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### THE CONSTITUTIONAL COURT DECLARES DIFFERENTIATED EDUCATION CONSTITUTIONAL AND MAKES PUBLIC FUNDING POSSIBLE FOR EDUCATIONAL CENTRES COMPLIANT WITH THE LAW

The Plenary Session of the Constitutional Court has dismissed in its entirety the appeal lodged by the Socialist Parliamentary Group of the Congress against the Law 8/2013, on the Improvement of the Quality of Education (“LOMCE”). The Court holds that single-sex education cannot be considered to be discriminatory. Rather, it constitutes a legal differentiation between male and female children “*regarding the access to schools*” and relies on a pedagogical method whereby this educational option is considered “*more efficient*” than others. From the point of view of the fundamental right to the freedom of teaching, “*any educational model which aims at the full development of human personality and which respects the principles and freedoms established in article 27.2 of the Spanish Constitution [CE]*” is in conformity with the supreme law. It concludes that the regulation of this matter established by the aforementioned challenged Law respects the Constitution as well as international treaties against discrimination signed by Spain. Magistrate Alfredo Montoya has acted as Rapporteur to this ruling. The judgement is accompanied by the concurrent opinion (which joins the decision rendered by the Court, but disagrees with its grounds) wrote by Vice-president Encarnación Roca. Magistrates Fernando Valdés Dal-Ré (joined by Magistrate Cándido Conde-Pumpido), Juan Antonio Xiol and María Luisa Balaguer have each formulated a dissenting opinion to this judgement.

The appeal challenged 14 sub-sections of the single article of the LOMCE law, which had introduced modifications to Organic Law 2/2006, dated May 3<sup>rd</sup>, on Education (“LOE”). The appeal consisted of three main arguments that the Court has consecutively analysed in its judgement.

#### 1) Single-sex education.

According to the appellants, by allowing differentiated education based on sex, the law violates the right to equality (art. 14 CE) in connection with the right to education (art. 27 CE).

The Court considers that single-sex education is an educational model that, in itself, does not constitute a discrimination. Considered as a pedagogical method, it is included any private centre’s right to establish its own identity or philosophy. Thus, this teaching method may not be considered contrary to the Constitution as long as it respects the applicable fundamental rights and constitutional principles.

The Court reached the aforementioned conclusion after examining the appeal from the perspective of both international treaties and comparative law, as well as in the light of Spanish constitutional principles.

The first of those international texts is the UNESCO Convention against discrimination in Education (1960), to which the challenged law also refers. Article 2 of the said Convention holds that the creation of separate educational systems based on sex “*does not constitute a discrimination*” as long as “*they offer equivalent access to education, provide a teaching staff with qualifications of*

*the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study*".

The judgement also refers to the Convention on the Elimination of All Forms of Discrimination against Women (1979), which does not forbid the existence of educational models different to the one that mixes both sexes. On the contrary, this Convention obliges to promote systems "*pursuing the elimination of stereotypes based on sex*". Although the law does not directly refer to this Convention, it does comply with the United Nations' obligation corresponding to single-sex educational centres, and only towards them, to spell out in their educational project "*the academic measures they will implement in order to promote equality*".

The analysis of the regulation established by other Member States of the European Union and by the United States leads to the conclusion that "*the pedagogical model consisting of an education differentiated by sex may not be considered to amount to a discrimination based on sex*".

The Spanish Constitution forbids discrimination in article 14. After having rejected, based on international norms, the claim that single-sex education is in itself discriminatory, the judgement goes on to state that this sort of education is a pedagogical model among others. The administration of each educational centre may freely decide to implement this system or not, and so may the parents do concerning their children. Therefore, the election of this kind of model is part of every centre's "*right to define its own philosophy or identity*". This right is comprised by the freedom of teaching (article 27.1 CE).

However, the right of the educational centre to endorse a philosophy may be subject to restrictions and, according to the judgement, "*it would not be acceptable if its content is, in itself, incompatible with fundamental rights*". Likewise, it would be unacceptable if, even though it does not constitute a direct violation of a fundamental right, it did not comply with the obligation resulting from article 27.2 CE: namely, that the education provided in the centre should "*aim at the full development of the human character, with due respect for the democratic principles of social coexistence and to the basic rights and freedoms as they are concretely reflected in the Constitution. Indeed, said principles must inspire any educational model, whether public or private*".

According to the appellants, differentiated education based on sex entails "*a high risk*" that one of the groups may be considered inferior to the other. The Court rejects this claim and notes that, in this regard, the constitutionality of this model is beyond all doubt: male and female children, regardless of the pedagogical model chosen by their parents, have their access to school guaranteed. Likewise, neither the planning of educational contents (a responsibility which falls on public institutions, as established by article 27.5 CE) nor the educational model adopted would be subject to a change depending on the mixed, feminine or masculine nature of the particular educational centre. In the event of constitutionally prohibited differences of treatment in some centres, these inequalities should not be attributed to the law or to the model itself, but would rather be attributable to the educational centre in question. In this regard, the judgement considers the measure established by the law in article 83.4 to be sufficient. This provision sets an obligation to single-sex educational centres, and only to them, to "*spell out in their educational project the educational reasons leading to the choice of that system, as well as the academic measures they develop in order to promote equality*".

The appellants also challenged the provision whereby the educational centres providing a model which differentiates based on sex may benefit from public funding. Based on the ground that the model in itself is not unconstitutional, the judgement reminds that public funding established in article 27.9 shall be regulated in accordance with the "*principle of equality*". Thus, there may not be any different treatment depending on the pedagogical model chosen by the centres. The Court concludes that single-sex educational systems "*may have access to the system of public funding on an equal footing with the rest of educational centres*", as long as they comply with the "*criteria or conditions*" established by laws. In other words, if they comply with the Constitution and the laws, the

option made by the educational centre shall not be an impediment for the access to public funding.

## **2) The right of teachers, parents and students to take part in the control and management of publicly funded centres.**

According to the appellants, the reform operated by LOMCE has led to a loss of competences for the School Council ("*Consejo Escolar*"). This, in turn, violates the right of teachers, parents and, in some cases, students (as guaranteed by article 27.7 CE) to intervene "*in the control and management of all publicly funded centres, as established by law*".

The judgement reminds that the right held by the educational community to participate in the control and management of educational centres has some limits. Particularly, it is limited by the right of the owners of the schools to create and run those centres. This right results, in turn, from the freedom of teaching in connection with the principle of free enterprise. In other words, the right of the educational community (teachers, parents and students) to participate in the administration and control of the centre may never completely overrule the prerogatives of the owner or the director of those centres. In this respect, the aforementioned control may be exercised with different intensities. Any kind of option, ranging from the mere issuance of a report to co-decision, is equally constitutional.

According to the judgement, the reforms channelled by the law (which limit the competences of the educational community in different areas of both public and private centres) are not contrary to the Constitution but rather remain within the boundaries of what is "*constitutionally permissible*". In addition, the Court reminds that the law-makers enjoy a wide liberty to configure the particular degree of those competences.

## **3) School subjects on Religion and Cultural and Civic Values / Ethical Values.**

The appellants question the equivalence established by LOMCE between the subjects on Religion, on the one hand, and Social and Civil Values / Ethical Values, on the other hand. They do so based on two grounds. First, by claiming that Religion becomes a school subject proper. And secondly, by alleging the potential discrimination incurred by students opting for Religion, resulting from the fact that they are deprived of the opportunity to receive education on ethical and civic values.

With regard to the first question, the Court rejects the claim that the existence of a school subject on religion infringes the Constitution. Rather, this school subject abides by the principle of the religious neutrality of the State, because it does not involve "*any appraisal of religious doctrines*". At the same time, it guarantees the right of parents to decide, according to their beliefs, the religious and moral education that their children receive.

With regard to the second question, the judgement rules out the alleged discrimination. It notes that LOMCE has opted in favour of a transversal model in which civic and constitutional education is permeates all the subjects that are taught in Primary and Secondary Education. This means that the law guarantees to all students, including those having opted for the subject on Religion, the acquisition "*of the values that constitute the fundamentals of a democratic society*".

On another issue, the appeal questions the separation of students in different educational pathways during their Secondary Education. The appellants consider that the regulation of that matter should have been carried out by means of an Organic Law, not through an ordinary Law. The Court, after examining each of the challenged provisions separately, dismissed this claim.

## CONCURRENT AND DISSENTING OPINIONS

The Vice-president of the Court, Encarnación Roca, notes through her concurring opinion that she shares the premise that differentiated education based on sex does not constitute a case of discrimination based on sex.

She considers that several statements of the ruling are “*highly questionable*”. Particularly, those suggesting that “*there is a right for the parents to choose an educational centre, that this centre may adopt differentiated education as a pedagogical method, and that it has the right to benefit from public funding in order to guarantee the gratuity of its teachings*”.

However, she agrees with the conclusion of the judgement whereby the Constitution does not contain a prohibition to fund educational centres which opt for single-sex education as a pedagogical method. She considers that this line of reasoning would have been sufficient to dismiss the second element of the appeal. Nevertheless, the judgement develops an argumentative line leading to the recognition of a right of those centres to public funding, a conclusion with which she disagrees. Therefore, she holds that it is impossible to share the judgement’s conclusion whereby “*there is a constitutional obligation derived from article 27.9 CE, according to which there is a right to receive public funding enjoyed by the educational centres where single-sex education is offered*”.

The concurrent opinion concludes stating that “*a hypothetical decision of the legislature whereby it limited the public funding of mixed private centres would not infringe neither the freedom of education nor the freedom to create educational centres of the owners of single-sex educational centres*”. That’s why the newly drafted LOE, following its reform carried out by LOMCE, provides that the choice of a differentiated education may not lead to an unfavourable treatment or a disadvantage concerning the conclusion of funding agreements with the educational administration.

For his part, Magistrate Fernando Valdés Dal-Ré considers in his dissenting opinion that segregated education according to sex blatantly violates article 27.2 of the Spanish Constitution, in connection with articles 1, 9.2 and 14 of the Spanish fundamental law. He holds that the only way to provide an appropriate protection to the interests of minors is to configure the substantive content of the right to education with the aim to accomplish the values, principles and rights that conform the constitutional educational set of ideas (27.2 CE). In order to achieve that objective, it is equally necessary to provide the minors the guarantee of a progressive discovery and exercise of their rights by themselves. Sex-based segregation deprives students and teachers of the necessary context to develop an education grounded on a democratic perception of current gender-based conflicts. Unfortunately, these conflicts persist and, so far, public institutions have failed to adopt the appropriate measures in order to prevent and solve these problems. The pedagogical models of segregated education are contrary to that set of educational ideas, and thus place themselves outside the essential scope of the right to education. Segregated education denies the main purpose of school as the space *par excellence* for socialization and harmonic coexistence based on equality since childhood (in the words of article 27.2 CE, the “*respect of the democratic principles of coexistence*”).

Therefore, far from complying with the constitutional postulates on education, segregated education infringes one of their pillars: namely, equality. In particular, it violates the principle of equality in its complementary dimensions related to articles 1.1, 9.2 (especially because it prevents any future option of adopting a policy of public funding which would exclude private centres that provide differentiated education based on sex) and 14 (because it accepts a legal differentiation based on sex without examining its purported objective rationale, its reasonableness and its proportionality) of the Constitution.

The dissenting opinion formulated by Magistrate Valdés Dal-Ré, which was joined by Magistrate Cándido Conde-Pumpido, further considers that another element of the challenged law is

also contrary to the Constitution. According to his opinion, the subjects on Social and Civic Values and Ethical Values are an integral part of the constitutional educational tenets established by article 27.2 of the Constitution. Thus, the design of religious teachings as an alternative to those subjects infringes the duty of religious neutrality that arises from article 16.3 CE, and which necessarily binds the activity of the State. As a result of this last educative reform, that activity has now acquired a sort of neoconfessional nature.

The dissenting opinion formulated by Magistrate Juan Antonio Xiol Ríos considers that binary sexual segregation in private educational centres violates the constitutional prohibition of discrimination based on sex and sexual identity. In his view, segregation is intrinsically suspicious of generating discrimination, since it is not possible to apply the principle of “*separate but equal*”, which was abandoned long ago in the realm of the measures against racial discrimination. Likewise, segregation entails an absolute exclusion of intersexual persons, and it may not be forgotten that it takes place in the realm of the public service of education, which constitutes a space of socialization based on democratic values.

The dissenting opinion further notes that school segregation lacks any reasonable justification, since it is founded on the topic of the difference of talent and capabilities between sexes. In addition, it is disproportionate, because it may not guarantee in an experiential manner the constitutional function of the educational system: namely, the mission to assure the acquisition of the values of coexistence within a plural society.

Besides, Magistrate Xiol Ríos holds that the regulation of religion as a school subject is contrary to the principle of secularism of the State, since it equates its content to that of social and ethical values, and thus equates the religious and non-religious teaching of democratic values.

For her part, Magistrate María Luisa Balaguer Callejón states in her dissenting opinion that “*differentiated education based on sex has no space within the Constitution of 1978*”. According to her, the judgement makes the mistake of referring, more or less vaguely, to pedagogy rather than referring to law. The judgement then bases the central axis of the solution given to the appeal on that prior reflexion. The opinion goes on to add that reasoning of the judgement “*is grounded on a categorical and ideological approach, which predetermines the selection of certain scientific data which are at least inconsistent. In most of the cases, they are the result of an inappropriate identification or an unsuitable interpretation. Indeed, this conclusion has been reached, without exception, by the majority of scholarship*”.

According to this opinion, it may be submitted that, in the current state of the art of pedagogical research in Europe, North America and Oceania, where such research has been conducted, there are no studies showing that segregated education improves academic performance in general terms. Therefore, Magistrate Balaguer considers that such a scarcely justified basis “*may not ground the constitutionality of the challenged provisions*”.

In addition, Magistrate Balaguer concludes that the judgement “*disregards the values and conditions in which a modern and globalized society operates, and remains at a historical moment that no longer reflects Spanish society*”.

Madrid, 19 April 2018