Constitutional Court Judgment No. 133/2010, of December 2 (Unofficial translation)

The First Chamber of the Constitutional Court, composed of the Honour Judges Ms. María Emilia Casas Baamonde, as President, Mr. Javier Delgado Barrio, Mr. Jorge Rodríguez-Zapata Pérez, Mr. Manuel Aragón Reyes and Mr. Pablo Pérez Tremps, has pronounced

IN THE NAME OF THE KING

the following

JUDGMENT

In the amparo appeal number 7509-2005, lodged by Mr. Antonio Gómez Linares, Ms. María Socorro Sánchez Martín, Mr. Florián Macarro Romero and Ms. Anabelle Gosselint, represented by the Court Agent Ms. Laura Lozano Montalvo and briefed by the Solicitor Mr. Fernando Piernavieja Niembro, against Judgment nº 548/2005, dated June 6th, 2005, handed down in appeal by Section Five of the Provincial Court of Appeal in Málaga (appeal roll nº 770-2003), confirming Judgment nº 36/2003, dated May 5th, 2003, handed down by the Court of First Instance nº 2 in Coín. The Office of the Public Prosecutor has taken part. Has been rapporteur the President, Ms. María Emilia Casas Baamonde, who expresses the opinion of the Chamber.

II. Grounds

1. The present amparo appeal is lodged against the Judgment of the Provincial Court of Appeal in Málaga which confirmed the Judgment handed down by the Court of First Instance nº 2 in Coín, whereby the minor children of the petitioners were ordered to attend school for elementary education instead of receiving teaching in their own home. In essence, both judicial bodies argued, on the one hand, that no parent can deny his or her children the right and duty to participate in the official education system, as derived from the constitutional mandate of compulsory education (Article 27.4 of the Spanish Constitution, hereafter SC) and, on the other hand, that compulsory school attendance is included within the very content of the right to education (Article 27.1 SC), not only due to the benefits it entails for minors while such school attendance takes place, but also for the future benefits in terms of learning within the framework of qualifications and degrees.

The petitioners allege, in the first place, the breach of their rights to an effective legal remedy and to due process (Articles 24.1 and 24.2 SC). They argue that Article 154 of the Civil Code —that establishes the content of parental custody of children— is not applicable to this case as it has been enacted to combat the failure to comply with school attendance when this is the result of an abandonment of paternal duties towards children, a situation that does not occur in the present circumstances. Therefore, they denounce that the contested judicial decisions have been adopted on the basis of elements not set out in the claim, specifically "the degree of understanding that the minors may have of the different subject areas and branches of elementary education, with respect to the recognized official system", an issue on which they would not have been able to defend themselves. Secondly, they also invoke the breach of the fundamental right to education (Article 27, Sections 1, 2, 3 and 4 SC) insofar as the decisions challenged deny the minors the right to continue their educational process at home, i.e., without joining the school system. Finally, they denounce the breach of the right to non-discrimination on the grounds of nationality (Article 14 SC), because some of the petitioners, who are not of Spanish nationality, are entitled to home schooling under the laws of their country of origin.

The Office of the Public Prosecutor has requested the dismissal of the petition for protection of constitutional rights, rejecting each of the alleged breaches. With regard to the complaint regarding the right to education, the Office of the Public Prosecutor focuses its arguments on the fact that education in one's own home must comply with certain requirements not met in the present circumstances: on the one hand, that its purpose is the full development of human personality and, on the other hand, that the sufficiency of the contents is assured, as it is a constitutional principle that the public authorities are empowered to inspect and certify the educational system.

2. Before undertaking the examination of the merits of the complaints alleged by the petitioners, we must point out that, in the complaint of infringement of the prohibition of discrimination on the grounds of nationality (Article 14 SC), there is a procedural bar corresponding to the absence of any formal invocation of the same in the prior judicial proceedings [Article 50.1 a), in connection with Article 44.1 c) of the Organic Law of the Constitutional Court]. This Court has stated on multiple occasions that the requirement of prior invocation has a dual purpose: it gives the judicial bodies the opportunity to make a pronouncement on whether or not there is an infringement of the alleged fundamental rights and, when necessary, to re-establish them, at the heart of the process; and preserves the subsidiary nature of the *amparo* appeal (as representative of all, Judgment of the Constitutional Court [in Spanish, "Sentencia del Tribunal Constitucional": STC] 133/2002, dated June 3rd, 2002, Ground [in Spanish, "Fundamento Jurídico": FJ] 3, and STC 228/2002, dated December 9th, FJ 2). To fulfill this requirement in the judicial proceedings, the petitioner does not have to make a specific and numbered mention of the constitutional provision recognizing the fundamental right breached, neither to mention its *nomen iuris*. On the contrary, it is sufficient for the fact giving rise to the breach to be submitted for analysis by the judicial bodies, giving them the opportunity to make a pronouncement and, where appropriate, to remedy the infringement of the fundamental right subsequently alleged in the *amparo* appeal lawsuit. In this case, the petitioners did not at any time invoke in their appeal any question whatsoever relating to any discriminatory behavior on the grounds of nationality. In consequence, the Judgment handed down by the Provincial Court of Appeal limited its pronouncements to the analysis and dismissal of the grounds submitted for the challenge. And since these did not include any reference to the alleged discrimination on the grounds of nationality, the petitioners thus made it impossible for the trial courts to award any eventual restoration of their right, a necessary prerequisite for the admissibility of the *amparo* appeal. Therefore this complaint must be excluded from consideration.

3. With invocation of their fundamental rights to an effective judicial remedy (Article 24.1 SC) and due process (Article 24.2 SC), the petitioners complain of the extra petitum inconsistency of the contested judicial decisions. In their opinion, these decisions have included a new element for the grounds of the resolution, which had not been taken into account during the proceedings, namely that regarding the level of knowledge by the minors with respect to the recognized official system and, in particular, the references in that line of argument to the various paragraphs of Article 27 SC.

a) We must recall that an extra *petitum* inconsistency or award in excess "occurs when the judicial body grants something not requested or makes a pronouncement on a claim that was not brought forward by the parties to the proceedings at the proper time and implies a maladjustment or "inadaptation" between the ruling contained in the judicial decision and the terms in which the parties submitted their petitions"; and always constitutes a breach of the principle on rulings and the contributions of the parties (as representative of all, STC 250/2004, dated December 20th, 2004, FJ 3, and STC 42/2006, dated February 13th, 2006, FJ 4). However, the foregoing does not entail that "the Judge must be rigidly bound to the specific language of the petitions articulated by the parties or the legal reasoning or arguments set out in support of these petitions. On the one hand, the principle of *iura novit curia* enables the Judge to

pronounce the Judgment on the pertinent legal provisions or regulations applicable to the case, even if they have not been invoked by the parties in the proceedings and, on the other hand, the trial court is only bound by the essence of what was requested and discussed in the proceedings and not by the literal terms of the specific petitions exercised, as they have been formally requested by the parties to the suit, so there will be no extra *petitum* inconsistency when the Trial Court decides or makes a pronouncement on a claim that, albeit not formally or expressly exercised, was implicit or an inseparable or necessary consequence of the petition articulated or of the main issue under discussion in the proceedings" (as representative of all, STC 264/2005, dated October 24th, 2005, FJ 2).

b) The preceding jurisprudence is rigorously applicable to this case, since the Trial Courts decided precisely on the petition exercised and did so upon the basis of constitutional and legal provisions clearly applicable to the case. The petitioners themselves state in their claim that "this is obvious, and this party not only recognizes it as such, but also thinks that this is where it lies the core of the dispute, that it is the constitutional aspect of the compulsory nature of elementary education (Article 27.4 SC) that truly sums up the issue to be decided". And this is precisely the question that was resolved by the Trial Courts, which did so, by the way, contrary to the petitioners' allegations, without assessing the level of knowledge by the minors with respect to the recognized official standards, an element they considered irrelevant. In consequence, this complaint cannot prosper.

4. The central issue brought up by this *amparo* appeal is that regarding the breach of the right to education (Article 27 SC) which the petitioners attribute to the challenged judicial decisions.

a) The complaint of infringement of this fundamental right is based on two premises.

Firstly, the petitioners claim that Article 27 SC gives them right to decide whether their children receive teaching in their own home instead of attending school, which they refer to as "official". They underline that Article 27 SC not only proclaims everyone's right to education but also recognizes the freedom of education (Article 27.1 SC) and the parents' right to ensure their children receive religious and moral instruction in accordance with their own convictions (Article 27.3 SC); these statements being consistent with the mandates that education will aim at the full development of human personality within the respect for the democratic principles of co-existence and fundamental rights and freedoms (Article 27.2 SC), and that elementary education will be compulsory and free of charge (Article 27.4 SC). Secondly, in the petitioners' opinion, we face "a legislative lacuna due to the fact that the Spanish regulations do not contain any reference to education other than school teaching". Accordingly, the Trial Courts, rather than "fill this gap with an open interpretation in accordance with the historical, social and political moment in which we live", would have settled it with a decision contrary to the fundamental freedom.

b) Prior to verifying whether the alleged harm has in fact occurred, it is still necessary to make two more observations.

First and foremost, the origin of the alleged harm would not lie in the challenged judicial decisions but, if that were the case, in the legislative provision that these decisions apply specifically to the facts submitted to the consideration of the Trial Courts. Indeed, despite what the petitioners sustain, in this case we are not facing any kind of regulatory lacuna since the question of whether school attendance at the age corresponding to the petitioners' children must be compulsory has been expressly decided in the affirmative way by the lawmakers. Article 9 of the Organic Law 10/2002, dated December 23rd, 2002, on Quality of Education (hereinafter, Quality of Education Law), in force at the time when the Provincial Court of Appeal handed down its Judegment, establishes that elementary education, apart from being compulsory and free of charge (paragraph 1) in terms of Article 27.4 SC, "includes ten years of school education", in such a way that "it will begin at six and will continue until sixteen" [paragraph 2; in the same sense, see Article 4.2 of the current Organic Law 2/2006, dated May

3rd, 2006 (hereinafter, Education Organic Law)]. This means that the behavior of the appellant parents, not sending their children to school, represents a failure to comply with a legal duty (one included, in addition, in their power of parental custody), which is therefore a non-legal situation in itself. There is, then, no lacuna of any kind in the regulations.

b) Having said that, we must add that in order to assure an appropriate examination of the complaint, it is necessary to elucidate whether the duty of school attendance imposed to children between six and sixteen by the Legislator is respectful of the fundamental rights invoked. In the light of the outcome of such an examination, it would therefore be appropriate either to reject the present *amparo* appeal, were an affirmative response to be reached, or else to refer the issue to the Full Bench (Article 55.2 of the Constitutional Court Organic Law), should the conclusion be of a contrary sign.

5. Once we have drawn up the constitutional contours of the complaint, we can already advance that the *amparo* appeal must be rejected on two grounds. Firstly, because the invoked option —which gives parents the right to choose an education outside the system of compulsory school attendance for their children, on grounds of a pedagogical nature— is not included, even prima facie, in any of the constitutional rights referred to in the lawsuit and recognized in Article 27 SC.

a) It is not included, first of all, in the freedom of education (Article 27.1 SC) of parents, which empowers them, like any other person, to teach others, in this case their children, both inside and outside the official education system. With respect to the teaching given outside this system, the contested judicial decisions and the regulations that they apply do not, in any way, prevent the petitioners from freely teaching their children outside school hours. With regard to elementary education, the parents' freedom of education finds the specific channel for its exercise, by an express provision of the Constitution recognizing the freedom to create schools (Article 27.6 SC). Parents' freedom of education in this context is therefore circumscribed to the power to teach their children without prejudice to the fulfillment of the duty to attend school, on the one hand, and the power to create a teaching center whose educational project, without prejudice to the unavoidable compliance with the provisions contained in Sections 2, 4, 5 and 8 of Article 27 of the Spanish Constitution, better meets their pedagogical or other preferences.

b) Secondly, neither is the power invoked by the petitioners included in everyone's right to education (Article 27.1 SC). Leaving aside the consideration of this fundamental right as an entitlement to public teaching benefits and focusing on its facet as an individual freedom, it should be noted that such freedom does not comprise the parents' liberty to send their children to school or not doing so. Indeed, according to our jurisprudence, the parents' right to choose the type of education their children are to receive is tantamount to their right to choose a school (STC 382/1996, dated December 18th, 1996, FJ 4) and their right to ensure that their children receive religious and moral instruction in accordance with their own convictions (Article 27.3 SC). Despite the opinions sustained by the petitioners, this latter right is not compromised in the present case, where the reasons set out by the parents for opting in favor of homeschooling do not in any way refer to the kind of moral or religious instruction received by their children, but to reasons associated with "drop-out rates in official teaching" attributed to "compulsory attendance at those official centers, whether publicly- or privately-funded". Regardless of this double content, the fundamental right to education, as an individual freedom, does not comprise the protection, not even prima facie, of a purported parents' power to choose, for pedagogical reasons, a type of education for their children that excludes their enrolment in approved public or private schools.

6. The first of the two announced grounds for dismissal resides, then, in the fact that the correct delimitation of the content of the constitutional rights invoked by the petitioners leads, in accordance with our case-law, to deny that the imposition of the duty of schooling through the Article 9 of the Quality of Education Law -whose effectiveness have asserted the Trial Courts

through the contested decisions–, can have any constitutional relevance. Against the allegations made in the writ of complaint, this conclusion is supported by an interpretation of Article 27 SC "in accordance with the Universal Declaration of Human Rights and the international treaties and agreements ratified by Spain on these matters" (Article 10.2 SC). a) On the one hand, it is true that Article 26.3 of the Universal Declaration of Human Rights generically recognizes the "prior right" of parents to "choose the kind of education that shall be given to their children", but we must bear in mind that this provision must not be construed, in the framework of Article 26 of the Declaration, as a generic right from which the right proclaimed in our Article 27.3 SC would stem as a specific type. Rather, it is equivalent to the latter which must, in addition, be systematically construed in connection with Article 26.1 of the Universal Declaration of Human Rights, which provides that "elementary education shall be compulsory".

b) The conclusion reached in the preceding Ground about the scope of Article 27 SC corresponds to a systematic construction of this provision in accordance with international instruments such as the International Covenant on Civil and Political Rights, whose Article 18.4 proclaims "the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions", or the International Covenant on Economic, Social and Cultural Rights, whose Article 13.3 recognizes the right of parents and legal guardians "to choose for their children or wards schools, other than those established by the public authorities, […] and to ensure the religious and moral education of their children in conformity with their own convictions".

c) The same conclusion is reached with regard to Article 2 of the Protocol to the European Convention for the protection of human rights and fundamental freedoms (ECHR), which acknowledges parents' right to ensure that their children's education and teaching shall be "in conformity with their own religious and philosophical convictions". It should be noted that, in accordance to the interpretation given to this provision by the European Court of Human Rights, those convictions may not cover any consideration regardless of its nature (em>see, inter alia, the Kjeldsen case, Judgment dated December 7th, 1976).

d) Finally, although Article 14 of the Charter of Fundamental Rights of the European Union guarantees the "right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions", this latter nuance must be understood to refer to those pedagogical options resulting from religious or philosophical convictions, as Article 14 of the Charter of Fundamental Rights of the European Union "is based on the common constitutional traditions of the Member States and on Article 2 of the Protocol to the ECHR". The reference to the pedagogical convictions is not among the extensions of this provision included in the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention, and that, as settled in the preamble of the Charter and in its Article 52.7, must serve a generic interpretation of the rights it recognizes.

7. Apart from this reason, the *amparo* appeal must be dismissed for a second reason. Even though the petitioners' decision not to send their children to a school were taken in accordance with moral or religious reasons, the only ones that could be accommodated within the content of Article 27.3 SC, which is the constitutional provision mainly cited in the lawsuit, we must conclude that the imposition of the duty to attend school for children between six and sixteen (Article 9.2 of the Quality of Education Law and Article 4.2 of the Education Organic Law), for the effective implementation of which the judicial rulings herein contested were handed down, constitutes a limit incorporated by the lawmaker and is constitutionally feasible insofar as it is justified by other constitutional determinations contained in Article 27 SC itself and because it does not generate any disproportionate restriction on the right in dispute.

a) Article 27.4 SC establishes that elementary education shall be compulsory. But this provision does not specify whether that "compulsory elementary education" must necessarily be devised as

a period of compulsory school attendance. So, the decision of the lawmaker to impose the duty of school attendance on children between six and sixteen at approved schools (and on their parents the related duty to ensure its fulfillment), is not a decision of pure constitutional implementation, but one of the possible alternatives that the Legislative branch can select exercising its freedom of choice inherent to the principle of political pluralism. This decision is in accordance with the constitutional mandate contained in Article 27.5 SC, which imposes to public authorities the duty to "guarantee everyone's right to education, through general education programming" and responds to the provision that they will "inspect and standardize the educational system in order to guarantee compliance with the law" (Article 27.8 SC); and, of greater importance to the present case, it is justified by the purpose constitutionally attributed to education, i.e., that it "shall aim at the full development of the human character with due respect for the democratic principles of coexistence and for the basic rights and freedoms" (Article 27.2 SC). The education that everyone is entitled to and which is guaranteed by public authorities as an inherent task is therefore not limited to a process of merely transmitting knowledge [see Article 2.1 h) of the Education Organic Law], but aspires to enabling the free development of the personality and the abilities of the students [see Article 2.1 a) of the Education Organic Law] and comprises the training of responsible citizens called to participate in the processes undertaken within the framework of a plural society [see Article 2.1 d) and k) of the Education Organic Law] under conditions of equality and tolerance, and with full respect to other citizens' fundamental rights and freedoms [see Article 2.1 b) and c) of the Education Organic Law].

b) According to Article 27.2 SC, this is the complex aim that all public bodies must pursue when setting up the educational system ensuring everyone's right to education, and the mandate for its achievement is the constitutional principle served by the regulatory imposition of the duty to attend school in the framework of compulsory elementary education (Article 9.2 of the Quality of Education Law and Article 4.2 of the Education Organic Law). This principle is not only a guideline laid down in the Constitution binding for all public authorities, first and foremost Lawmakers (Sections 2, 4, 5 and 8 of Article 27 SC), but also a content of the children's right to education (Article 27.1 SC). Even in those cases where the parents' decision not to send their children to school were intended to be covered by the exercise of the right recognized in Article 27.3 SC, the duty to attend school imposed by the legal regulations and applied by the Judiciary would find its constitutional rationale in the mandate addressed to the public authorities under Article 27.2 SC and in the right to education acknowledged to everyone by Article 27.1 SC, including the petitioners' children (STC 260/1994, dated October 3rd, 1994, FJ 2 *in fine*).

8. As well as finding justification in Article 27 SC, compulsory school attendance does not generate a disproportionate restriction on the fundamental right invoked, as this standard of judicial review has been constructed in our case-law (recently, STC 60/2010, dated October 7th, 2010, FJ 9, FJ 12 and following).

a) First of all, the petitioners do not deny that the arrangement of elementary education as a period of compulsory school attendance at certified schools represents an appropriate or suitable measure with respect to the satisfaction of the purpose inherent to it: "the assurance of the individual right to elementary education and the collective interest in having everyone trained in the understanding of and respect for the democratic principles and fundamental rights provide legitimacy for certain forms of restriction on the freedom of teaching. Therefore, the measure seems to be adequate".

b) The complaint sustains, however, that the measure is not necessary to achieve the aim: the imposition of "compulsory school attendance as a synonym of compulsory education does not pass the standard of necessity," since "the comparison of the regulations approved in countries around us, clearly shows that there are rules allowing a better conciliation of the different interests at stake. Measures that, without ruling out the educational option of homeschooling,

establish regular controls on the evaluation of the pupils' training as well as the monitoring of the contents conveyed."

It could perhaps be agreed that this alternative, namely to replace the schooling obligation by the establishment of administrative controls on the contents of the teaching dispensed to children at home and periodic evaluations of the results actually obtained from the perspective of their training, constitutes a less restrictive method than the imposition of the duty of school attending with a view to the satisfaction of the purpose to ensure a proper transmission of knowledge to students. Nonetheless, as we have stated, this is not the only aim to be pursued by the public authorities when setting up the educational system —especially in the elementary education— since education must also aim at the full development of human personality within the respect for the democratic principles of co-existence and fundamental rights and freedoms. This purpose is satisfied more effectively with a model of elementary education in which contact with the pluralistic society, and with its diverse and heterogeneous elements, far from being occasional and fragmentary, is part of everyday experience provided by school attendance.

In short, the measure proposed as an alternative might be less restrictive from the perspective of parents' right recognized in Article 27.3 SC, but it cannot in any way be equally effective with regard to the satisfaction of the mandate addressed to public authorities by Article 27.2 of the Constitution, which is, at the same time, part of the content of the right to education proclaimed by Article 27.1 SC.

Furthermore, the European Court of Human Rights has declared that the appreciation that these goals could "be equally met by home education even if it allowed children to acquire the same standard of knowledge as provided for by primary school education [...] as not being erroneous and as falling within the Contracting States' margin of appreciation which they enjoy in setting up and interpreting rules for their educational systems" (case of *Konrad v. Germany*, Decision as to the admissibility, September 11th, 2006, nº 35,504-2003).

c) The petitioners also question whether the duty to attend school at official educational centers is reasonable because, in their opinion, "the advantages obtained with the limitation of the right [are no] greater than the disadvantages produced in this case to those entitled to freedom of teaching", bearing in mind that in this case "parents, far from neglecting their duties, strive to offer their children a more specific and individualized teaching". This argument must also be rejected for the following three reasons.

In the first place, it should be noted that the *amparo* appeal once again focuses solely on the effects of the teaching provided to children assessed exclusively as a simple transmission of knowledge, ignoring any consideration about the best compliance that can reasonably be expected by the system of compulsory education of the different aims attributed to education in Article 27.2 SC, an education to which, on the other hand, children are entitled to in accordance with Article 27.1 SC.

Secondly, the scope of the constraint operated in the content protected by the parents' right recognized in Articles 27.1 and 27.3 SC by the decision to set up elementary education as a period of compulsory schooling, must be tempered because, as has already been noted, this decision does not prevent them from influencing in their children's education, both outside and inside the school: inside it because the public authorities continue to be recipients of the duty to take into account individual religious beliefs, and outside because the parents are still free to teach their children after school and during the weekends, so that the right of parents to educate their children in accordance with their moral and religious convictions is not completely unknown. As the European Court of Human Rights has stated, "compulsory primary school attendance does not deprive the applicant parents of their right to 'exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions' (see, em>mutatis mutandis, Kjeldsen, Busk Madsen and Pedersen vs. Denmark, cited above pp. 27 28, section 54; *Efstratiou vs.*

Greece, Judgment of 27 November 1996, Reports of Judgments and Decisions, 1996-VI, p. 2,359, section 32)" (Konrad vs. Germany, Decision as to the admissibility, September 11th, 2006, nº 35,504-2003).

Above all, however (and this is the third reason), we must reject the idea that the restriction of this right is clearly excessive insofar as the parents can exercise their freedom of education through the right to create teaching centers freely (Article 27.6 SC). Indeed it was this option, and not the one represented by the failure to comply with the legal duty imposed to parents of sending their children to school, that was open to the petitioners as the means to embody their different educational orientation. This is despite the fact that its articulation must in all cases, as is inevitable pursuant to Sections 2, 5 and 8 of Article 27 SC, ensure respect, "within the framework of the constitutional principles, for fundamental rights, service to truth, the demands of science and the other purposes necessary for the education mentioned, among other places, in Article 27.2 of the Constitution and in Article 13.1 of the International Covenant on Economic, Social and Cultural Rights, when dealing with schools that, like the ones referred to in the legal provision under analysis, are to teach normalized subjects, conforming to the minimum standards that the public authorities may establish with respect to the contents of the various subjects, number of class hours, etc." (see STC 5/1981, dated February 13th, 1981, FJ 8).

9. The Spanish Constitution does not prohibit the democratic legislator to set up compulsory elementary education (Article 27.4 SC) as a period of school attendance for a fixed term (see Article 9.2 of the Quality of Education Law and Article 4.2 of the Education Organic Law) during which parent's option to teach their children at home rather than proceed them to school is excluded. As has been confirmed, this legislative regulation does not affect the parents' fundamental rights invoked in the present case (Articles 27.1 and 27.3 SC) and, even if that were the case, it should be assessed a proportionate measure justified by the satisfaction of other constitutional rights and principles (Articles 27.1 and 27.2 SC). However, this is not an option required in any case by the Constitution which, in fact, does not enshrine the duty of school attendance, far less other more specific aspects of its legal regime such as, for example, the duration of this duty or the exceptional circumstances in which it may be set aside or be satisfied by means of a special regime. This means that, in the light of Article 27 SC, it is not appropriate to exclude other legislative options incorporating a certain flexibility into the educational system and, in particular, into elementary education, without this allowing not to satisfy the purpose that must govern their regulatory configuration (Article 27.2 SC), as well as other elements already defined by the Constitution (Sections 4, 5 and 8 of Article 27 SC). Nonetheless, the question of what the features of that alternative regulation for the regime of compulsory elementary education should be in order to comply with the Constitution requires clarification in abstract that clearly exceeds the functions inherent to this Constitutional Court, which must not act as a positive lawmaker.

Therefore, it is incumbent to conclude that the decision adopted by the Legislator through Article 9 of Quality of Education Law (see current Article 4.2 of the Education Organic Law), that was applied by the judicial decisions challenged in this proceedings, is constitutionally irreproachable, and this is why we must dismiss the present *amparo* appeal.

RULING

Having regard for all of the above, the Constitutional Court, BY VIRTUE OF THE AUTHORITY CONFERRED BY THE SPANISH CONSTITUTION,

Has decided

To deny the protection requested by Mr. Antonio Gómez Linares, Ms. María Socorro Sánchez Martín, Mr. Florián Macarro Romero and Ms. Anabelle Gosselint.

Let this Judgment be published in the "Official State Gazette".

Given in Madrid on December 2nd, 2010.