Data shows that this caused significant decrease in the public school enrollment rate by fall 2020. In some member states of the United States of America, for example in Michigan, the enrollment rate dropped by 3 percent. If one looks for the reasons behind this tendency, the disruption of the functioning of public schools changed the parental attitude towards public education, and made other alternatives, such as private schools more appealing (Musaddiq et al., 2022).

As a consequence, we have been experiencing the emerging social role of private education worldwide. According to statistics, as of fall 2021, 4.7 million students were enrolled in private schools across the United States of America. This takes up approximately 9 percent of public and private school pupils, combined. The growing significance of private education is backed up by the fact that the enrollment rate was 5 percent higher in fall 2021 than it was in fall 2011 (National Center for Education Statistics, 2024). In the case of India, the enrollment rate in private schools increased by 15 percent for secondary-level students from 1998 to 2021. Researchers have found evidence of stratification: high-achieving, male students and students from traditionally high-privileged castes tend to choose private schools over public education (Bagde et al., 2022). However, the emergence of LCPSs can significantly influence this trend.

With regard to the background of the Pridwin decision, some notes should be added from the South African context. Since South Africa has been profoundly influenced by the British educational approach, the country has an extensive system of private schools (Pretorius, 2019). Although the gradual growth of enrollment rates, the ratio of learning in the private sector has remained relatively low, with only about 5 percent of all students are enrolled in private schools. Private schools have traditionally been chosen mostly by families from the white middle class with higher incomes, for this reason, private schools have usually been better equipped than public schools until the recent rise of LCPSs. In spite of these facts, legal uncertainties reduce the attractiveness of South African private schools, judicial rulings like Pridwin derive from this uncertainty.

In comparison with South Africa, Central European private education could rely on fewer direct traditions, since only the political and economic transformation around 1990, also accompanied by educational changes led to the establishment of most private schools (Gawlicz & Starnawski, 2018). However, non-state education has only reached a limited share of students in the region, which has not changed during the public health emergency (Ondrejková 2024, p. 224). In Slovakia, the Czech Republic and Hungary, only around 5 percent of the students were enrolled in private schools (Filer & Munich 2003, pp. 196–197), while the Polish authorities have recently reported several concerns regarding the qualifications of private school teachers (AB Newswire, 2024). Across the whole Visegrád region, the private school enrollment rate was recently estimated to be around 4 percent (OECD/UNICEF, 2021). This rate not only correlates with the statistics of neighbouring EU member states such as Austria and Germany, but also approaches the rates found in South-Africa (Filer & Munich, 2003, p. 197).

With the increased importance of private education, constitutional guarantees should be integrated into the regulatory framework of private schools, so that these privately owned, non-governmental entities should be obliged to provide the same protection for the educational rights of the students as state authorities. When students might easily be pushed into a vulnerable position, and need to be more educated and well informed than ever in order to keep up with the constantly changing world, additional safeguards shall be implemented for the protection of educational rights (McEvoy & Lundy, 2016, p. 495). This is the point, which leads us to the detailed analysis of the Pridwin case. Due to the aforementioned fact, that the South African model of constitutional review relies on the German tradition similarly to the Central European countries, this analysis has a direct relevance for our region.

3 New impulse from South Africa: the main arguments and the significance of the Pridwin case

The Pridwin judgment concerned the dismissal of two students from a private school, after the father of the children breached the parent contract with the school (Fawole, 2022, p. 129). The main issue before the Constitutional Court was whether the school's termination clause should be constrained by the rights of the two students, who as a result of the termination and through no fault of their own, would be excluded from the school (Ally & Linde, 2021). The ruling brought to the forefront the uncertainties around the constitutional coverage of private schools with special regard to the right to education of private school students.

The Pridwin Preparatory School is well-known as an elite and prestigious boys' school, in one of the wealthiest neighborhoods of Johannesburg. With its high tuition fees, the affordability falls well beyond the reach of the great majority of South Africans, where an extreme range of social differences are experienced (Pridwin, 2020, p. 6; Kirsten et al., 2023). The school's legal relationship with its students and their parents is regulated by a private contract, negotiated after the admission, but prior to entry into Pridwin. The two children of the applicants, two boys were students at Pridwin. Although the boys were outstanding students, their situation in the school has deteriorated significantly, after their father regularly insulted, harassed and threatened the school staff. At first, the father complained about the alleged bullying and social isolation of the elder son, then, he criticized the staff during sports activities, as he believed, the natural sporting talent of his son was not nurtured and supported sufficiently. After another parent at the school complained about the adverse effects the applicant's behavior caused on her son, the father and the principal agreed, that he would refrain from such behavior. However, the agreement did not last long, and incidents continued. As a result, on 30 June 2016 the school terminated the contract with the parents. This led to the dismissal of the two students with a term notice (Pridwin, 2020, pp. 11-30). According to the parents, by terminating the contract, the school violated the students' right for basic education (Lowenthal, 2020).

After the termination of the contract, the parents sought judicial remedy on an urgent basis. The applicants argued that by canceling the contract, their sons' right to education was infringed. According to their submission, Pridwin had a negative obligation to not

diminish that right or act unreasonably. The parents claimed that as a private educational institution, Pridwin was performing a constitutional function and had a duty to not impair the student's access to education (Smit, 2024, p. 213).

According to the South Gauteng High Court, with the parent contract, the school was primarily engaged in a private contract, and the clause of free termination was concluded between the two private parties. Furthermore, the High Court found that right to equal education and right to attend schools shall not apply to students admitted to private education. The Court also highlighted that – opposed to what the applicants claimed – Pridwin had no duty to not impair the student's right to education (Smit, 2024, p. 214). Thus, the High Court held that the decision of Pridwin to terminate the parent contract was acceptable and constitutional, and found in favor of the respondents (Laubscher, 2020, p. 436).

The applicants were granted leave to approach the Supreme Court of Appeal, which upheld the decision of the High Court, concluding that private schools have no constitutional duty to hold a hearing in these circumstances. The Court found that Pridwin had no positive duty to provide basic education, nor did it have any obligation to admit students into the school. The Supreme Court highlighted that providing basic education should be the duty of state authorities rather than private institutions (Pridwin 2020, pp. 38–42)

The case eventually reached the Constitutional Court in 2019, which refocused the attention on the students (Fawole, 2022, p. 129). The Constitutional Court highlighted that the contract between the applicants and the school was not merely a commercial contract, since it directly governed students' fundamental right to basic education (Smit, 2024, p. 215). The Court claimed that such contracts are "of different species" (Pridwin, 2020, p. 63). Therefore, the main issue was not the cancellation of the contract, but rather the effects that the enforcement of the cancellation clause had on the students. So the main task of the Constitutional Court was to determine whether Pridwin had a constitutional duty (Smit, 2024, p. 215). Therefore, the Court disagreed with the arguments of the lower courts, as such precedent would mean that "private schools are not bound by the right to basic education in relation to the students who attend those schools, and that a private school can terminate parent contracts without having prioritized educational rights what would result in the exclusion of certain students" (Ally & Linde, 2021, p. 6).

A) Regarding the rights of students, the Constitutional Court has noted that section 29 of the South African Constitution must be thoroughly examined in order to determine whether it provides educational rights for those children attending private schools and the constitutional obligations these independent schools are bound to (Pridwin 2020, 73–75). Once a private entity takes on providing educational services, "it has a negative obligation not to interfere with such education, which includes the right to be heard before discontinuing the education. Additionally, once a child receives private education, the school cannot take away or diminish the right without proper justification." (Smit, 2024, p. 216).

   The Constitutional Court also defined the content of the right to education. The term "basic education" refers primarily to the content of the right to education. On this understanding of the term, children attending private schools are undoubtedly receiving and enjoying a basic education regardless of the fact that the level of private education might exceed significantly that of the public education.

(Pridwin 2020, 64). Although the termination of the contract was unconstitutional, it was also acknowledged, that not only the educational rights of the dismissed students, but also the similar reasonable points of the other pupils should be taken into account when the cancellation of the contract is considered (Pridwin, 2020, p. 93).

Also related to the priority of students' right to education, a few years earlier, the Durban High Court heard a case of a student, whose parents were unable to pay the tuition fees for the private school, therefore, the student was deregistered by the school and was prevented from taking his examinations. The Durban High Court pointed out that private schools could exclude students from education, however just as a final resort, and such a decision should be subject to due process safeguards: prior warning should be conveyed, and reasonable time should be left for parents to find an alternative school for their child. As a result, the rigid refusal of renegotiating the payment schedule of tuition fees meant an unreasonable step on behalf of the private school, therefore, right to education was infringed (Mhlongo v. John Wesley School, 2016).

The Supreme Court of India also relies to a remarkable extent on the German traditions of constitutional review (Brunello & Lehrman, 1991, pp. 267–272) and reached similar conclusions regarding the duties of public and private schools to secure the right to education. A judgment of the Supreme Court of India imposed the same duty on public and private schools to admit at least 25% of their students from marginalized social groups. Only such exceptions were provided, where the rights of minorities should outweigh the fight against segregation and the right of students to be educated in an integrated surrounding (Society For Un-Aided P.School Of Raj v. U.O.I & Anr., 2012). This case clearly has an intersectional dimension with the involvement of several fundamental rights, however, the detailed analysis of this aspect would fall beyond the scope of the present study. Similarly, the Supreme Court of India held that public and private schools should provide the same toilet facilities, drinking water, educational equipment and teacher staff to properly fulfill the basic educational needs of students (Environmental & Consumer Protection Foundation v Delhi Administration & Others, 2012).

B) Parents are also strongly affected by the right to basic education regarding their children. The reasoning of Pridwin reached the conclusion that private schools shall not diminish the right to basic education and shall act in the best interests of the child, in most cases, this also entails alerting the parents involved in the proposed termination and also providing a hearing to the parents (Pridwin 2020, 93). The concurring opinions also underlined the rights of parents to be heard for the sake of their children's best interest (Pridwin 2020, 209).

C) Regarding the private school management, the Constitutional Court of South Africa held that no private entity can be forced to maintain a private school, however, if they voluntarily decide to do so, they will inevitably be bound to constitutional obligations declared in section 29(3). Pridwin has been providing education since 1923, therefore it bears the aforementioned obligations. However, the Court highlighted that these obligations are not necessarily positive obligations. While the state has both positive and negative constitutional duties, those of the private institutions are rather negative obligations to not diminish the rights of students (Pridwin, 2020, pp. 85–86).

Either the majority judgment (Pridwin 2020, p. 62), and the concurring opinion signed by two judges found that the clause of free cancellation was unconstitutional and unenforceable, because it was contrary to public policy (Pridwin 2020, pp. 213–219). However, in essence, both the majority and the concurring opinion held that private schools have a negative obligation to not interfere with the student's right to basic education. Furthermore, they concurred that both procedural and substantive fairness must be applied when a student would be dismissed from a private school (Fawole, 2022). This means, that private school management shall be seen as an entity covered by the right to conduct a business under contractual freedom, however, the compliance with public policy as a restriction on this freedom requires the special protection of fundamental rights in these legal relationships (Pridwin, 2020, p. 61).

This has also been confirmed by the Juma Musjid decision of the South African Constitutional Court which showed the emerging social and legal interest to prevent with constitutional means private stakeholders from neglecting the educational rights of students in their major decisions. In this case, in 2011, an eviction order was provided against a public school established on a private land, threatening the basic learning needs of hundreds of South African students. The Constitutional Court argued that the constitutional right of students for basic education shall outweigh the legitimate financial claim of the private landowner, consequently, private stakeholders should take into account the basic educational needs of students during the implementation of their contracts (Juma Musjid Primary School v Essay, 2011).

D) Although the fact, that Pridwin has not detailed the obligations of state authorities safeguarding the right to education in private schools, the attitude of the Constitutional Court and the outcome of the controversy represent themselves clear examples of state supervision over private education. The ECtHR also confirmed in one of its earlier judgments the special responsibility of state authorities to protect the rights of students in both public and private schools (Costello Roberts v the United Kingdom, 1993). In this regard, the case of Dzibuti v. Latvia heard by the ECtHR should also be mentioned, which confirmed similarly to Pridwin, that private schools shall be seen as part of the basic educational structure (Dzibuti, 2023).

One can state that the South African Constitutional Court took a student's right approach in its judgment (Fawole, 2022). It was also specified, how private schools shall consider the Constitution and the most important fundamental rights of the students. However, Ally and Linde held that the Constitutional Court missed a great opportunity to outline exact standards for the interpretation of constitutional rights among private stakeholders such as the private schools and the parents especially with the direct involvement of the students, therefore, significant legal uncertainty would remain around the constitutional framework of private schools. It was also argued, that although the paramountcy of educational rights, fair process shall also be seen as a determining factor in the Pridwin case (Ally & Linde, 2021, p. 7). Smit concludes that private schools are obliged to uphold certain standards and not act in a manner that undermines a child's right to education. If the state is of the opinion that private schools should have positive obligations, it can enforce such responsibilities through legislation. Therefore, private schools, despite being private entities, shall comply with public policies, including the protection of fundamental rights and the requirement for a fair procedure when making key decisions (Smit, 2024).

4 New insights to constitutional review as a tool of monitoring private schools

If one aims to revisit the role of constitutional review over private education, the dynamics of these legal relationships should be understood more deeply, as the paramount constitutional arguments are attached to the specific structure of these forms of collaboration. The rise of private education not only establishes a sociological phenomenon, which requires numerous actions securing the equal chances for those who come from public and from private education (Coomans, 2009, 219), but also a matter of legal and constitutional concern, which should take into account the four actors participating in these mechanisms. On the ground of the arguments raised by the Pridwin case, the relationships of the four actors as well as the protection of their fundamental rights should be revisited.

A) Firstly, the most important stakeholders are the students themselves, who are entitled to special constitutional protection. From their perspective, it does not matter, whether the provider of the education is organized as a public – or as a private entity (Chetty & Govindjee 2014, pp. 33–34). From a constitutional perspective, students – most of whom also belong to the group of children constitute a marginalized social group that should be protected by additional state measures as safeguards of their proper physical and mental well-being and development (Lundy et al., 2016). As Pridwin underlines, the educational rights of students and their involvement should enjoy special weight during the balancing mechanism, private stakeholders should acknowledge the specificities of a group under strengthened constitutional protection, when they are engaged in providing services for such a community as a target audience (Lundy, 2006, p. 339). Nevertheless, this duty shall not overstep the safeguarding of equal social and educational rights for each student regardless of the management structure of the school providing the educational services. As Pridwin also mentions, since most students of private schools traditionally represent privileged social groups, and most private schools provide educational services that far exceed the required minimum standards, awarding disproportionate constitutional benefits to these students could exacerbate social inequalities, and further decrease the competitiveness and atractiveness of public education. The rise of LCPSs experienced since Pridwin might significantly reconsider the social context of this concern, however, this risk factor is still valid.

B) Secondly, should be their kids admitted, the parents of the students conclude private contracts with the maintainer of the schools, therefore, the parties have certain margin of movement under contractual freedom to negotiate the details of such agreements (Cornell & Limber, 2015, p. 338). However, Pridwin highlights the restrictions of this freedom, since education amounts to a public task, private entities should comply with strict conditions when they would like to provide such services. State authorities, particularly courts have certain competences to amend or cancel private contracts if these are severely incompatible with mandatory legal requirements, however, such interferences should remain extraordinary and should not be performed unless no less restrictive alternative could remedy the essential violation of fundamental rights caused by the contract. As a consequence, on the one hand, parents have a claim towards the state to refrain from

restricting their contractual freedom except in strongly justified cases. On the other hand, parents expect private school management to fulfill the social rights and educational needs of their children properly, and if the school management fails to do so, state authorities should redress the situation.

C) The management of a private school as a third actor would highlight business considerations and the aspect of profitability covered by the constitutional right to conduct a business, students would be admitted based on private contracts agreed upon with the parents. Moreover, constitutional clauses may describe the autonomy of private schools to determine their educational framework (Thompson, 2022, pp. 85–86). If public educational institutions were to be attacked before the judiciary, state authorities would have undoubtable competence to interfere in a legal relationship established between a public entity and a private individual. However, in the case of private education, additional justification would be needed since the horizontal effect of constitutional rights has been discussed in the academic literature and legal practice several times without being able to build broad consent (Haupt, 2024). What is sure, that private school management could argue for the right to conduct a business, contractual freedom and the autonomy of private education in these controversies; meanwhile the parents of students would invoke the strong connection between private schooling with right to education (Tampio, 2021). The balancing mechanism may vary significantly when the private school has a clear religious affiliation: in these cases, business rights would receive less weight. By contrast, freedom of religion should be considered with additional carefulness either on behalf of students, parents and the school management in order to strike a proper balance between the collective and individual aspects of freedom of religion, as well as the right to basic education.

D) Finally, state authorities lay down the rules for involving private stakeholders in fulfilling public tasks such as education. This may reduce the social costs of these sectors, and increase the flexibility of determining the framework of such services due to the autonomy granted for these private stakeholders (Priyadarshani, 2020). This could expand the parents' choices to select from multiple options for their kids the educational environment most compatible with their individual expectations. As a consequence, state authorities should carefully consider all the circumstances when the contractual will of the parties would be replaced by the orders issued by public bodies. Compelling reasons, such as the conflict with public policy, or the protection of fundamental rights, would be necessary. Thus, state authorities could operate only in a very narrow circle with direct instructions towards private education. Beyond this circle, only such mechanisms might be established, which might be able to identify and remedy the violation of fundamental rights caused by the unlawful conduct of private participants. Constitutional review could be an effective tool to further this ambition, however, either actor of these legal relationships has rarely used this instrument strategically so far.

From the Pridwin case, one may conclude that state authorities could vest private stakeholders with educational competences, but the final responsibility of respecting constitutional standards would still remain on the state, therefore, in the light of the rising social weight of private education, those tools might be exploited more effectively to secure the compliance in these institutions with all the constitutional requirements.

This might also overlap with the recent strand of the academic literature demanding a more robust protection of social rights through constitutional review (King, 2012). The private stakeholders such as the parents and school managements could contribute to the effectiveness of the monitoring mechanism by approaching courts or constitutional courts with reasonable claims, while courts and constitutional courts have the task of elaborating standards that can guide parents and school managements on how to tackle their conflicts without violating constitutional rights. Based on the Pridwin case, the following points might be provided for courts and constitutional courts hearing similar claims in the context of private education. Obviously, the validity of these considerations might depend on the country-specific circumstances, however, in our sense, wherever they are inwoked, these would have at least some relevance.

A) First, fulfilling the educational needs of students should be the primary consideration, the arguments of all other stakeholders should be seen in the light of this premise. All private contracts for educational services should be interpreted primarily as special frameworks for education as a public task, rather than contracts concluded between private parties under contractual freedom.

B) Nevertheless, second, the first assumption shall not mean that the basic educational needs of students enjoy automatic and absolute supremacy over other competing rights and interests in these controversies. Instead of this, the constitutional rights and interests of students as a group under distinguished constitutional protection; should be properly balanced in these rulings with the rights and responsibilities of parents, school management and state authorities respectively. The vulnerable situation of students should be reflected in these reasonings, especially when LCPSs are concerned with numerous students coming from underprivileged social layers. However, this should not eliminate per se the well-founded arguments of other stakeholders from the analysis.

C) Third, the autonomy of private schools should not be undermined. This model of education plays a crucial role in ensuring the flexibility and diversity of the educational system, as well as the autonomous, but controlled participation of private stakeholders in this public task which significance cannot be overestimated (Dieude, 2024, pp. 1–3). All forms of private education also fills with real content the freedom of choice for parents to decide from the education of their children. Therefore, private school managements should be made aware of the constitutional implications of their daily operations, however, undue and disproportionate expectations should not be imposed on them.

D) Lastly, constitutional remedies should be made easily accessible for parents with special weight of those contracted with LCPSs, without introducing unnecessary barriers. However, parents should use these initiatives responsibly as a final instance, when other available means of conflict resolution have been exhausted, or there would not be a chance to settle the controversy through other mechanisms. Then, constitutional remedies will remain as a final resort in the hands of the competent judicial bodies to enforce fundamental rights in the field of private education.

5 Conclusions

Our contribution aims to provide a contextual analysis of the Pridwin ruling of the South African constitutional court including the conceptualization of the concrete case, the review of the follow-up discussion; and the perspectives on lodging further constitutional remedies against the alleged misconduct of private schools. Our main thesis assumes that once private stakeholders take part in fulfilling constitutional tasks such as schooling, the same constitutional standards should be complied with by these actors if state authority were to be concerned, since no differentiation could exist between students based on the background of their service providers. We conclude from this that private schools should prioritize students' right to education in their work, while also duly considering the competing rights and interests of other stakeholders such as parents, private school management and state authorities. This stricter constitutional review should be limited to the most serious fundamental rights restrictions, so that it does not lead to further undermining of public education by disproportionately safeguarding its potential alternatives. At the same time, the essential content of fundamental rights must be ensured equally for all students.

The present contribution used the Pridwin judgment as a starting point, and aimed to revisit the role of constitutional review in safeguarding the right to education in the context of rapidly evolving private schooling. We are far from providing final answers to the unresolved questions raised by these complex legal relationships, however, the growing social weight of private education requires from us extensive analysis from the perspective of various disciplines to elaborate well-founded and feasible concepts.

This article focuses on the added value of constitutional law to this process, however, the constitutional discussion on these matters should not be isolated from the considerations of other scientific fields. These arguments should be read in the light of a broader discourse with the involvement of sociology, childcare, psychology, educational, management, and economic studies (Owens, 2002, p. 717). Constitutional arguments have rarely been discussed until now, especially in the Central European region (Poniatowski, 2021).

Nevertheless, in our view, the constantly evolving and highly internationalized educational landscape with increased plurality might lead to similar controversies in our region in the foreseeable future as well. For this reason, in our view, the analysis of Pridwin and the potential adaptation of its premises to the Central European specificities might have significant perspectives.

Referring to the Pridwin case as a starting point does not mean, that it is considered the most important constitutional ruling on private education in the recent years worldwide. This decision just invigorated the global discussion on the constitutional framework of private education, and our contribution aims at integrating Central Europe to this strand of the academic scholarship. We do not intend to provide definitive answers to the issues raised, but rather present some arguments stimulate further professional dialogue on private education and particularly its constitutional framework. As lots of students complete their education in private institutions, outlining with more exact terms the rights and responsibilities of each actor would contribute considerably to the transparency and the accountability of these forms of education (McTighe, 2004, 53). By publishing this contribution,we hope to have taken some small steps in this direction.

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