The Right to Education as a Framework for Educational Policies

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Abstract

Regarding the educational reforms proposed by the recent change of government in Spain, the aim of this study is to analyse the extent to which the proposed educational policies can affect school choice and other essential contents of the right to education, understood as a social right and the right to freedom.

It will be analysed whether these educational policies and reforms find a constitutional and legal basis or whether they are in some measure contrary to the text and the constitutional doctrine.

The constitutional, normative, doctrinal and argumentative basis will be provided to defend the essential aspects of the right to education. These include freedom of choice of school, the right of parents to ensure that their children receive the religious and moral formation that is in accordance with their own convictions, and the right to establish and direct schools and to provide them with the corresponding ideals.

Keywords: Right to education, freedom, choice school, autonomy and leadership.

1. Introduction

Education, both as a key factor of personal and social development and as a fundamental right of the human person by which it reaches its full realization, requires to be the subject matter of a State policy in a context characterized by stability and consensus.

Education policies have a margin of contribution, change and innovation depending on the different social programs in which they are enrolled, but they must respect the constitutional and legal framework in which they are inserted. It is a question of preventing education from becoming the object of ideology, from becoming the field of political marketing and from not fully responding to the public interest of citizens.

In view of the recent political change in the Spanish government, a legal analysis will be made about what extent the new proposals for educational reform are in accordance with the constitutional framework or to what extent they may have changed it.

In order to carry out this analysis, we will examine the hearing on 11 July 2018 of the Minister of Education and Vocational Training before the Congressional Committee on Education and Vocational Training, in which she proposes a change of some of the legal regulations of the Organic Law for the Improvement of Education (LOMCE) in force since 2013. The proposal for the modification of the Organic Law for the Improvement of Education presented by the Ministry of Education on 7 November will also be reviewed. Finally, the recent Draft Organic Law amending Organic Law 2/2006, of 3 May, on education, as amended by Organic Law 8/2013, of 9 December, for the Improvement of Educational

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Quality (LOMCE), will be analysed. In the regulations of the Preliminary Draft, the proposals presented both in the hearing and in the explanatory document of the amendment of 7 November are specified.

It will be a question of analysing legally if the reform proposals may not be in accordance with the Constitutional regulation of the Right to Education. For this purpose, special consideration will be given to the recent sentence of the Constitutional Court on the occasion of the appeals brought against some of the articles of the LOMCE by the political party in power today and promoter of the educational reform.

This will allow us to establish that aspects of education policies should promote the stability and consensus of a fundamental human right such as education as it is formulated in our Constitution.

We will focus our attention on the essential characteristics of the Right to Education as a social and freedom right: the subject of the right to education and the duty of parents, the State as guarantor of the right to education, and the freedom of education as the right to the creation and management of educational centres and therefore to endow them with their own ideals, respecting constitutional principles.

2. A perspective or theoretical framework

In the last 40 years, education in Spain has been characterized, among other dimensions, by having been subject to a continuous change of organic regulation of basic content according to the political party that came to power. This situation has been happening in contrast to the consensus reached on the regulation of the right to education in our Constitution.

In addition, these continuous changes and revisions in social policies such as education, which are bearing fruit after some years, have produced a desire for stability among the various stakeholders and families and a desire to reach a social and political pact for education.

In the most recent history, the Organic Law 8/2013, of 9 December for the improvement of educational quality (hereinafter, LOMCE) promoted by the Popular Party as a change in some of the articles of the previous Organic Law 2/2006, of 3 May, on Education, (hereinafter, LOE). The new law has produced in recent years an important political controversy intensifying the social desire to seek a Social and Political Pact for Education. In order to achieve this Pact, the Sub-Commission on Education of the Congress of Deputies was entrusted with the task of opening a broad debate, with the participation of a large number of experts and stakeholders. After a year of work and without completing the work, the Socialist Party withdrew from the debate table because it did not see some aspects that it considered essential in relation to the financing of education. After a short period, it became the case that this party acceded to the government of the nation because of a motion of censure against the government of the popular party.

In the exercise of its political responsibilities, the new government of the socialist party is proposing a series of changes in the current legal framework for education, based on the desire for the broadest possible dialogue and in order to achieve consensus. In order to analyse them with the greatest possible objectivity and approximation, we will rely mainly on the text of the hearing of the Minister of Education and Vocational Training before the Education Commission of the Congress of Deputies, in the proposal for the modification of the Organic Law on Education presented by the Ministry of Education on 7 November last and in the recent Draft Organic Law which includes in its regulations the proposals put forward in the two previous documents. The Preliminary Draft is proposed as a modification of Organic Law 2/2006, of 3 May, modified by Organic Law 8/2013, of 9 December, for the Improvement of Educational Quality (LOMCE).

Some programmatic points were made in this hearing, the proposal for amendment and the regulations of the preliminary draft will be contrasted with the constitutional texts and the recent doctrine established by the Constitutional Court in its ruling of 10 April 2000, when more than 50 members of the Socialist Parliamentary Group in Congress were appealing the LOMCE as unconstitutional. Finally, it will be pointed out that essential aspects of the right to education must be left out of the political vicissitudes by providing security and stability to the education system, considering it the object of a State policy based on Constitutional norms and values.

3. Analysis of government proposals under the constitutional framework

From the programmatic text for the change of educational policies, the proposals for modification and the Draft, we have identified four aspects that contrast with some essential dimensions of the right to education as a social right and a right to freedom as formulated in the constitutional text, in international treaties and in the jurisprudence of the Constitutional Court. We are going to develop each of these four aspects. To this end, in each of the four dimensions, we will present the texts that reflect the modifications and then we will make an assessment in the light of the constitutional framework.

The Constitutional framework to which we refer is constituted by the text of the Constitution, particularly Article 27 which regulates the right to education within Title I of Fundamental Rights. Also by Article 10.2, which states that 'the rules relating to fundamental rights and freedoms recognized by the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on the same matters ratified by Spain'. Finally, by the doctrine of the Constitutional Court and especially the judgements that have had the purpose of clarifying essential aspects of the right to education in relation to basic legislation, as is the case of STC 31/2018, of 10 April 2018, to which we will refer in a particular way.

3.1 The subject of the right to education, the duty of parents and the rights of stakeholders in their capacity to promote educational institutions

The Minister's statement in her hearing in the Congress of Deputies[1], 'the right to education always falls on individuals who are subjects of learning, it does not fall on families, territories or religions,' it shows a vision of the right to education in which the role of parents and other stakeholders can be relegated to second place.

The elimination in the text of the Preliminary Draft of Article 1.h bis introduced by the LOMCE in which it is affirmed as one of the principles of education 'the recognition of the role that corresponds to parents and legal guardians as the first responsible for the education of their children,' justifies the affirmation of the previous paragraph.

It is evident that the subject of the right to education is the child. But this does not diminish the recognition of the duty of parents in relation to the education of minor children. The child is the holder of the right, but legal guardians are attributed the function of educating them by accompanying their

1 "Surely one of the obstacles of the agreement has been to not notice that the right to education falls to children themselves, sons and daughters as individuals, according to the United Nations Convention on the Rights of the Child (1989). It is said that the right to education has always fallen to individuals that are subjects of learning, it does not fall on families, territories, or religions. Who cannot agree that this is a very important component? We must understand that rights are individual."

developmental process, which is not a State function. Article 154[2] of the Civil Code regulates the figure of parental authority as parental responsibility and includes a series of faculties and duties such as that of ensuring their education. Children are born in a family and this is the environment in which they are educated.

Considering children as individuals in contrast in some way to family and parental ties may disassociate them from the serious duties of parental authority. The assertions expressed in the hearing seem to respond rather to an emancipatory vision of the individual, as opposed to a conception of the fundamental role assigned to the family in the development of the individual and society.

The responsibility of parents in the education of their children is affirmed in international texts such as the Declaration of Human Rights (Article 26.3), 'parents shall have the prior right to choose the type of education to be given to their children'. The International Covenant on Economic, Social and Cultural Rights, Article 13.3, says 'the States Parties to the present Covenant undertake to respect the freedom of parents and, where applicable, legal guardians to choose for their children schools other than those established by public authorities. The States Parties to the present Covenant undertake to respect the liberty of parents (…) to ensure that their children receive a religious and moral education in conformity with their own convictions'.

In addition, Article 27 of our constitution proposes a multidimensional regulation of the right to education, contemplating a set of rights and duties of the various agents involved in the educational process. In paragraph three, it states that 'the public authorities guarantee the right of parents to have their children receive religious and moral education in accordance with their own convictions'.

The STS 31/2018 recalling the STC 86/85[3], gathers the amplitude of precepts that compose the Article 27 of the Constitution that, although being of different nature, 'the close connection of all these precepts, derived from the unity of its object, authorizes to speak, without a doubt, in generic terms, as a joint denotation of all of them, of the right to education'.

This multidimensional reality of the right to education and its interconnection does not correspond to partial interpretations that do not harmonize the various dimensions. That is why we must speak of a right to freedom and a right to provision.

2 Art. 154.
"Non-emancipated children shall be under the parents' parental authority. Parental authority shall be exercised always for the benefit of the children according to their personality, and respecting their physical and psychological integrity.
This authority comprises the following duties and powers:
1. To look after them, to have the in their company, feed them, educate them and provide them with a comprehensive upbringing.
2. To represent them and to manage their property.
If the children should have sufficient judgement, they must be heard always before adopting decisions that affect them.
3. Parents may, in the exercise of their powers, request the assistance of the authorities."

3 As a result, it is convenient to remember STC 86/85, of July 10, FJ 2, pronounced that the relation between the distinct precepts contained in this constitutional article, stating that, "while some consecrate rights to liberty (for example, paragraphs 1,3 and 6), others impose responsibilities (for example, obligatory basic education, paragraph 4), guarantee institutions (paragraph 10), or benefits (for example, the right to free, basic education, paragraph 3), attribute competencies to the public powers (for example, paragraph 8), or impose mandates on the legislator. The strained connection of all of these precepts, derived from the unity of the objective, authorizes to speak, without a doubt, in generic terms, how to denote everyone the right to education, or including the right of all to education, using an all-encompassing expression that mentions how the article employs a preliminary formula. This style of speaking does not allow one to forget, however, the indicated distinct legal nature of these precepts."

3.2 The choice of school based on social demand versus planning that articulates public education as the cornerstone of the education system

Regarding the structure of the education system and the various networks that make it up, the Minister in her hearing stated that:

> "The public school is the response of the Public Administration to guarantee the right to education and to guarantee social cohesion and the cultural development of citizenship. In no case will it be considered subsidiary or relegated as a minor option, so it will have due pre-eminence. Ladies and gentlemen, I propose to amend Article 109.2 of the LOMCE by which the programming of the supply of school places was established by the so-called "social demand", a euphemism that has served to encourage in some cases that the public school may be considered a subsidiary of the concerted school."

These affirmations are the ones that have aroused the most rejection and controversy in social sectors, considering that they represented a setback in the freedom of education (Article 27.1) or the right to the creation of educational centres (Article 27.6).

The Ministry's approach has been reaffirmed in the proposal to modify the LOMCE, which in Block VI on general education programming states that Article 109[4] 'has generated an imbalance between the two networks financed with public funds, and proposes the measure of recovering a non-restrictive formulation of the role of public authorities in general education programming and eliminating references to social demand, which in any case must be known within the framework of said programming'.

This proposal has been included in the text of preliminary draft Article 109, which revises one paragraph and adds two more. In the new wording of paragraph two, the expression 'taking into account...social demand' is deleted, and in the new third paragraph it is stated that 'the educational administrations will plan the educational offer in such a way as to guarantee the existence of sufficient public places, especially in newly-populated areas'.

This approach is not adequately consistent with the constitutional regulation of the right to education if we consider the two basic dimensions of this fundamental right. On the one hand, its dimensions as a right and duty to provide, which determines the State's obligation to guarantee access to education, with different intensity depending on whether it is primary, secondary or higher. On the other hand, its dimension of the right to freedom formulated in all international treaties and which recognizes the freedom of parents to choose the type of education for their children according to their convictions. International declarations revolve around these two poles. It does not mean that they are contradictory, since the obligation of the State to guarantee universal access to education in conditions of equality and without discrimination does not necessarily have to be realized by organizing the provision of the service itself. It will often do so by making it easier for society itself, its institutions and the parents themselves to organise the educational service in an institutionalised way.

4 5 Art. 109. Programming of the School Network.
1. In the programming of schools the Education Administrations will reconcile the demands arising from the obligation of the authorities to guarantee the right of all to education and the individual rights of students, parents and guardians.
2. Basic education, free and obligatory, is configured for the educative Administration to have in mind the offer of coordinated public and private centres assuring the right to education and articulating the principle of participation as the ideal mechanism to adequately serve the rights and liberties of all parties. The principles of programming and participation are correlated and coordinated in the creation of a proposal that involves the appropriate and equal admission of students while supporting specific needs.
3. The Education Administrations must plan the education offer in a way that guarantees the existence of sufficient public centres, especially in newly-populated areas.
4. The Education Administrations should keep in mind the existing allocated budget and the principles of economy and efficiency in the use of public resources.

3.3 Aspects that affect the pedagogical leadership of the principal and the right of participation by transferring competencies from the headmaster to other participation bodies such as the school board

Effective educational leadership, as well as the pedagogical autonomy and accountability of schools, are the pillars on which the improvement processes of schools are based. This is repeatedly affirmed in international reports[5] and literature[6].

In the hearing that has been commented on, the participation of the educational community is opposed to the increase in decision-making competencies of the headmaster and his team that come from LOMCE. For this reason, the Minister states that:

'I announce to you, ladies and gentlemen, the proposal to recover the participation of the educational community in the School Councils. We will modify articles 122, 127 and 135 of the LOMCE to recover the decision-making and governing role of the School Councils, also changing the way head teachers are selected in public schools'.

The proposed amendment to the Organic Law reinforces this measure by proposing 'to rebalance the competencies of the School Board and the principals of public and subsidised schools, increasing the latter's participation in decisions and the control of school decisions'[7]. It is based on the idea of the lack of actual and effective participation of the educational community in the governing bodies and of an imbalance in favour of the head of the centre and the director.

The text of the Preliminary Draft introduces change to Article 127 by conferring a decision-making capacity to the School Board, an article which, in its current wording, regulates the competencies of the Board to informing or merely participating. Consequently, it also modifies Article 132 which regulates the competencies of the principal and from which sections I, m, n, ñ, o, which confer the approval of relevant decisions such as the admission of students or the annual general programming of the school, including the obtaining of complementary resources.

Also, with regard to the process of selecting the headmaster, the educational Authority loses the capacity to make decisions in front of a commission in which they no longer have a majority since at least two thirds will come from the teaching staff and other members of the School Board, as stated in Article 135.3 of the Preliminary Draft.

With regard to the first final provision on the modification of Organic Law 8/1985, of 3 July, regulating the Right to Education, the Preliminary Draft eliminates revisions that were introduced to LOMCE, referring to the composition of the School Board. At the same time, it reinstates of section two of Article 54 of LODE, in point eight regarding the competencies of the director. In addition, it modifies Articles 11, 12 and 13 of LOMCE, with changes referring to sections one and two of Articles 59, 60 and 61 of LODE. The newly proposed regulation limits the faculties of the holder of the subsidized private center in favor of the School Council of the centre with regard to the designation or cessation of the director and of the teaching staff.

The Constitution, in the Article that regulates the right to education, recognises the freedom to create schools. Thus, Article 27.6 states that 'natural and legal persons are recognised as having the freedom to create educational centres, with due respect for constitutional principles'.

5 OECD (2016), PISA 2015 Results (Volume II): Policies and Practices for Successful Schools, PISA, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264267510.

6 Branch, G.F., E.A. Hanushek and S.G. Rivkin (2013), 'School leaders matter: Measuring the impact of effective principals', Education Next, Vol. 13/1, pp 62-69.

7 Propuestas para la Modificación de la Ley Orgánica de Educación (2018), Ministerio de Educación y Formación Profesional. pp 12. https://www.magisnet.com/pdf/modificacion.pdf

In addition, the Constitutional Court in various sentences derives from the right to the creation of schools, the right to their direction and management. This cannot be modified by invoking the right of participation and even more so in the case of private centres.

In this sense, STC 31/2018, FJ 5, affirms that 'as we have already expressed previously, and we have been repeating since STC 5/1981, in this type of centre the right of the holder of the teaching centre is of special importance, both in its positive aspect - to guarantee respect for the character of the centre and the right to assume in the last instance the responsibility of management - and negative - absence of insuperable limitations or that strip this right of the necessary protection. Thus, in the case of private creation centres, the right of participation provided for in Article 27.7 comes up against the additional limit that constitutes the need to be co-honest with the rights of the creator of the teaching centre'.

Weakening the educational leadership of the management team may lead to inefficiency in managerial action by diminishing the scope of its responsibility in the face of a more participatory regime in decision-making[8]. On the other hand, there may be interference in the rights of the owner of the centre to establish and direct according to the ideas of the centre.

3.4 Aspects relating to pedagogical freedom, in particular limitations on the teaching of religion and single sex educational projects

Finally, we will refer to two aspects that affect pedagogical freedom, the autonomy of schools and the right of parents to choose schools according to the educational projects they prefer for their children.

In her hearing, the Minister proposes to limit both the treatment of religion and the regime of centres of single sex education.

In the first case, it is stated in the hearing that 'the treatment of religion decided by the previous government does not seem to us to be the fairest or the most appropriate, taking into account the principle of secularity of the State. I announce that Religion will not be computable for academic purposes and will not have any form of alternative curriculum as it has been until now'.

In the proposal for the modification of the LOMCE there is talk of eliminating the harmful aspects of the teaching of confessional religion, although these aspects are not clear and the text of the Preliminary Draft specifies them in the articles that regulate the primary, secondary and baccalaureate curricula. It no longer has as an alternative the subject of civic values, which becomes obligatory. On the other hand, in the Second Additional Provision on the Teaching of Religion, it is proposed to eliminate section three, 'the determination of the curriculum and the evaluable learning standards that allow the verification of the achievement of the objectives and the acquisition of the competencies corresponding to the subject Religion will be the competence of the respective religious authorities. Decisions on the use of textbooks and teaching materials and, where appropriate, their supervision and approval, are the responsibility of the respective religious authorities, in accordance with the provisions of the Agreements signed with the Spanish State'.

In contrast to these proposals, the regulation of an alternative subject does not seem negative and rather avoids discrimination for those who choose religion because they do so in conditions comparable to other subjects. The fact that it is a subject of free choice does not affect that which is present in the baccalaureate curriculum either, and its elimination affects the right of parents and pupils to choose this subject.

Article 27.3 of the Constitution clearly states that 'the public authorities guarantee the right of parents to have their children receive religious and moral education in accordance with their own convictions'.

8 Sancho Gargallo, M.A. (2014), "Autonomía y Liderazgo en la LOMCE", El Cronista del Estado Social y Democrático de Derecho, num. 46, pp. 56-63.

The jurisprudence of the Constitutional Court has also established that the regulation of religion does not affect the principle of the secularity of the State, including the fact that it is evaluable.

Thus, STC 31/2018 states in FJ 6, 'the existence of this subject does not imply any appraisal of the religious doctrines that could affect the obligation of neutrality of the State. This is because, as already stated, the principle of "non-denomination or positive secularity" that characterises our constitutional system in this aspect (STC 46/2001, of 15 February, FJ, 4 and 38/2007, of 15 February, FJ 5) implies a performance guarantee with regard to the exercise of the right to religious freedom, which is enjoyed by individuals as well as by churches and confessions. To this must be added that the core content of religious freedom in its community or collective dimension is precisely "the public dissemination and expression of its religious creed" (STC 38/2007, FJ 5). Finally, this system is also an adequate channel for the exercise by parents of the right of their children to receive a religious and moral formation in accordance with their convictions. To conclude by stating that "therefore, as it is clear from our doctrine, the existence of an evaluable Religion subject of a voluntary nature for students does not imply any constitutional violation"'.

With regard to single sex education in the hearing of the Minister, she says that 'we find ourselves in an exceptional situation in the case of some concerted schools that practice the separation of boys and girls, in contradiction with the general principles of inclusive education and coeducation'.

In this sense, in the proposal for the modification of the LOMCE the reference that 'single sex education is not considered gender discrimination' is eliminated and the priority is reinforced in the system of concerts for centres that are organised under the principle of coeducation.

These ideas are reflected in the elimination of Article 84, section three, of the paragraphs:

> "The admission of pupils or the organization of education differentiated by sex does not constitute discrimination, provided that the education they provide is developed in accordance with the provisions of Article two of the Convention against Discrimination in Education, adopted by the General Conference of UNESCO on 14 December 1960."

In no way may the choice of education differentiated by sex imply for the families, students and corresponding centres a less favourable treatment, nor a disadvantage, when signing agreements with the educational Authorities or in any other aspect. To these effects, the centres must explain in their educational project the educational reasons for choosing this system, as well as the academic measures they develop to favour equality'.

But by maintaining that 'in no case shall there be discrimination for reasons of birth, race, sex, religion, opinion or any other personal or social condition or circumstance', the interpretation of differentiated education as segregation is favoured by deleting the precise reference to the UNESCO resolution.

On the other hand, the inclusion in the Twenty-fifth Additional Provision on effective equality between men and women that 'in the processes associated with obtaining and maintaining concerted units, it will be assessed that the centres apply the principle of coeducation' introduces an ambiguous element in the assessment that may lead to arbitrariness in the decision to postpone or exclude centres of differentiated education from the concert regime, as has been the case until the LOMCE has expressly affirmed its right to concert and that separation is not a cause for exclusion.

To describe this type of educational project as segregation is contrary to international legislation and to the reality of other educational projects and traditions. In addition, invoking as an argument the reinforcement of the principle of non-discrimination by gender takes for granted the discriminatory character that has been opposed by the credible ruling of the Constitutional Court.

Thus, STC 31/2018 in this sense concludes that, 'the system of single sex education is a pedagogical option that cannot be conceptualized as discriminatory. For this reason, it can form part of the right of the private school to establish its own character, in the terms that we have exposed previously'.

4. Conclusion: Essential aspects of the right to education as the basis of the social and political consensus

1. Freedom of education is part of the essential content of the right to education: The State must be the guarantor of its exercise.

2. The State must guarantee the right to education in a social context that is not always solidary and open to the needs of all citizens.

3. The State must respect the right of parents to educate their children in accordance with their religious and moral convictions.

4. Consequently, it cannot invade with ideological curricula that seek to impose a certain vision of the person beyond the constitutional principles.

5. In the same way, the freedom to create centres and therefore to direct and establish educational ideas and projects -within respect for public order- must be preserved. The State cannot impose contents that contradict the legitimate ideals and projects of the centre.

6. The financing of education must permit the exercise of freedom of choice within available resources.

7. Overcome the rigid planning that imposes the priority of a given educational network for the sake of misunderstood equity or equality.

8. To warn about the invocation of segregation in order to propose unique models as a sign of equality of opportunities and equity since they marginalize the position of the family and of the student himself, subject of the right to education.