# Chapter II

**Review of the Concept of the Public Private Partnership**

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Chapter II

REVIEW OF THE CONCEPT OF PUBLIC PRIVATE PARTNERSHIP

All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter.  
– Edmund Burke¹

2.1 Introduction

This chapter contains a comprehensive discussion on the concept underlying in roots of Public Private Partnership (PPP in brief). An extensive review of the literature pertaining to Public Private Partnership has been reported here. The literature has been gathered from a variety of sources, including policy papers issued by the various governments and international agencies as well as the research papers and reports published by people working in the different fields of knowledge and services in various parts of the world.

The concept of the Public Private Partnership has been theorized before the construction of the formal definition of the term PPP. Various definitions of PPP found in the assorted literatures have been examined and discussed to understand the salient ingredients and generic issues of the PPP. This is followed by the identification of the characteristic features of the PPP in the diversified contexts. Further, the concept will be substantiated with the classification of the PPP in various types based upon the theory, approach, objectives, governance as well as the nature of the PPP in practice. However, we begin with the evolution of the PPP movement tracing its evolution in 70s of twentieth century until the time when the present study was undertaken.

¹ Speech delivered by, Edmund Burke, an Irish statesman, on conciliation with America, in 1775.
2.2 Historical Development of Public Private Partnership

Private participation in the delivery of public goods and services has existed in many countries for more than a century. The United Nations has observed that many public works viz. harbors and public markets as well as the collective infrastructure like public bath were conceded in ancient time. A book 50 of the Digests in public and private law, published in A.D. 530 is exclusively committed to public work. The said book endorses the very existence of the concessional law and a law governing public estate licensee. However, this practice was warped with the fall of the Roman Empire during the 5th century. During the middle age somewhere in 12th and 13th centuries, the said mechanism of public procurement was revived for the occupation of the land and the construction of new fortified town in France. The occupants of the village were collectively under emphatic contract to improve the village in transforming it to fortified towns. The English Crown in 1299 taking operational and financial risks had financed the development of silver mine in Devon. European sovereigns in 16th and 17th centuries granted various public works e.g. Public transportation, waste collection, road paving, public lighting, construction of canals, - riverbeds, - opera house and general stores.

During seventeenth century, the railway construction projects in United Kingdom were largely supported by the private people. Several toll roads established in United States of America between 1780 and 1900 are illustrations of private participation. In London alone, till 1820, there were six water companies supplying water to the public. At the beginning of the 19th century, almost all of the waterworks in the US as well as electricity utilities in Chile, Brazil and Mexico were private entities. Private developers from Britain and France built and operated many of the early system of railways in Argentina, Uruguay and Brazil. There had been a significant role of

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3 Cul, Quingbin and Lindly, Jay, Evaluation of Public Private Partnership Proposals, University Transportation Center for Alabama, 2010.
private bodies in the construction of Italy’s first toll road between Milan and Lakes, in 1924 as well as similar motorway constructed in France in 1950s. India also has an incredible history of private participation in the endowment of the public goods and philanthropic contributions for social cause.

One of the earliest evidence of contracting out of public services (on long term basis) is found with regard to the implementation of ‘the war on poverty’ program of the federal government in the United States of America during the 1960s’. The federal government’s success in implementing the social service program through contracting, led the proliferation of government sponsored non-profit services agencies. However, the macro economic dislocations of 1970s and 1980s regarding public debt created a pressure on various governments to revise the classical model of public procurement. Consecutively the ‘classical’ cooperation between the state and the private organization has led to the emergence of a new version of collaboration called public private partnership. This term ‘Public Private Partnership’ was first used in 1980, when the private sector was involved in the context of defining the tendencies of urban development phenomena in US and UK.

In India, subject to the macro-economic policies of the central government, the role of the state and private organizations differ in economic activities and their inter-se relationship. Hence, conferring to the instantaneous policy decision, the structure of the activities also varies for the same ostensible objectives of the economic growth and welfare. In post-independence era, the functions of the state were limited to defense, governance, utilities and related issues. While the commerce, trade and enterprise were flourished in the hands of private organizations. Further the state enjoyed the ability to levy and recover fees and taxes under such legal and policy framework. In the post-independence era, between 1947 and 1980, there

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4 ibid


necessitated planned economy for the nation building as well as the social and economic justice.\textsuperscript{8} During the First Five Year Plan, the government sought ‘community support’ for the construction of the irrigation canals. Thereafter in Seventh and Ninth Five Year Plans the government recognized the role of NGO’s/Voluntary Organizations for social development. Furthermore, the system of extending grant-in-aid to educational institutions by the Ministry of Human Resources Development, Government of India has been a decade old practice. The union government has estimated an investment of $ 320 billion in the infrastructure in the 10\textsuperscript{th} plan. Though this new form of private contribution has been prevalent for the last two decades only, around 758 PPP projects worth $ 3833 billion are currently under development across the country. Both central and state governments are hoping to build on this progress, both by scaling up the use of PPPs in the sectors where progress has already been made, and introducing it in sectors where few private projects have yet been realized. The major infrastructure development projects in the Indian state of Maharashtra (more than 50\%) are based on the PPP model. In the 2000s, other states such Andhra Pradesh, Karnataka, Madhya Pradesh, Gujarat and Tamil Nadu also adopted this model. Sector-wise, the road projects account for about 53.4\% of the total projects in numbers, and 46\% in terms of value. Ports come in the second place and account for 8\% of the total projects (21\% of the total value). Other sectors including power, irrigation, telecommunication, water supply, and airports have gained momentum through the PPP model.\textsuperscript{9}

In early 1990s, a new model of public service delivery was established, where in the role of public and private actors came to be redefined.\textsuperscript{10} By the end of 20\textsuperscript{th} century, the modern newfangled concept of PPP caught the imagination of the state as an alternative instrument of public procurement implemented in several countries across the world.

\textsuperscript{8} National Public Private Partnership Policy, draft for consultation, Department of economic Affairs, Ministry of Finance, GoI, 2010.
\textsuperscript{9} Facilitating PPP for Accelerated Infrastructure Development in India, Regional Workshop of Chief-Secretaries, Department of economic Affairs, Ministry of finance, Government of India and Asian Development Bank.
A rapid growth of PPP has also led the numerous scientific publications by researchers and policy documents issued by the political institutions. Nevertheless, the usual nature of such publications involves political arguments proclaiming PPP as a universal remedy against the constraints of the public sector and the government.

### 2.3 Concept of Public Private Partnership

A co-operative arrangement between the public sector and private organizations for the implementation of government scheme or program is popularly known as the Public Private Partnership, i.e. PPP. In other words, PPP may be described as an exceptional public–private cooperation framework model which has its own structure, contractual relations, clearly labeled implementation and expected benefits. It is a legal binding involving public and private sectors for the provision of assets and the recovery of services that allocates responsibilities and business risks among the various partners. The private sector invests its own funds, experience and initiative while implementing such program or project to provide public services, to improve services, or to create the social and financial capital needed for the provision of public services. Hence, PPP may be regarded as a model of public procurement based on long term relationships between the government or other public bodies and the private sector for the delivery of the services. PPP can also be viewed as a contractual arrangement whereby the resources, risks and rewards of both the public sector and private organizations are combined to provide greater efficiency, better access to capital and improved compliance with a range of government regulations regarding the environment and workplace.

The concept of PPP denotes an array of possible relationships established among public and private sectors for the primary purpose of execution of infrastructural
projects and other services. Typically, PPP is recognized as long term cooperative institutional arrangements between public and private actors to achieve various purposes. Since, there is a wide range of PPPs with diverse features and different activities, the many people do not accept a precise, universally accepted singular concept of PPP. There are extensive debates about the concept of PPP. A review of the academic literature illustrates that the concept of PPP as an ambiguous term with a number of differing meanings and usage in various contexts. The term PPP is found as diversified as the number of articles written about it.

Savas opined that PPPs present an example of government delegating its task to the private sector, irrespective of whether it does so by providing funding to private service providers or by outsourcing the delivery of public services and goods.

It is quite difficult to find the meaning and essence of PPP solely through the legal analysis, without paying any attention to the social inter-disciplinary connections. The formation of the PPP as a concept requires an integral approach. Khanom expounds four different perceptions of PPP, which includes the concept of PPP as a tool of governance, tool of financial arrangement, tool of development process, and just as a language game.

Hodge and Grieve perceive PPP as a tool of governance, which provides a novel approach to delivery of goods and services to citizens. Being a novel mode of governance and management, the focus in this perception is on the organizational aspect of the relationship. The common covenant focusing the inter-organizational arrangements includes cooperation between organizations and sharing of risks. Both

15 Supra note 11.
of these are the most important aspects of PPPs. Risk-sharing is viewed as an important incentive for both the public and private sectors since it is assumed that risk-sharing could benefit both the actors. The third prospect is that these types of cooperation can result in some new and better products or services that no single organization, either public or private, could produce better all by itself. Further, PPP a partnership involves a longer term commitment which may continue for a number of years, e.g. 10 to 30 years.

Second perception of PPP emphasizes on the financial relationship and perceives PPP as a tool of financial arrangements. Collin defines Public-Private Partnership as an arrangement between a municipality and one or more private firms where all parties are involved in sharing risks, profit, utilities and investments through joint ownership.\(^{17}\) This perception also emphasizes sharing among the partners viz. risk sharing, profit sharing and sharing of utilities. Besides the financial investment of the organizations concerned, it underlines the joint ownership of organizations in a PPP project.

The notion of development strategy of PPP is widely accepted by most of the researchers. Since the PPP maximizes benefits for development through collaboration and enhanced efficiency, this has emerged as a new development arrangement. The arguments signifying PPP as a tool of development process is supported by ADBI studies\(^ {18}\). The World Bank defines\(^ {19}\) PPP as ‘joint initiatives of the public sector in conjunction with the private, for profit and not-for-profit sectors’, also referred to as the government, business and civic organizations. In these partnerships, each of the actors contributes resources (finance, human, technical and intangibles, such as information or political support) and participates in the decision-making process. This perception of PPP places the stress on the structure of partnership. One is the partnership for the implementation of the


previously agreed objectives by the partners. Such objectives are usually conceived through the communication and negotiations. Further, the partnership aimed at undertaking activities to accomplish specific commitment. Each of the partners performs its role to overcome the weakness of the other partner. The peculiar feature of this conception is about the nature of the partners. It includes different community group such as local government, Institutes of R&D (research and development), Community groups, NGOs in addition to the national government.

The fourth perception about PPP is that it is a sort of critique on the use of the terminology. The opponents of the privatization look at PPP as a language game about the back-door entry of the private sectors into the dominions of the public sector. Stern and Harding\textsuperscript{20} characterize PPP as a ‘loose’ term and Bovaird\textsuperscript{21} mentions it ‘just a fashionable word’. It is alleged that PPP is just designed to cloud a strategy encouraging the private providers to supply public services at the expense of the public organizations. Grieve indicates the dangers that just like another catchy piece of terminology; the government would keep off the attention of the people and continue contracting of public services in the name of PPP.\textsuperscript{22} Thus, the term PPP is often used to avoid the political controversy regarding the privatization. Sometimes it is also been used to entice the partners for the benefits through the catchy words.

Summarily, the term PPP may be conceptualized drawing upon common features derived from in all of the above perceptions of PPP, and these may be enumerated as follows.

(i) There exists collaborative activities and cooperation between partners.

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(ii) The public sector is involved in partnership with the private organization which include business houses, not-for profit bodies and development authorities as well as the international organizations.

(iii) There is a commitment animated for the long term duration.

(iv) All of the above features are related to the delivery of the specific goods or service.

Clarity in the concept of PPP helps to devise the strategy on PPP. Strategically, the vision, directions, objectives, purposes, cooperation model, etc. of the proposed structure in the diversified environmental parameters requires proper formulation of PPP scheme. Unified terminology and implementation measures are required to be described.

We shall now examine the various forms of definition for PPP in the next section.

2.4 Definition of Public Private Partnership

Due to complexities, multi-dimensionality and changeability of the concept, there does not exist universally acknowledged and convincing definition of PPP. Hence, there are numerous definitions, global in meaning and embracing all forms of cooperation between public and private sectors.

2.4.1 Definitions by International Organizations

In order to identify the cardinal attribute features incorporated while defining PPP, this sub-section review the definition of PPP stated by various international organizations.
In the United Nations, PPPs are defined as ‘voluntary and collaborative relationships between various parties, both state and non-state, in which all participants agree to work together to achieve a common purpose or undertake a specific task and to share risks and responsibilities, resources and benefits’\textsuperscript{23}.

The World Bank\textsuperscript{24} defines PPP as ‘joint initiatives of the public sector in conjunction with the private, for profit and not-for-profit sectors’, also referred to as the government, business and civic organizations. In these partnerships, each of the actors contributes resources (finance, human, technical and intangibles, such as information or political support) and participates in the decision making process.

According to the Asian Development Bank\textsuperscript{25}, the term ‘Public–Private Partnership’ describes a range of possible relationships among public and private entities in the context of infrastructure and other services. PPPs present a framework that—while engaging the private sector—acknowledge and structure the role for government in ensuring that social obligations are met and successful sector reforms and public investments achieved. A strong PPP allocates the tasks, obligations, and risks among the public and private partners in an optimal way. The public partners in a PPP are government entities, including ministries, departments, municipalities, or state-owned enterprises. The private partners can be local or international and may include businesses or investors with technical or financial expertise relevant to the project. The World Bank remarks that PPPs can follow a variety of structures and contractual formats. However, all PPPs incorporate three key characteristics :

(a) A contractual agreement defining the roles and responsibilities of the parties,

(b) Sensible risk-sharing among the public and the private sector partners, and


\textsuperscript{25} Public Private Partnership Handbook (Asian Development Bank)

(c) Financial rewards to the private party commensurate with the achievement of pre-specified outputs.

A World Bank Group on ‘Public-Private Infrastructure Advisory Facility’ states that PPP involves the private sector in aspects of the provision of infrastructure assets or of new or existing infrastructure services that have traditionally been provided by the government.

According to International Monetary Fund, public-private partnerships refer to arrangements where the private sector supplies infrastructure assets and services that traditionally have been provided by the government. In addition to private execution and financing of public investment, PPPs have two other important characteristics: there is an emphasis on service provision, as well as investment, by the private sector; and significant risk is transferred from the government to the private sector. PPPs are involved in a wide range of social and economic infrastructure projects, but they are mainly used to build and operate hospitals, schools, prisons, roads, bridges and tunnels, light rail networks, air traffic control systems, and water and sanitation plants.

Organization for Economic Cooperation and Development i.e. OECD defines a public-private partnership as an agreement between the government and one or more private partners (which may include the operators and the financiers) according to which the private partners deliver the service in such a manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners.

As per the European Commission, the term Public Private Partnership is not defined at community level. The term, in general, refers to forms of co-operation between public authorities and the business-world which aim to ensure the funding,

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26 Supra note
27 International Monetary Fund, IMF 2006: 1 and 2004: 4
construction, renovation, management and maintenance of an infrastructure of the provision of a service. While the choice of PPP structure is limitless in terms of financial and legal forms, the Commission is of the view that all PPPs can be defined in relation to the rules governing the choice of private partners and the selection and application of public procurement procedures.

According to European Investment Bank, 'public-private partnership' is a generic term for the relationships formed between the private sector and public bodies often with the aim of introducing private sector resources and/or expertise in order to help provide and deliver public sector assets and services. The term PPP is thus used to describe a wide variety of working arrangements from loose, informal and strategic partnerships, to design-build-finance-and-operate (DBFO) type service contracts and formal joint venture companies.

The World Economic Forum delineates PPP as a voluntary alliance between various actors from different sectors where both agree to work together to reach a common goal or to fulfill a specific need that involves shared responsibilities, means competencies and risks.

These different definitions reveal the following as the crucial elements of PPP:

(a) A contract between the government body and the private organization is the primary feature of PPP.

(b) There exist substantial risk transfer and the reward to the private organization for the provision of the public services as well as the public infrastructure.

(c) The investment from the private organization is not specific in most of the cases.

(d) More emphasize is on the delivery of the service or the provision of the infrastructure instead of the asset creation or investment.

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29 European Investment Bank, 2004:2
(e) The nature of the remuneration to the private organization is not specific in any of the definition. It could be through the user charge or the payment by the government.

2. 4. 2 Definitions by Developed Countries

Various competent authorities, to designate PPP project under the respective governments, specify their own set of essential condition while defining PPP in the context of their own objectives.

In United States of America, the ‘National Council for PPP’ is a think tank which represents collaboration between public sector and private sector entities. The council defines PPPs as a contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.

The Department of Transportation of USA treats PPPs as essentially a form of procurement. Unlike conventional methods of contracting for new construction in which discrete functions are divided and procured through separate solicitations, PPPs contemplate a single private entity, typically a consortium of private companies, being responsible and financially liable for performing all or a significant number of functions in connection with a project. In transferring responsibility and risk for multiple project elements to the private partner, the project sponsor relaxes control over the procurement, and the private partner has the opportunity to earn a financial return commensurate with the risks it has assumed.

In United Kingdom\textsuperscript{32}, Public private partnerships are defined as arrangements typified by joint working between the public and private sector. In the broadest sense, PPPs can cover all types of collaboration across the interface between the public and private sectors to deliver policies, services and infrastructure. Where delivery of public services involves private sector investment in infrastructure, the most common form of PPP is the Private finance initiative.

In Australia PPP is defined\textsuperscript{33} as a procurement method, those are the part of a broader spectrum of contractual relationships between the public and private sectors to produce an asset and/or deliver a service. They are distinct from early contractor involvement, alliancing, managing contractor, traditional procurement (design & construct) and other procurement methods.

The ‘Canadian Council for Public-Private Partnerships’\textsuperscript{34} defines Public Private Partnership as a cooperative venture between the public and private sectors, built on the expertise of each partner that best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards. The term "public-private partnership" carries a specific meaning in the Canadian context. First, it relates to the provision of public services or public infrastructure. Second, it necessitates the transfer of risk between partners.

‘Partnerships British Columbia’\textsuperscript{35}, a company owned by the British Columbia provincial government in Canada, defines PPP as a legally-binding contract between government and business for the provision of assets and the delivery of services that allocates responsibilities and business risks among the various partners. In a PPP arrangement, government remains actively involved throughout the project’s life cycle. The private sector is responsible for the more commercial functions such as project design, construction, finance and operations. A public private partnership is a partnership arrangement in the form of a long-term performance-based contract

\textsuperscript{32} HM Treasury (http://www.hm-treasury.gov.uk/ppp_index.htm)

\textsuperscript{33} National Public Private Partnership Policy Framework, Infrastructure Australia, Australian Government (December 2008)

\textsuperscript{34} www.pppcouncil.ca/aboutPPP_definition.asp

\textsuperscript{35} Understanding Public Private Partnerships, Partnerships British Columbia (March, 2003)
between the public sector (any level of government) and the private sector (usually a team of private sector companies working together) to deliver public infrastructure for citizens. A public private partnership could be any kind of infrastructure or service such as a new hospital or bridge or highway, a new type of technology that delivers services in a faster and more efficient manner, or a new federal government building – anything that citizens typically expect their governments to provide.

In Singapore, PPP refers to long-term partnering relationships between the public and private sector to deliver services. It is a new approach that Government is adopting to increase private sector involvement in the delivery of public services. With PPP, the public sector will focus on acquiring services at the most cost-effective basis, rather than directly owning and operating assets. For example, if PPP is used to develop a water treatment plant, the private sector will be engaged to not only construct the plant, but also to design, operate, maintain and raise financing to build the plant to supply water to the public agency. Hence, instead of owning and operating the water treatment plant, the public agency purchases the water directly from the private sector. This means that the private sector has more room to introduce innovation into the delivery of public sector services.

According to the Draft Public Private Partnerships Law of Brazil public-private partnership contracts are deemed to be agreements entered into between government or public sector entities and private sector entities that establish a legally binding obligation to establish or manage, in whole or in part, services, undertakings and activities in the public interest, in which the private sector partner is responsible for the financing, investment and management. According to the draft law, a public-private partnership may include (i) The total or partial assigned provision or management of a public service, which may or may not be preceded by a public works project; (ii) The performance of an activity within the jurisdiction of the government or a public sector entity, which may or may not be preceded by a public works project (iii) Carrying out a public works project for the government or a public sector entity and (iv) Carrying out a public works project for sale, rental or lease to the government or to a public sector entity.
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The government of Republic of Ireland\textsuperscript{36} defines PPP as an arrangement between the public and private sectors (consistent with a broad range of possible partnership structures) with clear agreement on shared objectives for the delivery of public infrastructure and/or public services by the private sector that would otherwise have been provided through traditional public sector procurement. A particular arrangement or project may constitute a PPP where the following key characteristics are present:

(i) Shared responsibility for the provision of the infrastructure or services with a significant level of risk being taken by the private sector, for example, in infrastructure projects, linking design and construction with one or all of the finance, operate and maintain elements;

(ii) Long-term commitment by the public sector to the provision of quality public services to consumers through contractual arrangements with private sector operators;

(iii) Better value for money and optimal allocation of risk, for example, by exploiting private sector competencies (managerial, technical, financial and innovation) over the project’s lifetime and by promoting the cross-transfer of skills between the public and private partners.

The authorities of South Africa\textsuperscript{37} deliberate the PPP as a commercial transaction between an institution and a private party in terms of which the private party –

a. Performs an institutional function on behalf of the institution; and / or

b. Acquires the use of state property for its own commercial purposes; and

c. Assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property; and

\textsuperscript{36} Overview of Public Private Partnership Framework, Ministry of Finance, Government of Northern Ireland (November, 2001)

\textsuperscript{37} Treasury Regulation 16: Public Private Partnerships (2004), issued in terms of the Public Finance Management Act 1999

d. Receives a benefit for performing the institutional function or from utilizing the state property, either by way of:

(i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a national government business enterprise or a provincial government business enterprise, from the revenues of such institution; or

(ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or

(iii) a combination of such consideration and such charges or fees.

We shall proceed now to study the versions of PPP definitions in the Indian context.

2. 4. 3 Definition of PPP under Indian context

During last one and half decades there has been a remarkable growth of PPP projects in India. This has become possible due to the institutional initiatives and some policies adopted by the central government. Government of India through its Department of Economic Affairs under the Ministry of Finance has formulated PPP Appraisal Committee. The committee is responsible to streamline the process of appraisal and approval of PPP projects.

Under the Viability Gap Funding (VGF) Scheme, the Ministry of Finance has provided the guidelines for the financial support to Public Private Partnership in infrastructure. The said guidelines define PPP as a project based on a contract or concession agreement, between a government or statutory entity on the one side and a private sector company on the other side, for delivering an infrastructure service on payment of user charges.

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38 Supra Note
However, the definition given under the scheme and guidelines for the India Infrastructure Project Development Fund is little more specific. It states PPP as, Partnership between a public sector entity (Sponsoring authority) and a private sector entity (a legal entity in which 51% or more of equity is with the private partner/s) for the creation and/or management of infrastructure for public purpose for a specified period of time (concession period) on commercial terms and in which the private partner has been selected through a transparent and open procurement system.

Nevertheless, there is minute deviation in the definition provided by some of the state governments, though the central idea remains the same. The state of Gujarat under Gujarat Infrastructure Development Board Act, 2006, mentions PPP a contract in the nature of the concession. The said Act defines concessions to mean as a grant of financial assistance or conferment of the right on either the government property or the public assets to any person other than the government agency. The terms and conditions for such rights and financial assistance are to be specified in the concession agreement. As per the aforesaid Act, depending upon the type of contract and these terms of specific concession, the concessionaire may or may not charge the user fee.

The state of Haryana refers PPP as a long term contractual partnership between public and private sector agencies specifically targeted towards financing, designing, implementing and operating infrastructure facilities that are traditionally provided by the Government and/ or its entities.

The state of Andhra Pradesh under the Andhra Pradesh Infrastructure Development Enabling Act, 2001, provides the definition of PPP as investment by private sector participant in infrastructure projects of the government agency or the local authority in the state.

Through the analysis of above mentioned versions of the definition for PPP, a broad definition may be given as follows,
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“Public Private Partnership means an arrangement between a government / statutory entity / government owned entity on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time, where there is well defined allocation of risk between the private sector and the public entity and the private entity receives performance linked payments that conform (or are benchmarked) to specified and pre-determined performance standards, measurable by the public entity or its representative.”

The Ministry of Finance has accepted this version as an umbrella definition\(^{39}\), which could be applied to diverged PPP projects with differed objectives. Following are seven essential components of this definition.

(1) Arrangement with private sector entity: The asset and/or service under the contractual arrangement will be provided by the Private Sector entity to the users. An entity that has a majority non-governmental ownership, i.e., 51 percent or more, is construed as a Private Sector entity\(^{40}\).

(2) Public asset or service for public benefit: The facilities/services being provided are traditionally provided by the Government, as a sovereign function, to the people. To better reflect this intent, two key concepts are elaborated below:

(a) ‘Public Services’ are those services that the State is obligated to provide to its citizens or where the State has traditionally provided the services to its citizens.

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\(^{39}\) Approach Paper on defining Public Private Partnerships, Department of Economic Affairs, Ministry of Finance, Government of India, February 2010, page no. 6

\(^{40}\) Private Sector Company means a company in which 51% or more of the subscribed and paid up equity is owned and controlled by a private entity. Private sector entity means - In case of a Company, one that is not within the purview of Section 617 and 619 B of the Companies Act, 1956. For other entities, those which are not controlled by the Government (‘control’ means the ownership, directly or indirectly through subsidiary(ies), of more than one-half of the voting power of the enterprise).
(b) ‘Public Asset’ is that asset the use of which is inextricably linked to the delivery of a Public Service, or, those assets that utilize or integrate sovereign assets to deliver Public Services. Ownership by Government need not necessarily imply that it is a PPP.

(3) Investments being made by and/or management undertaken by the private sector entity: The arrangement could provide for financial investment and/or non-financial investment by the private sector; the intent of the arrangement is to harness the private sector efficiency in the delivery of quality services to the users.

(4) Operations or management for a specified period: The arrangement cannot be in perpetuity. After a pre-determined time period, the arrangement with the private sector entity comes to a closure.

(5) Risk sharing with the private sector: Mere outsourcing contracts are not PPPs.

(6) Performance linked payments: The central focus is on performance and not merely provision of facility or service.

(7) Conformance to performance standards: The focus is on a strong element of service delivery aspect and compliance to pre-determined and measurable standards to be specified by the Sponsoring Authority.

However, for the good practice of PPP only these components do not suffice. In addition to these, it is desirable to include following parameters also for the more versatile form of PPP.

i. Allocation of risks in an optimal manner to the party best suited to manage the risks;

ii. Private sector entity receives cash flows for their investments in and/or management of the PPP either through a performance linked fee payment structure from the government entity and/or through user charges from the consumers of the service provided;
iii. Generally a long term arrangement (20-25 years) between the parties but can be shorter term dependent for instance on the sector or focus of PPP, for example, a management contract focusing on select operations and maintenance functions of a water distribution network;

iv. Incentive and penalty based structures in the arrangement so as to ensure that the private sector is benchmarked against service delivery;

v. Outcomes of the PPP are normally pre-defined as output parameters rather than technical specifications for assets to be built, though some minimum technical specifications might be identified; for example, an outcome parameter might be "the project must provide 24x7 water supply of a certain water quality standard to the consumer base", rather than identifying the size and capacity of treatment plants etc. This would leave room for innovation and technology transfer in project execution / implementation by the private sector entity, being one of the drivers of PPPs.

The approach paper also provides the exclusionary list, indicating the types of arrangements which should not be construed as PPP. The list includes:

a) Any Engineering Procurement Construction (EPC) contract, whether payments are deferred or on percentage completion of work or other terms, and where the management or operations and maintenance of the asset is not retained by the private sector after three years from completion of construction;

b) Any arrangement for supply of goods or services for a period of up to three years;

c) Any arrangement or contract that only provides for a hire or rent or lease of an asset without any performance obligations and other essential features of a PPP.
2. 5  Characteristic Features of Public Private Partnership

This sub-section examines the various aspects of PPP viz. ingredients of PPP contract, peculiar characteristics, generic issues of its governance, as well as theoretical conceptualization of public private partnership.

2. 5. 1  Ingredients of Public Private Partnership

Van Ham and Koppenjahn define PPP as [c]ooperation of some sort of durability between private and public actors in which they jointly develop products and services and share risks, costs, and resources which are connected with these products.\(^{41}\) Arnold ponders that too many definitions of PPP are due to its euphemistic constituents. Instead of aiming a single handy definition, a catalogue of PPP immanent ingredients may be enumerated as under.

(1) Since, the PPP is an interactive relationship between public and private partners on the co-operational basis, it act as an intermediary between these two sectors.

(2) Since the central aspect of the PPP is its life cycle including planning, finance, building, operation and utilization, the collaboration focuses on durability and process orientation.

(3) Since, the private partner has to carry out a substantial part in the task fulfillment so that the basic idea of task sharing is realized.

(4) As there is sharing of responsibilities between the public and private sector, the development of community responsibility is been reflected in PPP projects.

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(5) Despite both the partners having different interests, they are structurally coined in such a manner that they follow the compatible goal.

(6) The tenders inviting the proposal are output oriented rather than the input orientation. It means that the public authority has concern to determine what the result should be instead of regulating how the performance is realized.

### 2.5.2 Peculiar Characteristics of Public Private Partnership

A government of India, through its Department of Economic Affairs under the Ministry of Finance has developed a toolkit forming a consulting consortium with Economic Consulting Associates (ECA) of London, UK and CRISIL Risk and Infrastructure Solutions Limited. The said toolkit characterizes PPP as follows,

1. The private sector is responsible for carrying out or operating the project and takes on a substantial portion of the associated project risks.

2. During the operational life of the project the public sector’s role is to monitor the performance of the private partner and enforce the terms of the contract.

3. The cost of the private sector may be recovered in whole or in part from charges related to the use of the services provided by the project, and may be recovered through payments from the public sector.

4. The payments of public sector are based on performance standards set out in the contract.

5. More often the private sector will contribute the majority of the project’s capital costs, although this is not always the case.

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2. 5. 3 Generic Issues of Public Private Partnership

The acceptance PPP model requires the healthy environment to attract the private money into public project. At the same time it also requires a system of check and balance which could prevent the public resources going into the private projects. Studying from developed and developing economies of different countries, Lakshmanan suggests following six generic issues vital for the better accomplishment of PPP projects43.

(a) Transparency: The process of the PPP execution ordinarily has various stages, which are quite complicated depending upon varied policies and scheme of the government. The process of bidding has to be transparent enough to avoid the allegations of undue favor to any particular private organization. While awarding contract, the terms of concession agreement needs to be protective of public interest.

(b) Project Appraisal: Technical aspects of the project viz. soundness, viability return, etc. required to be clear on hand before its execution under PPP. The proposed project has to pass through the appraisal process to judge the necessity of private partnership. The choices whether the project to be implemented by government or private organization or both may be assessed rigorously before operating the project under PPP. Realization of the PPP project is likely to thrive when there is a strong environment supporting the public sector. Common obstacles to PPP implementation ought to be identified in advance and the project should not be scheduled as a PPP, if such obstacles are insurmountable. However, in case, it is required to proceed under PPP, these obstacle need to be factorized and thorough plan should be developed to overcome them. A systematic appraisal of the project before its execution is quite important to avoid ill consequences of the PPP project.

(c) Risk Allocation: Public projects are prone to various kinds of risks viz. financial risk, market risk, demand risk, construction risk, residual value risk, etc. The risk transfer is the indispensible element of PPP project. The allocation of the risk should be unambiguous, to avoid the unnecessary litigations. Assumption of too many risk create unwarranted pressure on the private sector and prevent potential private partner from the participation. On the other hand under-estimation of the risk adversely affects the cost and progress of the project. Hence, these deferred risks may be shared between the partners who are best able to manage them. Such an arrangement would minimize the cost and improve the performance. The partners of the project can distress the amount of risk by the level of influence they have over the event and the level of information they have about the present and future of the project. Since, the public and private sectors are different in the types of influence as well as information resources, they can control risks in different ways from each other. Public sector may assume social-environmental and political risks whereas the financial and commercial risks may be transferred to the private sector.

(d) Government guarantee: Before entering into a venture, a private investors, usually look for a Government guarantee for their investment as well as the return there under. On fiscal point of view, the Government guarantee is not advisable. Nevertheless, explicit guidelines and transparent policies regarding the Government guarantee provide clear perception to the private investors and encourage participation even in the risky area of investment. The frequent changes in the formula of the Government guarantee dampen the private investment in PPP project.

(e) Regulatory Independence: Mostly, the PPP project are under the scanner of multiple regulating authorities. The implementation of the policies get adversely affected because of the disagreeement between the regulatory authorities. Hence, the regulating independence is vital for the speedy realization of PPP project. A single autonomous agency regulating the
activities would reduce the risk of arbitrariness and ad-hoc policy interventions which may arise under multiple authorities.

(f) Corporate governance: A proper dealing of the public interest with all the above generic issues taken into consideration would lead to a good governance of the project. Unlike the government project, a PPP project has to be operated under the framework of corporate governance. Accurate and timely disclosures of all material matter are crucial for the economic health of private sector and social health of the public sector. Matching with the benchmark of best corporate governance practices, the faith can be developed among the private sector for their participation in PPP.

2. 5. 4 Governance of Public Private Partnership

Partnerships under PPP employ non-hierarchical method instead of top-down or authoritative modes of steering. The process of decision making is based on collaboration instead of coercion. These features of partnership lead the management of partnership as well as the project in an innovative mode of governance. Governance comprises the mechanism, processes and institutions through which citizens and group articulate their interests, exercise their legal rights, meet their obligations and mediate their difference. According to the UNDP both economic and political aspects of governance emphasize decision making process which affect the economic activities, its relationship with other interested groups and also the policy formulation process.44

David Hay, to understand the governance of PPP project, deliberates various means of governance structure used to manage inter-organizational partnership.45 Out of large number of definitions of governance available in the literature the version best fitting in the context of PPP is that given by Palay who defines the governance as a


shorthand expression for the institutional framework in which contracts are initiated, negotiated, monitored adapted and terminated. In a much broader sense, the governance is a mode of organizing transaction, which may have two extreme conditions as discrete transaction and hierarchical transaction. In case of discrete transaction, there is no control of the partners over each other, while in later case there is a complete control over the partner. Since, the management of PPP is about the long-term inter-organizational partnership either the formal or informal mechanism of governance can be applied. Alternately these may be regarded as contractual governance and relationship governance. Though, in practice a combination of these two, a hybrid mechanism of governance is observed.

Contractual governance is considered a formal, legal and economic governance strategy widely held in PPP projects. However, there are several non-legal sanctions in PPP relationships; hence relationship governance is also equally popular for the governance of PPP project. These non-legal sanctions are pragmatic to accomplish the commitments of public as well as private sector in PPP relation. Hence, relational governance is defined as the strength of the social norms present in the exchange or transaction. The relationship governance mode also uses extra-legal devices which include social norms, influence of reputation in addition to the terms of the contract. The non-legal governance devices also have influence over the PPP relationship. For an example, the performance of a buyer-seller relationship may suffer under the detailed legal contract without the consideration to social relationship and extra-legal devices in under the environment of high uncertainty. Thus, a relational governance and contractual complexity have been found to function as complementary during the assessment of performance of the partnership.

46 ibid
Above and beyond these, a mode of explicit contract governance is pointed out by Stinchcombe as a structure with legitimate authority, with a manipulable incentive system, a method for adjusting costs, quantities and prices, with a structure for dispute resolution, and with a set of standard operating procedures looks very much like a hierarchy. All these features are routinely obtained by contracts between firms in some sector of economy. This version of governance best fits with most of the PPP in the present era. An innovative approach where a formal contractual and informal relational governance mechanisms are integrated using them simultaneously to reinforce each other.

### 2.5.5 Theoretical aspect of Public Private Partnership

Under PPP project the management of the relationship is quite crucial for its effective realization. In the management science various aspect of such relationships are studied relying upon the theories of business management. Since, the management of PPP project is one of the key factors deciding its success; it is relevant to examine the PPP through an eye-piece of these theories.

(a) Agency Theory: Since, this theory is based upon the dyadic contractual relationship between the principal and agent, it is also popular as the principal-agent theory. It refers to an affiliation between the principal and agent with emphasize on the basic task of the principal i.e. to choose the agent and control the agency. As the principal depends on the agent to undertake some form of action on the principal's behalf, the agency relationship is a significant component of almost all exchange. However, because of own self-interest involved the agent act to maximize the outcome without extending effort towards achieving the principal’s objectives. Nonetheless, the impact of the society and the social restrictions cannot be overlooked against the self-interest of the private actor. For the optimal

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48 supra Hay, David  

agency design, the contract should regulate the perspectives of agency and grant incentives to decrease any attitudinal differences; hence the interest of the agent may be aligned with that of the principal. Principal’s monitoring can ensure the balance between contractual obligations along with compensation governance mechanism and their impact on the parties’ relationship. This is how this theory focuses on the outcome associated with the decision taken about the extent of monitoring activity and the manner in which the performance of the agent is rewarded.

(b) Transaction Cost Economic Theory : The foremost decision query regarding PPP is, ‘whether to make or buy’ the required facility. The response to this basic question is rooted in transaction cost economic (TCE) theory. Under PPP, it is also relevant to the monitoring and enforcement activity of the public sector. This theory identifies the rational reasons for choosing the means of governing transactions. Transaction costs are the costs of running the system and include *ex ante* cost such as drafting and negotiating contracts and *ex post* costs such as monitoring and enforcing contract. Further it also includes direct cost of managing the relationship and the occasional cost of making inferior governance decisions. Meanwhile the transaction’s assets include specialized asset, specialized skills and the combination of both. The degree to which these assets can be redeployed to an alternative use without scarifying the productive value is referred as asset specificity. As the asset specificity increases, the ease of transfer to alternative user decreases, bilateral dependence increases with a corresponding increase in the parties contracting hazards. Dyer and Chu suggests that in developing the approach to the management of inter-organizational partnerships, the partners should consider the use of hierarchical and relational governance mechanism. Because the uniqueness of relational governance minimizes transactions costs as well as create value in the exchange relationship which enables them to achieve optimum solution. Thus, this theory emphasize that contract should account for both personal and social expenses while reaching a contract and further noted that the process of contracting could be costly
because it includes cost of structuring, bonding, monitoring, negotiation and residual loss due to principal agent problem.

(c) Moreover, PPP is also been substantiated by evolutilonal theory which contemplate PPP for its efficiency and prudent utilization of available resources targeting at reducing imitation in the overhead expenses. In the same manner the exchange and dependency theory emphasis on the integration of disjoined policies regarding the management mechanism, financial arrangement and inclusive development.

2.6 Distinctive Features of Public Private Partnership

Different studies use PPP concept in different meaning and context, which lead to perplexities about the kinds of partnership, their relations and management. In this section I report my observations regarding the classification of PPP based up on different field of research and knowledge. Let us first identify the characteristic elements of PPP which distinguish it from the traditional approach of procurement and the privatization.

2.6.1 Distinction from Traditional Approach

Since long the private organizations have been involved in the process of public procurement. There are numerous examples of building roads, school, bridges, hospitals, school as well as providing management and maintenance services. However, in case of PPP these separate arrangements are bundled into a single contract and a private partner is charged not for building the infrastructure, rather for the flow of the infrastructure services for the given period of time.50

Traditionally government used to engage the private sector counterparty to construct an asset, or deliver equipment, whereas PPP emphasizes on the provision of service and the value of money over the length of the relation. Apart from these there are some basic differences in the procedures and outcome of PPP compared to that of traditional procurement.

(a) In case of the traditional approach the respective department of the government request the works department to design their desired facility. While in case of PPP the concern department itself defines their desired facility in terms of the required service.

(b) Traditionally the works department after the planning and approvals invites tenders from private contractors either for the construction or building the facility as per the design. Whereas in PPP the concerned department prepare an output based performance specifications and invite the proposal from the private organizations for the design, finance, building, operation and maintenance of the facility for a specific period.

(c) In both approach the government department; thereafter conduct the consultation with general public and legislators for the financial endorsement. However, in traditional approach, the successful bidder is one who satisfies the minimum requirements of the concerned department, with respect to the quality of service or the product. The evaluation of tender is based up on technical as well as cost aspect. On the other hand in case of PPP, the successful bidder is one who satisfies the mandatory requirement specified with respect to the ability of the facility to deliver the required service, quality of design, construction and operation as well as the terms which provide best value for money.

(d) Once the contract has been awarded the works department monitor the construction process under the traditional approach. Conversely, in PPP procurement, the advisors of the concerned department deal solely with the
consortium only. And the consortium has to manage the specialist contractor and involve them in the process of procurement.

(e) When the traditional project is complete the payment is made after the inspection made by the works department and its report of satisfaction. However on the completion of the PPP project either the concern department or third party validate the fitness of the facilities established for the purpose and then the payment is made to the private consortium.

Conclusively PPP provides the integration of design, construction, operation, maintenance and refurbishment costs with potential to achieve value for money. There are greater opportunities available to private partner to fashion innovative solution to meet various risks at each phase. Since, the functional briefs are finalized before the tendering; the contractor bears design risk as well as the fitness of the project for the predefined purpose. Further, the operational and maintenance standards are agreed and the cost is been approved for the period of concession, there exist the certainty of contract value before the construction.

2. 6. 2 Distinction from Privatization

A PPP is institutionalized form of cooperation of public and private partners, which on the basis of their own indigenous objectives, work together towards a joint target. Thus, PPP imply a sort of collaboration to pursue common goals, while leveraging joint resources and capitalizing on the respective competence and strength of the public and private partners.

Since, PPP were originally treated as a derivative of the privatization movement, some critique allege that it is just a language game to cloud the privatization policy of the government. A proponent of privatization Savas elaborate the term PPP broadly

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“malleable as a form of privatization”. Other contention integrating PPP with privatization is that PPP enables the private organizations to get market share of public service provision. Further allegation, in third world development is donor agencies often promote privatization and government subsidizes to private entrepreneurs in the name of building PPPs. However, privatization and subsidies should not be confused with PPPs.

PPP is neither privatization nor it could be described as partial privatization. Privatization is the process of shifting the ownership or management of service or activity, in whole or part, from the government to the private sector. However, the definition of the privatization itself depends on which country is involved. In United States of America, any shift of providing public service from public to the private sector is referred as privatization. While in United Kingdom, a clear transfer of the public asset to the private ownership is referred as privatization. Further, the privatization may be of various forms including outsourcing, service shedding, franchise, management contracts, corporatization, long term lease, asset sales, disinvestment, etc. Privatization indeed did not result in massive reductions in national debts nor did the private sector demonstrate the universal superiority in running business that had provided the philosophical underpinnings of the privatization process. In developing countries, privatization of the public services has led to the exclusion of the poor. Further the privatization has severe implications on the fundamental issues of equity and access. There is a widespread consensus that the unfettered privatization agenda of economic reforms is flawed and has not worked. Therefore, PPPs are seen as a way of involving the private


sector in projects of national importance, while avoiding the problem associated with the extensive privatizations.$^{54}$

Michael opined that PPP in practical sense represents the form of collaboration under a contract by which public and private sectors, acting together, can achieve what each acting alone cannot. Lakshmann identified following aspects of procurement distinguishes PPP from privatization.$^{55}$

(i) Delivery of service: In case of privatization the private sector is entirely responsible for the delivery of the service as well as its funding. While such responsibilities are fully retained by the government in PPP project.

(ii) Ownership: Under privatization, the ownership rights are sold to the private sector along with associated benefits and cost. Whereas the legal ownership of asset is retained by the public sector.

(iii) Decision making: The nature and scope of the services under privatization is determined by the private provider, while in case of PPP, both party contractually determined the same defining the terms and condition of the contract.

(iv) Risk and reward: Typically risks and rewards are shared among the partners of PPP i.e. government and the private organization. However, in case of privatization, all the risks of the project rest with the private sector only.

Thus, PPP projects are neither nationalized nor privatized, rather they operates at the boundary of the public and private sector. Some conceive PPPs as representing middle path between state capitalism and privatization. Elizabeth Wang, World


$^{55}$ Supra
Bank,\textsuperscript{56} suggest the following figure indicating the extent of private sector in PPP project

![Figure 2.1: Extent of Private Participation in PPP Project.](image)

Thus, politically the PPP represent a third way in which government deliver some public service in conjunction with private sector. Nevertheless the political power of the PPP label is strong and immediately it seems to dissolve traditional left-right ideological debates about pro-against private service delivery and ownership of public assets.\textsuperscript{57}

\section*{2. 6. 3 Classification of PPP based on Partners}

PPP is an arrangement of role and relationship where the public and private sector combine complementary resources to achieve definite outcome. Most of the time, the personal interests of both the sectors are diverged. Their distinct differences persist in the incentive, mandates and system of operation. Hence, PPPs are also classified on the basis of the actors/partners involved in it. In many versions of PPP the terms public and private lack the specificity. An individual agent or


organizational entities of which the main mandate is to undertake activities for the generation of social returns are referred as public sector.

However, there is difference of opinion among the scholar while defining the private sector. Broadwater and Kaul define private body in PPP as an entity whose main rationale for engaging economic activity is to generate private returns, i.e. fiscal gain. Utting and Zammait consider all non-governmental body as private sector, including non-profit organizations. Among formal market participants also the private foundations and business associations are treated differently on private realm. A disagreement is about considering the civil society separated from the corporations. These arguments lead the categorization of the private actors of PPP as commercial partner and non-commercial (social) partner. Commercial partners are profit oriented organization such as business houses, companies and corporations. Whereas the non-commercial i.e. social partners include civil society organization, NGOs, academic centers, which do not have the profit-making aim. In short, this categorization is based on the interest of the private actor either ‘for-profit’ or ‘for-public’.

The percussions of this categorization of public partner are also observed in various definitions of PPP. Several definitions of PPP employed by various International Organizations are been discussed in section 2.4.1, which also reflect the variance in the recognition of the private partners in their respective context.

Moreover, this categorization of public partner involved in the project leads to the added classification of PPP. A kind of contractual partnership in case of each type of private partner is formed differently as economic partnership and social partnership respectively. Hence, the classification of PPP is as Economic PPP and Social PPP. The economic PPP involve project where a private sector contract with public sector to take on the responsibility to design, finance, build, operate and maintain the project over a long-term period taking various risks and the it is been paid accordingly. On the other hand social PPP involve somewhat less formalized contractual burden. Being the protector of public interest, the state (/public sector) ought to harmonize the influence of various groups. However, there is inherent
conflict between profit-driven interest and welfare-driven interest among these two players. Hence, the very purpose, objectives and outcome of these two types of PPP are diversified as follows.

The purpose of the economic PPP is to obtain the project finance and reduce the public capital investment, while the purpose of social PPP is to achieve the political goals. The economical PPP results into the acceleration of service delivery and the later result into the improved service to the community. The objectives of economical PPP are to optimize the value for money and the risk allocation. On the other hand the objectives of social PPP are to reduce the income inequality and environment enhancement. Thus, the economic PPP maximizes excess to the underutilized assets, while the social PPP maximizes the area of services even to the remote region and populations.

2. 6. 4 Nature based Classification of Public Private Partnership

One mode of classification of PPP is based upon the nature of partnership between the public and private sector. Since, the risk transfer is the key ingredient of PPP, there could be multiple combination of sharing of the resources, risks, responsibility and reward between the public and private sector. Following are most commonly used formats of PPP projects which lead to classification of PPP on the basis of the nature of partnership, which is described with their popular abbreviated terminologies.

(a) Build Operate and Transfer (BOT) : It is a kind of contractual arrangement whereby the private sector undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The private partner also operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding these proposed in its bid or as negotiated and incorporated in the contract to enable the private partner to recover its investment, and operating
and maintenance expenses in the project. At the end of the fixed term the facility is transferred to the government agency or the local government.

(b) Build-Own-Operate-and-Transfer (BOOT) : It is a project based on the granting of a concession by a Principal (the Union or Government or a local authority) to the private organization, called concessionaire, who is responsible for the construction, financing, operation and maintenance of a facility over the period of the concession before finally transferring the facility, at no cost to the Principal, a fully operational facility. During the concession period the promoter owns and operates the facility and collects revenue in order to repay the financing and investment costs, maintain and operate the facility and make a margin of profit.

(c) Build-and-Transfer (BT) : Under this contractual arrangement the private partner undertakes the financing and construction of a given infrastructure or development facility. After the completion of the project, it is returned to the Government Agency or Local Government unit concerned. The government pays the proponent on an agreed Schedule its total investments expended on the project, plus a reasonable rate of return thereon. This arrangement may be employed in the construction of any infrastructure or development project, including critical facilities which, for security or strategic reasons, must be operated directly by the Government.

(d) Build-Own-and-Operate (BOO) : A contractual arrangement whereby a private body is authorized to finance, construct, own operate and maintain an infrastructure or development facility. The private partner is allowed to recover the proponent of total investment, operating and maintenance costs plus a reasonable return thereon by collecting tolls, fees, rentals or other charges from facility users.

(e) Build-Lease-and-Transfer (BLT) : This represent a contractual arrangement whereby a private sector is authorized to finance and construct an infrastructure or development facility and upon its completion turns it over to the government agency or local government unit concerned on a lease arrangement for fixed
period after which ownership of the facility is automatically transferred to the
government agency or local government unit concerned.

(f) Build-Transfer-and-Operate (BTO) : A contractual arrangement whereby the
public sector contracts out the building of an infrastructure facility to a private
entity such that the private partner builds the facility on turn-key basis, assuming
cost overrun, delay and specified performance risks. Once the facility is
commissioned satisfactorily, title is transferred to the implementing agency, i.e.
either the government or the public sector. The private entity however, operates
the facility on behalf of the implementing agency under an agreement.

(g) Design Built Finance Operate (DBFO) : In such a contractual arrangement the
private party is authorized to detailed design work, so that the time and money
required to prepare the project get reduced. The states then bid the project based

(h) Contract-Add-and-Operate (CAO): Under this type of contractual arrangement
the private body adds to an existing infrastructure facility which it rents from the
government. It operates the expended project and also collects the user levies, to
recover the investment, over an agreed franchise period. There may, or may not
be, a transfer arrangement in regard to the facility.

(i) Develop-Operate-and-Transfer (DOT) : In such a contractual arrangement
favorable conditions external to anew infrastructure project which is to be built
by a private project proponent under BOT, are integrated into the arrangement
by giving that entity the right to develop adjoining property, and thus, enjoy some
of the benefits the investment creates such as higher property or rent values.

(j) Lease Management Agreement : Under this arrangement the State Government,
the government agency or the specified agency leases a project owned by the state
government, the government agency, or, as the case may be, the specified
government agency to the person who is permitted to operate and maintain the
project for the period specified in the agreement.
Moreover, Kapur adds few more innovative formats of partnership under PPP. He observes, in some projects, existing infrastructure facilities are turned over to private entities to be modernized or refurbished, operated and maintained, permanently or for a given period of time. Depending on whether the private sector will own such an infrastructure facility, those arrangements may be called either ‘refurbish-operate-transfer’ (ROT) or ‘modernize-operate-transfer’ (MOT), in the first case, or ‘refurbish-own-operate’ (ROO) or ‘modernize-own-operate’ (MOO), in the latter. The expression ‘design-build-finance-operate’ (DBFO) is sometimes used to emphasize the concessionaire’s additional responsibility for designing the facility and financing its construction. Hence, these formats may be explained as,

(k) Rehabilitate-operate-and-Transfer (ROT) : Under which an existing facility is handed over to the private entity to refurbish, operate (collect user levies in operation period to recover the investment) and maintain for a franchise period, at the expiry of which the facility is turned over to the Government Local Authority. This could cover the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.

(l) Rehabilitate-own-and-operate (ROO) : In this arrangement also, an existing facility is handed over to the operator to refurbish and operate with no time limitation imposed on ownership. As along as the operator is not in violation of its franchise, it can continue to operate the facility and collect user levies in perpetuity.

Cheung Esther (2009) has further added three more versions of partnerships to this classification, which include.

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(m) Operation and Maintenance (O & M) : A private organization operates and maintain a publicly owned asset. Usually the state owned facilities and services which cause a heavy burden, is been transferred to reduce the financial commitments.

(n) Private Finance Initiative (PFI) : This is commonly used format of partnership in United Kingdom. A private organization is emphatically responsible for the finance of the project while the role of the government is more of the supervisor and regulator.

(n) Joint Venture (JV) : In such partnership public and private sector are almost on the same footing. Both the sectors jointly finance, own and operate the facility. There is equal contribution of resources, even distribution of risks and comparable fraction of the reward between the partners.

Government of India, under National PPP Policy\(^6\) has identified following three hybrid structures of partnership to encourage PPP in India.

(i) User-Fee Based BOT models - Medium to large scale PPPs have been awarded mainly in the energy and transport sub-sectors (roads, ports and airports). Although there are variations in approaches, over the years the PPP model has been veering towards competitively bid concessions where costs are recovered mainly through user charges (in some cases partly through VGF from the government).

(ii) Annuity Based BOT models – In sectors/projects not amenable for sizeable cost recovery through user charges, owing to socio-political-affordability considerations, such as in rural, urban, health and education sectors, the government harnesses private sector efficiencies through contracts based on availability/performance payments. Implementing “annuity model” will require necessary framework conditions, such as payment guarantee mechanism by means of making available multi-year budgetary support, a

dedicated fund, letter of credit etc. Government may consider setting-up a separate window of assistance for encouraging annuity-based PPP projects. A variant of this approach could be to make a larger upfront payment (say 40% of project cost) during the construction period.

(iii) Performance Based Management/ Maintenance contracts – In an environment of constrained economic resources, PPP that improves efficiency will be all the more relevant. PPP models such as performance based management/maintenance contracts are encouraged. Sectors amenable for such models include water supply, sanitation, solid waste management, road maintenance etc.

(iv) Modified Design-Build (Turnkey) Contracts: In traditional Design-Build (DB) contract, private contractor is engaged for a fixed-fee payment on completion. The primary benefits of DB contracts include time and cost savings, efficient risk-sharing and improved quality. Government may consider a “Turnkey DB” approach with the payments linked to achievement of tangible intermediate construction milestones (instead of lump-sum payment on completion) and short period maintenance / repair responsibilities. Penalties/incentives for delays/early completion and performance guarantee (warranty) from private partner may also be incorporated. Subsequently, as the market sentiment turns around these projects could be offered to private sector through operation-maintenance tolling concessions.

However, depending upon the type i.e. economic PPP and social PPP, the formats of these partnerships further get modified. The relevance of these diversified formats in the field of education is studied in the next chapter.

2.6.5 Contract based Classification of Public Private Partnership

Among the states of European Union, the models of PPP are classified on the basis of the nature of contract. Peterson studied three different types of PPP displayed
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under the regulatory framework of European Union. According to the different legal requirements, these are (a) contract PPP (b) concession PPP and (c) institutional PPP, abbreviated as CT-PPP, CC-PPP and IPPP respectively.

(a) Contract PPP: This type of PPP are based upon a classical principal-agent relationship written into a contract. A priority projects are subjected to detailed community regulations as formulated in the procurement directives under the legal framework. The public sector pays the private sector a monthly, quarterly or annual unitary payment for the service, building or infrastructure over the long-term contract period. This form of partnership corresponds to the various models of PPP such as DBFOM, DBFO, DBF, etc.

(b) Concession PPP: For the non-priority public works or public services, this type of PPP are implemented. This also is a contractual relationship, sparsely regulated by secondary legislation. However, the asset is fully transferred to a private sector, which either collects direct charges from the user of the asset or collects unitary payment from the public sector.

(c) Institutional PPP: This type of PPP involves shared public-private ownership of an asset or organization, with public and private sectors each holding shares. Usually, such PPP are supported by the government in new regulations on joint public-private owned companies. Since, this model is implemented for the projects of the national issue, ordinarily a public tenders are not invited.

Some of these forms are in practice in India as a hybrid model, which also be discussed in the next chapter while identifying the appropriateness of the PPP model for the Legal Education in India.


2. 7 Summary of Chapter II

The concept of public private partnership may be summarized as a long-term contractual partnership between the public and private sector for the purpose of financing, designing, implementing, and operating infrastructure facilities and services which were traditionally provided by the public sector. The foundation of such collective endeavors are rooted in the expertise and capacity of the project partners under a contractual agreement ensuring mutually agreed, appropriate allocation of resources, risks and returns.

However, the government’s responsibility and accountability do not get reduced. The project remains in public domain with the commitment to provide the critical service to citizens. Since, the government remains actively involved in the project throughout a life of the project, it remains accountable for service quality, price certainty and cost-effectiveness (value for money) of the partnership. Therefore, the government’s role under PPP gets redefined as one of facilitator and enabler, whereas the private partner plays the role of financier, builder, and operator of the service or facility.

Taking this view, PPPs may be regarded as venture in which all the required resources and total risks apprehended along with the rewards/returns are shared on the basis of a predetermined formula, which is formally agreed under the contract.

PPPs aim to combine the skills, expertise and experience of both the public and private sectors to deliver higher standard of services to customers or citizens. Thus, PPP aim to take advantage of the strength of the public sector through stable governance and those of private sector by their better operational efficiency, advanced technology, professional efficacy for the delivery of the services to the citizens with high standard of quality and greater value for money.

PPP integrates the public sector and the private sector along-with all community stakeholders, they all can advantage by amalgamation of their resources and sharing responsibilities. Hence, the projects which are technically sound, environmentally acceptable, financially viable and affordable by all users can be designed, developed
and implemented. PPP, further provide an opening to the public sector to harness private organizations for the economic, infrastructural and social development of the nation. Between two extreme political options of nationalization and privatization, PPP has emerged as third way of the delivery of the service to the public.

More often the discussion regarding PPP is ideological. Therefore, the evolution of PPP in many areas lacks the objective analyses as well as the empirical evidences. Since, this study aims to evaluate the scope of the PPP for the advancement and expansion of legal education, we conclude this chapter realizing the need for the analytical study of PPP projects in the field of an education, which is been deliberated in the next chapter.