

Right to education in Spain*

Santiago Cañamares Arribas
Professor of Law
Complutense University of Madrid

1. Introduction

The Spanish Constitution (1978) in its first article identifies equality, liberty, and political pluralism as fundamental values of the constitutional system. The approval of the Constitution signified the transition from dictatorship to democracy.¹ This transformation required both the recognition of fundamental and universal rights, in accordance with the provisions of the international human rights instruments which Spain would subsequently ratify, and the adoption of new basic principles to inspire the actions of public authorities in political, social, and religious contexts.

Within the catalogue of fundamental rights recognized by Chapter II of the Spanish Constitution (hereinafter CE), those concerning education are included in art. 27. For a proper understanding of the content and limitations of this basic right, it must be born in mind that according to art. 10.2 CE, ‘the laws concerning fundamental rights and freedoms recognized by the Constitution, must be interpreted according to the Universal Declaration of Human Rights and the international agreements and treaties on these subjects, which have been ratified by Spain.’”

Within this framework, the European Convention on Human Rights is a significant factor, given its binding legal nature and the continuing oversight exercised by the European

* The author is extremely grateful to Prof Javier Garcia Oliva, at the University of Manchester, for his generous help in editing the final version of this work. Any remaining infelicities are of course entirely my own.

¹ A detailed explanation of the political and religious background of Spain can be found in J. Martínez-Torrón, *Religion and Law in Spain. International Encyclopaedia of Laws: Religion*, Wolters Kluwert (2013) 17-33.

Court of Human Rights. Furthermore, a number of articles are particularly relevant to upholding the right to education and instruction. Art. 9 ECHR, covers religious and ideological freedom and art. 2 of its First Additional Protocol, recognizes both the right to education and the right of parents to choose for their children the instruction that is in accordance with their own ideological convictions. In addition, the International Covenant on Economic, Social and Cultural Rights (1966) is also relevant for interpretative purposes, as well as the Charter of Fundamental Rights of the European Union, which is also applicable when European Law is at issue.²

2. Nature of the legal system

Art. 27 CE proclaims both the right to education and freedom of teaching. While the former corresponds to the obligation of the State to provide all individuals with a free place to attend the compulsory levels of education, the latter encompasses a set of provisions aimed at enabling parents to ensure that their children receive an education that is in accordance with their own worldview.

2.1 Right to education

Historically, the right to education was conceived of in terms of the duty on the part of the State to provide to all citizens the elementary education completely free of charge through the establishment of state schools, which were ideologically neutral. Once the programme of the movement known as Illustration was implemented in the XVIII century, it was made clear

² The right to education is shrouded in art. 14 of the European Charter of Fundamental Rights, which reads as follows: 1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

that education had to be provided without taking the role of religious communities into account. Consequently, this crucial task was to be carried out by the State through a ‘secularising’ programme which aimed at ending the pre-eminence of religion in both the cultural and social life of the people.

Nowadays, the right to education is considered an individual right which guarantees a place in state educational institutions to all students. The provision of this service is guaranteed, as the Spanish Constitution acknowledges in art. 27.5 through general education programming, with the effective participation of all parties concerned and the setting up of educational centres.³ Likewise, the creation of educational institutions by the State, proclaimed in the same article, is regarded as a mean to guarantee this right, as well as the public financing of those educational institutions which meet the criteria recognised by the legal framework.

The right to education is considered universal which means that it refers to both Spanish citizens and others, irrespective of their legal status. Consequently, it is so recognized in the Organic Law 4/2000, on the rights and liberties of foreigners in Spain and their social integration⁴. Interestingly, this norm was modified, in compliance with the doctrine set out by the Constitutional Court in its Judgment 236/2007, 7th November⁵ where it acknowledged the right of all minors to enjoy the benefits accorded to Spanish citizens and legal residents from other jurisdictions in respect of compulsory and post-compulsory levels of teaching.⁶

It must be pointed out that the right to education effectively amounts to a right to be provided with a service. Although the State is required to guarantee a place for pupils during the compulsory stages of education, the Constitution does not establish any sort of correlation

³ See Constitutional Court Judgement 86/1985, 10th July, *Fundamento jurídico tercero*

⁴ Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social. Spanish Official Bulletin (Hereinafter BOE) 12 January 2000

⁵ *Fundamento jurídico octavo*

⁶ Article 9 of this Organic Law reads as follows: Foreigners under the age of sixteen have the right and duty to education, which includes access to basic, free and compulsory education. Foreigners under eighteen years of age also have the right to post-compulsory education.

between the right to free basic education and the freedom of teaching insofar as there is no right to obtain a free place in one's favoured educational institution. Freedom of teaching is a freedom strictly speaking, which means is not a right to be provided with a service, and therefore there is no constitutional right to demand financial support from the State in order to attend a private teaching institution with a particular ethos.⁷

Finally, it should be highlighted that article 27.2 CE states that education shall aim at the full development of the human character in relation to the democratic principles of coexistence along with the fundamental rights and freedoms.

2.2 Freedom of teaching

The freedom of teaching has been always conceived as the right of both citizens and social groups to create teaching institutions because it was considered that the function of the State in this respect was meant to be subsidiary.

More precisely, the Constitutional Court in its Judgment 5/1981, 13th February gave freedom of teaching a broad interpretation. According to this decision, this freedom includes the right of parents to choose religious and moral education for their children in accord with their convictions under art. 27.3 CE.⁸ It is widely accepted that this recognition paved the way to the incorporation of religious teaching in state teaching institutions.⁹

Consequentially to this content, this freedom also includes scope to create educational institutions as recognised in art. 27.6 CE and support the idea that private bodies may be

⁷ Constitutional Court Judgment 86/1985, 10th July 1985. The Supreme Court took this same approach in its Judgment of 20th January 1987.

⁸ Art. 27.3 CE reads as follows: The public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction that is in accordance with their own convictions.

⁹ This chapter uses the term 'state' rather than 'public' in order to refer to schools owned by public authorities. We opted to avoid the term public as it has the potential to generate confusion for readers in the United Kingdom, where it is used to describe privately funded educational establishments. Further, it should be borne in mind that education is a devolved matter in Spain, and therefore 'state' as an adjective has been used to refer to both the State and the regional authorities.

supported by public funds, and in such cases, teachers, parents and, where appropriate, pupils, shall share in the control and management of the teaching centre.

It cannot be ignored that intimately related to the freedom in teaching is freedom of religion or belief that is recognised in art. 16 CE. This freedom encompasses both the individual and collective right to manifest religious and ideological beliefs, which cannot be limited beyond what it is strictly necessary for the protection of public order. The content of this provision was developed by the Organic Law¹⁰ (Ley Orgánica) 7/1980, on Religious Freedom¹¹ which refers in art. 2 to some faculties that are inherent to this basic freedom, like the right to receive and to deliver religious teaching, whether orally, written, or through any other means, as well as the right to choose for oneself and for minor children, inside and outside of school settings, education in accordance with one's religious convictions.

Equally, from a collective perspective, this law also acknowledges the right of religious denominations to disseminate their own doctrine. In order to apply these rights properly and effectively, public authorities must adopt whatever measures are necessary to facilitate religious education within state educational institutions. At the same time, religious denominations, in common with all other legal persons, are recognised as having the right to fund their own teaching institutions, provided they act in conformity with constitutional principles.

The Organic Law on Education¹² (hereinafter LOE) in its second Additional Provision establishes that religious education will be tailored to the content of the cooperation agreements signed with the various religious denominations, viz, the Catholic Church, and the Protestant churches, the Jewish community and the Muslims.

¹⁰ The *leyes orgánicas* are superior to ordinary laws in the juridical hierarchy and regulate, among other subjects, the development of fundamental rights and public freedoms, as set out in Art. 81 of the Constitution.

¹¹ Ley Orgánica 7/1980, de Libertad Religiosa, 5 July 1980. State Official Bulletin (hereinafter BOE) 24 July 1980.

BOE is fully accessible (only in Spanish) at: https://www.boe.es/diario_boe/

¹² Ley Orgánica 2/2006, del Derecho a la Educación, 3 May 2006. BOE 4 May 2006

Finally, it is also provided that "In the regulatory framework for Primary Education and Compulsory Secondary Education, non-denominational teaching on the culture of religions may be established."

As far as the Catholic Church is concerned, Article II of the Agreement on Teaching and Cultural Affairs between Spain and the Holy See (1979)¹³ declares that in the different educational levels, excluding universities, the teaching of Catholic religion will be provided in all schools and must be offered in similar conditions to the other fundamental subjects. It is also agreed that such education will not have a compulsory character for students but they are guaranteed the right to receive it. On the other hand, the Agreements with minority religions in their respective article 10 guarantees, at all different teaching levels, the right of parents and students in state and publicly-funded private schools to received religious education, as long as the exercise of this right does not contravene an institution's own nature.¹⁴

On some occasions, the parents' right to choose religious and moral education for their children in compliance with their convictions has not enjoyed the same level of protection as set out by the Strasbourg Court in Folgero¹⁵ and Zengin.¹⁶

Another important aspect of freedom of teaching is the academic freedom (the so-called *libertad de cátedra*), which refers to the freedom of expression of teachers and lecturers in their academic positions. This freedom is not contained in art. 27 CE, but in art. 20 CE, alongside the right to freedom of expression and information.¹⁷ This article states that its exercise must

¹³ Agreement on Teaching and Cultural Affairs, 3rd January 1979, available at <http://spcp.prf.cuni.cz/dokument/esp4a.htm> (Last visit 23 January 2023)

¹⁴ These agreements were approved by an ordinary law in the Spanish Parliament, so that the Law 24/1992, 10 November, approves the Agreement between the State and the Federation of Evangelical Entities of Spain (FEREDE); the Law 25/1992 approves the Agreement with the Federation of Jewish Communities while the Law 26/1992, approves the Agreement with the Islamic Commission of Spain. (BOE 12 November 1992)

¹⁵ ECtHR Judgment (GC) Folgero v. Norway, 29 June, 2007. Available at <http://hudoc.echr.coe.int/eng?i=001-81356>

¹⁶ ECtHR Judgment Zengin v. Turkey, 9 October 2007. Available at <http://hudoc.echr.coe.int/eng?i=001-82580>

¹⁷ Article 20 of the Spanish Constitution reads, in relevant part, as follows: "1. The following rights are recognised and protected: [...] the right to Libertad de cátedra (academic freedom)

respect fundamental rights of others and particularly the protection of youth and childhood, amongst other rights. While the content of this right has not been developed through a specific legal instrument (Ley Orgánica), its coverage and limits have been clarified by the Constitutional Court.

This freedom, in its original understanding, is derived from the need to protect freedom of expression of university lecturers before any state coercion in light of their relationship with the State in the public teaching sector. Therefore, initially the only holders of this right were university lecturers.

The Constitutional Court, in its Judgment 5/1981, defined the academic freedom (*libertad de cátedra*) as follows: ‘it is a freedom against public authorities, the content of which is defined by the specific characteristics of the teaching post or *cátedra*, and such a position entitles the teacher to enjoy such a freedom.’ As the Court observed later on in its Judgment 179/1996, *libertad de cátedra* is undoubtedly a continuation of the ideological freedom of teachers and their right to convey, freely, their thoughts, ideas, and opinions in relation to the subjects which are the scope of their teaching.

The Constitution of 1931 first recognised in article 48 the academic freedom which led to its application to all teachers in the state educational sector. However, this freedom currently refers to all teachers, irrespective of their levels of teaching, and regardless of the relationships between their teaching and research.

In any event, the exercise of this right depends on both the level of teaching and the nature of educational institutions as state or private, as recognised by the Constitutional Court in its Judgment 5/1981. Consequently, in state schools, this freedom has a negative dimension which empowers teachers to reject any attempt to teach in accord with particular ideological

[...] These freedoms are limited by respect for the rights recognised in this Title, by the legal provisions implementing it, and especially by the right to honour, to privacy, to personal reputation and to the protection of youth and childhood.”

stances. From this point of view, “libertad de cátedra” is incompatible with an official faith or ideological position.

In private educational institutions, the aforementioned Judgment of the Constitutional Court declared that the existence of an ethos does not obligate teachers to promote it actively or to teach with a view toward indoctrination. Further, teachers are not expected to subordinate scientific rigor to a particular ethos. However, such exercise must be compatible with the freedom of a school with a particular ethos and from that point of view any direct or indirect attacks to such an ethos is not acceptable. In this context, the Court considered that teachers in general can carry out their activities in the way they deem appropriate.¹⁸

The academic freedom also has a positive dimension which refers to the determination of the content of teaching and its methodology. This freedom is wider in higher education, because in the lower levels of schooling educators must respect the minimal content of teaching as established by relevant educational authorities.

In any event, the positive content is not that generous to allow these professionals to teach in a manner which is completely in accordance with their convictions and subject to no limitation. More precisely, in state schools, the teaching activities must respect the principle of state neutrality which requires the rejection of ideological indoctrination because this is the only possible way to respect the freedom of families who have decided to provide their children with a non-biased education and therefore have chosen not to send their children to schools with particular ideological stances. Conversely, in private centres the academic freedom is as complete as the freedom of teachers in state schools but its boundaries has set by the school’s ethos. The Constitutional Court in its Judgment 5/1981, rightly acknowledged that ‘the limiting factor of the ethos will be more significant in relation to purely educational and formative aspects of the teaching, and less relevant with regard to the mere transmission of knowledge,

¹⁸ See Fundamento jurídico 10

which is obviously an area in which the legitimate demands of teaching provide very limited room for different ethos.’

2.3 Constitutional inspiring principles in education

Setting this aside, a reference should be made to some general principles of the Spanish constitutional system that have a direct impact on the exercise of some education rights. In particular, the principle of religious neutrality must be highlighted. This principle is recognized by Article 16.3 CE, which states that no religious denomination may have an official status. As a result, the traditional model of Catholic confessionalism was abandoned and in its place a positively separatist system was set up. Such a framework prohibits any intermingling of religious and State functions and when it comes to education rights it requires State to abstain from supporting any religious belief in the providing education.

As indicated in its Judgment 5/1981, the Constitutional Court wrote that in a juridical and political system based on pluralism, ideological, and religious freedom of individuals and the non-confessional nature of the State, all public institutions, but in particular those focused on teaching, must necessarily be ideologically neutral. This neutrality does not prevent these schools from supporting religious activities in order to enable parents to choose religious and formal education for their children in conformity with their own convictions according to art. 27.3 CE.

Consequently, neutrality must be observed by all teachers working in state schools. This requirement imposes a duty on teachers to renounce any type of ideological indoctrination because this is the only possible way to make teaching compatible with the freedom of families who have chosen not to send their children to schools with explicit ideological stances.

In relation to state schools, religious neutrality is not in itself an ideology. The exercise of the religious freedom of employees is shaped by both the safeguard of the legitimate aims

of education as well as the respect for the right to religious and ideological freedom enjoyed by the members of the educational community. Among the members of the community, pupils, who should never be subject to any sort of ideological indoctrination by their teachers, must receive proper attention. Consequently, the observance of specified religious practices is possible as long as these do not involve unfair or excessive inconvenience for educational centres, particularly in their internal running and organisation.

3. Major legal developments

Both the right to education and freedom of teaching have been developed by different Organic Laws which have been successively enacted as a result of changes within Government and Parliament.

3.1 Freedom to establish teaching centres

The Spanish Constitution recognizes in article 27.6 the free establishment of teaching centres applicable to both natural and juridical persons as long as they respect constitutional principles. This provision was developed by article 21 of the Organic Law 8/1985 on the right to education (hereinafter LODE)¹⁹ which recognises that all natural or juridical persons of private nature and Spanish nationality have the freedom to create private teaching institutions within the parameters recognised by both the Spanish Constitution and the remaining legal framework.

From this background article 108 of the Organic Law 2/2006, on Education²⁰ (hereinafter LOE) distinguishes three different types of educational institutions: state institutions, the holders of which are public administrations; private schools, which belong to

¹⁹ Ley Orgánica 8/1985, de 3 de julio, reguladora del Derecho a la Educación. BOE 4 July 1985

²⁰ Ley Orgánica 3/2020, de 29 de diciembre, por la que se modifica la Ley Orgánica 2/2006, de 3 de mayo, de Educación. BOE 30 December 2020

natural or juridical persons; and publicly-subsidised private schools, which are private, but are under the umbrella of legal agreements with public administrations.²¹

With regard to the freedom to create teaching centres, it the Organic Law 5/1980, on the statute of teaching centres (LOECE)²², repealed is also crucial. The Constitutional Court confirmed in its Judgement 5/1981, 13th July that it is constitutionally appropriate for a private educational institution to maintain a particular ethos while clarifying the extent to which public authorities can intervene in the administration of institutions funded by public authorities. The Court went on saying that the possibility of adopting a particular ethos is a faculty which goes certainly far beyond the freedom of enterprise which is recognised in article 38 of the Spanish Constitution.²³ At the same time, the Constitutional Court clarified that the terms ‘own character,’ and ‘ethos’ are synonymous. However, it did not provide a definition of them, although it highlighted that it is the expression of the ideological character of a school which also comprises the pedagogical and educational aspects of a particular institution.

Consequently, it can be affirmed that both fully private and publicly subsidised private schools are entitled to establish their own ethos as a direct consequence of their freedom of establishment. Even though this faculty is not explicitly mentioned in the Constitution, it is a right with direct constitutional protection because an ethos is nothing different from the practical expression of the freedom of teaching, and it is a necessary tool which facilitates educational pluralism. The LOE recognizes in article 115 that the holders of private institutions, irrespective of being financially subsidised, are entitled to establish their “own character”.

²¹ J. J. Guardia Hernández, “Marco constitucional de la enseñanza privada española sostenida con fondos públicos: recorrido histórico y perspectivas a futuro” *Estudios constitucionales: Revista del Centro de Estudios Constitucionales*, Año 17, N° 1, (2019), pp. 321-362.

²² Ley Orgánica 5/1980, de 19 de junio, por la que se regula el Estatuto de Centros Escolares. BOE 27 June 1980

²³ Article 38 of the Spanish Constitution reads as follows: “Free enterprise is recognised within the framework of a market economy. The public authorities shall guarantee and protect its exercise and the safeguarding of productivity in accordance with the demands of the economy in general and, as the case may be, of its planning.”

In any event, setting up an educational ethos has a double dimension: a positive and a negative one. The positive dimension facilitates the freedom of teaching while enabling parents to choose for their children a school the ethos of which is in accordance with their personal convictions. The negative dimension becomes a limit to the fundamental rights of others members of the educational community, particularly to the so called “Libertad de cátedra” of the teacher. The limitations that are derivative from the ethos are more significant in relation to the purely educational aspects of teaching and less relevant in relation to other aspects related to the mere transmission of knowledge.²⁴

Article 27.7 CE states that teachers, parents and students, when appropriate, will take part in the management of those educational institutions which are financially supported by public administrations, in compliance with the relevant legal provisions. In consequence, insofar as they are financially supported, there is an entitlement on the part of the community to be involved in their control and administration. This right clearly gives rise to limitations on the holder of the centre in the governance of these schools and stands in stark contrast to the position of schools which are completely private. These rights to participate are implemented through two different governing bodies: a School Board and a Council of Teachers (art. 54 LODE).

The School Boards are composed of the school’s director, three representatives of the holders of the institution, four teacher representatives, four parent representatives, two student representatives, and a representative of the support staff.

The functions of School Boards are those embedded in art. 57 of the LODE, including amongst others, to take part in the appointment of the director of the school as well as in the selection of teachers and in the process of admission of students; to approve the budget of the

²⁴ On this topic, see M. E. Rebato Peño, “Los límites del ideario o carácter propio de los centros educativos de titularidad privada en el marco de la libertad de enseñanza”, *Enseñar la constitución, educar en democracia* / coord. F. J. Díaz Revorio, C. Vidal Prado, (2021), pp. 29-56

educational institution in accordance with the funds allocated by the public administration; to propose, to the relevant public administration, an authorisation to charge some families for complementary activities; etc.

It is important to highlight that the School Board cannot alter the ethos of an educational institution. In this regard, the Constitutional Court, in its Judgment 77/1985, 27th June declared that respect for the ethos is within the core of the right of the holder to establish and govern an educational center.²⁵ Consequently, whatever the circumstances are, and whatever use is made of the powers of the various branches of the educational community, this fundamental content can never be set aside.

3.2 Teaching of religion

The unique position of teachers of religion in state schools must be highlighted. Following art. 27.3 of the Spanish Constitution, the religion can be taught within the state school system; this has been implemented via the establishment of agreements of cooperation between the State and some religious denominations: the Catholic Church, and three other communities: Protestants, Jewish and Muslims.

The legal position of teachers of religion in public schools is developed by the Third Additional Provision of the LOE, according to which ‘teachers, who without being civil servants, are in charge of the teaching of religion in state schools, will be subject to Employment Law, and their status will be according to the Workers’ Statute. The selection of these teachers is based on objective criteria, namely: equality, merit, and capacity. They will receive equivalent salaries to those subject to temporary working arrangements at the same educational levels.

²⁵ Fundamento Jurídico Noveno

In any event, although the employer will be the public administration, the appointment will come from the religious authorities and will be automatically renewed every year. Spanish case law has regarded the employment position of these teachers as a special one because the signatures of the contracts by relevant administrations who will be responsible for the payment of the salary and social security contribution, require the prior appointment by relevant religious authorities. Contracts, either on full or a part-time bases, depending on a school's specific needs, are to be determined by the relevant public administration. Any retraction of the appointment by the religious authorities must be done in accordance with the law.

The contracts of these teachers are indefinite, but they can be terminated, if the relevant religious authorities revoke the declarations of suitability. Such revocations must necessarily be in accord with the law and due process.

The removal of some teachers of the Roman Catholic faith by the relevant ecclesiastical authorities because their private lives were not in accordance with Catholic doctrine²⁶ has been particularly problematic. The most well-known case involved a priest, a celibate, whose bishop withdrew his appointment after a regional newspaper published a report of him having a wife and five children. In the write up, the priest made statements completely incompatible with the doctrine of the Catholic Church, particularly in terms of sexual morality and contraception.

The Constitutional Court, in its Judgment 128/2007, 4th June, declared that the actions of ecclesiastical authorities are subject to jurisdictional control where they impact on the fundamental rights of teachers. The Court found that the bishop's retraction of the priest's proposal, as a teacher of Catholic religion, did not constitute a disproportionate breach of his fundamental rights to religious freedom and ideological freedom in connection with the

²⁶ J. Otaduy, "La idoneidad de los profesores de religión católica y su desarrollo jurisprudencial en España," *Estudios Eclesiásticos*, 88, 347 (2013) 849-871; S. Cañamares Arribas, "El control jurisdiccional de la autonomía de la Iglesia católica en la designación de los profesores de religión" in *Revista Española de Derecho Canónico*, Vol. 66, (2009), pp. 275-292; A. López-Sidro, "Dimensión colectiva del derecho de libertad religiosa en los centros docentes públicos: la designación de los profesores de religión", *Revista General de Derecho Canónico y Eclesiástico del Estado*, 14 (2007), <http://www.iustel.com>

freedom of expression. The Court added that the priest's removal was justified out of respect for the religious freedom of the Catholic Church, on the one hand, and the rights of parents to the religious education of their children on the other.

As the Constitutional Court affirmed 'it would be simply unreasonable if the teaching of religion in schools were carried out without taking into consideration, as a criterion in the process of selection of the teachers, the religious convictions of those people who put themselves forward to attain one of these positions, as this is a conscious guarantee of the right of religious freedom, in both its external and collective dimension.'²⁷

This case was finally decided by the Grand Chamber of the European Court of Human Rights in *Fernández Martínez v Spain*.²⁸ In rejecting the applicant's appeal, the Strasbourg Court decided that the dismissal of the teacher of Catholic religion was not a disproportionate restriction of his private life. In fact, the Court explained that the teacher was subject to particular obligations of loyalty due to his membership in the Church he voluntarily embraced and which should have been manifested through a coherent connection between his classroom teaching and life style.

The Court concluded that the breach of these obligations entitled the Church, in the exercise of its right to autonomy, to dismiss the applicant as a teacher of religion in order to avoid the risk of scandal and maintain the- credibility of the Catholic Church.

In relation to the position of teachers of religion in educational institutions, there have been controversies about it in terms of their right to vote and to be elected for a School Board, as well as their entitlement to be eligible as directors of a school. The Supreme Court resolved

²⁷ Fundamento jurídico quinto

²⁸ *Fernández Martínez v. Spain* (GC), 12th June 2014

On this Judgment, see generally, M. J. Valero, "Autonomía institucional de las confesiones religiosas y derecho al respeto de la vida privada y familiar en Estrasburgo: la sentencia de la Gran Sala del TEDH *Fernández Martínez c. España*", *Revista General de Derecho Canónico y de Derecho Eclesiástico del Estado*, 36 (2014); G. Puppink, "El "principio de autonomía" de la Iglesia Católica ante el Tribunal Europeo de Derechos Humanos. El caso *Fernández Martínez contra España*", *Revista General de Derecho Canónico y de Derecho Eclesiástico del Estado*, 28 (2012), <http://www.iustel.com>

the first question in its Judgment of 1st February 1990, recognising the teachers' right to the full participation in the designation of the members of the School Boards. Later, the Ministerial Order of 21st November 1993 accepted the right of religion teachers to participate in the governing bodies of particular schools.

Yet, as far as their entitlements to be elected as directors of educational institutions, both the Supreme Court's Judgment of 13th October 1987 and the Order of the Constitutional Court 47/1990, 20th March, acknowledged the constitutional legitimacy of non-eligibility, due to the temporary status of their working agreement. Still, from the enactment of the *Decreto 696/2007*, the employment relationship of teachers within public administrations has been accorded permanent status, and, as a result, people in such positions are now eligible to become directors.²⁹

3.3 Teachers' equality and non-discrimination on religious grounds

Article 14 of the Constitution proclaims the equality of all Spanish citizens before the law, while declaring that discrimination on the grounds of race, sex, opinion, or religion, is unconstitutional. Following the decisions of the Spanish Constitutional Court, equality does not mean uniformity. In other words, differences in treatment are legitimate when they have objective and reasonable justifications and are proportionate to the aims they pursue.

In state schools, teachers are civil servants who are appointed on merit and capacity basis. The Royal Legislative Decree 5/2015, on the basic legal framework of civil servants,³⁰ recognises the rights and obligations of public employees. In contrast, in private schools,

²⁹ Real Decreto 696/2007, de 1 de junio, por el que se regula la relación laboral de los profesores de religión prevista en la disposición adicional tercera de la Ley Orgánica 2/2006, de 3 de mayo, de Educación. BOE 9 June 2007

³⁰ Real Decreto Legislativo 5/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto Básico del Empleado Público. Spanish Official Bulletin (BOE) 31 October 2015

irrespective of being publicly subsidised, teachers are subject to the Worker's Statute and specific collective agreements.³¹

The teachers of both state and private educational institutions are entitled to religious freedom which allows them to profess religious beliefs and to hold them before third parties while rejecting interference by the State and any other social groups. However, the exercise of this freedom in education is conditioned by two elements.

First and foremost, its exercise must be compatible with the general aims of education, as affirmed by art. 27.2 CE. Second, it depends on the nature of an educational institution, whether state or private, since the exercise of religious freedom must be weighted with neutrality of state schools and the respect for the ethos of private educational institutions.

It must be pointed out that schools with a particular ethos are regarded as “empresas de tendencia”³² which enjoy a wider degree of protection to guarantee that they can fulfil their goals when developing their activities. In consequence their holders are entitled to subject their employees to specific duties of loyalty that in case of contravention can lead to the dismissal of the teacher.

Moreover, officials in these schools are entitled to hire or to dismiss employees according to their religious beliefs without receiving the risk of sanction for employment discrimination. In this context, a mention must be made of the content of European Directive 2000/78 by virtue of which religious denominations and faith-based organizations may take into account the religion of a worker as a legitimate and justified professional requirement, by reason of the nature of their activities or the context in which they are carried out.

In this way, a school with a religious ethos may require its teachers to profess the faith with which it identifies. They may opt to refrain from hiring those who belong to other religions

³¹ Real Decreto Legislativo 2/2015, 23rd October, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores. BOE 24 October 2015

³² See Constitutional Court Judgment 38/2007, 15th February, *fundamento jurídico 10*; Constitutional Court Judgment 106/1996, 12th June, *fundamento jurídico tercero*.

or who have no religion, provided that the religious belief has a direct bearing on the activity that they are required to undertake.

In any case, the provisions of EU Directive 2000/78 allow religious denominations and ethos-based organizations to subject their workers to obligations of loyalty as long as they are proportionate to the fulfillment of the purposes that inspire the activity of the employer. In other words, in order to be acceptable such obligations must operate as an essential, legitimate and justified professional requirements in view of the nature of the activity performed or the context in which it is provided. Needless to say that the EU Directive 2000/78 applies to the educational sector, which means that denominational schools are considered as ethos-based organizations (*empresas de tendencia*) that are entitled to discriminate against employees by subjecting them to heightened duties or loyalty with respect to their doctrine or ethos.

In this context it is important to make reference to a remarkable Judgment of the European Court of Justice: IR v. JQ (2018)³³. In this case the Court decided a preliminary ruling raised by a German court in the context of a labour procedure initiated by a physician, head of the internal medicine service at a Catholic hospital who was dismissed for not having respected the indissolubility of canonical marriage as he celebrated a second civil marriage after being divorced from his previous canonical marriage before the civil courts. The Court of Justice considered that the dismissal was discriminatory since adherence to the notion of marriage advocated by the Catholic Church does not appear to be necessary for the promotion of the employer's ethos due to the importance of the occupational activities carried out by the physician, namely the provision of medical advice and care in a hospital setting.

³³ ECJ Sentence IR v. JQ Case C-68/17 (2018) Available at <https://www.curia.europa.eu>

On this decision see generally, S. Cañamares Arribas, "Obligaciones de lealtad y discriminación religiosa de los trabajadores de las confesiones religiosas y empresas de tendencia: Sentencia del Tribunal de Justicia de la Unión Europea de 11 de septiembre de 2018, asunto C-68/17: IR v. JQ", *La Ley Unión Europea*, 64, (2018)

As to this issue, the European Court of Human Rights in *Siebenhaar v. Germany* (2011)³⁴ decided on the possible discrimination suffered by a nursery school teacher who was fired for belonging to a different religious denomination from that of the employer. The Court stressed that teachers in schools with a particular ethos are subject to obligations of loyalty which are more demanding than those that can be imposed on professionals working in other contexts. The Court explained that in this case the duties of loyalty were acceptable as long as they were proportionate to the aims pursued by the employer according to his ethos. In this case, the fact that a kindergarten teacher who belonged to a Protestant Church was, at the same time, a member of another denomination, was regarded as a sufficiently powerful reason to justify her dismissal on the basis that this diminished her credibility in the eyes of the parents of students and the wider general public.

From this point of view, the main difference is that the teacher that works in a private centre is obliged to respect the ethos of the school meanwhile those who work in a public institution are bound by the principle of state religious neutrality. Explicit and implicit attacks on such ethos are prohibited and such conduct could lead to the dismissal of teachers.³⁵

Finally, in the Spanish experience there have been situations in which the holders of educational institutions have exceeded their power and have gone beyond legitimate requirements in relation to the religious profiles of their employees. The decision of the Supreme Court of Justice of Valencia, on 30th July 2015³⁶ should be highlighted. In this case, the Court considered the dismissal of a teacher of Spanish Language and Literature as void because the reasons offered by school officials had only a weak link with the defence and promotion of the institution's ethos.

³⁴ Judgment *Siebenhaar v. Germany*, 3 February 2011. Available (only in French) at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-103236"\]}](https://hudoc.echr.coe.int/eng#{)

³⁵ Constitutional Court Judgment 47/1985, 27th March.

³⁶ Judgment of the Superior Court of Justice of Valencia, 30 July 2015

4. Emerging issues in education law

4.1. Funding for public and non-public schools

Closely related to the right to establish educational institutions and to the parent's rights to choose the religious and moral education of their children the state funding of private institutions, mentioned by article 27.9 CE, is also a key element of the framework, as it enables those citizens who could not afford private education to provide their children a religious or moral education that cannot be obtained in public schools because of the principle of religious neutrality.³⁷

However, the Constitutional Court, in its judgment 77/1985, 27th June, warned that this constitutional disposition cannot be interpreted in a manner which grants the legislature a broad range of discretion as far as the financial support is concerned. Further, neither can the Constitution be read as there is a general constitutional duty to support every single educational institution since the legislative delegation implies that such financial support must be qualified in light of the constitutional principles and values contained in it.

Developing this constitutional provision, the LODE established a system of financial agreements (so-called *conciertos*) which could be adopted by private educational institutions meeting a list of requirements. Moreover, the LODE declares that the conditions and limits of the financial support must be articulated by giving due weight to educational rights and freedoms as well as the principle of equality.

The basic elements of the system of financial agreements are currently contained in the LOE that have been recently amended by the Organic Law 3/2020 (hereinafter LOMLOE)³⁸. In accordance with its article 116, all private centres can join this system as long as they satisfy the schooling needs of a certain area. This reference, added by the LOMLOE involves an

³⁷ Article 27.9 CE reads as follows: "The public authorities shall give aid to teaching establishments which meet the requirements to be laid down by the law."

³⁸ Ley Orgánica 3/2020, de 29 de diciembre, por la que se modifica la Ley Orgánica 2/2006, de 3 de mayo, de Educación. BOE 30 December 2020

important limitation on the possibility of making financial agreements, since authorities will deny this possibility when there are places available in public centres. In consequence, the new regulation presents a significant impact on freedom of education as it will not allow parents to send their children to a private subsidized school when there are places available in a public centre.

Apart from these considerations, this article provides a list of preferential criteria for the establishment of such agreements, that includes the following: those that serve school populations in economically deprived communities, those whose work contributes particular pedagogical interest for the educational system, those that promote local schooling and those that are constituted and operate under a cooperative regime.

As a counterpart to the signing of a financial agreement with the educational administration, the LOE establishes in its art. 88 that "to guarantee the possibility of enrolling all students without discrimination for socioeconomic reasons, in no case may public or private but subsidized institutions take funds from families receiving free education, impose on families the obligation to make contributions to foundations or associations or establish mandatory services, associated with education, that require financial contributions from the families of the students.

However, in light of the provisions of art. 51 LODE, extracurricular activities and school services are excluded from these express prohibitions, as these will be voluntary in any case. Conversely activities that are considered *necessary* for educational development must be scheduled and carried out in such a way that does not impose discrimination for economic reasons.³⁹

³⁹ The decision of the Superior Court of Justice of Andalucía of 17th October 2013, which confirms the sanction imposed to a publicly-funded private school because of its request of a donation of 20 euros every three months, is particularly interesting in this field.

Financial agreements, though, brings about a number of obligations for schools in relation to the admission of pupils, the composition and functions of a School Board (art. 54 LODE), and the selection of the teachers which must respect the principles of merit and capacity (art. 60 LODE). The establishment of agreements does not prevent private schools from adopting an educational ethos, but such ethos cannot not be incompatible with the respect for freedom of conscience, which in case of religious inspired institutions means that any confessional activity must have an elective nature.

In relation to the renewal or termination of a financial agreement, once its allotted term has expired, it can be renewed at the discretion of the school. Consequently, such a renovation is a right of the institution and cannot be denied by the public administration as long as it meets the relevant requirements, provided that school authorities have not acted in a way justifying its termination, as set out in art. 62 LODE. In this regard, it is important to consider that according to the LOMLOE the administration can terminate the agreements with private schools when there are places available in public centers in a certain area.

In any case, in situations in which these agreements are terminated, educational administrations are bound to take the necessary actions in order to provide for students who wish to continue under a free system of provision (art. 63 LODE).

4.2 Students admission in publicly-subsidised centres

Article 84.3 LOE declares that when it comes to the admission of students there should be no discrimination on grounds of birth, race, sex, religion, opinion, or any other condition or personal or social circumstance. In this regard is important to make reference to the Organic Law 8/2013, on the improvement of the quality of education (hereinafter LOMCE)⁴⁰ which

⁴⁰ Ley Orgánica 8/2013, de 9 de diciembre, para la mejora de la calidad educativa. BOE 10 December 2013

For a critical analysis of this law, see R. Beneyto Berenguer, ¿Puede ser inconstitucional la LOMLOE? CEFLegal: Revista práctica de derecho. Comentarios y casos prácticos, N°. 255, (2022), pp. 81-110

modified that article by declaring that the division of teaching by genders was not discriminatory⁴¹ ‘as long as the teaching is delivered in accordance with Article 2 of the Convention against Discrimination in Education 1960.’

This disposition added that under no circumstances the election of one gender education could give rise to a less favourable treatment of families, students, and educational institutions, or a disadvantage in terms of agreements with educational authorities about any other aspects of schooling.

The Constitutional Court declared this model of education fully constitutional in its Judgment 31/2018, 10th April, by saying “From a strictly literal perspective, the separation of students by gender during the schooling process constitutes a legal differentiation between boys and girls, specifically in terms of access to an educational establishment. However, this practice corresponds to a pedagogical model or method flowing from certain ideals that conceive that this approach is more effective than others. Given that the Constitution recognizes the freedom of education (art. 27.1 CE), any educational model that aims at the full development of the human personality and respect for the principles and fundamental rights and freedoms that recognizes the art. 27.2 CE must be deemed lawful.”

The Court continued that “single sex education is a pedagogical approach voluntarily adopted by the educational establishments, and is the free choice of parents opting for such institutions, and, in some instances, also by the students attending. As such, it is part of the ethos or educational character of the schools that opt for such an educational formula. At this point, it recalled that, according to the doctrine established in its Judgment 5/1981, the right to establish an ethos is not limited to religious and moral aspects of the educational process, and could therefore logically include establishing single sex education.

⁴¹ See M. J. Carazo Liébana, “La educación diferenciada por sexos: ¿discriminación o libertad de enseñanza?”, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, Nº. 58, (2022)

Aware that the right to set a particular ethos is not absolute, the Court maintained that it is clear that "it would not be acceptable if its content is incompatible with fundamental rights or if, even without a direct violation of such protections, any policy fails to comply with the obligation, derived from art. 27.2 of the Constitution, to ensure that the education provided has as its core objective the full development of the human personality, including respect for democratic principles, social harmony and coexistence, as well as fundamental rights and freedoms." Finally, the Court considered that it was not the case of an ethos of single sex education, as this model of education is not per se discriminatory, provided that, as set out in the 1960 Convention, the conditions and teachings within schools for each gender were equal and comparable. It therefore concluded that "if any undue difference in treatment existed, it would only be attributable to the school in which it occurred, and would not be attributable to the model itself. Therefore, the premise from which the appellants start, that single sex education implies discrimination, is not fulfilled."⁴²

Although, as affirmed, the Court declared this model fully compatible with the Spanish Constitution, the modification introduced by the LOMLOE has meant that not only has any reference to single sex education in art. 84.3 LOE been removed, also, it has also been indirectly declared prohibited, as the new law states that the regulations governing access to public and private but subsidized institutions: "will have the necessary measures to avoid the segregation of students for socioeconomic reasons or any other nature". This sweeping ban on segregation undoubtedly includes divisions between male and female students. The consequence, therefore, is that the financial agreements with those private institutions that have opted for a single sex education will be terminated.

⁴² R. Báez Serrano, "Hacia la consolidación de la constitucionalidad de la educación diferenciada. A propósito de la sentencia del Tribunal Constitucional 31/2018", *Revista de derecho político*, N° 105, 2019, pp. 251-278

4.3 Students' free exercise of religion

Article 8 of the *Organic Law 1/1996*, of Juridical Protection of Minors, recognises that minors have a right to freedom of expression allowing them to publish and disseminate their opinions.⁴³ The exercise of this right can be subjected to the restrictions contemplated by the law in order to guarantee the respect for the rights of others and the protection of security, health, moral and public order. Further, this right faces a specific limit in the protection of intimacy and images of the minors.

In the educational sector, the right to freedom of speech can be exercised as long as it does not harm the rights of the other members of the educational community; there must also be assurances that the expression does not breach the due institutional respect in conformity with the constitutional principles and rights. It must be pointed out that in publicly-subsidised private schools, pupils are bound to respect the ethos of their schools, and defamatory or insulting statements against such ethos are unacceptable.

In relation to religious dress, educational legislation does not prohibit the use of religious symbols by students. There have been some conflicts triggered by the use of the Islamic veil that, in general, have been decided at the administrative level. The only judicial pronouncement so far has been the Judgmente 35/2012, 25th January, of the *Juzgado de lo Contencioso-Administrativo de Madrid*. In this case, parents of a Muslim student unsuccessfully challenged the actions of educational authorities of the Region of Madrid upholding the decision of different secondary schools that forbade the use of this attire in their premises. The regional authorities decided to move the Muslim student from one school to another within this region in order to avoid any prohibition adopted by the School Board.

⁴³ Ley Orgánica 1/1996, de 15 de enero, de protección jurídica del menor, de modificación del Código Civil y de la Ley de Enjuiciamiento Civil (BOE 17 January 1996)

The Superior Court of Justice of Madrid, in a widely criticised decision,⁴⁴ based on previous decisions of the Court of Strasbourg, found that the prohibition to wear the Islamic veil did not amount to a breach of the girl's religious freedom. The Court reached this conclusion because authorities met the requirements established by the European Convention on Human Rights: the prohibition was recognised in the internal regulations of the school and it was necessary to protect the safety and fundamental rights of others in the school premises.

With regard to dietary requirements the Agreement with the Islamic Commission of Spain, declares in article 14 that 'the food [...] of Muslim pupils in state and publicly-funded private schools, who request it, will be adapted to the Islamic religious precepts, as well as fasting dietary requirements.'

Such accommodation is required from the public administration unless it causes harm or undue pressures on the general delivery of the food. Despite the fact that all other Agreements do not refer to this question, in order to respect the religious freedom of the students of all other faiths, the same response would have been expected.

Some controversies have emerged over observance of dietary requirements of a particular faith. An example of such a situation was present in the decision of the Superior Court of Justice of Madrid of 16 June 2015 which rejected the request of a Muslim student for due protection of his religious beliefs in the school dining room. The Court declared that this service was voluntary and that the student was free to look for another school which was more responsive to his requests.

5. Conclusion

⁴⁴ See S. Cañamares, "La inclusión de los otros: la simbología religiosa en el espacio público," *La inclusión de los otros: símbolos y espacios de la multiculturalidad*, Ed. Comares, (2012) 99-120; M. Alenda, *El símbolo religioso en el Estado laico español*, Ed. Tirant (2016); J. Martínez-Torrón, "La cuestión del velo islámico en la jurisprudencia de Estrasburgo," in *Derecho y Religión* (2009) 87-109.

The division of competences between the State and regional authorities in Spain, as acknowledged by the 1978 Constitution, requires the State to approve the basic norms for the development of educational rights, while regional authorities are in charge of the development of the applicable legislation within their respective territories. This has given rise to situations in which the implementation of national rules has not been homogeneous throughout Spain.

At times, required legislation from regional authorities has been subject to delays for a variety of reasons, including political friction, a situation bound to continue unless the underpinning national legislation is the result of a strong parliamentary consensus. Apart from these issues, the exercise of educational rights by different bodies has been controversial. As a result, teachers have been subjected to indirect discrimination on religious or ideological grounds when school authorities have gone beyond their entitlements in expecting their employees to conform with the ethos in their schools.

To sum up, generally speaking, the exercise of educational rights is in good health in Spain. However, the new Organic Law 3/2020 has proved quite controversial due to its significant impact on some aspects of freedom of teaching. In particular, because it unnecessarily limits the possibility of private centers to establish financial agreements, by making them conditional upon the absence of schooling needs in a certain area. Secondly, because it leads to the termination of financial agreements with those educational institutions which segregate on the basis of sex, with the consequence that students are forced to be transferred to a private but subsidized institution, or if there are no places available, to attend a public school.

Yet, selected aspects of these freedoms still must be carefully examined, particularly in relation to the exercise of religious and ideological convictions of schools. Some of the conflicts which have been described in this chapter come from the wording of Acts of Parliament which were approved by different political parties in recent years, with little

parliamentary consensus, and worryingly, without a proper understanding of the needs of minorities. On other occasions, problems were generated by the poor application of the rules by the relevant educational authorities. This misguided approach to the real and effective exercise of freedoms in the educational field is ironic insofar as this arena is one in which it is important learn to respect the exercise of fundamental rights by others.