Public Funding of Compulsory Education in Non-Governmental Schools, of Whatever Legitimate Pedagogical Option, Declared in Spain a Constitutional Duty to Satisfy the Human Right to Education with Freedom

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Summary: *1. Judgment 31/2018, of April 10, of the Spanish Constitutional Court, rejecting a socialist suit against a 2013 education Act, resolves particularly, among other issues, the conflict in Spain on the public funding of single-sex non-governmental schools. 2. Schools and education activities for a single-sex do not incur discrimination by themselves and are in conformity with constitutional order, having therefore, if they are private or non-governmental, the same right to public funding contracts as the coeducational mixed ones. 3. New clarifications of the case-law of Constitutional Court on public funding of education at the service of the right to education with freedom guaranteed by the Constitution. 4. The concurring opinion of the Vice-Chief Justice Encarnacion Roca confirmed* a contrario *the meaning of the doctrine of the Constitutional Court on this substantial point. 5. This comprehension of relationship between duties of public funding and the right to education with freedom is a decisive contribution for the equality, and offers a fitted answer to the need, internationally proclaimed, that liberty «does not lead to extreme disparities of educational opportunities for some groups in society».*

1. Judgment 31/2018, of April 10, of the Spanish Constitutional Court, rejecting a socialist suit against a 2013 education Act, resolves particularly, among other issues, the conflict in Spain on the public funding of single-sex non-governmental schools

1. The Official Gazette of the Spanish State of 2018, May 22, has published the Judgment of the Constitutional Court 31/2018, of April 10[1], which has dismissed in its entirety, by a majority of 8

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1 Following the practice of European Union Court of Justice, we will use the word *Judgments* for the Spanish *Sentencias*. The Spanish abbreviation *STC* (*Sentencia del Tribunal Constitucional*) is translated here as CCJ (Constitutional Court Judgment). The case-law of the Spanish Constitutional Court is easily accessible by internet. The Spanish name of the Official Gazette is *Boletín Oficial del Estado*. It is fully available in internet.

votes[2] against 4[3], the unconstitutionality appeal presented by more than fifty Members of the Socialist Group in the Congress against several precepts of the 8/2013 Organic Act, of 2013 December 9, for the Improvement of the Educational Quality (LOMCE), by which several modifications were introduced in the Education Organic Act (LOE) of 2006. The LOE, with these modifications, remains one of the two major basic laws determining the Spanish non-university educational system.

2. The LOMCE was approved, in the middle of a great social and political debate, under the first Rajoy Government of the Popular Party, which had obtained an absolute majority in the Congress of Deputies at the end of 2011[4].

Several unconstitutionality appeals were lodged against it, almost all for the same reasons as those presented by the Congress Members of the Socialist Group, but also, in those filed by the Autonomous Communities, for discrepancies over the limits between the legislative powers of the State and of the Autonomous Communities[5].

The appeal of the Socialist representatives focused mainly on these three issues of the appealed Act: the right to a contract of public funding of the non-governmental single-sex schools (of "differentiated education", according the expression used in Spain)[6] expressly guaranteed by the LOMCE, the modifications established by this same Organic Act on the participation of the different components

2 Those of Chief Justice J.J. González Rivas, Vice-Chief Justice E. Roca Trías, and Associate Justices A. Ollero Tassara, S. Martínez-Vares García, P. J. González-Trevijano Sánchez, A. Narváez Rodríguez, A. Montoya Melgar, and R. Enríquez Sancho. The appointment for the Court of Chief Justice and the first of these Associate Justices was proposed by the Congress of Representatives (the Low Chamber of *Cortes Generales,* the national Parliament) in 2012, on initiative of Popular Party, having been before, the Chief Justice, President of the Contentious-administrative Chamber of the Supreme Court, and Ollero a Law's Philosophy full professor and a former member of the Popular Group of the Congress; Martínez-Vares was appointed on proposition of the General Council of the Judicial Power in 2013 and he was also a Justice of the Contentious-administrative Chamber of the Supreme Court; González-Trevijano, a Constitutional Law full professor and a former President of University, and Narváez, Public Prosecutor of the Supreme Court, were appointed on proposition of the Government –at that time of the Popular Party- in 2013 too; Montoya, a Labor and Social Security Law full professor, and Enríquez, a Justice of the Contentious-administrative Chamber of the Supreme Court, have been appointed in 2017 on proposition of the Senate and on initiative of Popular Party. Ms. Vice-Chief Justice had been a Civil Law full professor and a member of the Civil Chamber of Supreme Court, being appointed on proposition of the Congress in 2012 on initiative mainly of the Socialist Party; she filed a concurring opinion, explaining some disagreement on some of the foundations of the Judgment.

3 Associate Justices F. Valdés Dal-Ré, C. Conde-Pumpido Tourón, Mª. L. Balaguer Callejón and A. Xiol Rios. The three first were appointed on initiative of Socialist Party, on proposition of the Congress in 2012 the first, and on proposition of the Senate in 2017 the other two; Valdés has been a Labor and Social Security Law full professor, Conde-Pumpido was a Justice of the Criminal Chamber of the Supreme Court and had been Attorney General of the State since 2004 to 2011, appointed by the socialist Government of Rodríguez Zapatero; and Ms. Balaguer has been a Constitutional Law full professor. Xiol Ríos, with a long judicial career, a specialist in contentious-administrative affairs, filled some political-administrative responsibility in the Justice Ministry under the first socialist governments of Felipe González, and arrived to Constitutional Court in 2013 appointed on proposition of the General Council of the Judicial Power. Valdés filed a dissenting opinion in which Conde-Pumpido joined. The other two Justices filed too, separately, broad dissenting opinions.

4 It was finally passed by 182 votes in favor –of Popular Group-, 143 against and 2 abstentions, apparently of the representatives of Navarrese People Union and Canaries Coalition, which supported some aspects of the bill or promoted or sustained some accepted amendments, but they disagreed with some of its contents or insufficiencies.

5 See about these appeals «Decisiones pendientes del Tribunal Constitucional y últimos pronunciamientos judiciales», Chapter 3 of Martínez López-Muñiz, J.L., Calvo Charro, Mª, González-Varas Ibáñez, A., y De los Mozos Touya, I. Mª, *Legitimidad de los colegios de un solo sexo y de su derecho a concierto en condiciones de igualdad*, Iustel, Madrid 2015, pp. 102 and ff. Only the appeal of the Catalonian Government, strictly limited to some issues about competences, was accepted in some aspect about the rules on language of teaching, by the Judgment 15/2018, of February 20. This recourse and other one presented by the Basque Government –completely rejected by the Judgment 68/2018, of June 21- were the unique ones not included the motives argued by socialist members of Congress.

6 This expression used in Spanish language to avoid the negative connotation of the notion of "separated education", which some ones understand immediately as "segregated education" with a pejorative meaning, holds also some risk of confusion. It is rather simply a personalized and "specialized education" which adapts pedagogically the same aims and contents to particularities of the sexes, particularly in their different process of growth. The usual terminology in English which speaks of single-sex education is perhaps better, more neutral.

of the education community in the schools supported by public funds, and their rules on religion teaching in public or governmental schools and on their teaching staff.

The Judgment 31/2018, which has finally come to be delivered four years later, has dismissed, as we have said, this appeal in its entirety, but here we will only speak about that the Court has said to confirm and clarify its doctrine about the Government duties regarding the public funding of the private or non-governmental educational centers.

Shortly later, in the following months, Judgments 49/2018, 53/2018, 66/2018 and 67/2018 would confirm with identical majority the same doctrine, totally rejecting the appeals filed, respectively, by the Parliament of Catalonia and the Governments of Asturias, Canary Islands and Andalusia. The Court has yet adopted the Judgment 74/2018, of July 5, also with the same majority, repeating its doctrine but adding it had had to be applied already to the LOE of 2006, before its reform in 2013 by the LOMCE[7].

3. The Court has ruled on this important issue to face the challenge of the Socialist Members of the Congress against the explicit legislative affirmation of the right of single-sex non-governmental or private educational institutions to the same public funding as the other private schools of their educational level, introduced in the LOE by the LOMCE. In order to uphold this challenge as unfounded, it has had to reject previously, against the plaintiffs, their accusation that the so-called “differentiated education” by sex, even in the conditions established by the treaties and by the very same text that the LOMCE has introduced in the LOE, is discriminatory or less legitimate than mixed coeducation.

Before entering into what we have wanted to be the more specific object of this contribution, it will be useful to make a summary of the conflict that this judgment has come to resolve, in order to better understand the context of the pronouncements of the Court.

4. In Spain, as in other European and American countries, most of the primary and general secondary education institutions, both public (governmental) and private (non-governmental), became coeducational (in the sense of mixed) in the seventies and eighties of the last century, although in general, except in rural areas of low population, they had previously been single-sex. Nevertheless no statute, in fact, imposed such change: It was merely the consequence of a pedagogical and social trend (not infrequently pure economic or practical reasons) and of some ideological tendencies.

Since 1985, under the socialist governments of Felipe González, it was implemented in Spain a public funding, although incomplete, of a free compulsory basic education (primary and general secondary) in non-governmental schools, through regulated and compulsory adjudicated contracts that, inspired by the French partnership contracts, were called “concerts”[8]. They were established by the LODE (Right to Education Organic Act 8/1985, of 1985, July 3) after its constitutional depuration by the very important Constitutional Court Judgment 77/1985, of June 27. These “concerts” replace the subsidies that previously could have benefited the mentioned private schools. Anyway at that time only some of non-governmental education centers were single-sex.

7 This Judgment overruled two decisions of regional educational Administration of Cantabria of 2009 which had denied the public funding by concert to an only boys school, accusing it of sex discrimination because it was single-sex, as well as the judgments of the Higher Court of Justice (Tribunal Superior de Justicia) of Cantabria, in 2011, and of the Supreme Court, in 2012, which had considered such decisions in conformity with law. The plaintiffs were parents with sons in that school. The ruling of the Judgment declares first of all that decisions and judgments reversed had «violated their fundamental rights to educational freedom (Article 27, 1 and 3 SC), in connection with the constitutional guarantee of the ideological freedom (Art.16.1 SC) ». The Higher Courts of Justice are regional State’s courts. The Autonomous Communities do not have an own Judicial Power. We will use SC as abbreviation of Spanish Constitution.
Afterwards, in October 2018 the Supreme Court (Chamber 3, of “Contentious-administrative” order, specialized in judicial review on administrative actions) has pronounced six Judgments rejecting several Andalusian Government appeals against the Judgments of Higher Justice Court of this region which overruled a plurality of decisions of its Educative Administration refusing finance contracts (“concerts”) to a plurality of single-sex schools. Supreme Court explicitly recognized in these Judgments that Constitutional Court has reversed its since 2012 mistaken case-law, briefly mentioned lower in these pages.

8 See De los Mozos Touya, I., *Educación en libertad y concierto escolar*, Montecorvo, Madrid 1995.

When the Ministry of Education, which was still competent for that purpose in most of the Spanish territory[9], decided to grant a "concert" to some single-sex schools of Asturias that had requested it when the Popular Party arrived, with Aznar, to the State Government in 1996, the most significant trade-unions, very linked to the Socialist Party and other parties of the left, challenged it before the courts. Almost at the same time, or shortly afterward, some Autonomous Administrations, the new Educative Administrations which the State transferred its competence to, tried to suppress "concerts" with single-sex schools, or denied their granting or renewal to educational institutions with such a configuration. All of that opened other several judicial review processes.

The contentious-administrative courts in general, and in particular and above all the Chamber of this jurisdictional order in the Supreme Court, maintained the legality of the "concerts" with the single-sex schools and their right to such public funding in equal terms than the rest of non-governmental educational centers, until the beginning of the second decade of the current century[10].

5. However, since July 2012, the Supreme Court, with the sole precedent of a couple of *obiter dicta* included in some of their judgements of 2006 and 2010[11], generated a confused case-law that denied the right to the "concert" to the single-sex schools, considering they were involved in discrimination, at the same time that, contradicting such a harsh qualification, recognized them as fully lawful[12]. The Legislative Power of the State hastened to immediately reject such jurisprudence: first, as contrary to the correct interpretation of the 2006 LOE, through the State General Budgets Act for 2013[13], and shortly later, in a more definitive and forceful way, inserting with the LOMCE, in December of that same 2013, two additional paragraphs in art. 84.3 of the LOE that clarified what should not be considered included in that discrimination by sex which, with good reasons, that article had already prohibited with respect to the admission of pupils to schools supported by public funds[14].

These two paragraphs are the ones that Judgment 31/2018, in what now matters, will analyze and judge, declaring its conformity with the Constitution and rejecting the contrary arguments of the Socialist representatives. In arguing it, the Constitutional Court will reaffirm its doctrine on the fundamental rights and freedoms in education and on the constitutional duties of the public power to protect and

9 The administrative and even legislative competences on education (these last strongly subordinated however to those of the State upon the legal bases of all the system) had already been transferred in the eighties to Catalonia, the Basque Country, Galicia, Andalusia, Valencia and the Canary Islands, and it would be soon also distributed among all the other Autonomous Communities at the end of the nineties. More details can be found in Meix Cereceda, Pablo, *Descentralización de la enseñanza y derechos fundamentales (Un estudio comparado entre España y Alemania)*, INAP, Madrid, 2013, more particularly in pp. 143 and ff., and 235 and ff.

10 There were nevertheless two unfortunate Judgments of the Supreme Court in 2008, April 16 and July 2, which, reversing, in a special and restricted process, a previous 2004 Judgement of the Higher Court of Justice of Castilla La-Mancha that annulled a decree of the regional Government, had admitted that the Executive of an Autonomous Community could subordinate the public funding to private schools to the condition to be coeducational mixed. Actually however a new Judgement of the same Supreme Court, pronounced in a process of full judicial review in 2010, February 24, restored the Judgment of the mentioned Higher Court of Justice, and recognized that state law in force did not allow establishing such a condition. About all this may be seen Chapter 7 of Martínez López-Muñiz, J.L., Calvo Charro, Mª, González-Varas Ibáñez, A., y De los Mozos Touya, I. Mª, *Legitimidad de los colegios de un solo sexo y de su derecho a concierto en condiciones de igualdad*, Iustel, Madrid 2015, pp. 276-288.

11 Judgments of 2006, June 26 (see lower down) and of 2010, February 24 (mentioned above). After holding that the single-sex schools could not be excluded of concerts of public funding because the applicable statute law did not ban it, the Court pointed out, in an amazing way, beyond the object of the suits, that one other conclusion should be established as soon as an Act forbids discrimination by sex. As Constitutional Court has come finally to recall in all clearness, never it should have been thought that discrimination by sex can be acceptable: obviously it has been always forbidden in the Constitution.

12 The leading case, judged in 2012, July, 23rd, with one dissenting opinion of the 5 judges, has been reversed by the Judgment 74/2018 of the Constitutional Court, quoted above. For a broader information about this case-law see Chapter 5 of quoted Martínez López-Muñiz, J.L., Calvo Charro, Mª, González-Varas Ibáñez, A., y De los Mozos Touya, I. Mª, *Legitimidad de los colegios de un solo sexo…*, pp. 202-204, and Chapter 6 of the same book (written by González-Varas Ibáñez, A.), pp. 239-244.

13 See our comment in mentioned Chapter 5 of repeatedly quoted book, pp. 187-212.

14 Details of the parliamentarian shaping of the text, including the amendments rejected, in Chapter 2 of the same book quoted above, pp. 50-97. In Medina González, S. *Los derechos de los padres en el sistema educativo*, Aranzadi, Thomson-Reuters, Cizur Menor (Navarra), 2016, pp. 51-60, it can be also found a good explanation about all the history of the issue.

guarantee them, specifying, as we will see, in an important way, these duties regarding the public funding of the non-governmental or private schools.

2. Schools and education activities for a single-sex do not incur discrimination by themselves and are in conformity with constitutional order, having therefore, if they are private or non-governmental, the same right to public funding contracts as the mixed coeducational ones

1. The first of the paragraphs added in 2013 to art. 84. 3 of LOE came indeed to say that:

> *"The admission of pupils, boys and girls, and the organization of education differentiated by sexes do not constitute discrimination, provided that the teaching they teach is carried out in accordance with the provisions of article 2 of the Convention on the fight against Discrimination in Education, approved by the General Conference of UNESCO on December 14, 1960."*[15]

It is obvious that this was changing nothing of the pre-existing legal system, because that Convention was in force in Spain since 1969 and the Supreme Court, in 2006, had already said that equality in the right to education and freedom of education, guaranteed by the Spanish Constitution of 1978, ought to be interpreted, as required by its art. 10. 2, in accordance with that Convention[16]. Surely for that reason, in the legislative procedure for the elaboration of the LOE in 2005-2006, under a socialist majority, the amendments that some minority groups of the most radical left had presented to the Congress and the Senate, which sought to include an express ban of "concerts" with the single-sex schools, had been rejected[17]. But the Socialist Party apparently changed its opinion about it between 2006, when the government was theirs, and 2013, already in the opposition, and not only opposed to the introduction through the LOMCE of these clarifying complements to art. 84.3 of the LOE, but, after failing to achieve that purpose, decided to challenge them before the Constitutional Court, while the Autonomous educational Administrations ruled by this party were contumacious in ignoring the new and clear mandate of the law.

2. Judgment 31/2018, as we have advanced, with a broad line of argument based on the aforementioned UNESCO Convention and other international agreements on rights and freedoms in education and

15 Which says: *(…) the following situations shall not be deemed to constitute discrimination, within the meaning of Article I of this Convention:*
(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions 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;.

16 Legal Basis 8 of this Judgment of 2006, June 26 (Chamber 3, specialized in the Contentious-administrative order, Section 7), on the "cassation" recourse 3356/2000, of *UGT-FETE*, case of *concerted private schools in Asturias.* The unanimous opinion of the tribunal was filed by one of their 5 Justices who is a Constitutional Law professor (P. Lucas Murillo de la Cueva). The President of this tribunal was one of the current Associate Justices of the Constitutional Court (J.J. González Rivas).

17 Details can be seen in Chapter 5 of Martínez López-Muñiz, J.L., Calvo Charro, Mª, González-Varas Ibáñez, A., y De los Mozos Touya, I. Mª, *Legitimidad de los colegios de un solo sexo…*, quoted above, p. 200.

about equality into them[18], on the comparative reality of several countries of the European Union (United Kingdom, France, Germany or Belgium) and of the United States of America, as well as on the Spanish Constitution itself and constitutional case-law already set up in its interpretation, concluded in its LB[19] 4, a), that «the system of single-sex education is a pedagogical option which cannot be deemed as discriminatory. Therefore, it can be a part of the right of any private or non-governmental school to establish its own character», which is a public freedom guaranteed by the Constitution, Art. 27.6. And in precedent paragraphs it is reminded, very opportunely, that this own character, ethos, way of being or basic set of ideas that shape each school (*ideario*) «can be considered to a great extent (...) as the point of convergence that makes possible the exercise of the right of creation of educational institutions and the right of the parents to choose the kind of education that they wish for their children, putting in connection educational supply and demand», with all its importance for these fundamental and constitutional rights.

We will not lengthen us further on this issue, in spite of very interesting terms of the motivation of the Judgment in this regard. It is not the central issue of these pages.

3. The other paragraph introduced by the LOMCE in art. 84.3 of the LOE, which is the third one of those that currently make up it, draws out the consequences and says:

> *"In no case the election of the differentiated education by sexes will be able to imply for the concerned families, pupils, boys or girls, and schools a less favorable treatment, neither a disadvantage, at the time of subscribing concerts with the educational Administrations or in any other aspect. To this end, the institutions must expose in their educational project the educational reasons for the choice of said system, as well as the academic measures they develop to favor equality."*

The Socialist representatives, as plaintiffs, tried to justify the unconstitutionality of this rule asserting that «it does not contribute to make effective the equality of the sexes nor its aim is to respect the democratic principles of living together and the fundamental rights and freedoms» (*sic*).

In the LB 4.b) of its Judgment 31/2018, the Constitutional Court rejects such an accusation and maintains that this rule is consistent with the constitutional order, since, as it rightly affirms, «only in the case that differentiated education by sexes is unconstitutional, the legislator's option to deal in an equal manner both pedagogical models (the single-sex and the mixed) in the field of educational concerts, could be objected». And it had already been shown that this pedagogical option, the so-called "differentiated education" in single-sex schools or activities, is not unconstitutional by itself, but, on

18 Specially the 1979 Convention on the Elimination of all Forms of Discrimination Against Women, Art.10, c), where *coeducation and other types of education which will help to achieve this aim* of the *elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education*, were encouraged as *measures to eliminate discrimination against women in order to assure to them equal rights with men in the field of education.* Rightly the Constitutional Court, as Supreme Court already did in its quoted Judgment of 2006, has recognized that "differentiated education" by sexes in the sense accepted by UNESCO Convention of 1960 is one of these legitimate and appropriates *other types of education which* may *help to achieve this aim*. In no way mixed coeducation is considered the unique acceptable form. We had commented this Convention in a similar sense, in Chapter 7 of Martínez López-Muñiz, J.L., Calvo Charro, Mª, González-Varas Ibáñez, A., y De los Mozos Touya, I. Mª, *Legitimidad de los colegios de un solo sexo…*, quoted above, pp. 262-264; and, facing the arguments of socialist deputies appeal and picking up the outstanding Judgment of the German Administrative Federal Supreme Court of 2013, January, 30th, in Chapter 3 of the same book, pp. 107-111.

19 The motivation of jurisdictional decisions is articulated successively in numbered facts and legal basis of the final adjudication. We will use here LB (legal basis) for the *FJ* (*Fundamentos Jurídicos)* of the Judgments of the Spanish Constitutional Court.

the contrary, constitutes a legitimate option for the right to education with freedom and for the school freedom[20].

3. New clarifications of the case-law of Constitutional Court on public funding of education at the service of the right to education with freedom guaranteed by the Constitution

1. It was precisely in that same legal basis 4 b) of the Judgment that we are commenting, in order to motivate the constitutionality of this right of single-sex schools and of pupils or their families who opt for them, to receive no less favorable dealings or any disadvantage, at the time of signing "concerts" with educational Administrations or in any other aspect, as it says the legal norm subject to the trial, when the Constitutional Court has come to illustrate, in a concrete and precise way, never used until now, the exigencies that derive from the Constitution with regard to the grant of public resources to non-governmental educational institutions.

2. His first statement is already momentous and situates very appropriately the issue: «The public funding of private educational institutions responds, essentially, to the provisions of three constitutional precepts: first, to what is established in Article 27.9 SC, according to which *the public authorities shall give aid to teaching establishments which meet the requirements to be laid down by the law* (by statute law); secondly, to the provision of article 27.4 SC, according to which *basic education is compulsory and free*, and, finally, to Article 9.2 SC, which indicates that *it is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life*».

3. The consequence immediately extracted is net and with important implications: «In this way,» it says, «although the constitutional anchoring of public funding is basically found in Article 27.9 SC, it cannot be ignored that the fourth paragraph of that same constitutional Article imposes the basic education in a free way which we have considered a right to receive this essential service (CCJ 86/1985, of July 10, LB[21]3)», that is not only a liberty right but also a right to receive from others and, if necessary, of the competent authority the appropriate means to satisfy the concerned human need. «The relationship between both paragraphs of Article 27 SC is clear for two reasons. First, because there is, among all the precepts that make up that article, "a narrow connection ... derived from the unity of its object" (CCJ 86/1985, of July 10, LB 3). Secondly and more specifically, as we have stated since the aforementioned CCJ 86/1985, because the rule in which the funding requirements of private schools have to be defined ex Article 27.9 SC "will not able, in particular, to contradict educational rights and freedoms of this article", what binds to take into account the exigencies of a free education imposed by the fourth paragraph of article 27».

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20 An updated overall view on this pedagogical option, with international bibliographical information, in Calvo Charro, Mª, *La Educación diferenciada en el siglo XXI (Regreso al futuro)*, Iustel, Madrid 2016. May be also useful, among others, Barrio Maestre, J.Mª, (ed.), *Educación diferenciada, una opción razonable,* Eunsa, Pamplona 2005 (including contributions of von Martial, I., Salomone, R.C., Hoff Sommers, Ch., and other ones). There has been several International Congresses of Single-Sex Education: about the first, EASSE (ed.), *Building Gender-Sensitive Schools-El tratamiento del Género en la escuela*, Barcelona 2007; about the second, La Marca, A. (a cura di), *L'educazione differenziata per le ragasse e per i ragazzi (Un modello di scuola per il XXI secolo)*, Armando, Roma, 2009; about the third, Fundacja EASSE Polska, *Sukces w edukacji (Personalizacja nauczania) / Success in education (Personalized teaching),* Warsawa 2011; about the fourth, which took place in Lisbon, 2013, http://www.easse.org/fr/content/232/Lecturers+-+IV+Internacional+Congress+of+ Single-sex+Education/; about the fifth, London 2016, http://www.easse.org/ en/content/475/5th+EASSE+CONFERENCE+/.

21 In Spanish, as in other continental European languages, the adjective used for this kind of rights is *prestacional.* Because it seems there is no any similar word in English, we use this equivalent expression: a *prestacional* right is indeed a right to receive some service, which will have to be considered an essential service if the right is a fundamental human right. It is common to have these rights as *social rights*, opposed to freedom rights (the old liberal rights par excellence). The right to education has a double dimension: primarily as freedom right and also as social right. Spanish Constitutional Court has repeatedly said it.

Never the Court had said it with such firmness and in such an explicit manner, even though it was implicit in what already was laconically affirmed in CCJ 86/1985. But actually it has not stopped in this statement; it has gone further.

4. What the Judgment immediately affirms gets the utmost importance and excludes from Spanish constitutional order the opposite approaches: «On the other hand», it says, «**this constitutionally guaranteed free education cannot refer exclusively to the governmental or public school, denying it to all private or non-governmental schools, since this would imply the compulsory nature of such a governmental education, at least at the basic level, preventing the real possibility to choose the basic education in any private center. This would cut from the root not only the right of parents to choose a teaching center, but also the right to create teaching centers enshrined in Article 27.6 SC**, whose essential content we have lately specified in CCJ 176/2015, of July 22, LB 2, picking up statements of our CCJ 77/1985, of June 27, LLBB 9 and 20[22]. In this sense, **public funding of private schools is at the service of the *prestacional* content enshrined in Article 27.4 SC**», that is to say of the duty this constitutional norm imposes to public authorities in order to provide the means assuring everyone a free basic education.

We have allowed ourselves to highlight in bold the lines that seem to us be making explicit for the first time something extremely important, dispelling any possible doubt about it. Perhaps it could be said even more clearly, but it is incontestable that the Court is upholding that the Constitution compels to public funding of a free compulsory education in both public (governmental) and private (non-governmental) schools. The right to education is certainly understood as a social *prestacional* right and therefore not merely as a liberty right, then as a right to receive de necessary means to satisfy the human essential need of education. It is not a right to be educated necessarily in governmental institutions. It is rather the right to be educated, if necessary with the public economic support, in some available educational institution, subjected to the common general rules established for the schools of the same educational level, which parents or guardians have to be able to choose on behalf of their children while they are minor, in their name and representation. What obviously requires a framework that makes possible the establishment of all kind of educational centers, with the orientation, shaping, character or basic ideas which better satisfy the effective social demand, that is the legitimate preferences of learners, or, if they are minors, those of their parents or guardians[23]. But sure: that framework is not enough under a Social State of Law such as Spanish is (Article 1.1 SC): a fundamental human right as the right to education which cannot be only a liberty right because is always also a social right, a right whose effective ability of exercise must be assured by the Public Power, cannot be guaranteed simply as a freedom merely formal to choose, only available in fact for those which can afford it for themselves, but necessarily also through an appropriated system of public funding of all the regulated education. This applies of course especially to basic and compulsory education that the Spanish Constitution and international agreements require free for everyone, therefore available and accessible without costs in direct charge of the students or of their families. That is indeed the reason that it is not to forget that, as the commented Judgment clearly states, **public funding of private schools is at the service of the *prestacional* content** of the right to education **enshrined in Article 27.4 SC**, though it only refers particularly to the basic education.

22 Constitutional Court has interpreted *the liberty to create educational institutions*, such as it is recognized in favor of *any physical and legal person* by the mentioned Art. 27.6 of the Constitution, in conformity with and under the light of the Art.13.4 of the International Covenant on Economic, Social and Cultural Rights, of 1966, which establishes: *No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.* Since 1981 its case law is holding up that part of the essential content of that liberty undoubtedly is to shape the educative project with legitimate ideas freely chosen. See, among others, the more recent comments of Medina González, S. *Los derechos de los padres en el sistema educativo*, quoted above, pp. 48-49.

23 See, in similar sense, commenting Article 14.3 of the Charter of Fundamental Rights of the European Union, P. Meix Cereceda, *El derecho a la educación en el sistema internacional y europeo*, Tirant lo blanch, Valencia 2015, p. 160.

5. The Court has been careful to clarify that these statements do not contradict the doctrine set forth in Judgment 86/1985 when it said that «the right to education (to free education in basic education) does not include the right to free education in **whatever** non-governmental (private) institution, because public resources do not have to go, unconditionally, wherever individual preferences go», or, what is the same idea, that the Constitution does not require «that **every** private educational center of compulsory level are publicly financed» [bold type is added]. But, in recalling that, the Court has not said anything that might be understood as admissibility of any condition for that public funding based on whatever legitimate educational options specifically chosen by the schools. Therefore in no way it could be understood that it allows handling the public funds to condition or restrict educational freedoms beyond their common and general regulation. It is clear that it has implicitly accepted, in short, the principle of neutrality recalled at this regard by the State's Attorney in its defense of the challenged Organic Act against the plaintiffs' claims. What does not mean, of course, that the allocation of public resources cannot and should not be legally conditioned (as indicated in Article 27.9 of the Constitution in general terms) by the acceptance and fulfillment of the specific requirements that might guarantee the effectiveness of this public funding for getting its legitimate purposes, such as certain standardization of payable costs, minimum number of pupils per teaching unit -if this is the base of the funding system- or maximum assignment per pupil, or, eventually, the ways to receive the funds and to give account about its effective correct application.

6. Additionally the Judgment that we comment makes yet clear that «[t] he concert is the model adopted by the legislator to comply with the obligation contemplated in Article 27.9 SC, although other different forms of aid would also be appropriate», and that, «in this way, educational concerts are framed in the *prestacional* or social dimension of the most generic right to education», in its exigency the needed means be provided. Therefore these contracts implement the duty of the Public Administration to guarantee the effectiveness of the right to education with freedom when in its exercise anyone opts for a private educational institution.

4. The concurring opinion of the Vice-Chief Justice Encarnacion Roca confirmed *a contrario* the meaning of the doctrine of the Constitutional Court on this substantial point

1. The meaning of all these pronouncements of the Judgment 31/2018 is further clarified and confirmed, if possible, in view of the considerations of the concurring opinion of the Vice-Chief Justice Encarnación Roca. Although she voted with the majority totally rejecting the claim of the socialist representatives, she decided to express his discrepancy about some of the arguments expressed by the majority to justify particularly the constitutionality of the third paragraph of LOE, Art. 84.3 introduced by LOMCE.

«From the premise, which I share – the opinion literally says - that differentiated education by sexes cannot be considered a case of discrimination based on sex, I do not believe that it can be concluded, as the Judgment seems to suggest, that there is a constitutional obligation derived from art. 27.9 SC, from which arises a right to the concert for institutions in which this education is imparted».
It is then evident that this confirms, excluding any doubt, that the Court in its Judgment, with a large majority of its components, actually is recognizing the right to the "concert" (to this public funding contract) for single-sex schools, as a right certainly derived from 27.9 of the Constitution, interpreted in combination with paragraph 4 and others ones of the same Article and with the clarifications and nuances that have already been exposed. And it is true: that marks duties for the future and not only for the past, also for the Parliament.

2. Justice Roca accused the majority's reasoning «be limiting, in a certain measure, the legitimate options of the democratic legislator in this matter. Options that are, in short –she said- an expression of political pluralism as a higher value of the legal system (Article 1.1 SC)».

It is an argument certainly a bit amazing. It is not a valid reason to decide how the Constitution has to be understood in a disputed point. It should not be necessary to recall that all what the Constitutional Court establishes as something required by the Constitution, comes of course to exclude from the democratic arena the legitimacy of whatever contrary options, except to propose a constitutional amendment or reform. Constitution protects the political pluralism always into these limits. And obviously the Court must not to enlarge unduly the constitutional content, increasing such limits. But the question is if the constitutional content includes or not the specific exigencies on which the Court has to decide. And truly, in our case, concurring opinion of Justice Roca don't give reasons in this respect against those of the majority, so solidly anchored.

5. This comprehension of relationship between duties of public funding and the right to education with freedom is a decisive contribution for equality, and offers a fitted answer to the need, internationally proclaimed, that liberty «does not lead to extreme disparities of educational opportunities for some groups in society»

1. This doctrine of Spanish Constitutional Court, so clearly upheld in the commented Judgment 31/2018, and later consolidated in the other mentioned Judgments of the same year 2018, has a great importance for the improvement of conditions of a more real equality without which an effective enjoyment of the right to an true education, freely chosen, will keep being difficult for many. It is something that the notion of the right to education as fundamental human right undoubtedly requires. Without freedom this fundamental right lacks its primary essential content. Unfortunately many people are suffering this lack all over the world. Probably real conditions of a total equality are impossible, but to be closer of justice societies can and should much improve the conditions of equality in the liberty.

2. It is pertinent to recall at this regard the realist warning of the United Nations Committee on Economic, Social and Cultural Rights, in its *General Comment 13,* on *The right to education (article 13 of the Covenant),* of 1999, December 8 (E/C 12/1999/10), paragraph number 30, when it speaks about *the right to educational freedom* commenting Article 13 (3) and (4) of the Covenant on Economic, Social and Cultural Rights of 1966.

With reference more particularly to Article 13 (4), this *General Comment* proclaims that, under this rule, «everyone, including non-nationals, has the liberty to establish and direct educational institutions. The liberty also extends to "bodies", i.e. legal persons or entities. It includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education».

But just after all that, the *Comment* wisely adds: «Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in article 13 (4) does not lead to extreme disparities of educational opportunity for some groups in society.»

How will it be possible to implement this purpose whether public authorities give the economic necessary means to pay the schooling only to governmental schools? Although generous social initiatives, even sometimes stimulated by governments, can praiseworthily reduce in some measure the problem, it is evident that, in such a context of concentration of the public funds in governmental schools, the opportunity to attend to non-governmental or private schools will be reserved in fact for people with sufficient economic possibilities, what will lead to consequent disparities among more or less poor or rich persons. The same disparities of course which would have to be diminished, not promoted, and more specifically by public authorities in their management of the money of all citizenry. That is why it is so important what international Committee on Economic, Social and Cultural Rights has so expressly declared.

3. It will not be superfluous additionally to remember that, as the same *General Comment* explicitly says at its paragraph 29, «the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to "such minimum educational standards as may be laid down or approved by the State"» [« the second element of Article 13 (3)» of the commented Covenant], «has to be read with the complementary provision, Article 13 (4), which affirms "the liberty of individuals and bodies to establish and direct educational institutions", provided the institutions conform to the educational objectives set out in article 13 (1) and certain minimum standards».

Certainly this last liberty only finds its deepest justification in that other liberty, more fundamental and inherent to right to education, to choose the school. Human services only are justified by the human needs they satisfy. The center and the reason of education system must be then in any case the persons to be educated, their dignity, their needs to learn and their liberty, duly represented by parents or guardians whereas they are minor, as the best guarantors, generally speaking, of their liberty and pluralism. And yes, exactly because of this centrality of pupils in education, the duty of a public funding granted both to governmental and non-governmental schools, proclaimed by the Spanish Constitutional Court in the Judgments commented, is ultimately founded in the equality required by the right to education in the face of the public authorities action in order to its effective protection and satisfaction.