

**GENDER-SEPARATE EDUCATION IN SPAIN: REFLECTIONS  
ON EDUCATIONAL RIGHTS AND FREEDOMS FROM A  
CONSTITUTIONAL AND HUMAN-RIGHTS PERSPECTIVE**

***EDUCACIÓN DIFERENCIADA POR RAZÓN DE SEXO EN ESPAÑA:  
REFLEXIONES SOBRE LOS DERECHOS Y LIBERTADES  
EDUCATIVAS DESDE LA PERSPECTIVA CONSTITUCIONAL Y DE  
LOS DERECHOS HUMANOS***

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**ABSTRACT**

Gender-separate education, understood as a pedagogical model that provides separate schooling for boys and girls, has been subject to legal and public scrutiny for the past thirty years. Nonetheless, it has not been until 2018 that this educational option was put into the spotlight, especially regarding its constitutionality and compatibility with arts. 1.1, 9.2 and 14 of the Spanish Constitution, which constitute a manifestation of the principles of equality and non-discrimination, while at the same time trying to balance it with art. 27 of said constitutional text, with respect to the right to education and freedom to choose and create educational centers.

Against this backdrop, the present paper reviews the constitutional state of play and makes further reflections from a rights-based perspective and taking into account the cultural pluralism that characterizes contemporary societies.

**KEYWORDS:** gender-separate education, single-sex schools, principle of equality, right to education, educational freedoms.

## RESUMEN

La educación diferenciada por sexos, entendida como un modelo pedagógico que escolariza por separado a niños y niñas, ha sido objeto de controversia pública jurídica en los últimos treinta años. No obstante, no ha sido hasta 2018 cuando esta opción educativa se ha puesto en el punto de mira, especialmente en lo que respecta a su constitucionalidad y compatibilidad con los arts. 1.1, 9.2 y 14 de la Constitución española, que constituyen una manifestación de los principios de igualdad y no discriminación, y su conciliación con el art. 27 del mismo texto constitucional, en relación con el derecho a la educación y las libertades de los padres y centros educativos. Con este telón de fondo, este artículo revisa el estado de la cuestión constitucional y ofrece reflexiones adicionales desde una perspectiva basada en los derechos y tomando en consideración el pluralismo cultural que caracteriza las sociedades contemporáneas.

**PALABRAS CLAVE:** educación diferenciada por sexos, escuelas no mixtas, principio de igualdad, derecho a la educación, libertades educativas.

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## **I. Introduction.**

Education and equality are two basic premises and two guiding elements of the very essence of constitutional states. They are also two key issues from a human rights perspective: equality is not only a global priority, but, as the 2030 Sustainable Development Goals (“SDGs”, hereinafter) reflect, it is also inextricably linked to the right to education in terms of the need for equality in access to education and equality as a mechanism of empowerment in (and through) education<sup>1</sup>.

Education undoubtedly has an instrumental and intrinsic value for individuals and for societies as a whole. From an individual point of view, education significantly impacts a person not only in terms of labor opportunities, but also enables general human development and flourishing and allows for the effective participation, as an informed citizen, in democratic and public affairs. With regard to the latter, from a collective point of view, society as a whole benefits from well-trained and well-informed workers who can generate socio-economic wealth. Likewise, democratic societies need (and benefit from) citizens who are capable of participating and are actively involved in public and shared governance. There is a strong association and a close correlation between education and civic participation: educated citizens are not only better prepared to exercise civic rights and duties, but are also much more interested in (and informed about)

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<sup>1</sup> Education 2030 Framework for Action, SDG 4 aims to “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all” and SDG 5 aims to “achieve gender equality and empower all women and girls”. For more information, see A/RES/70/1 Resolution adopted by the General Assembly on 25 September 2015 titled “Transforming our world: the 2030 Agenda for Sustainable Development”. Source: [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)

political and social matters. All of the above justifies the uncontroversial character of the following statement: education is a highly valuable good to both individuals and to society, and is vital for the materialization and maintenance of democracy in contemporary societies. In the words of Nelson Mandela: “*an educated, enlightened and informed population is one of the surest ways of promoting the health of a democracy*”.

Equality is also, in itself, a transversal notion. It constitutes a general value, a guiding principle and a fundamental subjective right in contemporary societies, becoming an indispensable foundation for the establishment of the social and democratic state governed by the rule of law<sup>2</sup>. In the words of US Supreme Court Justice Sonia Sotomayor, “*until we get equality in education, we won't have an equal society*”; we will come back to the difference between equality in (versus equality for) education and subsequent legal nuances later on. Speaking of equality and justice, we must remember that the social and democratic state of law is present throughout the Spanish Magna Carta. SALCEDO BELTRÁN insists that a closer reading at the SC shows the “*numerous references that complement it [art. 1 SC]*” as it relates to the “*recognition and exercise of human rights or the establishment and maintenance of a just economic and social order*”, which have become “*fundamental postulates that shape it*”<sup>3</sup>. We believe it is mainly based in the recognition of the equal dignity of all persons in all facets of life, under the axiological Kantian assumption that all human beings have an inherent value solely because they exist. In other words, dignity is projected as an intrinsic quality of the human person. Equality is nowadays a deep-rooted, settled and uncontroversial premise, but it is of fairly-recent universal recognition. Despite de fact that, historically-speaking, initial indications of the idea of equality between men and women can be traced back to Stuart Mill's essay *The Slavery of Women* (1869), the legal materialization of this principle and human right dates back to the International Labor Organization Constitution (1919) and the plethora of international human rights instruments post-WWII.

Slightly deviating from course, it is important to stress that, as has been said on numerous occasions, the protection of fundamental rights and freedoms has been one of the main objectives of the second half of the last century and continues to be a primary goal today, at all levels. Within the Council of Europe and the European Union, human rights have constituted, since the origins of both organizations, the essential core of contemporary legal culture, and have become fundamental pillars on which both supranational systems have been built. Any analysis on rights and freedoms, therefore, must inexorably take into

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<sup>2</sup> Such legal formula (social and democratic state based on the rule of law) forms the basis of the highest values of the legal system of numerous European and world constitutions. It is also part of the “fundamental essence” of the Spanish Magna Carta. For more, see the introductory remarks already made in MARTÍNEZ LÓPEZ-SÁEZ, M., “La Carta Social Europea y los derechos sociales emergentes: una aproximación a la garantía del derecho de acceso a la información ambiental”, *Lex social: revista de los derechos sociales*, Vol. 9, n. 1, 2019 (Ejemplar dedicado a: Homenaje profesor Manuel Terol Becerra, valedor y guardián de los derechos sociales), pp. 173-174.

<sup>3</sup> SALCEDO BELTRÁN, C., “Retos y compromisos internacionales para la consolidación del estado social y democrático de derecho en España”, *Lex social: revista de los derechos sociales*, Vol. 9, n. 1, 2019, p. 501.

account the *Internationalization* (and, subsequently, *Europeanization*) of the human rights perspective and, *mutatis mutandis*, the *constitutionalization* of International and European Human Rights Law. Coming back to the materialization of equality, we would like to highlight the sister conventions at the Council of Europe level: the European Convention of Human Rights (1950) that recognizes equality via the principle of non-discrimination on grounds of sex (art. 14) and through the promotion of equality through the collective enforcement of a general prohibition of discrimination (Protocol 12), and the European Social Charter (1961/1996) that clearly reflects the cross-cutting nature of equality throughout the text and specifically recognizes equality between men and women in Arts. 20 and 27.

In the Spanish case, we must remember that both education (understood in its broadest sense) and equality are unequivocally recognized in the Spanish Constitution (“SC, hereinafter), as we will further detail in the following sections. What is important to highlight prior to that analysis are two basic starting premises that have to do with all rights and freedoms involved, which, in turn, have become two points of departure of this academic contribution. Firstly, as our Constitutional Court has asserted time and time again that the SC “*is not the sum and aggregate of a multiplicity of unconnected mandates, but a fundamental legal order of a political community that is governed and guided by the proclamation pursuant to paragraph 1 of Article 1, which must result in a coherent system in which the entirety of the contents of the SC find the space and effectiveness that the constituent power design for them*”<sup>4</sup>. The first article of the SC, serves as the gateway for contemporary Spanish constitutionalism and advocates for freedom, justice, equality and political pluralism as the highest values of the Spanish legal system. They are enshrined as the foundations of Spain, as a social and democratic State, and the SC develops them and “specifies”<sup>5</sup> them throughout its text. In the words of SERRA CRISTÓBAL: “*the adjective ‘social’ acquires its meaning through the principle of ‘equality’ and, mainly, through the recognition in the constitutional text of the protection of singular social rights, and the duty for the public administration to remove the obstacles that impede those rights being effective [...] Thus, art. 9 SC states that public institutions must promote the conditions that ensure real and effective liberty and equality for individuals and groups they belong to. It is the responsibility of the state to enact policies that break down social inequalities. Likewise, it is obvious that many social rights are a necessary condition for the full enjoyment of the classic individual rights*”<sup>6</sup>. With

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<sup>4</sup> The first time the supreme interpreter of our constitutional text made this assumption was in Constitutional Court judgment (CCJ) 206/1992, of 27 November.

<sup>5</sup> We use this term to allude to phenomenon relating to the “gradual process of human rights specification” BOBBIO, N., *El tiempo de los derechos* (trad. DE ASÍS ROIG, R.), Editorial Sistema, Madrid, 1991, pp. 10-15.

<sup>6</sup> SERRA CRISTÓBAL, R., “Economic, Social and Cultural Rights”, in AGUILERA VAQUÉS, M. and SERRA CRISTÓBAL, R. (Aut.) *Rights and Freedoms in the Spanish Constitution*, Tirant lo Blanch, Valencia, 2015, pp. 168-169.

this we simultaneously justify how the content of this paper fits the topic of the journal<sup>7</sup> and we anticipate one of the main issues or concerns regarding the principle of equality in the educational context that we will try and tackle in this paper: how to effectively promote conditions that ensure real and effective liberty and equality in cases where these values seem to apparently clash and seem to be inserted in inherently-incompatible structures.

Secondly, and partly related to above, this is why it is necessary to always read constitutional and human rights texts in their entirety. This is also the main reason why we do not subscribe to theories relating to the generational classification of rights or their legal prioritization or ranking based on their particular location or level of protection within a constitutional or human rights' text. Paragraph 1 of art. 1 of the SC establishes that "*Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism*". A systematic and teleological reading of this provision undoubtedly means attributing all values (and subsequent rights emanating thereof) not only a universal and indivisible character but also recognizing their interdependence<sup>8</sup>. Human rights (and the values they stand for) are interrelated: they cannot be separated or fragmented and must be understood as a whole. This also implies that the enjoyment and exercise of one right is linked to the guarantee of others, and, *mutatis mutandis*, the interference or violation of one right also puts others at risk. The principles of interdependence and indivisibility<sup>9</sup>. have become basic principles that, in the context of human rights, generate the obligation to give equal importance and treatment to all human rights, regardless of their generational category; that is, regardless of whether they are of a civil, political, economic, social, cultural or any other nature. Both principles are grounded in the idea that all human rights are subjective rights, meaning that they generate a legal basis for action or inaction (i.e. forming positive or negative legal expectations and subsequent legal claims -rights- in relation to the action or omission of States or third parties -duties-)<sup>10</sup>.

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<sup>7</sup> It perfectly aligns with the topics covered by the journal as it tackles human rights from a social lens (through the principle of equality and human rights based perspectives) and tries to offer legal context and insights into the current interpretative and practical challenges facing these rights in contemporary societies.

<sup>8</sup> See the Special Rapporteur on cultural rights thematic report A/73/227 to the General Assembly on the universality of human rights, cultural diversity and cultural rights: "*The universality of human rights is one of the most important principles codified in international law during the twentieth century. It is the central idea of the Universal Declaration of Human Rights and a foundational aspect of the entire human rights system. Universality means that human beings are endowed with equal human rights simply by virtue of being human, wherever they live and whoever they are, regardless of their status or any particular characteristics. Universality must be understood as closely related to other core human rights principles of interdependence, indivisibility, equality and dignity*". Source: <https://undocs.org/A/73/227>

<sup>9</sup> Some have even insisted in respecting indivisibility of rights and freedoms as a premise for their effectiveness, especially those inherent to the social and democratic rule of law. See MACÍAS JARA, M., "La sustantividad de las libertades educativas en el marco de la irreversibilidad del Estado social y democrático de Derecho", Paper in the XVIII Congreso de la Asociación de Constitucionalistas de España (ACE), 2021, p. 1.

<sup>10</sup> FERRAJOLI, L., *Sobre los derechos fundamentales y sus garantías*, Comisión Nacional de los Derechos Humanos, México, 2006, p. 33.

The interconnectivity of educational rights and freedoms and the principle of (and subsequent right to) equality becomes clearer with case-by-case examples. In addition to the complexity of inserting and ensuring equality in the field of education, which will be studied in more detail in the following pages, there are numerous other specific challenges stemming from the interesting dynamics generated by the territorial organization of the Spanish State (in autonomous communities), that also produce inequalities; from access to and content of education, to socio-economic segregation, also linked to zoning and urban planning. As if the above were not enough, this past year the Covid19 pandemic forced the suspension of face-to-face education, making the digital divide and other situations of vulnerability and inequality linked to the socio-economic-educational sphere even more evident.

There are numerous and diverse challenges currently linked to the right to education and freedom of teaching, among other rights and freedoms linked to art. 27 SC. This contribution merely intends to add further reflection, from a human rights perspective, on a subject still in need of constitutional maturation, as it intends to explore a challenge (and subsequent socio-legal debate generated) on a specific branch of the education-equality dichotomy: the case of gender-separate or single-sex education.

## **II. Normative points of departure**

### **1. Right to (and freedom of) education: a historical and complex dichotomy.**

#### **1.1. Constitutional configuration: a plurality of rights and freedoms**

It is commonly said that one of the most controversial (and debated) constitutional provisions, before (and after) the adoption of our Magna Carta, has been art. 27 SC. This is not only confirmed by the heated and difficult preparatory parliamentary works and debates<sup>11</sup>, but also by the fact that the legislative development of this provision has either been systematically challenged<sup>12</sup> before the courts (though mainly the Spanish Constitutional Court through the mechanisms established in art. 162 SC) or has produced a wave of doctrinal and civic protest.

We can safely affirm that art. 27 SC, despite its “de minimis” consideration, is part of one of the hardest constitutional compromises of the Spanish founding fathers<sup>13</sup>. We can also argue that art. 27 SC recognizes a tapestry of different-yet-complementary educational

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<sup>11</sup> For a descriptive analysis of said constitution-making process and debates, see ALZAGA VILLAAMIL, O., *Comentario sistemático a la Constitución Española de 1978*, Marcial Pons: Ediciones Jurídicas y Sociales, Madrid; as well as BÁEZ SERRANO, R., *Educación diferenciada y conciertos públicos*, Tesis Doctoral, Sevilla, 2015.

<sup>12</sup> This reality has been called the “educational wars” by NUEVO LÓPEZ, P., “Derechos fundamentales e ideario educativo constitucional”, *Revista de Derecho Político (UNED)*, n. 89 (January-April), 2014, p. 208.

<sup>13</sup> This has been called the “pacto de inclusión de mínimos” as part of a “constitución educativa”. See CÁMARA VILLAR, G., “Las necesidades del consenso en torno al derecho a la educación en España”, *Revista de Educación*, n. 344 (September-December), 2007, p. 67. He also analyzes initial and current “consensus” or “compromises” in educational matters from a Constitutional Law perspective.

rights and freedoms. This constitutional provision is one of the lengthiest provisions (arguably the most extensive<sup>14</sup>) in the SC, containing 10 subparagraphs (rare if we exclude the two articles on the attribution of State and regional competences), each containing different rights (or, at the very least, different aspects on the essential content of two specific human rights –right to education and freedom of teaching-) <sup>15</sup>. Below we insert *verbatim* the content of this constitutional provision to then proceed to quickly summarize each section:

*“1. Everyone has the right to education. Freedom of teaching is recognized. 2. Education shall aim at the full development of the human character with due respect for the democratic principles of coexistence and for the basic rights and freedoms. 3. 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. 4. Elementary education is compulsory and free. 5. The public authorities guarantee the right of everyone to education, through general education programming, with the effective participation of all parties concerned and the setting up of educational centers. 6. The right of individuals and legal entities to set up educational centers is recognized, provided they respect Constitutional principles. 7. Teachers, parents and, when appropriate, pupils, shall share in the control and management of all the centers maintained by the Administration out of public funds, under the terms established by the law. 8. The public authorities shall inspect and standardize the educational system in order to guarantee compliance with the law. 9. The public authorities shall give aid to teaching establishments which meet the requirements to be laid down by the law. 10. The autonomy of Universities is recognized, under the terms established by the law.”*

The right to education (art. 27. 1 SC) guarantees everyone free (art. 27.4 SC) access to quality education in terms of respecting personal development (art. 27.2 SC), democracy and plurality (art. 27.3 SC) as well as good public governance (art. 27.5 SC). Guaranteeing access directly creates obligations for the State in terms of setting up, financing and supervising schools and the educational curricula (art. 27.5, art. 27.8 and 27.9 SC). The other side of the ‘right to education coin’ (and the second part of art. 27.1 SC), is freedom of teaching, which includes the right to set up and manage educational institutions (art. 27.6 and art. 27.7 SC), the right of parents to choose the education of their children according to their cultural sensibilities, whether of a religious, linguistic or ideological nature (art. 27.3 SC) and be involved in the education of their children (art. 27.7 SC), their funding or financial support (art. 27.9 SC) so as to guarantee a universal

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<sup>14</sup> It is undoubtedly the longest provision in the Spanish Bill of Rights (arts. 14-52 SC) and, apart from the provisions relating to the distribution of competences in our decentralized State (arts. 148-149 SC) it is the longest (if not in terms of word count, at least in terms of number of subparagraphs).

<sup>15</sup> This also seem to be the position of ALZAGA VILLAAMIL, as he states that the first paragraph of art. 27 is the most fundamental one given that the sections that follow are only precisions or developments (some more necessary than others) of that first paragraph. See ALZAGA VILLAAMIL, O., *Comentario sistemático a la Constitución Española de 1978*, Marcial Pons: Ediciones Jurídicas y Sociales, Madrid, 2017, p. 203.



general interest service and fairness in a context of cultural diversity, as well as other related constitutional rights and guarantees, such as academic freedom (art. 20.1(c) SC) or high education institutional autonomy (art. 27.10 SC). As we can see art. 27 SC constitutionalizes many constitutional (and fundamental) rights and freedoms. We have no intention of extensively examining each section of art. 27 SC, as it goes beyond the scope of this paper and has already been brilliantly examined<sup>16</sup>. However, three (basic) considerations are in order, as they will come up again further down.

First and foremost, a brief reference to the opening to (or openness towards) international standards is necessary. On the one hand, it is important to remind that art. 27.2 SC was directly inspired by the content of a diverse array of international instruments. In terms of the duality of this provision, the two-fold dimension of art. 27 SC is reflected in international human rights texts such as the Universal Declaration of Human Rights (“UDHR”, hereinafter), which established, within the same provision, the right to education (art. 26.1) and freedom of teaching (art. 26.3). Furthermore, in terms of its literal content, art. 27 SC’s resemblance with art. 13.1 of the International Covenant of Economic Social and Cultural Rights (“ICESCR”, hereinafter) and art. 26.2 UDHR is uncanny<sup>17</sup>. Last but not least, it might be interesting to note that, within the Council of Europe, the European Convention on Human Rights (“ECHR”, hereinafter) recognizes the right to education in article 2 of its Protocol 1<sup>18</sup> and that the European Social Charter, albeit in a limited way, establishes a general right to education in its article 17, but makes reference to education and vocational training throughout the text<sup>19</sup>. While European standards are quite succinct, this is not the case for specialized or “sectoral” international instruments, such as the UNESCO 1960 Convention against Discrimination in Education, which thoroughly develops strong standards and commitments in this subject-matter,

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<sup>16</sup> VIDAL PRADO, C., *El derecho a la educación en España. Bases constitucionales para el acuerdo y cuestiones controvertidas*, Marcial Pons, Madrid, 2017.

<sup>17</sup> This provision established that “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, [...]”.

<sup>18</sup> Interestingly, it enshrines it by adopting a “negative formulation”. This was probably due to the fact that States “were reluctant to adopt a positive obligation as they knew very well that it would create an additional duty and bind them to take effective actions to enable each and every person to have access to instruction”. See PILLAI, S., “Right to Education under European Convention for the Protection of Human Rights and Fundamental Freedoms 1950”, *Christ University Law Journal*, Vol. 1, n.1, 2012, 103-104.

<sup>19</sup> Education as a necessary component for the effective enjoyment of other social rights and the effective protection of certain groups in situations of vulnerability can be seen in Arts. 7, 10, 11, 15, 30 ESC. As we will see later on, equality has been mostly focused as it relates to accessibility of minority groups and those at risk of social exclusion, and not so much on the dynamics of equality between men and women as it relates to different education dynamics and methods. According to MATEOS Y DE CABO, it merely prohibits “children of compulsory school age from being employed in work that deprives them of the full benefit of their education” and “refers to access to higher technical education, and to university education using, as a basis for the university education using, as a basis for selection, individual aptitude as demonstrated by the demonstrated”. See MARTEOS Y DE CABO, O., “El derecho a la educación, la igualdad y la inclusión social”, Paper in the XVIII Congreso de la Asociación de Constitucionalistas de España (ACE), 2021, p. 4.

among which is the elimination and prevention of any discrimination (avoiding preferences and restrictions) in national legislation passed or administrative practices in education matters (i.e. tuition fees, scholarships, etc.)<sup>20</sup>.

On the other hand, the traditional state-based rights' protection has clearly been surpassed and the use of the *pro personae* principle has transformed into a key hermeneutic criterion from a human rights-based perspective<sup>21</sup>. We find ourselves compelled to mention the internationalization and universalization of human rights, the *internationalization* (and *europianization*) of Constitutional Law, as well as the *constitutionalization* of International (and European) Law<sup>22</sup>. In a nutshell, we refer to the (positive) impact of international human rights standards on national legal orders. In the Spanish case, this mainly revolves around Arts. 10 and 96 SC<sup>23</sup>. Some authors have called into question the need for art. 10 SC and have qualified its content as “superfluous” or “redundant”, affirming that it undermines the normative value of human rights treaties<sup>24</sup>. Most authors, however, have considered that both provisions establish different contents and functions, and we concur that the emphasis on the relationship between international and national law contributes to the perfection of constitutional legal orders and the protection of human rights. CUENCA GÓMEZ, for example, states that art. 10.2 SC contributes to amplify this positive pro human rights' impact: “*Its [International Human Rights Law's] adherence by national public authorities - and especially by judges - who are called upon to interpret art. 10.2 SC is essential for the effective evolution of our system of rights in line with the progress achieved at the international level*”<sup>25</sup>.

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<sup>20</sup> Though we will come back to this, it is interesting to note that differences in treatment are prohibited except those based on merit or needs.

<sup>21</sup> In this regard, we can extrapolate some of ALZAGA VILLAAMIL's points to educational rights and freedoms. For example, when he states that, as it relates to the interpretation of fundamental rights, Art. 10 SC must too be interpreted from a person-based (and not a state-based) perspective so too must we interpret art. 27 as it is directly related to the free development of the personality. See ALZAGA VILLAAMIL, O., *Comentario sistemático a la Constitución Española de 1978*, Marcial Pons: Ediciones Jurídicas y Sociales, Madrid, 2017, p. 204.

<sup>22</sup> A more recent study can be found in JIMENA QUESADA, L., “La internacionalización de la Carta Magna española de 1978: signo de madurez constitucional”, *Revista de Derecho Político (UNED)*, n. 101 (Ejemplar dedicado a: Monográfico con motivo del XL aniversario de la Constitución Española de 1978 (II)), 2018, pp. 819-866.

<sup>23</sup> To this end, we recall that the SC itself contains a general clause relating to the “fundamental axiological order”, based on personal dignity and free development (art. 10.1 SC) and the openness towards international standards, as it relates to the protection and interpretation of human rights (art. 10.2 SC), which, in turn, recognizes that these shall be interpreted in light of (on the basis of) those human rights instruments ratified by Spain (and the interpretation thereof that their corresponding monitoring mechanism issues). In view of the importance of universal standards of human rights protection contemplated in art. 10 CE and the integration of international treaties into domestic law as enshrined in art. 96.1 SC, it is of priority interest to take into consideration, in relation to the legal status of the human person, such universal standards.

<sup>24</sup> See DE ASÍS ROIG, R., *Jueces y normas. La Decisión Judicial desde el Ordenamiento*, Marcial Pons, Madrid, 1995, p. 177.

<sup>25</sup> CUENCA GÓMEZ, P., “La incidencia del Derecho Internacional de los Derechos Humanos en el derecho interno: la interpretación del artículo 10.2 de la Constitución Española”, *Revista de Estudios Jurídicos*, n. 12 (Segunda Época), 2012, pp. 2-3.

Closely linked to globalization from a constitutional perspective is the simultaneity and multiplicity of different legal sources within the same legal system: internal and external normative production, which become, *de facto* and *de iure*, part of that internal legal system. Normative openness towards universal standards has undoubtedly also produced a process of jurisdictional (and interpretative) openness. The proliferation of international legally-binding norms has come hand in hand with the multiplication of jurisdictional and non-jurisdictional bodies in charge of interpreting and applying these new sources. Judicial interpretation has indeed been affected by a substantial change in the notion of human rights; in Europe this is clearly demonstrated by the so-called multilevel protection of fundamental rights<sup>26</sup>. Indeed, human rights standards must be taken into consideration by all in charge of ensuring human dignity and all legal expectations and claims that emanate from its due respect and protection. In Spain, for example, we find that one of the first constitutional judgments relating to educational rights and freedoms, which specified the importance of genuine educational pluralism by establishing that “*education in a democratic system must primarily aim at the full development of the personality of the student*”<sup>27</sup>, was directly inspired by a previous European Court of Human Rights’ (“ECtHR”, hereinafter) judgment of 7 December 1976<sup>28</sup>. This is one of many illustrative examples.

Secondly, and also relating to art. 27.2 SC, the fact that this second paragraph is thought to be the focal point of art. 27 SC has become practically unquestionable. SÁNCHEZ FERRIZ and JIMENA QUESADA were one of the first to allude to it as a “*key principle of the entire educational system*” and “*governing rule in the essential content of the right to education*”<sup>29</sup>. Let us remember that this provision establishes three main objectives or aims of education in Spain, which, according to ALÁEZ CORRAL make up “*a series of constitutional-democratic objectives that operate as a necessary inspirational principle of the whole educational process (positive content) and as a limit to educational freedoms (negative content)*”<sup>30</sup>. These three aims are one, the full development of the human character, two, the due respect for the democratic principles of coexistence and, three, the full respect of basic rights and freedoms. This provision has certainly put the emphasis on the fact that education (whether considered a right or a freedom) is key in human and social development<sup>31</sup>. The complementary character of these three aims seems clear to

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<sup>26</sup> See GÓMEZ SÁNCHEZ, Y., *Constitucionalismo multinivel: derechos fundamentales*, Sanz y Torres, Madrid, 2014.

<sup>27</sup> CCJ 77/1985 of 17 July (legal basis point 29).

<sup>28</sup> ECtHR judgment of 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen vs. Denmark*. Applications 5095/1971, 5920/1972 y 5926/1972.

<sup>29</sup> SÁNCHEZ FERRIS, R. and JIMENA QUESADA, L., *La enseñanza de los derechos humanos*, Ariel, Barcelona, 1995, p. 77.

<sup>30</sup> ALÁEZ CORRAL, B., “El ideario educativo constitucional como límite a las libertades educativas”, *Revista Europea de Derechos Fundamentales*, Vol. 17, n. 1, 2011, p. 95. This positive and negative nature was also prescribed in CCJ 5/1981 of 13 February (legal basis point 7).

<sup>31</sup> “*Art.27.2 SC balances a personal conception of education (the full development of each student’s personality) with a very clear social conception (obliging to respect, in any case, the rules of democratic coexistence and the fundamental rights of all students)*”. See REY MARTÍNEZ, F., “El ideario educativo

most. ALÁEZ CORRAL masterfully addresses this: “*It is only possible to live together under an effective constitutional-democratic system if individuals are educated for the purpose of fully developing their personality*”, and this can only happen “*if they know their own rights and are aware of the rights of their counterparts, if they learn to respect them and if they internalize the co-habitation rules of a democratic society*”<sup>32</sup>.

Perhaps because education must serve to promote and ensure full personal development, some authors have alluded to art. 27.2 SC as the main interpretative clause for this constitutional provision as a whole<sup>33</sup>. This is a good time as any to address the fact that this constitutional provision seems to be the only one in the Spanish constitutional text that hints towards a militant democracy<sup>34</sup>, though some authors do not see it that way<sup>35</sup>. This is worth highlighting since militant democracy is something that, technically, has no place in contemporary Spanish constitutionalism<sup>36</sup>. We will also develop this idea on the neutrality (or lack thereof) of certain constitutional provisions relating to fundamental rights (including art. 27 SC) and concerns relating to democratic pluralism later on.

Third and lastly, art. 27 SC establishes a legislative mandate to develop the content of some of the aforementioned sections; hence the emphasis on what is legally-established or the “requirements laid down by law” seen in its last four sections. This partially explains the relentless seesaw of legal acts<sup>37</sup> (and subsequent “educational wars”<sup>38</sup>) adopted each time there has been a political turn around in the legislative branch: education act 5/1980 (“LOECE”, in Spanish), education act 8/1985 (“LODE”, in Spanish), education act 2/2006 (“LOE”, in Spanish), education act 8/2013 (“LOMCE”, in Spanish) and, lastly, for now, education act 3/2020 (“LOMLOE”, in Spanish). We will come back to some of these laws when examining the constitutional materialization and evolution of gender-separate education in Spain.

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constitucional: objeto de enseñanza y parámetro de validez del sistema educativo”, *XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021, p. 2.

<sup>32</sup> *Id.*, p. 111.

<sup>33</sup> CÁMARA VILLAR, G., “Constitución y Educación (los derechos y libertades del ámbito educativo a los veinte años de vigencia de la Constitución Española de 1978)”, in TRUJILLO, G., LÓPEZ GUERRA, L.M., and GONZÁLEZ-TREVIJANO SÁNCHEZ, P.J. (Coords.) *La experiencia constitucional, 1978-2000*, Centro de Estudios Políticos y Constitucionales, Madrid, 2000, p. 271.

<sup>34</sup> DE OTTO Y PARDO, I., *Defensa de la Constitución y Partidos Políticos*, Centro de Estudios Constitucionales, Madrid, 1985, pp. 20-21 and 39; more recently confirmed by NUEVO LÓPEZ, P., “Derechos fundamentales e ideario educativo constitucional”, *Revista de Derecho Político (UNED)*, n. 89 (January-April), 2014, p. 208.

<sup>35</sup> For ALÁEZ CORRAL, this provision implies “taking sides” and undoubtedly implies a “certain loss of neutrality on the part of the State's educational authority”, but does not break up “state neutrality in education matters” as it only instills in its citizens the epistemological and axiological premises that make up democratic pluralism. See ALÁEZ CORRAL, B., “El ideario educativo constitucional como límite a las libertades educativas”, *Revista Europea de Derechos Fundamentales*, Vol. 17, n. 1, 2011, pp. 108-110.

<sup>36</sup> The Spanish Constitutional Court has given its views on this issue on numerous occasions, especially as it relates to freedom of ideology/thought.

<sup>37</sup> Organic acts (or fundamental laws, if preferred) according to the requirements set forth in art. 81 SC.

<sup>38</sup> See, once again, NUEVO LÓPEZ, P., “Derechos fundamentales e ideario educativo constitucional”, *Revista de Derecho Político (UNED)*, n. 89 (January-April), 2014, p. 208.

## 1.2. Constitutional scrutiny: the rights and wrongs of a two-for-one provision

We have previously stated that art. 27 SC is one of the most controversial constitutional provisions. This is also, in part, due to the fact that two rights/freedoms that up until 1978 had been conceived as opposing or mutually exclusive were jointly constitutionalized in one single provision. Numerous references have been made to the rights and freedoms contemplated in art. 27 SC (mainly, the right to education and freedom of teaching) as one of the many compromises and consensus of the Spanish constituent power<sup>39</sup>.

Some authors consider that they should have been constitutionalized in different provisions: Freedom of teaching, inherently a public freedom (an alleged first generation right) should have been left in section one of Chapter II or Title I, whereas the right to education (an alleged second generation right) should have been enshrined in section two of that chapter, or even in Chapter III<sup>40</sup>. This does not escape controversy, as this arrangement also generates legal consequences and differential treatment in terms of the level and scope of their normative guarantees (stemming from the organic law reserve of art. 81.1 and the extraordinary constitutional protection established in arts. 53.2 and 161 SC). This serves as a good reminder that this is precisely why we are opposed to the generational classification of rights, advocating for legal formulas that are compatible with the notion of indivisibility of human rights<sup>41</sup>. This is also a good occasion to confirm that most of the rights (those especially linked to the right to education) enshrined in art. 27 SC are indeed “social rights” in the theoretical sense of the word<sup>42</sup>, though it might be unconventional to find it in that particular constitutional location (as most “social” rights are renamed “principles governing social and economy policy” and unfortunately “devalued”<sup>43</sup> to another section with lesser normative and jurisdictional guarantees).

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<sup>39</sup> This might also explain why the Spanish constitution-making process has been coined the “Pacted Transition Model”. See ROSENFELD, M., “Constitutional Identity”, in ROSENFELD, M., and SAJO, A., (eds.) *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, pp. 765 and 769.

<sup>40</sup> All of which, let us remember, also generates normative consequences and normative differential treatment (organic law reserve art. 81.1 and extraordinary constitutional protection of arts. 53.2 and 161 SC).

<sup>41</sup> MARTÍNEZ LÓPEZ-SÁEZ, M., “La Carta Social Europea y los derechos sociales emergentes: una aproximación al derecho de acceso a la información ambiental”, *Lex social: revista de los derechos sociales*, Vol. 9, n. 1, 2019, p. 175. It is also worth mentioning, in this regard the ideas presented by MORA GALIANA, J., “Preferencias axiológicas y valores jurídicos. Para una deontología profesional”, *Cuadernos Electrónicos de Filosofía del Derecho*, 2009, pp. 166-179; and more recently, MONEREO PÉREZ, J.L., “El principio de indivisibilidad e interdependencia en el sistema jurídico internacional multinivel de garantía de los derechos fundamentales”, *Revista derecho del trabajo*, n. 15, 2017, pp. 21-68.

<sup>42</sup> As GORDILLO PÉREZ affirms “social rights are those that most directly affect citizens” as social beings; hence, in a dual sense of the word. First, this means that “the individual cannot exercise them outside of his/her relation with other individuals, given he/she is member of a particular political community or another well-defined and organized group”. Second, this also means that social rights can only be exercised if the community provides the necessary resources and services to ensure the concrete specification of human dignity. All in all, “contrary to the classic idea of freedom vis-à-vis the State (traditionally linked to first generation rights and freedom), social rights would contribute to the idea of freedom with State assistance”. GORDILLO PÉREZ, L.I., “Derechos Sociales y Austeridad”, *Lex social: revista de los derechos sociales*, Vol. 4, n. 1, 2014, p. 37.

<sup>43</sup> Term coined by JIMENA QUESADA, L., *Devaluación y Blindaje del Estado Social y Democrático de Derecho*, Tirant lo Blanch, Valencia, 2017.

As we have previously said, the right to education and freedom of teaching, despite being, in more than one (legal) occasion, two conflicting realities, were constitutionalized in the same provision. This is, on the one hand, a triumph, not only in terms of constitutional consensus (difficult to reach in 1978, especially with such a sensitive topic), but also from a human rights perspective as it showed that a balance between universal values and democratic principles such as equality, freedom and participation can be found (and, subsequently, showing that a democratic social State based on the rule of law should only be understood from an integrating perspective)<sup>44</sup>. It can also be considered a triumph given that said article, given the finalistic or instrumental function that it grants to education, must be interpreted in a purposive manner: education is a means to and end (to three objectives to be exact) and not an end in itself.

On the other hand, and as a practical consequence, it has also ensued numerous, diverse and difficult constitutional (and socio-political) debates. That art. 27 SC is neither neutral nor without controversy is almost a universal understanding. Without going into the different State models and educational policies, it is worth at least alluding to the questions surrounding the content and terminology of art. 27 SC<sup>45</sup>, certainly making it one of the provisions included in the dogmatic part of our constitution that has posed the greatest problems in our country; one of the many ongoing debates is that concerning the desirability and even constitutionality (or lack thereof) of separate education (whether it is based on sex -object of this paper-, on disability, on merit, or, as of more recently, on age).

## **2. Equality: a core value of any social democratic system, a fundamental right and a multifaceted legal principle**

### **2.1. Examining a three-fold and universal concept: right to equality and the principle of non-discrimination**

After having delved into the highly contentious and debated right to education, it becomes also imperative to place the issue of gender-separate education within the Spanish constitutional mandate to equality and non-discrimination.

To this end, a preliminary consideration is required. The concept of equality has a tripartite constitutional nature: it is envisaged as one of the highest values of the legal system (art. 1.1 SC), as a fundamental right (art. 14 SC) in its formal manifestation and as a legal principle (art. 9.2 SC) in its substantial or material strand. Accordingly, we will now proceed to make a series of brief considerations on each of these aspects.

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<sup>44</sup> What Cámara Villar has called “dialectic integration” of the right to education and freedom of teaching. See CÁMARA VILLAR, G., “Las necesidades del consenso en torno al derecho a la educación en España”, *Revista de Educación*, n. 344 (September-December), 2007, pp. 66-68.

<sup>45</sup> For a constitutional perspective, see NUEVO LÓPEZ, P., *La Constitución educativa del pluralismo: una aproximación desde la teoría de los derechos fundamentales*, UNED, Madrid, 2009; y, más recientemente, MONZÓN JULVE, M., *Educación en el ordenamiento constitucional una apuesta renovada de democracia militante (educación para la ciudadanía y desarrollo de los valores constitucionales)*, Tesis Doctoral, Universidad de Valencia, 2015.

To begin with, our constitutional text conceives the democratic value of equality as the cornerstone of the entire constitutional framework. This is clearly expressed in art. 1.1 SC, which “*advocates as the highest values of its legal order, liberty, justice, equality and political pluralism*”<sup>46</sup>; values that must inform the entire positive order in its development, interpretation and application. Equality is thus a preeminent value of our legal system that “*is projected with a transcendent effectiveness so that any situation of persistent inequality after the entry into force of the constitutional norm becomes incompatible with the order of values that the Constitution, as the supreme norm, proclaims*”<sup>47</sup>.

As a projection of the value of equality, we find, in the first place, art. 14 SC thereby enshrining that “*Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance*”. This provision embodies the principle of formal equality and the fundamental right to equality before the law by excluding any kind of discrimination. Two further considerations must be made.

On the one hand, art. 14 SC requires an equal treatment before the law (legal formal equality) which results in not being treated differently in the legal arena compared to those in the same position, thus limiting the action of the public authorities in such a way that equal factual situations are to be applied equal legal consequences<sup>48</sup> and requiring an adequate reasonableness in order to justify a difference in treatment. In other words, the principle of equality prohibits the use of differentiating elements that can be described as arbitrary or lacking reasonable justification. In this regard, the Spanish Constitutional Court has concluded that: “*Art. 14 SC contains in its first section a general clause of equality of all Spaniards before the Law, having been configured this general principle of equality, by a well-known constitutional doctrine, as a subjective right of the citizens to obtain equal treatment, which obliges and limits the public authorities to respect it and which requires that the assumptions of equal facts are treated identically in their legal consequences and that, to introduce differences between them, there must be sufficient justification for such a difference, which at the same time appears to be well-founded and reasonable, in accordance with generally accepted criteria and value judgments, and whose consequences are not, in any case, disproportionate*”<sup>49</sup>.

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<sup>46</sup> This first paragraph of Article 1 of the Constitution, by describing the State as “social” (taking the concept of the social State from the Fundamental Law of Bonn, the first constitutional text to enshrine it), determines the orientation of the activity of public authorities towards the objective of associating freedom with equality, which is precisely the meaning of the social State, a term that cannot be separated from those of the democratic State and the Rule of Law.

<sup>47</sup> CCJ 8/1983 of 18 February.

<sup>48</sup> In this way, equality operates a “homogenization” of individuals before the norms, since by ignoring or determining to ignore many of those personal traits that distinguish them in fact, those individuals are regarded as “more equal” from the point of view of normative consequences. See LAPORTA, F. J., “El principio de igualdad: Introducción a su análisis”. *Sistema* n. 67, 1985, p. 14.

<sup>49</sup> CCJ 200/2001 of 4 October (legal basis point 4)

It is therefore utterly essential to distinguish between discrimination and differentiation, being the latter the consequence of the rationale that different (uneven) situations shall be treated as such, and this does not constitute a discrimination on the basis of the principle of equality enshrined in art. 14 SC. But the contrary is true: this provision and the non-discrimination mandate contained therein does not prevent the legislator from assessing different situations in order to regulate them differently as long as there is a reasonable relationship between those differences and this distinction that explains or justifies the unequal treatment<sup>50</sup>. In a nutshell, the Constitutional Court points to two objective elements that may be used as a guidance in order to know if we are before a discrimination or a differentiation: “*the principle of equality requires not only that the difference in treatment be objectively justified, but also that it pass a constitutional test of proportionality regarding the relationship between the measure adopted, the result produced and the purpose pursued*”<sup>51</sup>. Therefore, in order for a differential treatment to be compatible with the Constitution: (1) there must be an objective reason which justifies it; and (2) the legal consequences deriving from such distinction must be proportionate to the constitutional aim sought<sup>52</sup>.

On the other hand, the prohibition of discrimination<sup>53</sup> operates precisely by establishing when different normative treatment is not justified by virtue of such differentiation. In this respect, art. 14 SC imposes on all public and private authorities the prohibition of discrimination on specific and expressly reprehensible grounds – incompatible with human dignity (protected under art. 10 SC) – that are considered as “suspicious” grounds of discrimination<sup>54</sup>. According to GONZÁLEZ-TREVIJANO SÁNCHEZ this is grounded on the fact that certain groups of people have historically and traditionally been marginalized or treated in a pejorative manner<sup>55</sup>. Therefore, this anti-discrimination constitutional mandate is aimed at wiping out those historically-rooted grounds of discrimination, entailing that in the case a difference in treatment is conducted with respect to one of the aforementioned protected grounds, an extra-jurisdiction for the reasons justifying the difference in treatment will be needed in order for it to be deemed

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<sup>50</sup> CCJ 26/1987 of 27 February.

<sup>51</sup> CCJ 200/2001 of 4 October.

<sup>52</sup> *Id.* This has been given the name of the “*equality test*”.

<sup>53</sup> The prohibition of discrimination should not be confused with the principle of equality in its negative aspect of prohibition of unequal treatment.

<sup>54</sup> RIDAURA MARTINEZ, M. J., RODA ALCAYDE, J. and SARRIÓN ESTEVE, J. *Contestaciones al Programa de DERECHO CONSTITUCIONAL para acceso a las carreras Judicial y Fiscal*. Tirant Lo Blanch. Valencia, 2015.

<sup>55</sup> GONZÁLEZ-TREVIJANO SÁNCHEZ, P., *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado: España*. European Parliamentary Research Service. Comparative Law Library Unit. PE 659.297– October 2020, p. 72.



acceptable<sup>56</sup> – actually, this may even be regarded as a reversal of the burden of proof in procedural matters<sup>57</sup>.

Concerning the jurisdictional guarantees granted to the principle of equality and non-discrimination of art. 14 SC, it is important to discern that we are before a fundamental right due to the position it occupies within the structure of the constitutional text. Accordingly, the right to equality is regarded as a “*true fundamental right that is binding and directly applicable by judges and courts*”<sup>58</sup>, and which may, subsequently, be invoked before the Constitutional Court by means of an individual appeal for protection (*amparo appeal*) in the event of (alleged) breach of this right, as per art. 53.2 SC.

In conclusion, the equality clause enshrined in art. 14 SC is of a triple dimension: it is an objective requirement of the legal order in its form and content, it is a condition for the regularity of the enjoyment and exercise of other fundamental rights and, finally, it is a guarantee of the individual as a fundamental right in itself<sup>59</sup>.

Another aspect of this projection of the value of equality set forth in art. 1.1 SC is the principle – or “optimization mandate”<sup>60</sup> – enshrined under art. 9.2 SC, which includes substantive or material equality as a mandate addressed to the public authorities to remove all obstacles that prevent its effective realization, as can be deduced from the same: “*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*

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<sup>56</sup> See SERRA CRISTÓBAL, R., “The Equality Clause”, in AGUILERA VAQUÉS, M. and SERRA CRISTÓBAL, R. (Aut.) *Rights and Freedoms in the Spanish Constitution*, Tirant lo Blanch, Valencia, 2015, p. 61.

<sup>57</sup> On this issue, see Article 13 of Equality Act 3/2007 which foresees that: “*In accordance with the procedural law, in proceedings in which plaintiffs’ claims are based on discriminatory actions based on the grounds of sex, the respondent shall prove the absence of discrimination in the action taken and proportionality. Nothing in the preceding paragraph shall apply to criminal proceedings*”. Nevertheless, it should be noted that such reversal is not absolute, since the party arguing the violation must prove “the existence of rational indications of the probability of the alleged injury” (CCJ 84/2002 of 22 April, 3<sup>rd</sup> legal basis).

<sup>58</sup> CCJ 91/2019 of 3 July. This linkage is expressly specified in Article 7 of the Organic Act of the Judiciary (*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*) when it establishes that: “*1. The rights and freedoms recognized in Chapter Two of Title I of the Constitution are binding, in their entirety, on all Judges and Courts and are guaranteed under the effective guardianship of the same. 2. In particular, the rights set forth in Article 53.2 of the Constitution shall be recognized, in all cases, in accordance with their constitutionally declared content, without judicial decisions being able to restrict, impair or non-apply said content (...)*”.

<sup>59</sup> GONZÁLEZ-TREVIJANO SÁNCHEZ, P., *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado: España*, European Parliamentary Research Service-Comparative Law Library Unit, 2020, p. 72.

<sup>60</sup> ALEXY, R., *Teoría de los Derechos fundamentales* (trad. GARZÓN VALDÉS, E.), Centro de Estudios Constitucionales, Madrid, 1993, p. 86. According to ALEXY, principles are “optimization mandates” (*mandatos de optimización*) characterized by the fact that they can be fulfilled to different degrees and because the due extent of their fulfillment depends not only on the actual possibilities, but also on the legal possibilities; these latter being determined by the principles and rules that play in the opposite direction to the principle at stake.

to facilitate the participation of all citizens in political, economic, cultural and social life”.

In the eyes of our constitutional watchdog, “art. 9.2 of the Spanish Constitution is a provision that commits the action of public authorities, so that substantial equality between individuals can be achieved, regardless of their social situation”<sup>61</sup>. Inter alia, it has declared that the corrective principle of formal equality in art. 14 SC is expressly enshrined in art. 9.2 SC, when it imposes on the public authorities the obligation to “promote the conditions for the equality of individuals and groups to be real and effective”<sup>62</sup>. Therefore, it goes beyond a merely legal formal equality and advocating for a meaning of the principle of equality in accordance with the definition of art. 1 SC<sup>63</sup>, which establishes Spain as a democratic and social State governed by the rule of law<sup>64</sup>. Therefore, together with the principle of formal equality proclaimed in art. 14 SC, the Spanish Magna Carta incorporates this conception of the principle of material equality in art. 9.2 SC with the aim of achieving a real and effective equalization of citizens’ social rights.

This provision may impose the adoption of special rules tending to correct the uneven and disparate effects that can result from the application of general provisions in a society whose radical inequalities have been negatively valued by our constitutional text. Therefore, what “is proclaimed in art. 9.2 may require a minimum of formal inequality in order to progress towards the achievement of substantial equality”<sup>65</sup>, thereby allowing regulations whose formal inequality is justified in the promotion of material equality. Eventually, the Constitutional Court has also remarked that: “It cannot be considered discriminatory and constitutionally prohibited – on the contrary – the action of favoring, even temporarily, that those powers undertake for the benefit of certain groups, historically neglected and marginalized, so that, by means of a more favorable special treatment, their situation of substantial inequality is softened or compensated”<sup>66</sup>.

Finally, a brief consideration, in line with the phenomenon of internationalization (or Europeanization) of human rights, to the principles of equality and non-discrimination in the European and international arenas should be presented. One of the current

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<sup>61</sup> CCJ 39/1986 of 31 March.

<sup>62</sup> CCJ 81/1982 of 21 December.

<sup>63</sup> VILAS NOGUEIRA, J., “Los valores superiores del ordenamiento jurídico”. *Revista Española de Derecho Constitucional*, núm. 12. Septiembre-diciembre 1984, p. 97. This idea is also portrayed in the Constitutional Court Judgment 34/1981 of 10 November, as pointed out by CARMONA CUENCA. See CARMONA CUENCA, E., “El principio de igualdad material en la jurisprudencia del Tribunal Constitucional”, *Revista de Estudios Políticos* (Nueva Época), n. 84. (April-June), 1994, p. 274.

<sup>64</sup> The legitimization implicit in the formula of the “social and democratic State governed by the rule of law” finds a specific normative projection in the constitutional declaration of art. 9.2, expressing that freedom and equality – enshrined in art. 1.1 as the “highest values of the legal order” – should be “real and effective”. Thus, this article can be understood as a specific projection of the social nature of the Spanish State, linking the claim of “reality and effectiveness” of freedom and equality to the constitutional aim of guaranteeing generalized material well-being, which constitutes one of the main objectives attributed to our democratic State. See *id.*, p. 91.

<sup>65</sup> CCJ 19/1988 of 16 February.

<sup>66</sup> CCJ 216/1991 of 14 November.

groundbreaking norms on the field of equality in the primary law of the European Union is art. 157 TFEU, which establishes the principle of equal pay for male and female workers for equal work or work of equal value. Art. 8 TFEU and art. 3 TEU, setting as one of the Union's goals the promotion of equality between men and women in the EU and the erasure of inequality, must also be highlighted. Equally (if not more) important is the CFREU<sup>67</sup>, whose Chapter III is devoted to equality and from which we should emphasize, in relation to the present paper, arts. 20 (equality before the law), 21.1 (principle of non-discrimination) and 23 (establishing a specific legal obligation for public authorities to ensure equality between men and women, by adopting measures in favor of the under-represented gender). On the other hand, in the area of EU secondary law, in addition to the extensive case law<sup>68</sup> off-the-shelf, we can find several fundamental normative instruments<sup>69</sup>.

In the international realm, with the adoption of the UN charter, a non-discrimination clause applying to everyone became a recognized part of international law. The principles of equality and non-discrimination are fundamental elements of international human rights law, as it is reflected in both art. 7 UDHR and art. 26 of the ICCPR. The ICESCR also contains a specific non-discrimination clause enshrined in art. 3, which is similar to that of the ICCPR. Moreover, due to the scope of this paper, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) cannot be left aside when referring to equal rights jurisprudence of the United Nations. In the regional European scene, the ECHR come into play as well with respect to non-discrimination clauses, especially with regards to art. 14<sup>70</sup>. The ESC, for its part, recognizes this principle in two of its arts. 20 and 27.

In this regard, it should be noted that, as indicated by art. 10.2 SC, the principles relating to the fundamental rights and liberties constitutionally recognized shall be interpreted in conformity with the international and regional treaties and agreements ratified by Spain. Thus, these international instruments act as a hermeneutic criterion when ratified, constitutionally configuring the principle of equality and non-discrimination as a

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<sup>67</sup> The legal rules contained in this Charter are to be considered as legally binding by virtue of art. 6 TEU, which states that this instrument “*shall have the same legal value as the Treaties*”.

<sup>68</sup> See *Defrenne v Sabena*, *Deutsche Telekom v European Commission*, *Tanja Kreil v Bundesrepublik Deutschland*, or *Roca Alvarez v Sesa Start Espana ETT, SA*, as some examples.

<sup>69</sup> Among others, Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services are noteworthy.

<sup>70</sup> Unlike Article 7 UDHR and Article 26 ICCPR, Article 14 ECHR does not provide a general prohibition of discrimination. The limitations inherent in Article 14 have led the European Court of Human Rights to acknowledge that certain forms of discrimination cannot be brought within the article's scope. Moreover, Article 14 has no independent existence since it relates only to the “enjoyment of the rights and freedoms set forth in this Convention”. Therefore, it is merely accessory, meaning that it can only be invoked in conjunction with one or more of the other Convention's substantive provisions. See GRIEF, N., “Non-discrimination under the European Convention on Human Rights: a critique of the UK Government's refusal to sign and ratify Protocol 12”. *European Law Review*, 27 (2002), p. 2-3.

mandatory consequence, in the opinion of certain legal scholarship, of the same notion of dignity of the person recognized in art. 10 SC<sup>71</sup>.

## 2.2. The cross-cutting character of the principle of equality: Anti-discrimination measures and gender mainstreaming

By virtue of the mandate contained in art. 9.2 SC, thoroughly analyzed in the previous section, the real and effective achievement of the principle of equality (whose main characteristic is that of being mainstream or cross-cutting (*transversalidad*), on the social level is subject to the adoption of measures aimed at leveling out situations of imbalance, arisen due to historical disparities suffered by certain groups of individuals, in order to overcome such inequalities. This is what the Constitutional Court has designated as an “*equalizing unequal right*” (*derecho desigual igualatorio*) so as to ensure effective equality<sup>72</sup>. This “*equalizing unequal right*” allows, therefore, the adoption of anti-discrimination law measures. Succinctly explained, they include specific measures attempting to reduce *de facto* discrimination against particular groups whose personal or circumstantial characteristics (such as, gender, race, disability...) have victimized them, and to increase their participation and accessibility in those contexts in which these groups are regarded as underrepresented.

Within the umbrella concept of anti-discrimination law measures, two subcategories are worth mentioning. Firstly, reverse discrimination<sup>73</sup> (*discriminación inversa*), known in Europe under the name of “*positive discrimination*”, refers to temporary or transitory favorable normative actions aimed at compensating the historical discrimination suffered by a disadvantaged group or stigmatized community, producing as a result certain harm to the majority population or limiting their right to access some public goods, services or facilities<sup>74</sup>. Secondly, affirmative actions (*acciones positivas*) constitute, in the words of BARRÈRE UNZUETA<sup>75</sup>, “*a legal instrument against group inequality, but this latter being understood more as domination or subordination than as discrimination stricto sensu*”. SERRA CRISTÓBAL<sup>76</sup> observes that this tool, materialized in a more favorable

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<sup>71</sup> GONZÁLEZ-TREVIJANO SÁNCHEZ, P., *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado: España*, European Parliamentary Research Service-Comparative Law Library Unit, 2020, p. 10.

<sup>72</sup> CCJ 229/1992 of 14 December (legal basis 2)

<sup>73</sup> For further information, see DWORKIN, R., “Reverse Discrimination”, in DWORKIN, R., *Taking Rights Seriously*. Harvard University Press, Cambridge: Massachusetts, 1977.

<sup>74</sup> SERRA CRISTÓBAL, R., “The Equality Clause”, in AGUILERA VAQUÉS, M. and SERRA CRISTÓBAL, R. (Aut.) *Rights and Freedoms in the Spanish Constitution*, Tirant lo Blanch, Valencia, 2015, p. 64. By way of illustration, we could cite the fees for the benefit of the disabled, which have been deemed as constitutional by our supreme interpreter of the constitutional text, following what was prescribed by the Court of Justice of the European Union (CJEU) in the case *Marschall v Land Nordrhein Westfalen* (1997) inasmuch as this latter understands that actions of positive discrimination (reverse discrimination) are not contrary to the principle of non-discrimination

<sup>75</sup> BARRÈRE UNZUETA, M. A., *Discriminación, Derecho antidiscriminatorio y acción positiva en favor de las mujeres*, Cuadernos Cívitas, Madrid, 1997, p. 121.

<sup>76</sup> SERRA CRISTÓBAL, R., “The Equality Clause”, in AGUILERA VAQUÉS, M. and SERRA CRISTÓBAL, R. (Aut.) *Rights and Freedoms in the Spanish Constitution*, Tirant lo Blanch, Valencia, 2015, p. 64.

treatment to a group holding a disadvantaged position from the beginning, is intended to provide equal opportunities by providing assistance to the most underprivileged. In this case, unlike reverse discrimination, the majority group does not experience a direct damage. An example of these actions may be the economic bonus for childcare granted to working mothers<sup>77</sup>. In the opinion of RIDAURA MARTÍNEZ, these antidiscrimination law measures should be distinguished from the so-called “*paternalistic or falsely protective*” measures (*paternalistas o falsamente protectoras*), which pretend to be an improvement when in fact what they do is hindering the attainment of equality<sup>78</sup>. For instance, the Constitutional Court has declared as paternalistic or falsely protective measures of women the exclusion of men from the widower’s pension<sup>79</sup>, as well as the establishment of a minimum continuous night rest of twelve hours for female workers (with the sole exception of clinics or sanatoriums), since it was based on “*a protectionist valuation of women’s work which has no relevance in today’s society, and that has not been shown to result in their real and effective promotion*”<sup>80</sup>; to name a few.

Despite significant progress having been made in recent decades with respect to the mitigation of deep-rooted inequalities through the implementation of antidiscrimination law measures, the reality is that the effectiveness of the instruments adopted so far to achieve equality between men and women is still insufficient. Accordingly, in order to overcome the shortcomings of the principle of equality, understood both in its formal and substantial meaning, a new concept was coined by the Beijing Conference Declaration(1995): “*In addressing unequal access to and inadequate educational opportunities, Governments and other actors should promote an active and visible policy of mainstreaming a gender perspective into all policies and programmes, so that, before decisions are taken, an analysis is made of the effects on women and men, respectively*”<sup>81</sup>

In this manner, the concept of “*gender mainstreaming*” (*transversalidad de género*) was introduced as a strategy in international gender equality policy requiring all Member States to transpose these guidelines into their national strategies for its implementation<sup>82</sup>. Nevertheless, if we are looking for a more descriptive definition, the European Commission provides us with the following in its Communication of 21 February 1996 relating to the incorporation of equal opportunities for women and men into all

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<sup>77</sup> As recognized in CCJ 128/1987 of 16 July.

<sup>78</sup> RIDAURA MARTÍNEZ, M. J., RODA ALCAYDE, J. and SARRIÓN ESTEVE, J., *Contestaciones al Programa de DERECHO CONSTITUCIONAL para acceso a las carreras Judicial y Fiscal*. Tirant Lo Blanch. Valencia, 2015.

<sup>79</sup> CCJ 142/1990 of 20 September.

<sup>80</sup> CCJ 38/1986 of 21 March.

<sup>81</sup> The so-called “Gender impact assessment”, which is described by the European Institute for Gender Equality as an “*ex ante evaluation, analysis or assessment of a law, policy or programme that makes it possible to identify, in a preventative way, the likelihood of a given decision having negative consequences for the state of equality between women and men*”.

<sup>82</sup> SERRA CRISTÓBAL, R., “Gender Mainstreaming”, in AGUILERA VAQUÉS, M. and SERRA CRISTÓBAL, R. (Aut.) *Rights and Freedoms in the Spanish Constitution*, Tirant lo Blanch, Valencia, 2015, p. 66.

Community policies and activities: “*The principle of ‘gender mainstreaming’ consists of taking systematic account of the differences between the conditions, situations and needs of women and men in all Community policies and actions. This global, horizontal approach requires the mobilization of all policies*”.

This idea has not remained only on the European surface<sup>83</sup>, but has also reached the shores of the Spanish legal system. Thus, the principle of gender mainstreaming (as well as the concept of affirmative actions<sup>84</sup>) is found in Spanish Organic Act 3/2007 for the effective equality of women and men<sup>85</sup>, where a legal definition can be encountered. The current National Equal Opportunities Strategic Plan 2018-2021 (*Plan Estratégico de Igualdad de Oportunidades 2018-2021*), which includes a governmental commitment to implement the principle of gender mainstreaming in all policy areas is also worth highlighting, among others.

On balance, the main conclusion that can be extracted from all the information herein showcased is that the Constitution imposes a duty on public authorities, as a constitutional transversal aim, to promote equality-ensuring conditions and remove all the potential obstacles that may appear during the performance of this mandate. And both antidiscrimination law measures and gender mainstreaming constitute two essential complementary instruments for the achievement of this constitutional goal.

### **III. Gender-separate education in Spain: State of play and further reflections in light of recent developments**

#### **1. Conceptual clarity and legal configuration of gender-separate education**

Gender-separate education (*educación diferencia por razón de sexo*), also known, worldwide, as single-sex education (as opposed to the so-called coeducational or mixed model)<sup>86</sup>, consists of the schooling of students according to their sex: either offering

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<sup>83</sup> Where it has been afterwards reinforced in the “*Community framework strategy on gender equality (2001-2005)*”, and in the “*Roadmap for equality between women and men (2006-2010)*”.

<sup>84</sup> See Article 11 of the Organic Act 3/2007 for the effective equality of women and men, prescribing that: “*1. In order to give effect to the constitutional right to equality, the public authorities shall adopt specific measures in favor of women to correct clear situations of de facto inequality with respect to men. Such measures, which shall be applicable for as long as such situations persist, shall be reasonable and proportionate in relation to the objective pursued in each case. 2. Private individuals and legal entities may also adopt this type of measures under the terms established in this Law.*”

<sup>85</sup> This Act, among other outstanding aspects, introduces electoral parity by establishing a minimum percentage of 40% of every gender on the electoral lists (declared constitutional in CCJ 12/2008 & 13/2009), and also requires the balanced presence of both women and men in appointments made by the public authorities, amending art. 44 of the Organic Act 5/1985 on the General Electoral System (*Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral General*, LOREG). See RIDAURA MARTÍNEZ, M. J., RODA ALCAYDE, J. and SARRIÓN ESTEVE, J., *Contestaciones al Programa de DERECHO CONSTITUCIONAL para acceso a las carreras Judicial y Fiscal*. Tirant Lo Blanch. Valencia, 2015.

<sup>86</sup> Though there are academic discrepancies, as some differentiate between ‘mixed education’, understood as educating men and women jointly, and ‘coeducation’, as something much broader, including the fact that actions and practices that promote the integral development of all persons involved are provided not only from collective reflection but from practical gender analysis and subsequent implementation. See PÁEZ MARTÍNEZ, R.M., “Coeducación y educación diferenciada. Una opción por la igualdad de género

enrolment to only one of the sexes or, albeit less frequent in the Spanish case, despite enrolling both sexes in the same institution, organizing the curriculum in separate classrooms. Some have considered it an educational model whereas others have boiled it down to a pedagogical model<sup>87</sup>. Some in Spain have also preferred to refer to it, in a positive tone, as “differentiated” education, respecting differences and diversity (whether natural or cultural) in the context of education, and others, in a pejorative tone, have preferred to refer to it as “segregated” education as it tends to shift far away from inclusion. It might also be interesting to know that there are varied conceptual equivalents, depending on the legal tradition and system: single-sex schools (typically in common-law system), *écoles non mixtes* (non-mixed schools in the French legal system), *educazione omogenea* (homogenous schools in the Italian legal system), *monoedukative schule* (monoeducation in the German legal system)<sup>88</sup>.

It is, in short, a model that separates students by sex, with the sole purpose of maximizing individual potential and facilitating better opportunities for both sexes, based on the fact that there are cognitive and maturation differences between men and women at primary and secondary levels, evidenced by scientific data<sup>89</sup>, drop-out rates and poor academic results contingent upon the subject-matter (seemingly linked to sex)<sup>90</sup>. Under the previous premise, the gender-separate or single-sex education model contemplates that instructors cannot ignore the differences, for example, in mental and psychological growth rate<sup>91</sup>, between the sexes, much like differences between ages or functional capacity, when teaching and must take into account not only the way each group approaches learning, but also the cognitive and affective needs of both sexes when teaching. The root of this premise is founded on anthropological premises<sup>92</sup> and the alleged scientific fact that both sexes differ fundamentally in terms of brain functioning and stress responsiveness,

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en la escuela pública mixta”, *Educación y Ciudad*, n. 27 (July-December), 2014, pp. 131-132. In any case, most agree that coeducation models strive for adaptations towards equality by equalizing and single-sex education models strive for personalization, one gender at a time, making educational adjustments based on the different individualities and rhythms of the student.

<sup>87</sup> NUEVO LÓPEZ, P., *La constitución educativa del pluralismo. Una aproximación desde la teoría de los derechos fundamentales*, UNED, Madrid, 2009, p. 141.

<sup>88</sup> BÁEZ SERRANO, R., *Educación diferenciada y conciertos públicos*, Tesis Doctoral, Sevilla, 2015, p. 159.

<sup>89</sup> See the interesting correlations found, from the perspective of a world-renowned neuropsychiatrist, in BRIZENDINE, L., *The Female Brain*, Broadway Books, New York, 2006; and BRIZENDINE, L., *The Male Brain*, Three Rivers Press, New York, 2010. She writes, in both books, that the genetic differences between men and women are less than 1%, and yet, this seemingly-miniscule and insignificant variation makes all the difference in the world, as even the tiniest percentage influences the tiniest cells and nerves in our body and brain in charge of pain, pleasure, perception, emotion and an infinite etc.

<sup>90</sup> Despite the fact that the majority of school systems are of a mixed nature, making spatial and cognitive teaching configurations and practices the same, PISA reports systematically show that the learning process is different for boys and girls and there are clear indicators of a gender gap. For example, see the 2009 and 2012 results. Source: <https://www.oecd.org/pisa/46660259.pdf> and <https://www.oecd.org/pisa/keyfindings/pisa-2012-results-gender-eng.pdf>

<sup>91</sup> MARTÍNEZ LÓPEZ-MUÑIZ, J.L., “Escolarización homogénea por razón del sexo y derecho fundamental a la educación en libertad”, *Revista española de derecho administrativo*, n. 154, 2012, pp. 75-77.

<sup>92</sup> AHEDO RUIZ, J., “El fundamento antropológico de la educación diferenciada”, *Estudios sobre Educación*, Vol. 28, 2015, pp. 155-170.

making it impossible (and counterproductive) to teach them effectively in the same classrooms. The purpose of this differentiation (we will later on analyze if it amounts to discrimination) is to ensure and improve equal opportunities and learning by working in a more homogeneous way; taking away the factor that visibly facilitates and reinforces gender stereotypes in a classroom.

A segment of the population (backed by a segment of education experts) believe that it is a model that favors equal opportunities, as it facilitates and personalizes the learning and teaching process avoiding the gender gaps and stereotypes statistically found in mixed classrooms (i.e., girls are more free to pursue activities and subjects that otherwise would be ‘monopolized’ or ‘excelled at’ by their male counterparts, and vice versa)<sup>93</sup>. There is also sound evidence and arguments, from a legal perspective and from the so-called “equal educational opportunity doctrine”, that it is an educational model that benefits minority groups and persons in situations of vulnerability or at risk of social exclusion (primarily girls that already suffer, or are at risk of suffering, from double or multiple discrimination)<sup>94</sup>.

From the experience of those having taught in both gender-separate and mixed education institutions, there is certain consensus that female students become more empowered in the former, as they recognize each other as individuals, and not as the other (opposite) sex, making them feel more capable of doing anything without the constant weight of (and shame brought by) gender stereotypes (i.e. excelling at sports or numerical sciences, for example). There are indications that the percentage of successful women in differentiated education is higher<sup>95</sup>, and even if it were not the case, it is a useful alternative model, widely valued by families, despite it still being a minority choice in Spain. In any case, gender-separate education advocates for self-definition and self-determination without taking into account (or being constantly compared to) the other sex.

We should remember that one of the most significant phenomena in the past half century, as it pertains to equality and education, is the increase in the percentage of women in all levels of education and the ‘facilitation’ of access to educational qualifications. This was made possible, originally, by the creation of gender-separate or single-sex educational institutions. The increase in schooling has allowed women a ‘reduction’ of cultural and social differences, where such differences constituted real forms of inequality between and their gender counterparts.

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<sup>93</sup> Source: <https://www.theatlantic.com/education/archive/2013/10/the-bizarre-misguided-campaign-to-get-rid-of-single-sex-classrooms/280262/>

<sup>94</sup> SALOMONE, R. C., *Same, Different, Equal: Rethinking Single-Sex Schooling*, Yale University Press, New Haven, 2003; vulnerability and social exclusion risk groups have been confirmed by RIORDAN, C., *Single-Sex Schools: A Place to Learn*, Rowman & Littlefield, Maryland, 2015, pp. 38-44.

<sup>95</sup> For more on this, see MARCHADOR A., “Educación diferenciada: ¿una fórmula eficaz para luchar contra la brecha de género?”, *Crónica Global*, 26-12-2020. Source: [https://cronicaglobal.elespanol.com/vida/educacion-diferenciada-brecha-genero-424815\\_102.html](https://cronicaglobal.elespanol.com/vida/educacion-diferenciada-brecha-genero-424815_102.html)



Perhaps this is why it is still one of many pedagogical education options endorsed (or, at the very least, allowed) by international and supranational organizations: human rights bodies and instruments have confirmed its legality and the right of parents to choose the option that best suits their children<sup>96</sup>. For example, the Declaration on the Elimination of Discrimination Against Women (“DEDAW”, hereinafter), of 1967, urged States to adopt measures to ensure equality between men and women in the exercise of educational rights and freedoms, whether it be in the context of a coeducational or non-coeducational institution (art. 9(b) DEDAW). Hence, it recognized the existence and compatibility of gender-separate education with the universal system of human rights. This is also the impression that we have after a careful reading of art. 14.3 of the Charter of Fundamental Rights of the EU (“CFREU”, hereinafter), as it enshrines the different rights and freedoms already commented in this paper (namely, the right to free education, the freedom to create educational establishments, and the right of parents to choose their children’s educational based on “religious, philosophical and pedagogical convictions”. Art. 14.3 *in fine* CFREU seems to be the most relevant as it pertains to the object of this paper: the EU recognizes and protects diverse pedagogical (different from religious or philosophical) convictions in the context of education, and therefore, also recognizes and protects their materialization as practices or methodologies in educational institutions. Example of pedagogical convictions can mean anything from the classical mixed or coeducation formats, to more alternative teaching and learning methods, whether it be Montessori or single-sex education. What all these pedagogical practices have in common is that they all aim to better academic excellence, to ensure equal educational opportunities and enrich educational options for parents and their children.

From a comparative perspective, the United States is one of the countries in the world where this model is more commonly-accepted (both socially and politically) mainly based on their sacrosanct freedom or “right to choose”<sup>97</sup>. A systematic review assigned to the US Department of Education (the equivalent of the Spanish Ministry of Education and Vocational Training) corroborated some of the abovementioned features: on the one hand, positive effects of single-sex schools on subject achievement test scores in comparison to coeducational schools, and, on the other hand, in terms of socio-emotional development, students in single-sex schools tend to have a higher self-esteem and focus more on grades and skills than in physical attributes or other socio-bio-emotional factors<sup>98</sup>. However, the results are certainly insufficient, and perhaps even outdated, to determine the superior

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<sup>96</sup> Art. 26 UDHR does not prescribe a specific model to ensure equality in education, but rather leaves the preferential choice of parents. Art. 2 of the UNESCO Convention against Discrimination in Education of 1960 explicitly recognizes the gender-separate educational model.

<sup>97</sup> As CALVO CHARO states, politicians from opposite sides of the political aisle, including former President Barack Obama, have publicly come out supporting this pedagogical option. CALVO CHARRO, M., “Los colegios diferenciados por sexo en Estados Unidos: constitucionalidad y actualidad de una tendencia imparabable”, *Revista de Derecho Político (UNED)*, n. 86 (January-April), 2013, p. 161.

<sup>98</sup> MAEL, F., ALONSO, A., GIBSON, D., ROGERS, K., and SMITH, M., *Single-Sex Versus Coeducational Schooling: A Systematic Review Doc # 2005-01*, US Department of Education-Evaluation and Policy Development, Policy and Program Studies Service, Washington DC, 2005. Source: <https://files.eric.ed.gov/fulltext/ED486476.pdf>

advantages of gender-separate over mixed educational models, and vice versa; the samples are not fully representative and, as most studies, have biases. England is another country with a long-standing tradition of single-sex education schools and reports seem to consistently confirm better academic performance with this type of model: the 10 best schools in the country are 4 all-boys schools, 4 all-girls schools and 2 coeducational schools, and, generally-speaking, academic performance results, at least in secondary education, are significantly higher in single-sex education institutions<sup>99</sup>. This, however, is not the case of Australia, for example, where research shows that there does not seem to be an added value to this model in comparison to the coeducation one<sup>100</sup>.

In any case, the starting point is erroneous: debates should not be reduced to the superiority (or higher advantage) of either educational model, but the enriching results that such plurality and choice in pedagogy brings to bettering education and individualized results. In this regard, it is also based in ensuring equality among children, customizing education by adapting teaching methods to the different learning styles, allowing, in turn, real equality of opportunities for the students as the transfer of knowledge and abilities are tailored to specific needs, without limiting their capabilities based on the majority learning style (generally determined by their counterparts of the opposite sex) and allowing them to freely choose vocational options, not based on gender stereotypes found in a mixed classroom: *“Single sex education provides boys and girls a greater freedom of choice in subjects and professional opportunities not associated with their sex [...] provides greater space for girls and helps to increase their self-esteem and encourages the effort in males not having to [...] worry about their image as students [...] the percentage of students from female schools who choose undergraduate degrees of scope scientific-technical increases significantly. On the other hand the number of male students who decide to study Teaching, a career with little male presence, is much higher [in single-sex educational institutions] than the average”*<sup>101</sup>. The studies and standards presented<sup>102</sup> at least debunk some single-sex education myths that tend to be present in discourses that reject such pedagogical model.

Still, there is something to be said about those that question and reject this model, especially from a sociological perspective. SUBIRATS MARTORI, for example, reminds us that most countries where this model is still the majoritarian option are those *“still on the path of change towards the consolidation of the concept of equality between men and women”*<sup>103</sup>. She also exposes two very interesting and compelling counterarguments.

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<sup>99</sup> Source: <http://www.telegraph.co.uk/education/leguetables/9482674/A-Level-results-2012-results-from-427-state-schools.html> Although, as with most issues, there are not only benefits but also limitations to this model. Source: <https://www.theatlantic.com/education/archive/2015/12/the-resurgence-of-single-sex-education/421560/>

<sup>100</sup> Source: <https://www.acer.org/gb/discover/article/single-sex-schooling-and-achievement-outcomes>

<sup>101</sup> Source: <http://www.easse.org/en/content/74/Wide+career+choices/>

<sup>102</sup> See also EURYDICE NETWORK, *Gender differences in educational outcomes: measures taken and current situation in Europe*, Eurydice, Brussels, 2009. Source: [http://eacea.ec.europa.eu/education/eurydice/documents/thematic\\_reports/120ES.pdf](http://eacea.ec.europa.eu/education/eurydice/documents/thematic_reports/120ES.pdf)

<sup>103</sup> See, for all, SUBIRATS MARTORI, M., “¿Coeducación o escuela segregada? Un viejo y persistente debate”, *Revista de la Asociación de Sociología de la Educación*, Vol. 3, n. 1, 2010, p. 144.

First, the focus on bio-neurological differences generally means omitting the environmental factors that strongly influence children's vocational training outlook and educational performance. The classic 'nature versus nurture' debate comes into play yet again as it is impossible (and intellectually dishonest) to ignore socio-economic factors (from purchasing power to the educational background of the parents) and cultural patterns and structures that impacts or reinforces gender roles<sup>104</sup>. Secondly, the fact that if better academic outcomes can be observed in single-sex education it is not so much a product of the excellence of their model but more of the deficits of its alternate (coeducation)<sup>105</sup>. Perhaps the 'own goal' metaphor can be a good representation of this counterargument. In any case, BÁEZ SERRANO has provided us with an extensive and quite objective summary of the arguments in favour and against such pedagogical educational model<sup>106</sup>.

Gender-separate education has legally-existed in Spain for quite some time. Although historically-speaking, this model has its roots prior to the SC, it was not until the beginning of the 21<sup>st</sup> century that we started to see its constitutional and legal configuration; at first, "indirectly"<sup>107</sup> linked to the educational institutions' own ideology that was legally-recognized to them (art. 15 LOECE, art. 22 LODE, art. 73 LOCE, art. 115 LOE)<sup>108</sup>. We find an implicit legal nod to gender-separate education in Spain as far back as 2006 with the so-called LOE, which explicitly mentioned in its art. 84.3 the prohibition of student admission discriminatory practices on grounds of sex and referenced, in its twenty-fifth additional provision, a sort of priority financial treatment to centers that developed the "principle of coeducation" in all educational stages in line with the promotion of effective equality between men and women<sup>109</sup>. Up until this time, we see interesting case-law developments<sup>110</sup>.

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<sup>104</sup> *Id.*, p. 152: "Denying the importance of social environment [...] [and] relying on biological differences to apply a differentiated education, which apparently responds to a natural need [...] continue[s] to promote the division of gender roles, i.e., of different cultural and social models for men and women [...] biology has already made it clear that it is not independent of the environment, and that social stimuli shape our behavior and habits, favoring or hindering the development of certain capacities".

<sup>105</sup> *Id.*, pp. 156-157: "The coeducational school has not yet resolved the issues it had raised [and the problems its creation intended to solve]. The transfer of knowledge in school continues to be done from an androcentric perspective and culture that has not sufficiently made room for feminist cultural contributions, values and practices [...] [it has not yet achieved] a balanced use of spaces, schedules or [...] [has not sufficiently fought for a change of inclusive] language [...] [nor allowed to] reconstruct a modern form of masculinity that abandons old rules [...]".

<sup>106</sup> See BÁEZ SERRANO, R., *Educación diferenciada y conciertos públicos*, Tesis Doctoral, Sevilla, 2015, pp. 159-167.

<sup>107</sup> Some have affirmed that there was neither a direct legal confirmation nor a prohibition of gender-separate education stemming from each educational institution's freedom to create their educational project and formative plan (respecting the requirements set down by art. 27 SC, of course). See CALVO CHARRO, M., "Apoyo de la jurisprudencia española a la educación diferenciada como una opción legítima dentro de la libertad de elección de centro docente de los padres", *Diario La Ley*, n. 6711, 2007, pp. 1-2.

<sup>108</sup> See CCJ 77/1985 of 27 June (legal basis point 8).

<sup>109</sup> VIDAL PRADRO, C., "Educación Diferenciada y Tribunal Constitucional", *Revista General de Derecho Constitucional*, núm. 29, 2019, p. 4.

<sup>110</sup> They are brilliantly summarized in CARAZO LIÉBANA, M.J., "La opción por la educación diferenciada por sexos: ¿discriminación en las escuelas concertadas o libertad de enseñanza?", Paper in the XVIII Congreso de la Asociación de Constitucionalistas de España (ACE), 2021, pp. 3-7.

However, it was not until 2013 with the LOMCE that we find an explicit reference to gender-separate education. This particular education legislation reform modified the previous law as it pertains specifically to gender-separate education. It changed art. 116.1, relating to public financial aid, established that the choice of center by reason of its own ideology cannot mean a less favorable treatment or disadvantage for families, students and centers. In the same way, art. 84.3 was developed (as it added two new incisions) and read: *“In no case shall there be discrimination on the basis of birth, race, sex, religion, opinion or any other personal or social condition or circumstance. The admission of male and female students or the organization of teaching differentiated by sex does not constitute discrimination, as long as the education provided is carried out in accordance with the provisions of Article 2 of the Convention against Discrimination in Education. Convention against Discrimination in Education, adopted by the General Conference of UNESCO on General Conference of UNESCO on 14 December 1960. In no case shall the choice of gender-separate education imply for families, students and corresponding centers, a less favorable treatment, nor a disadvantage when it comes to signing agreements with the educational administrations or any other aspect of the education system. To this effect, centers must state in their educational project the educational reasons for the choice of such system, as well as the academic measures that they develop to favor equality”*.

These additions (especially the ones pertaining to art. 84.3) intended to settle the debate concerning gender-separate education. From the new wording of the provision, it became clear that this minority model, alternative to coeducation, is one of many options that parents can choose from (and subsequently, that educational institutions can develop as part of their educational project and ideology). CARLOS VIDAL goes a step further by affirming that although *“coeducation still prevails [as the majority and preferable option], gender-separate education is also a legitimate model and compatible with educational legislation [and the Spanish Constitution]”*<sup>111</sup>. This last part is what we will examine more closely below: whether gender-separate education is compatible with equality, as a value, as a transversal principle and as a fundamental (educational) right, potentially clashing with other educational freedoms.

The most recent education reform, the LOMLOE also contemplates education in its duality (transfer knowledge and renew value-based culture) and equality (though through the reference of “avoiding discrimination”) as a guiding principle<sup>112</sup>, not only in its preamble but also in its normative provisions. Art. 20 *bis* (attention to individual differences) is added in this reform (though it only contemplates student-classroom ratios

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<sup>111</sup>VIDAL PRADRO, C., “Educación Diferenciada y Tribunal Constitucional”, *Revista General de Derecho Constitucional*, núm. 29, 2019, p. 5.

<sup>112</sup> Education is *“the most suitable means of transmitting and, at the same time, renewing culture and the body of knowledge and values that sustain it, extracting the maximum potential [...] fostering democratic coexistence and respect for individual differences, promoting solidarity and avoiding discrimination, with the fundamental objective of achieving the necessary social cohesion”*.

as an adequate pedagogical strategy)<sup>113</sup>. Art. 1(l) is added and establishes that, in the name of developing equality (“equal rights, duties and opportunities”), among others, “the promotion of effective equality of women and men through the consideration of the coeducation model” must be ensured. This could lead to thinking that gender-separate education is rejected by the Spanish legislator; if there were any doubts they were cleared by the 25<sup>th</sup> additional provision. This supplementary provision establishes that, so as to foster effective gender equality: “*centers supported partially or totally with public funds will develop the principle of coeducation in all educational stages[...] and will not separate students by gender*”. Although some have been more radical in their disagreement with this new line<sup>114</sup>, it is certainly interesting since the Spanish Constitutional Court has confirmed quite the opposite position, also basing itself in equal access and opportunity claims; we will come back to this later on.

## 2. Uncertainties of gender-separate education: tensions with other values

Without going into specific detail about other controversies (and subsequent concerns) stemming from gender-separate education (for example, if the application of the educational ideology of the SC as a limit to educational freedoms means excluding educational facilities from public funding schemes) we will focus mainly on the compatibility of such practice with the fundamental values and guiding principles set down as in the SC.

### 2.1. Equality concerns: beyond ‘separate but equal’?

Almost the entirety of the debates surrounding education, and rights associated with it, ultimately revolve around equality. The idea of education as a positive right, and therefore, in creating positive obligations for the State, in creating a public service<sup>115</sup>, is one of the many legacies of the French Revolution for which contemporary constitutional orders should be deeply grateful. Education, is therefore conceived, on the one hand, as an instrument of social equality<sup>116</sup>, and, on the other, as an instrument for real and effective equality, insofar as it is responsible for teaching (and making effective)

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<sup>113</sup> It reads: “*At this [educational] stage, special emphasis will be placed on individualized attention to students, early diagnosis and the establishment of support and reinforcement mechanisms to avoid school repetition, particularly in socially disadvantaged environments. In such environments the Administrations will proceed and adjust the student/unit ratios as an element favoring these pedagogical strategies*”.

<sup>114</sup> Some, like NUEVO LÓPEZ (in line with FERNÁNDEZ-MIRANDA CAMPOAMOR and SÁNCHEZ NAVARRO) have insisted on the risks of “*Pretending that citizens with different perceptions on how to achieve and internalize equality between men and women must assume the one defined by the legislator (i.e., by the political majority in office)*”. See NUEVO LÓPEZ, P., “Derechos fundamentales e ideario educativo constitucional”, *Revista de Derecho Político (UNED)*, n. 89 (January-April), 2014, p. 232.

<sup>115</sup> Given that education is a “public service of a social nature”. See MÍGUEZ MACHO, L., “La polémica sobre la compatibilidad con el principio constitucional de no discriminación por razón de sexo de los conciertos de la administración con los centros que imparten educación diferenciada”, *Persona y Derecho*, n. 72, 2015, p. 239.

<sup>116</sup> Some talk of equal access or opportunities in education. See NAVAS SÁNCHEZ, M.M., “Educación e Igualdad” *XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021. Some others talk of education as a “social lift [or elevator]” or a way to climb the socio-economic ladder. See VIDAL PADRO, C., “Educación e Igualdad”, *XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021.

constitutional values and principles. That education is a key element in a democratic society is indisputable, which is why we introduced its justification at the beginning of this paper; not only does it reduce or attenuate socio-economic inequalities, but it is also an enabler of other fundamental personality and public participation rights.

It also seems pretty straightforward to affirm that institutionalized education (schooling) is an important element of achieving equality. For some, the school (in the physical sense of the word) is preferred option<sup>117</sup>. However, as we will see, some affirm that depending on the internal and external elements that compose said schooling, equality will be better achieved. NAVAS SÁNCHEZ has placed particular emphasis on the importance of education in the construction of the social and democratic State based on the rule of law, developing it as both a cause and a consequence. According to her, it is simultaneously “*the right to a free and plural education that can be provided both by the State directly through public schools and by private individuals through the educational centers they create*” and “*the right to a democratic education based on constitutional values and fundamental rights*”<sup>118</sup>. In fact, in addition to considering equality as a superior value of the legal system (art. 1.1 SC) and as a principle and right in its formal aspect (art. 14 SC), and therefore as a clear limit to the actions of the public authorities (equality in the law and equality before the law), she also considers that it is extremely important to guarantee equality in a material sense (art. 9.2 SC); or, in other words, to ensure real and effective equality. To achieve this, in the field of education, some have argued that the only way is to establish a sort of prevalence of equality (both in its formal and material aspects), under the right-to-education-as-a-public-service argument, insofar as equality is projected among the educational objectives set down in art. 27.2 SC (what we will later call the “educational ideology of the Spanish Constitution”) is through coeducation.

The fact that the SC sets down as essential educational objectives both the guarantee of fundamental values and the respect of rights and freedoms, opens the door to consider that equality (both as a value, principle and a fundamental right) not only needs to be embraced in the transfer of knowledge but also systematically embraced through practical assimilation. Internalizing gender equality (equality between men and women) for some can only be successful in coeducation or mixed models, through the coexistence, within the classroom, of students of both sexes<sup>119</sup>. In other words, it seems quite hard to achieve the constitutional (and educational) objective of forming citizens in the context of a plural

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<sup>117</sup> SIMÓN RODRÍGUEZ, M. E., *La igualdad también se aprende: cuestión de coeducación*, Narcea, Madrid, 2010, p. 129

<sup>118</sup> NAVAS SÁNCHEZ, M.M., “Educación e Igualdad”, *XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021: she hence, differentiates in terms of freely choosing and equally accessing education (*educación en libertad y en igualdad*) and education based on and about equality (*educación para [inculcar y alcanzar] la igualdad*).

<sup>119</sup> ALÁEZ CORRAL, B., “El ideario educativo constitucional como fundamento de la exclusión de la educación diferenciada por razón de sexo de la financiación pública”, *Revista Española de Derecho Constitucional*, n. 86, 2009, pp. 49-52.

and equal society from a “unisex microcosms”<sup>120</sup>. SALAZAR BENÍTEZ goes a step further in this internal and external assimilation, as he argues that the same reasoning used by the Spanish Constitutional Court for positive actions (for example in the electoral context) from a gender perspective should be used in the context of education: “*the goal is that the representative bodies -or, in this case, the school- do not distort the composition of society or the main objective of a transversal and universal principle, which is none other than ‘the radical equality of men and women’ [...] an inclusive school of both sexes is essential for an educational system based on the values on which our constitution is founded upon, and, in turn, guarantees*”<sup>121</sup>.

Our supreme interpreter has, indeed, stated that “an inclusive representation of both sexes is essential for the government of a society that is necessarily composed by both sexes”<sup>122</sup>. This could, in turn, be extrapolated, through the principle of analogy, from the electoral to the education context. SALAZAR BENÍTEZ rejects the two classic arguments in favor of gender-separate education by alluding to the problematic premise that there are “natural” differences between both sexes; first, because most differences (that tend to end in discriminatory treatment) are, according to him, more of a social or cultural nature than a biological one, and secondly, and even more convincing, in line with SUBIRAT MARTORI’s earlier point, it is certainly difficult to understand how men and women will be “*more capable of complementing each other in society if they have not been encouraged to co-exist and learn together from an early age*”<sup>123</sup>. In fact, he has qualified this pedagogical education methodology as unlawful providing three sound arguments: (1) we are before an “artificial” and “unjustified” differential treatment on ground of sex given that there are, in his view, no sufficiently reasonable justification based on objective or commonly-accepted criteria<sup>124</sup>, (2) the consequences derived from this differentiation do not satisfy the proportionality test, and, on the basis of CCJ 128/1987 of 16 July, (3) it seems to undermine the principle of material equality as it reinforces historical differentiations based on deep-rooted conceptions of a particular segment of the

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<sup>120</sup> CARAZO LIÉBANA, M.J., “La opción por la educación diferenciada por sexos: ¿discriminación en las escuelas concertadas o libertad de enseñanza?”, Paper in the XVIII Congreso de la Asociación de Constitucionalistas de España (ACE), 2021, p. 10.

<sup>121</sup> SALAZAR BENÍTEZ, O., “Educación diferenciada por razón de sexo y derecho a la educación. Sobre la inconstitucionalidad de la reforma del art. 84.3 de la Ley Orgánica de Educación”, *Revista Española de Derecho Constitucional*, n. 106 (January-April), 2016, p. 468.

<sup>122</sup> CCJ 12/2008 of 29 January (legal basis point 8).

<sup>123</sup> SALAZAR BENÍTEZ, O., “Educación diferenciada por razón de sexo y derecho a la educación. Sobre la inconstitucionalidad de la reforma del art. 84.3 de la Ley Orgánica de Educación”, *Revista Española de Derecho Constitucional*, n. 106 (January-April), 2016, p. 469.

<sup>124</sup> Although according to the ECtHR case-law different educational ideological projects and programs must be respected and it is enough to prove that opinions or ideological convictions (in this case pedagogical convictions) “have a sufficient degree of strength, seriousness, coherence and importance that makes them worthy of respect in a democratic society and are not incompatible with human dignity”. For more, see SOUTO GALVÁN, B., “El derecho de los padres a educar a sus hijos conforme a sus propias convicciones en la jurisprudencia del Tribunal Europeo de Derechos Humanos”, *Revista europea de derechos fundamentales*, n. 17, 2011, p. 267.

population, systemic obstacles that the coeducation model tried to remove<sup>125</sup>. We will focus on his first two arguments later.

Along these lines, he extends what has been coined as “parity democracy”<sup>126</sup> to the education context: alluding to the need of a sort of ‘parity education’. In other words, gender equality (and the educational ideology of the SC, i.e. the aims of education set forth in art. 27.2 SC) can only be ensured in educational models and practices where both sexes are visibly represented and are able to interact with each other. This explains one of the main arguments against (what we are calling ‘concerns’ about) gender-separate education: the questions that it raises in relation to equality between men and women and, correlatively, unreasonable discriminatory presumptions and practices based on a protected characteristic. In this regard, Spain is bound (not only as it pertains to the compliance of arts. 14 and 9.2 SC, but also, via the normative and interpretative openness towards international standards as per arts. 10 and 96 SC) to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”, hereinafter)<sup>127</sup>. Art. 10 CEDAW establishes, among other things, that States Parties must take all appropriate measures to eradicate: “*discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women [...] (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality; (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programs and the adaptation of teaching methods[...]*”.

Art. 10(b) CEDAW establishes that, among others, gender equality in education is guaranteed not only in access to the same curricula but also to the same human (qualified) and material (quality) resources. These criteria will play a role later on when examining gender-separate education in light of anti-discriminatory legislation. In other words, whether it constitutes discrimination or differentiation (all dependent on whether the grounds of sex is as a determinant factor, on whether we are before a comparable situation and on whether there is a justifiable objective reason). From a ‘literal’ interpretation of art. 10(c) CEDAW, we clearly see a direct reference to mixed education models, opting for coeducation as a clear practice better suited to ensure gender equality and to avoid discrimination based on stereotypes and sexism stemming from ignorance or false systemic perceptions. Using the same interpretative criteria, we must also point out that despite stating coeducation as an example, there is also a more vague reference to other potential and equally-effective models and practices to achieve gender equality. From a

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<sup>125</sup> *Id.*, pp. 469-471.

<sup>126</sup> For two recent studies see ALDEGUER CERDÁ, B., “Democracia paritaria”, *Eunomía. Revista en Cultura de la Legalidad*, n. 19, 2020, pp. 342-364; and ARANDA ÁLVAREZ, E., *Democracia paritaria. Un estudio crítico*, Centro de Estudios Políticos y Constitucionales, Madrid, 2013.

<sup>127</sup> Ratified by Spain in 1984 and now part of the Spanish legal order for all intents and purposes.



systematic and teleological interpretative perspective (both deemed logical hermeneutic legal criteria), which obliges us to interpret a provision by taking into consideration the legal system as a whole and the spirit and purpose of the provision, we must also interpret this provision in line with others relating to equality between men and women. For example, arts. 23-25 of the organic act 3/2007, on the effective equality between women and men, establish that gender equality must be guaranteed at every stage of the education system. A systematic and teleological interpretation of these provisions would oblige us to consider the integrating and transversal nature of the principle of equality as it pertains to the active adoption and application of legal norms and public policies, including the case of educational models that differentiate on reasons directly-related to sex.

Without an exhaustive pedagogical study and bearing in mind historical models that also differentiated based on particular bio-social characteristics that mounted to segregation (racial segregation in the US<sup>128</sup> and the South African Apartheid seem the most flagrant examples), one certainly understands the suspicion and apprehension towards the gender-separate model. The discrimination of women, even in the educational context, has been present not only in Spain's history<sup>129</sup> but is a practice that could (and can still) be seen around the world. Perhaps this is why it is quite interesting that in other European countries where the social value of the democratic State is even more prominent and where a militant democracy exists, as is the case of Germany, gender-separate education has never given rise to suspicion of being a discriminatory practice<sup>130</sup>. In addition, despite the arguments previously exposed regarding the benefits of single-sex education, many other studies have shown that this not necessarily the case, or if it is, it is based on "*cherry-picked, or misconstrued scientific claims rather than by valid scientific evidence*"<sup>131</sup>.

However, what seems to be purely a matter of the law and public policies also has a genuine and important philosophical dimension: at the heart of this debate lies the concept of equality, and depending on whether we understand it as formal equality (in the sense of equal treatment) or we understand it as demanding different or special treatment to achieve a real and effective equality, public and legal opinions tend to shift. SALOMONE summarizes this dilemma<sup>132</sup> very well: "*individuals who have passionately fought side*

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<sup>128</sup> Where the "separate but equal" legal doctrine enshrined in *Plessy v. Ferguson* (1896) allowed for racial segregation in schools until it was overturned in *Brown v. Board of Education* (1954) which ruled that "separate educational facilities are inherently unequal".

<sup>129</sup> REY MARTÍNEZ, F., *Derecho Antidiscriminatorio*, Aranzadi, Cizur Menor, 2019, p. 142.

<sup>130</sup> See ESTEVE PARDO, J., "Paradojas de la discriminación en materia educativa", *El Cronista del Estado Social y Democrático de Derecho*, n. 37, 2013, p. 5.

<sup>131</sup> HALPERN, D.F., LISE, E., S. BIGLER, R., FABES, R.A., HANISH, L.D., HYDE, J., LIBEN, L.S., and MARTIN, C.L., "The Pseudoscience of Single-Sex Schooling", *Science*, Vol. 333, n. 605023, 2011, pp. 1706-1707.

<sup>132</sup> Dilemma that has turned, in recent years, into feminist wars: some pushing for greater equality within co-educational models, and others rejecting coeducation altogether for being just another space and vehicle for reproducing male patriarchy and dominance. To some extent, SUBIRATS MARTORI alluded to this long ago, although she still defends coeducation despite the "sexist order" imprinted in it. For more see SUBIRATS MARTORI, M., "Conquistar la igualdad: la coeducación hoy", *Género y Educación: Revista Iberoamericana de Educación*, n. 6 (September-December), 1994.

*by side for sex equity are now facing off against each other [...] [depending on their own understanding of –and measures to achieve- equality] The first is compensation, or remediation, which obviously evokes images of affirmative action or preferential treatment. The second is the related dichotomy of sameness and difference, which has engaged feminist scholars[...] followed one of several strategies: to deny the extent or essential nature of differences between women and men, to recognize and even celebrate them, or, more recently, to discard them by redefining the terms for debating gender relations[...]revealing many contentious points implicit in gender equality”<sup>133</sup>.*

It is certainly a slippery slope whether we “naturalize inequalities” or accept ideas based on “neutralizing egalitarianism”<sup>134</sup>. The first reduces the issue to an unalterable reality (without taking into account socio-cultural factors) and leads to further gender polarization and the second potentially generates unequal results for treating everyone the same without taking into consideration potential biased structural frameworks and realities; both feminist (albeit a sector<sup>135</sup>) and single-sex advocates seem to (or at least should) agree on that. In the case of the former, let us remember that a sector of feminist thought rejects egalitarianism (understood from the point of view of similarity and equivalence<sup>136</sup>), given that, from a gender perspective, in practice, women are not equal to men and the movement does not want to be reduced to the idea of sameness, understood from a male-female dichotomy (which, is indeed, also questionable from a broad gender

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<sup>133</sup> SALOMONE, R. C., *Same, Different, Equal: Rethinking Single-Sex Schooling*, Yale University Press, New Haven, 2003, p. 41.

<sup>134</sup> In terms of content, equality is not equivalent to egalitarianism. As the Spanish Constitutional Court has so often said, equality entails equal treatment of equals and, therefore, this constitutional value and principle is not violated when unequal (situations or persons) are treated unequally. Only “substantially equal factual assumptions must be treated identically in their legal consequences” (See CCJ 212/1993 of 28 June). In this sense, in terms of equity (or social justice), there is no greater injustice than the uniform or rigid application of the principle of equality (that is, a homogeneous equalization). Egalitarianism without a nuanced application is a clear degradation of equality. This being said, of course, given the equal dignity of all human beings, any nuanced interpretation or different application must be adequately justified (based on the three-part test assigned to the interpretation of the principle of non-discrimination) on a case-by-case basis (and never generalized)

<sup>135</sup> Equality feminism is associated with the politics of sameness (whereby the goal is an androgynous ideal in which men and women are equal), whereas difference feminism claims, on the one hand, that men and women are fundamentally different (and specifically, that there is a distinctiveness and uniqueness to being a woman), and, on the other hand, that there is a male bias inherently inserted in our way of thinking, and hence, there is always a case for differential treatment to address and remedy gender inequality. For more on the dangers of the equality-comparison perspective, and the arguments in favor of the difference avenue, see IRIGARAY, L., *Yo, tú, nosotras, Madrid*, Ediciones Cátedra-Universitat de Valencia-Instituto de la Mujer, Valencia, 1992, p. 9. RODRÍGUEZ MAGDA, R.M., “El feminismo francés de la diferencia”, en Amorós, C. (Coord.), *Historia de la teoría feminista*, Comunidad de Madrid-Instituto de Investigaciones Feministas, Madrid, 1994, pp. 205-206.

<sup>136</sup> In the words of COBO, we should understand equality as a synonym of (or striving for) identity or uniformity as equality does not presume social uniformity nor is it based in treating everyone exactly the same: “equality is not an enemy of diversity or of differences but of privileges of specific social groups. Equality is an ethical and political principle that rejects discrimination, exploitation, exclusion, subordination, and, in general, any type of oppression”. See COBO, R., “Democracia y Crisis de Legitimación Patriarcal”, in DÍAZ, C. and DEMA, S. (Eds.) *Sociología y Género*, Tecnos, Madrid, 2013. Speaking of uniformity, AHEDO has also come out to insist that “equality should not be confused with uniformity in educational treatment”. See AHEDO RUIZ, J., “El fundamento antropológico de la educación diferenciada”, *Estudios sobre Educación*, Vol. 28, 2015, p. 164.

perspective)<sup>137</sup>. In the case of the latter, practically the entirety of their philosophy is based on the fact that “*men and women are not necessarily the same, whether innately or through social conditioning and that their distinct ways of perceiving reality should be equally recognized*”<sup>138</sup>, and therefore, should be allowed to be remedied in the educational context and should take into consideration other factors and situations that could benefit from such differentiation<sup>139</sup>. It is certainly interesting that naturalizing inequalities (that is, basing decisions on biological sexual differences) while it is not entirely accepted in the educational context, it has been generally accepted when differentiation based on biological or sexual differences favor women<sup>140</sup>.

Lastly, it seems necessary to also refer to the importance of the instilling of values, including equality through a proactive agenda<sup>141</sup>. Much like the need to teach not only human rights from an informative perspective but also from a human rights perspective (the so-called “human rights culture”<sup>142</sup>) so too must education proactively teach by, among other things, praising and enhancing equality and rejecting discriminatory attitudes and practices. The “*insertion of the principle of equality in the education field becomes a requirement of the highest order in the task of bringing the Constitution to life*”<sup>143</sup> and it would make sense that if equality is not only taught *viva voce* but is also visually present in the daily lives of students, this would be an ideal way to instill such a

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<sup>137</sup> These ideas are based on the female-male dichotomy which gender identity studies deeply negate as it assumes and assigns notions based on certain characteristics that define men and women. For more see the reflections made on the issues concerning heteronormativity in WEISS, J.T., “The Gender Caste System: Identity, Privacy and Heteronormativity”, *Law & Sexuality*, n. 10, 2001, pp. 123-186.

<sup>138</sup> *Id.*, p. 73.

<sup>139</sup> Both points are well summarized in another of SALOMONE’s academic contributions: “*Difference feminism allows for valuing attributes, whether inherent or socialized, that may appear more common among females than males. But at the same time, liberal feminism, ever mindful of historical exclusion, tempers that recognition and defines its outer bounds, warning against overbroad generalizations and the dangers of promoting feelings of deficiency. As Deborah Rhode has noted, ‘to ignore sexual differences is to ignore human experience; to romanticize their value is to risk exaggeration’.* Meanwhile, dominance theory forces educators to look at the population served and to reflect on whether the program is likely to remedy the harm that comes from a position of subordination or second-class citizenship. In that sense, it serves to justify single-sex programs for girls and for racial minority students of both sexes. Finally, the insights gained from (in)essentialist sensitivity to multiple identities are especially important in addressing racial and economic differences among students. The rich literature in this area pushes educators to look beyond the sameness-difference dilemma and consider ways to attend to the specific educational and social problems confronting minority girls and boys in particular (...)At its best, single-sex education can be an effective tool of empowerment and self-realization for some girls and boys (...)But then again, at its worst, and as history has proven, single-sex schooling can unwittingly become a tool of gender polarization”. See SALOMONE, R.C., “Feminist Voices in the Debate over Single-Sex Schooling: Finding Common Ground”, *Michigan Journal of Gender & Law*, Vol. 11, n. 1, 2004, pp. 92-93.

<sup>140</sup> Biological and sexual characteristics are used as justifications or defenses to differentiate in employment matters (pregnancy and maternity seems the most obvious case to cite) but also in criminal law matters (in relation to criminal penalties in cases of violence against women).

<sup>141</sup> FERNÁNDEZ-MIRANDA CAMPOAMOR, A., “Educación para la ciudadanía. Una perspectiva constitucional”, en LÓPEZ CASTILLO, A. (Ed.) *Educación en valores: ideología y religión en la escuela pública*, Centro de Estudios Políticos y Constitucionales, 2007, pp. 147-153.

<sup>142</sup> See SÁNCHEZ FERRIS, R. and JIMENA QUESADA, L., *La enseñanza de los derechos humanos*, Ariel, Barcelona, 1995.

<sup>143</sup> MONZÓN JULVE, M., “Los valores constitucionales como fines educativos. La igualdad en el ámbito educativo”, *CEFLegal: revista práctica de derecho. Comentarios y casos prácticos*, n. 204, 2018.

fundamental premise. Certainly, at least, most of the legal doctrine agrees that the SC endorses civic or values-based teaching<sup>144</sup>. It is a matter of teaching (and learning) to coexist with differences and a matter of teaching (and learning) to learn with (and despite) differences; an idea closely linked to inclusion (equal access and opportunities)<sup>145</sup>. There is certainly something to be said about the application of the classical “do as I say, not as I do” parenting doctrine. However, it is also true that such thinking creates a slippery slope because personal and collective freedom in educational matters is weakened (even jeopardized) by a *iure et de iure* presumption that the respect for principles, values and rights is only possible or guaranteed by one type of educational project or ideology based on the physical manifestation or visualization of those principles and values. Perhaps, if that were the case, gender inequality would have disappeared long ago. Coeducation, understood in a limited way (the presence of both sexes in the classroom) certainly could create a “social illusion” that such coexistence is the great equalizer<sup>146</sup>, but history thus far has shown us that this is not enough, turning it into a “vener of equality”, as children’s choices can still be severely constrained and conditioned by social, familiar or cultural conventions, regardless of classroom compositions.

## 2.2. Democracy concerns: beyond the ‘educational ideology of the Constitution’?

From the freedom-equality dichotomy stems a good part of the constitutional debates of our time. It is certainly difficult to guarantee that all are equally free and freely equal. To teach under equality claims, whilst simultaneously guaranteeing autonomy, freedom (right and freedom to choose in educational matters) and ideological and cultural diversity is taking on a highly challenging and complex (if not impossible) task. This is mainly due to the plurality of positions and opinions on WHICH methods are most adequate and HOW they are implemented<sup>147</sup> so as to reach the objectives set down and guarantee the diverse array of fundamental rights and values at stake.

Speaking of conflicting rights and interests, there is certainly a difficult balancing of the two sides of the educational coin. This becomes especially apparent in the case of the gender-separate or single-sex educational model as achieving a true democracy also means ensuring the respect of other values besides equality, notably freedom and

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<sup>144</sup> Confirmed in Constitutional Court judgments 133/2010, 236/2007 and, more recently, 66/2018. Also brilliantly summarized by ALÁEZ CORRAL: “*The constitutional framework not only makes the admissibility of certain pedagogical techniques conditional upon students of both sexes achieving the objective of receiving a complete, formative and equivalent education, (quality education), but also that through this quality education the students are taught with philosophical and moral convictions present in the constitutional ideology, i.e., that the educational process contributes to the civic-democratic education of the students*”. See ALÁEZ CORRAL, B., “El ideario educativo constitucional como límite a las libertades educativas”, *Revista Europea de Derechos Fundamentales*, Vol. 17, n. 1, 2011, p. 120.

<sup>145</sup> For more see ÁLVAREZ VÉLEZ, M.I., “En torno a los fines de la educación en nuestro estado democrático”, Paper in the in the *XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021, pp. 10-11.

<sup>146</sup> GARCÍA SUÁREZ, C.I., and MUÑOZ ONOFRE, D.R., “Devenir de una perspectiva relacional de género (y cultura)”, *Nómadas*, n. 30, 2009, p. 134.

<sup>147</sup> This idea is further explained by CÁMARA VILLAR, G., “Constitución y Educación” in GONZÁLEZ-TREVIJANO, P., LÓPEZ GUERRA, L., and TRUJILLO, G. *La experiencia constitucional (1978-2000)*, Centro de Estudios Políticos y Constitucionales, Madrid, 2000, p. 265.

pluralism (equally present in art. 1.1 SC). The legal conflict mainly comes from the fact that, in education matters, there should also be a clear focus on freedom (of choice) and there should be a clear design based on (the respect for) pluralism. Education should foster coexistence and respect individual and group differences. In fact, this is also in line with the premises of equality. Let us remember that the principle of equality is not opposed to differences, but to inequalities. Equality implies the right to be different while simultaneously implies the right to be equal in basic material conditions of life. Herein lies the core of many of the problems to which the law has to respond, finding the difficult balance between a prohibiting discrimination and protecting that which makes us different and those that choose to be different (whether it be learn, teach or express themselves differently).

Respect for diversity and minority perspectives is also an integral part of a pluralist society, and democracy in general. ALÁEZ CORRAL has corroborated that in relation to educational rights and freedoms: “*freedom of education guarantees, among other conducts, the freedom to create educational centers and to teach in them in order to satisfy the right to education, including the implementation of their own ideology, thus expressing, in the educational field, the ideological pluralism existent in society*”<sup>148</sup>. Art. 1.1 SC is clearly written in both a prescriptive (in a normative sense) and descriptive tone (in terms of its ethical and philosophical content). It has been traditionally identified, much like the right to life, with the development of fundamental rights: the enjoyment of the latter is impossible without the former. On the one hand, freedom is seen in a tripartite approach: from the freedom-autonomy, from the freedom-participation and from the freedom-provision of services spheres<sup>149</sup>. Depending on the perspective, freedom has a different significance (and consequence). And directly related to all the abovementioned, on the other hand, pluralism, a direct manifestation of freedom, also plays a role in the educational context: whether we are talking about “internal pluralism” (or pluralism within schools) or “external pluralism” (or pluralism of schools)<sup>150</sup>, we still mainly refer to the freedom of parents to choose the educational project that best suits how they want to educate their children and the freedom to create such institutions.

Indeed in a democratic State, it is necessary to take into consideration the plurality of social actors and the plurality of philosophical and pedagogical convictions, allowing all to decide which educational project is more adapted to the aforementioned premises. In the words of ÁLVAREZ JUNCO, in a globalized world, composed of pluricultural societies, democratic education is more difficult because there is less consensus than in centuries prior, “*where societies were more ethically, ethnically and ideologically homogeneous*”; he also affirms that in “a global village” we all have “ephemeral

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<sup>148</sup> ALÁEZ CORRAL, B., “El ideario educativo constitucional como límite a las libertades educativas”, *Revista Europea de Derechos Fundamentales*, Vol. 17, n. 1, 2011, p. 119.

<sup>149</sup> This is more developed in MONZÓN JULVE, M., *Educación en el ordenamiento constitucional una apuesta renovada de democracia militante (educación para la ciudadanía y desarrollo de los valores constitucionales)*, Tesis Doctoral, Universidad de Valencia, 2015, pp. 35-36.

<sup>150</sup> In the words of BÁEZ SERRANO, R., *Educación diferenciada y conciertos públicos*, Tesis Doctoral, Sevilla, 2015, pp.231-233.

identities” meaning that they are ever-changing and while trying to achieve a collective homogeneous identity based on civics is certainly a desirable goal, it seems to be still an unattainable social tendency<sup>151</sup>. We are part of a society, made up of plural people, and, for this reason, pedagogical choices must reflect that plurality. Perhaps this is why some have given a preferential treatment to the democratic-participatory aspects of educational rights and freedom, more linked with freedom and pluralism as cardinal values: “*the Spanish Constitution educates for democracy and pluralism in the context of pluralism*”<sup>152</sup>. In any case, given the fact that the Spanish constitutional order is not based on militant democracy, particular ideological models should not be imposed. In the words of our Constitutional Court, “*pluralism precludes public authorities from trying to control, select and seriously condition the free movement of ideas and ideological beliefs*”<sup>153</sup>, although, in the educational context this needs to be “adjusted”, according to some<sup>154</sup> given that what is at stake is the defense and respect for human rights and public freedoms.

The cultural pluralism (using such a term, although perhaps erring on the side of technical rigor, in its broadest sense to include religious, ideological, ethnic, social and other aspects) that exists in Spanish society has highlighted an inevitable tension: a tension “*between the claims of families to exercise educational freedoms in accordance with their own moral or religious values and convictions (art. 27.1, 3, 6 and 7 SC) and the subordination of these freedoms to the interests of the community, expressed by the educational authorities through their constitutional powers (art. 27.5 SC), especially when these interests consist of the protection of liberal-democratic values that do not always coincide with the values of the families or the individuals that comprise them*”<sup>155</sup>. Part of this tension comes from the consideration of the right to education as a freedom-based right (connecting it with personal dignity and free development, inherent in art. 10.1 SC, and, as an indirect consequence, distancing itself from possible dogmatic monopolies in how and what to educate as conveyed in art. 27.2 SC –in a negative sense, as it relates to protection from state interference of personal and ideological beliefs-) and its consideration as a provision-of-services right (-in a positive sense- obliging and limiting individual and collective freedoms for the sake of universalization, as expressed in the fourth, fifth and eighth paragraphs of art. 27 SC).

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<sup>151</sup> ÁLVAREZ JUNCO, J. “Educación, identidad, historia” in LÓPEZ CASTILLO, A. (Coord.) *Educación en valores: ideología y religión en la escuela pública*, Centro de Estudios Políticos y Constitucionales, Madrid, 2007, pp. 20-21.

<sup>152</sup> ÁLVAREZ ÁLVAREZ, L., “La educación en el Estado social y democrático de derecho. El ideario educativo en la Constitución Española”, in PRESNO LINERA, M.A., and WOLFGANG SARLET, I. (Eds.) *Los derechos sociales como instrumento de emancipación*, Thomson Reuters, Madrid, 2010, pp. 177-187.

<sup>153</sup> CCJ 48/2003 of 12<sup>th</sup> March (legal basis point 7).

<sup>154</sup> In school, tolerance must be taught and its rejection should be abolished. ÁLVAREZ VÉLEZ, M.I., “En torno a los fines de la educación en nuestro estado democrático”, Paper in the in the *XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021, p. 5.

<sup>155</sup> ALÁEZ CORRAL, B., “El ideario educativo constitucional como límite a las libertades educativas”, *Revista Europea de Derechos Fundamentales*, Vol. 17, n. 1, 2011, p. 92.

On another (yet-related) note, the three educational aims explained in Section 1.1. of this paper have been famously coined as the educational ideology of the Spanish Constitution (*ideario educativo constitucional*)<sup>156</sup>. Very few would doubt the importance of educating the present and future generations in universal values and constitutional principles and familiarizing them with the fundamental rights of which they (and their fellow citizens and classmates) are entitled to and conditioned by. The constitutional educational ideology is a core requirement of a true democracy. That is not put into question in this paper, nor, would we argue, should be put into question by any true constitutional law scholar in any democracy characterized by pluralism (of any and every kind). According to ALÁEZ CORRAL, compulsory teaching of democratic and constitutional-based ideologies is not indoctrination, because it teaches “*a doctrine that is sufficiently open and plural to allow the development of opposing doctrines*”, and therefore, merely expresses a “*common ethical minimum*”<sup>157</sup>. However, the differences of opinion and approach rather come from how extensive or restrictive we interpret this provision taking into consideration potential or real-life everyday examples. Indeed, there is nothing wrong (quite the contrary) in teaching constitutional values (“constitutional education” is implicitly compulsory<sup>158</sup>), but the issue rather lies in picking-and-choosing and the way they are interpreted (being limited to objective closed notions); this is where we might find encroachments<sup>159</sup>. Some believe that, in a “well-ordered liberal State”, public schools must be as neutral as possible and, consequently, there is no room for religious education, whether we are talking about moral religious or secular education (“civil religion”)<sup>160</sup>. Some are more open yet cautious, and warn us of the serious danger of educational “sectarianism” in democratic values and puts special emphasis in the particular risk that comes from “camouflaging” national, regional or cultural identities as constitutional values<sup>161</sup>, advocating for a minimal or restrictive conception of the educational ideology of the SC<sup>162</sup>. Others describe problems that could arise even with such a restricted or minimal conception emphasize the need to ensure that values and knowledge are transferred in an objective way, otherwise it would lead to “cultural dirigisme”<sup>163</sup>.

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<sup>156</sup> By Spanish Constitutional Court judge Tomás y Valiente in his dissenting opinion of CCJ 5/1981 of 13 February.

<sup>157</sup> ALÁEZ CORRAL, B., “El ideario educativo constitucional como límite a las libertades educativas”, *Revista Europea de Derechos Fundamentales*, Vol. 17, n. 1, 2011, pp. 110 and 117.

<sup>158</sup> GARCÍA COSTA, F.M., “La educación constitucional: algunas cuestiones fundamentales”, Paper in the *XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021, pp. 1-18.

<sup>159</sup> See BARRERO ORTEGA, A., “Educación cívico-ciudadana y adoctrinamiento ideológico”, Paper in the *XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021, p. 6.

<sup>160</sup> PRIETO SANCHÍS, L., “La escuela (como espacio) de tolerancia: multiculturalismo y neutralidad”; in LÓPEZ CASTILLO, A. (Coord.) *Educación en valores: ideología y religión en la escuela pública*, Centro de Estudios Políticos y Constitucionales, Madrid, 2007, p. 51; and, again, in PRIETO SANCHÍS, L., “Educación para la ciudadanía y objeción de conciencia”, *Persona y Derecho*, n. 60, 2009, pp. 209-240.

<sup>161</sup> SOLOZÁBAL ECHAVARRÍA, J.J., “La enseñanza de valores entre la libertad ideológica y el derecho a la educación”, in LÓPEZ CASTILLO, A. (Coord.) *Educación en valores: ideología y religión en la escuela pública*, Centro de Estudios Políticos y Constitucionales, Madrid, 2007, p. 141

<sup>162</sup> VIDAL PRADO, C., *El derecho a la educación en España. Bases constitucionales para el acuerdo y cuestiones controvertidas*, Marcial Pons, Madrid, 2017, p. 53.

<sup>163</sup> NUEVO LÓPEZ, P., “Derechos fundamentales e ideario educativo constitucional”, *Revista de Derecho Político (UNED)*, n. 89 (January-April), 2014, p. 222.

The respect for diversity and minority perspectives must also be ensured in democracies that are characterized by their cultural diversity and ideological and religious pluralism. Starting where we left us in terms of educational neutrality, the majority of the academic doctrine agrees that art. 27 SC certainly takes sides. REY MARTÍNEZ has eloquently summarized the justification of calling this provision a militant democracy clause: “*the SC is densely populated by values and, therefore, a contrario, by dis-values*”, choosing “*certain [ideological and socio-political] positions over others that are in conflict. It opts for democracy, as opposed to any form of authoritarianism; for equality as opposed to machismo, racism, xenophobia, homophobia, etc.; for an adequate environment as opposed to a predatory development of resources*”<sup>164</sup>. Indeed, we do not believe that art. 27 SC is ideologically neutral nor that absolute neutrality is possible in the education context<sup>165</sup>, as educating inherently involves not only giving intellectual, but also moral, and social instruction. This is not only the linguistic majority opinion<sup>166</sup> but also the majoritarian opinion of the academic doctrine<sup>167</sup> and the Spanish Constitutional Court, which considers the right to education and freedom of teaching as activities that are “*systematically aimed at minimally continuing with the transmission of a certain body of knowledge and values*”<sup>168</sup>. Schools and their educational projects cannot be 100% neutral, but they can (and should strive to) be 100% plural<sup>169</sup>.

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<sup>164</sup> REY MARTÍNEZ, F., “El ideario educativo constitucional: objeto de enseñanza y parámetro de validez del sistema educativo”, Paper in the XVIII Congreso de la Asociación de Constitucionalistas de España (ACE), 2021, p. 7.

<sup>165</sup> History has shown us that time and time again, it has been wrongly used as an instrument not for personal and citizenship flourishing but for political gain and confrontation. In other words, it has been systematically used as “weapon in political debates”. See MÍGUEZ MACHO, L., “La polémica sobre la compatibilidad con el principio constitucional de no discriminación por razón de sexo de los conciertos de la administración con los centros que imparten educación diferenciada”, *Persona y Derecho*, n. 72, 2015, p. 262: “*in the name of effective equality and the expansion of rights, in reality, the rights of those who are considered ideological enemies are restricted and effectively discriminated against*”.

<sup>166</sup> According to Merriam Webster’s dictionary to “to develop mentally, morally, or aesthetically especially by instruction”. Source: <https://www.merriam-webster.com/dictionary/educate>

<sup>167</sup> See classics such as TORRES DEL MORAL, A., *Principios de Derecho Constitucional Español*, Vol. 1, Servicio de Publicaciones de la Facultad de Derecho, Madrid, 1992, p. 591; and VIDAL PRADO, C., *El derecho a la educación en España. Bases constitucionales para el acuerdo y cuestiones controvertidas*, Marcial Pons, Madrid, 2017, p. 18; and, more recently, NAVAS SÁNCHEZ, M.M., “Educación e Igualdad”, XVIII Congreso de la Asociación de Constitucionalistas de España (ACE), 2021, p. 3.

<sup>168</sup> Spanish CCJ 5/1981, 13 February (legal basis point 7). In this same vein, MONZÓN JUVE has expressed that: “*according to the Spanish Constitutional Court, the activity of public powers, especially in the educational context, should always be guided by ideological neutrality. If we add the fact that it is practically impossible to consider education separate from the idea of transmission value-based contents and ideals (since every educational process, whether by content or by the methods used, is inseparably accompanied by the transmission of a personal or societal model) may only leads us to the conclusion that it is extremely difficult to maintain the neutrality that is previously imposed. Hence, in view of the prohibition of any behavior involving State indoctrination, in order to safeguard the aforementioned neutrality, it is imperative to contemplate a framework of pluralism within the varied educational models contemplated in our legal framework*”. See MONZÓN JULVE, M., *Educación en el ordenamiento constitucional una apuesta renovada de democracia militante (educación para la ciudadanía y desarrollo de los valores constitucionales)*, Tesis Doctoral, Universidad de Valencia, 2015, p. 324

<sup>169</sup> REY MARTÍNEZ, F., “El ideario educativo constitucional: objeto de enseñanza y parámetro de validez del sistema educativo”, XVIII Congreso de la Asociación de Constitucionalistas de España (ACE), 2021, p. 6: “*with an external pluralism (diversity of options of educational institutions, achievable through the*



### 3. The Spanish Constitutional Court's position: much ado about nothing?

Despite the fact that it would seem logical that the answers to all the questions previously raised correspond mainly to education experts, we cannot forget the essential functions that the Law plays in this matter. Law, is not only in charge of regulating social conducts (amending, adapting and reinventing itself *vis-à-vis* new social realities and transformations) but is also instrumental in resolving disputes, protecting rights and freedoms and ensuring social justice. Just as it is the case of the Law, lawyers and judges (in particular constitutional lawyers and judges) must too respond to legally-relevant challenges concerning legislative developments and conflicts emanating from the simultaneous exercise of clashing rights and interests. The above is inevitably reflected in matters related to educational activities and practices. The supreme interpreter of the Spanish Constitution officially reviewed gender-separate education quite late in its life (barely 4 years from now). Below we will analyze two of its decisions, one in the context of its constitutionality review and the other in the context of an *amparo* appeal.

#### 3.1. Constitutional Court judgment 31/2018

The Spanish Constitutional Court officially examined gender-separate education in its decision 31/2018 of 10th April, when it resolved an unconstitutionality appeal/action filed on behalf of more than 50 parliamentary representatives (congressional deputies) against several provisions of the 2013 education act (the LOMCE). The appeal (and subsequent judgment) is quite extensive, as it focused on five themes, the first of which was the compatibility of gender-separate education and its public financing with the SC; we will focus on the first of these two issues. The appellants argued that the new wording of the second and third section of art. 84.2 violated the right to (and principle of) equality as per arts. 14 and 9.2 SC as well as the right to education of art. 27 SC. They based part of their argument in the fact that this type of educational model requires the separation of students based in their sex, both in the admissions' process in the organization of teaching the curriculum. Specifically, they argued that using sex, a protected ground, as a determining parameter for the admission of students or the organization of education constitutes an unjustified discriminatory treatment and goes against the educational objectives set down in art. 27 SC both in terms of ensuring equality as a value to be taught and in terms of ensuring the free development of the personality.

The Spanish Constitutional Court issued three relevant conclusions<sup>170</sup>. First, it qualifies gender-separate education as “merely instrumental” and “pedagogical”, focusing on the idea of optimizing the potential of each of the sexes, not based on one sole philosophical, moral or ideological conception of the individual, life or society (as we have previously noted, a diverse array of ideologies and religions support this model—from a specific branch of feminism, to conservative branches of the main world religions, to those wanting to end social exclusion in impoverished neighborhoods—). The court, therefore,

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*freedom to found or create schools) and with an internal pluralism (diversity of opinions and ideas imparted by educators through their academic freedom)”.*

<sup>170</sup> All found in Spanish CCJ 3/2018 of 22 June (legal basis point 4).

considered it one more option within the plural and diverse Spanish society (and subsequent legal order) and therefore as a substantial aspect of the freedom of education (both of parents and educational institutions to be able to choose what they consider the best educational model for their children). Second, it does not consider it as a discriminatory model, essentially because it meets the conditions set out in the pertinent UNESCO Convention, also referenced in all the education acts prior to the controversial 2013: that access to education is equivalent for boys and girls; that the teaching staff is equally qualified; that the facilities and equipment are of equal quality, etc. It also stresses that for schools who do not choose the coeducation model, if they want to opt for the eligibility to sign agreements (generally of an economic nature) with educational administrations, they must justify how their educational project (that does not contain a physical representation of equality between sexes) alternatively ensures and favours equality (under the premises of equivalence or comparability). In any case, the court insists that despite it being less obvious, no substantial elements allow to arrive to the generalized conclusion that single-sex education models are incapable of (or “prevent”) achieving the objectives constitutionally foreseen for education in art. 27.2 SC (especially its connection to formal and material equality of arts. 14 and 9.2 SC), and that, other academic measures must be put in place (to incentivize an education that shifts towards the elimination of sex-based stereotypes).

In other words, it considers, on the one hand, the equivalent quality requirements of the UNESCO Convention, and, on the other hand, the obligation (solely imposed on non-coeducational centers) to “state in their educational project the educational reasons for the choice of such system”, as well as the academic measures developed to alternatively favor equality as sufficient to guarantee effective equality. Lastly, it reminds us that educational inspection regimes (arts. 27.8 and 27.9 SC) have the task to detect exceptions or infringements to this rule. Specifically as it relates to the material equality argument, which was, without a doubt, the most relevant and questionable issue in this case, the court stated that this constitutional provision “*enables and commands the legislator to carry out formulas to make material equality [between women and men] effective. But it does not impose the adoption of specific measures, nor does it require the legislator to decide on any kind of prohibition [...] but only empowers it, in genere, to promote, remove and facilitate such equality*”<sup>171</sup>.

In conclusion, the Spanish Constitutional Court ruled against the unconstitutionality of the controversial provision, and has even established that there cannot be an unfavorable treatment to those centers, families, adolescents and children who opt for the single-sex school model, for the simple fact of being different from the majority coeducation opinion. NAVAS argues the reasons why she does not agree with the constitutionality arguments of this provision, referring mainly to the fact that it saves formal equality but not material equality. According to her, “not preventing” is not the same as “favoring” or “fostering” equality between men and women as a value and guiding principle. Moreover,

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<sup>171</sup> *Id.*, legal basis point 4(b)

according to her, in any case, it will be the task of the legislator (and not of the constitutional judge) to decide and position itself whether it is convenient to not prevent the achievement of educational goals related to equality or favor the full realization of that equality<sup>172</sup>. It certainly seems that in this particular human rights' clash, the Spanish Constitutional Court takes a side: "*it is not the same to analyze the constitutionality of this educational model -and its possible financing with public funds- from the perspective of freedom of education as it is to do so from the perspective of the right to education [...]it is clear that the Court approaches this question from the perspective of freedom of education*"<sup>173</sup>. SALAZAR BENÍTEZ proposes a middle-ground, given that no discriminatory behavior or practice (meaning differentiating without a rational and objective basis) should have a place within the public education system. He advocates for discarding a "radical prohibition" of gender-separate education, allowing it as a private school educational option, but firmly believes that they should exist without the possibility of being publicly-endorsed through state subsidies and firmly believes this should not be allow in public schools<sup>174</sup>.

VIDAL, on the contrary, takes the side of the Spanish Constitutional Court, also referring to a report of the Commissioner for Human Rights of the Council of Europe, on the need to demonstrate real harm linked to differentiation in school access or composition, although he also makes additional arguments. In the specific case of gender-differentiated education, on the one hand, he alludes to the fact that although this methodological option or resource (gender-separate education) does not favor the equal socialization of boys and girls, it should be allowed as another ideology as long as it does not incur in real discrimination. On the other hand, as it relates to the interesting conciliatory solution proposed by SALAZAR BENÍTEZ, he considers that in order to solve a hypothetical problem of discrimination, a new discrimination<sup>175</sup> would be taking place, since access to certain centers would be made impossible for those families who do not have a certain

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<sup>172</sup> NAVAS SÁNCHEZ, M.M., "Educación e Igualdad", *XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021, pp. 20-21.

<sup>173</sup> NAVAS SÁNCHEZ, M.M., "¿Diferenciar o segregar por razón de sexo? A propósito de la constitucionalidad de la educación diferenciada por sexo y su financiación pública. Comentario A la STC 31/2018 y conexas", *Teoría y Realidad Constitucional (UNED)*, n. 43, 2019, p. 493.

<sup>174</sup> SALAZAR BENÍTEZ, O., "Educación diferenciada por razón de sexo y derecho a la educación. Sobre la inconstitucionalidad de la reforma del art. 84.3 de la Ley Orgánica de Educación", *Revista Española de Derecho Constitucional*, n. 106 (January-April), 2016, p. 467

<sup>175</sup> This is also insinuated by MÍGUEZ MACHO when he affirms that: "*It is one thing for the public education system to prefer coeducation because, rightly or wrongly, it is understood that it favors equality of rights and opportunities and promotes effective equality between men and women more effectively than differentiated education 16, and it is quite another for private centers that practice the latter to be deprived of preferential and priority attention in the application of the provisions of the Organic Law on Education, as if they were second class or semi-clandestine. This discriminates, in violation of Article 14 of the Constitution, against the students of these centers, who are as much entitled to the right to education as the students of centers that develop the principle of coeducation, and against their teachers and principals, who, in the same way, should be able to exercise the freedom to teach and to create educational centers under the same conditions as the teachers and principals of coeducational centers*". See MÍGUEZ MACHO, L., "La polémica sobre la compatibilidad con el principio constitucional de no discriminación por razón de sexo de los conciertos de la administración con los centros que imparten educación diferenciada", *Persona y Derecho*, n. 72, 2015, pp. 249-250.

socio-economic level, thus reducing their equality and freedom of choice<sup>176</sup>. Thus, based on the comparative international experience and on the court decision, he recalls that there is still no scientific evidence that proves the inadequacy to educate for equality and diversity in seemingly-unequal representative and homogenous school models, positioning itself in favor of the *iuris tantum* presumption as far as the constitutionality of said pedagogical model goes<sup>177</sup>.

### 3.2. Constitutional Court judgment 74/2018

The Spanish Constitutional Court soon thereafter had to repeat itself in a similar case, this time, replying to an extraordinary appeal for judicial protection (an *amparo appeal*) presented by a private single-sex education institution after a rejected renewal of an educational agreement with the Cantabrian regional government. Despite this being almost entirely related to the public financing of educational centres that do not subscribe to the common coeducation formula, aspect that is not treated in this paper, there are two arguments worth repeating. On the one hand, it provides a summary of its doctrine as it relates to the numerous educational rights and freedoms recognized in art. 27 SC. The court reminds us, firstly, that the right to education, much like any fundamental right, is not absolute and it is possible to justify exceptions or limitations to its exercise; the court has confirmed such limitations in a diverse array of issues relating to education, including state intervention and limits (or additional requirements) to the creation of educational institutions and the rights of parents and children when such limits serve a constitutionally-established and legitimate purpose and are necessary and proportional to the achievement of such objective. Secondly, it has echoed that the legal configuration of the right to education not only must be guaranteed from a provision-of-service perspective, but from a freedom-based dimension as well. Herein is where public authorities have the constitutionally-assigned task to ensure their effectiveness from an educational pluralism lens. As it relates to public funding and other State interventions, it reminds us that art. 27 SC “cannot be interpreted as a rhetorical statement, leaving it entirely up to the legislator whether or not to grant such aid [...] In this sense, the legislator is not entirely free to enable this necessary normative framework in any way”. Lastly, the Constitutional Court reminds us that a values and rights-based culture (including democratic and other principles necessary for peaceful coexistence) is imposed through art. 27.2 SC, and that this objective intends to have a “positive inspiration” or function.

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<sup>176</sup> Indeed, affluent families who believe in this pedagogical model would still be able to take their children to the school of their choice, but if the single-sex education model is not available in public or subsidized schools, low-income and middle-class families would not be granted equal access and equal opportunities of education for their children, therefore violating their educational and ideological rights and freedoms.

<sup>177</sup> With regards to funding, he recognizes that there is no right to a subsidization and that coeducational centers could be favored, as a criterion of public educational policies (we understand also by virtue of art. 9.2 SC) but in no case vetoing funding altogether to single-sex educational centers. For all the above and more see VIDAL PADRO, C, “Educación e Igualdad”, *XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021, pp. 1-18.

On the other hand, as it specifically relates to the object of study in this paper, it emphasizes, once again, that gender-separate education is a voluntary pedagogical choice and does not imply, *per se*, a discriminatory practice on grounds of sex. It specifically states that: “*there is no evidence to conclude that such system [gender-separate or single-sex education], as such, does not serve the constitutionally required purposes and, in particular, that it is not inspired by the democratic principles of coexistence or of the respect of fundamental rights and freedoms, or that it does not meet the objectives set by the general rules*”. It repeats its previous doctrine when it establishes that gender-separate education “*does not prevent the attainment of the objectives enshrined in Article 27.2 SC, centered on the full development of the human personality, on the respect for the democratic principles of coexistence and on the respect for fundamental rights and freedoms*”, because if it did prevent their attainment this would not only mean “*the impossibility of financially-assisting schools that practice this pedagogical formula, but the impossibility of such model altogether*”. In this regard, it considers that “*article 27.2 SC does not operate as a mere external limit*”, but imposes an internal limit (as it obliges the educating-the actual teaching and learning- to meet certain requirements, independently from the composition of the classroom)<sup>178</sup>.

The Constitutional Court concludes that when the State excludes certain educational centres from accessing the public financing system for the sole reason that their educational model contemplates the individualized schooling of children based on sex, it makes access to free education impossible for parents who opt for this pedagogical option, thus violating the educational rights and freedoms recognized in art. 27.1 and 27.3 SC.

#### **4. Valid alternative interpretations: dissenting votes and additional thoughts**

By the same token, it is also of the outmost interest to analyze the individual dissenting opinions (“*votos particulares disidentes*”) and concurring opinions (“*votos particulares concurrentes*”) issued by some Constitutional Court judges, against the aforementioned judgment 31/2018 of 10 April<sup>179</sup>, by virtue of the power conferred upon its judges by art. 90.2 LOTC, since they offer a different legal perspective equally worthy of being analyzed and explained.

First of all, the concurring opinion cast by Vice-President Encarnación ROCA TRÍAS does not disagree with the final decision held by the plenary to reject the appeal, but does with respect to the legal basis used in order to dismiss the objection to the last paragraph of art. 84.3 LOE as amended by the LOMCE. From where she stands, it is not possible to consider that the constitutionality of gender-separate education (a position that she shares)<sup>180</sup> implies a right to an educational agreement (*concierto educativo*) on the part of the educational centers in which such education is practiced, arising from an “alleged”

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<sup>178</sup> All the above is found in CCJ 74/2018, of 5 July (legal basis point 4).

<sup>179</sup> We have refrained from assessing those formulated against Judgment 74/2018 of 5 July, since their authors basically resort to those previously expressed in CCJ 31/2018 of 10 April, even in their entirety in some cases.

<sup>180</sup> Constitutional Court judge ROCA TRIAS shares the premise that gender-separate education does not constitute a case of discrimination on the basis of sex.

constitutional obligation derived from art. 27.9 SC, since this would limit the decision of the legislative power, which constitute a manifestation of political pluralism. In her own words, this ruling: “has the effect of limiting, to a certain extent, the legitimate options of the democratic legislator in this matter. These options are, in short, an expression of political pluralism as the highest value of the legal order (art. 1.1 SC). It should not be forgotten that the Constitutional Court is the supreme interpreter of the Constitution, not a legislator, and it should only be expected from it to make pronouncements on the adequacy or inadequacy of the provisions with the Constitution, without it being possible, directly or indirectly, to impose certain contents on the decisions of that legislator”.

In addition, the dissenting judge describes the statements made in the ruling suggesting that the educational centers offering this modality of education have *“the right to access the educational agreement in order to guarantee the free nature of the education it provides”*, as “very debatable”. She does not argue against the conclusion that there is no constitutional prohibition of assistance to educational centers that make use of gender-separate education as a pedagogical method. Instead, what she alleges is that this educational agreement at stake would not be denied *“to all private schools but only to some of them because of the pedagogical method used, which does not coincide with the coeducation promoted by the educational administrations”*. Her concurring opinion wraps up by asserting that: *“I believe, therefore, that a decision of the legislator that, hypothetically, would limit public funding to private coeducational centers would not violate the freedom of education or the freedom to create educational centers (arts. 27.1 and 6 SC) of the owners of private centers of gender-separate education. And, for the same reason, neither do the provisions of article 84.3 LOE, in the wording given by the LOMCE, according to which “in no case may the choice of gender-separate education imply for the families, students and corresponding centers a less favorable treatment, or a disadvantage, when signing agreements with the educational administrations or in any other aspect”*.

This is due to the fact that, as she sees it, no right (including that of parents to choose an educational center) is absolute, nor does it *“imply the right to choose a subsidized school, nor does it violate the freedom of education or the freedom to create schools recognized by articles 27.1 and 6 SC, since, regardless of public funding, the model of gender-separate education can continue to be applied.”*

What cannot be accepted, according to her, is to affirm that art. 27.9 SC generates a duty to help each and every educational center for the simple fact of existing, since the referral to the Law in art. 27.9 SC can be understood in a conditional way (taking into account other constitutional principles, values or mandates). Some examples of these could be the mandate of free basic education (art. 27.4 SC), or the promotion by the public authorities of the necessary conditions for freedom and equality to be real and effective (arts. 1 and 9 SC)<sup>181</sup>. Therefore, if public aid is legislated so that it is can only be granted to

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<sup>181</sup> Let us remember the doctrine emanated from CCJ 77/1985 (legal basis point 11).

coeducational centers, this would not, following her thesis, breach art. 27 SC, as there is no constitutional principle that requires a conduct to the contrary; and yet, this limitation is solely the result of a decision by the legislator, which is legit by virtue of the constitutional norm containing the specific mandate to the legislator for the configuration of the regulatory framework of such public aid to be established for this purpose.

Secondly, Constitutional Court judge María Luisa BALAGUER CALLEJÓN issued, in this case, a dissenting opinion against both the legal reasoning and the final outcome of the judgment. In this regard, she outlines that *“gender-separate education, which segregates boys and girls in access to the education system and in the organization of teaching, has no place in the framework of the Constitution of 1978”*, and therefore both art. 84.3 LOE and the controversial provision of the LOMCE should have been declared unconstitutional. In addition, she considers it contradictory that the judgment establishes that gender-separate education *“is a merely instrumental system of a pedagogical nature, based on the idea of optimizing the potential of each of the sexes”*, and then associates it with the ideology of the educational center and, therefore, with the exercise of the right to create centers and the right of parents to choose the type of education they want for their children<sup>182</sup>.

On another note, she reasons that gender-separate education entails, in an implicit manner, the assertion of the existence of biological or cognitive differences that justify the teaching of boys and girls in separate centers or classrooms, which involves *“transforming into legal truth a manifest scientific falsehood, if we consider the latest research that is reflected, moreover, in public documents as relevant as the OECD’s PISA reports”*. Thus, she indicates that this ruling takes a step back in history, ignoring that gender differences are merely cultural, and that there is no scientific basis in the consideration of a biological difference in which a distinction between women and men in relation to their intellectual abilities could be grounded. And the issue is that, in most cases, *“when speaking of cognitive differences, we are basically referring, even if it is not made explicit, to the lower capacity of women regarding scientific and technological disciplines”*. However, what does exist is sufficient evidence that *“segregation by sex enhances gender stereotypes that directly threaten material equality”*, enshrined in art. 9.2 SC, so that instead of moving towards a potential equality not only formal but also substantive in the educational sphere, what will be achieved is the perpetuation of existing gender roles and stereotypes. In this way, BALAGUER CALLEJÓN recognizes that the model of coeducation, as opposed to the practice of gender-separate education, *“finds a better fit, not only in the national and international regulation of reference, but in art. 9.2 SC itself”*. She acknowledges, moreover, the existence of *“elements that lead to attribute separate education a structural or ontological incapacity to achieve the educational*

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<sup>182</sup> *“With respect to the determination by parents of the type of education their children will receive, this constitutional right is limited, according to our doctrine, to the prima facie recognition of the freedom of parents to choose an educational center [...] and the right of parents to ensure that their children receive a religious and moral education in accordance with their own convictions (art. 27.3 CE)”*.

*objectives set forth in the Constitution*”, as the principle of equality cannot be properly conveyed in contexts where the gender relationship does not exist.

Likewise, she deems it “evident” that this type of private educational centers resort in order to establish this system of gender-based differentiation to a suspicious discriminatory category; in this case, gender or sex (considered as such by art. 14 SC). As the Constitutional Court already pointed out: “*so as to make effective the clause of non-discrimination on grounds of sex of art. 14 SC, this Court has established a much stricter and rigorous canon than that of mere reasonableness that, from the generic perspective of the principle of equality, is required for the justification of the normative difference in treatment*”<sup>183</sup>. As for the present ruling, in an attempt to justify that this criterion cannot be considered discriminatory, a series of unacceptable arguments are put forward. In the first place, it is resorted to the “*exegetical parameter offered by international treaties and agreements ratified by Spain, in a forced interpretation of Article 10.2 SC, in order to interpret regressively the scope of the right to education, and to contextualize it in a historical time from which more than 40 years have already passed*”. To this extent, for instance, Article 2 of the UNESCO’s Convention against Discrimination in Education, ratified by Spain in 1969<sup>184</sup>, is mentioned.

Regarding the question of public funding, BALAGUER CALLEJÓN shares the reasons argued by ROCA TRÍAS to declare these provisions unconstitutional. Accordingly, the law does not only contemplate the possibility of financing gender-separate educational centers by means of an educational agreement, but also expressly establishes that they cannot be excluded from financing for this same reason, thus limiting “*the power of the Autonomous Communities to establish, among the criteria for awarding the agreement or for getting access to it, the question of educational segregation as a determining element for exclusion, or as a criterion of comparative disadvantage*”. In this regard, it is highlighted that “*the fact that the legislator, in the manner it deems most appropriate in the use of its freedom of configuration, takes into account, among other possible circumstances, the social and economic conditions of the final addressees of education when indicating to the Administration the guidelines and criteria according to which the aid in question is to be dispensed cannot be considered unconstitutional*”.

In this vein, there is not a constitutional obligation to finance any kind of existing educational model or teaching system, nor does art. 27.9 SC establish a subjective right to receive public aid, since the possibility of requesting such aid, and the correlative duty of the public administrations to provide it, arise strictly from the law, with the requirements and conditions established therein. Nonetheless, in the words of BALAGUER CALLEJÓN, the majority decision seems to create such a fundamental right, not foreseen by our constitutional text.

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<sup>183</sup> CCJ 2/2017 of 16 January (legal basis point 5).

<sup>184</sup> It is worth noting that mixed education (co-education) did not yet exist in our country, as the Spanish model opened to this educational method with the General Education Act of 1970.



Last but not least, we would like to remark an aspect which we consider of utmost importance concerning the legal dispute. This last consideration is about the difficulties a binary educational system poses to the free development of some children's personalities when it comes to gender identity<sup>185</sup>. The dissenting opinion of Constitutional Court judge Fernando VALDÉS DAL-RÉ, to which Constitutional Court judge Cándido CONDE-PUMPIDO TOURÓN adheres, is also based on the idea that the second and third paragraphs of art. 84.3 LOE constitute a head-on infringement of art. 27.2 SC, in relation to the constitutional mandate of equality and non-discrimination provided for in arts. 1.1, 9.2 and 14 SC. This is due to the fact that the pedagogical model of gender-separate education confronts the constitutional educational *ethos* in accordance with which the right to education should be exercised, thereby falling outside the essential content of the right to education (or, if preferred, of the freedom to teach and to create educational centers). In the words of VALDÉS DAL-RÉ: “(...) *gender-separate education deprives students and teachers of the setting or context necessary to educate from a democratic perception of the pronounced gender conflicts that still exist in our society*”.

Therefore, this “pedagogical” model denies the role of the school as the quintessential space for the proper socialization and coexistence in equality since the earliest childhood, and, furthermore, “*contributes both to perpetuating outdated patterns of thought and sexist stereotypes, and to hindering the fight against discrimination based on sexual orientation and gender identity, in the opposite line to the need to advance in the protection of the rights of LGTBI people, highlighted in various works of the European Union Agency for Fundamental Rights, among other bodies*”. According to him, only the coeducational or mixed model is able to provide the necessary basis for this constitutional educational *ethos* to certainly exist, and therefore the inclusive representation of both genders constitutes an indispensable policy in order to govern a society that is composed in such a way<sup>186</sup>.

Again, regarding the public funding of these educational centers, he agrees with his colleagues in arguing that it is not a competence of this Court to set educational policy guidelines for the financing of private schools, and much less to do so by vetoing the adoption of a policy of public financing of private educational centers that excludes those providing the model of gender-separate education (examining this from a substantial equality perspective based on art. 9.2 SC). Continuing with VALDÉS DAL-RÉ's thesis,

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<sup>185</sup> She expresses this idea as follows: “*In the existing Autonomous Communities' regulation in this respect, the recognition of gender identity is inevitably linked to the right of persons to schooling in a necessarily mixed system, being this a requirement that arises from the overcoming of the binary consideration of gender identity, from the statement that each person, including children and adolescents, has the right to their own gender identity and to its development in the school environment, and from the recognition contained in Article 2(d) of Organic Act 1/1996, of 15 January, on the legal protection of minors, that the preservation of the sexual orientation and identity of minors is in their best interest, as well as their non-discrimination due to this or any other conditions, guaranteeing the harmonious development of their personality*”.

<sup>186</sup> This idea is previously affirmed in CCJ 12/2008 of 29 January (legal basis point 7)

“any differentiation on the basis of sex must surpass a particularly rigorous scrutiny”. Thus, it becomes imperative to assess the objective rationale, reasonableness and proportionality of the gender-separate educational model; an essential valuation that, in his opinion, has not been taken into consideration nor has it been sufficiently demonstrated and has, consequently, led to the non-discussion of what constitutes the true core of this constitutional debate.

The referral to the principle “separate-but-equal”<sup>187</sup> is also brought forth, as a concluding argument, by maintaining that, even if the reasoning that gender segregation does not necessarily entail a difference in the contents taught, based on the parallelism of the expression used by the majority as “equivalent” or “comparable” education<sup>188</sup>, was accepted (which he does not), the parallelism with the United States experience with racial segregation (and the fact that separate-but-equal practices were found inherently discriminatory) should not be ignored.

The last dissenting opinion is the one formulated by Constitutional Court judgment Juan Antonio XIOL RÍOS, who also disagrees with the majority as regards the constitutionality of gender-separate education. He begins by remarking the lack of clarity of the ruling concerning the fact that allowing gender-separate appears exclusively in relation to subsidized private centers<sup>189</sup>. This way, according to him, if it had been expressly stated, the impossibility of implementing this gender-separate educational model in public schools would have been manifestly clear. What has, conversely, been made crystal clear is the mainstream opinion that this educational model in private subsidized schools is not in itself discriminatory and, therefore, does not even need to be subjected to the analysis of whether it is a justified and proportionate discrimination. To this extent, it is of utmost relevance to remember that “*the prohibition of certain grounds of discrimination is closely linked to human dignity (art. 10.1 SC), the highest values of equality and political pluralism as the basis of the legal system of a social and democratic State governed by the rule of law (art. 1.2 SC) and the mandate addressed to the public authorities to promote the conditions for the equality of the individual and of the groups in which they are integrated to be real and effective, removing the obstacles that prevent or hinder its fullness (art. 9.2 SC)*”. And, having this as the point of departure, anti-discrimination law has evolved to the point of establishing two important elements<sup>190</sup>.

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<sup>187</sup> These three words were used in the United States’ Judgment *Plessy vs. Ferguson* of 1896 in order to justify that racially segregated public facilities were legal so long as the facilities for both African American and white people were equal.

<sup>188</sup> The majority holds, as indicated by VALDÉS DAL-RE, that “*art. 84.3 LOE provides for an education differentiated by sex but “equivalent” or “comparable”, a precept which also highlights that these educational projects must develop academic measures in order to promote equality*”.

<sup>189</sup> As evidenced by: “*(i) the fact that paragraph III regulates the effects of this educational option only regarding private schools within the framework of the regulation of their educational agreements; and (ii) the requirement that for the adoption of this measure, the educational centers must state in their educational project the educational reasons for the choice of such system, as well as the academic measures developed in order to favor equality, which only makes sense with respect to the aforementioned private schools*”.

<sup>190</sup> “*(i) the use of these reasons by the legislator is so intrinsically suspicious that only very powerful reasons linked to higher interests can permit their use to establish differentiated treatment; and (ii) in order to compensate for historical situations of prolonged discrimination, affirmative or positive actions of a*

Accordingly, he does not agree with the statement made by the majority, because of the suspicious character of such provision, and considers the need for this provision to be subjected to a specific test in order to assess if there are sufficient grounds in order to consider this differentiation as proportionate and justified by the pursuit of a constitutional aim (and therefore qualify it as non-discriminatory). In this regard, he provides four essential elements which demonstrate that gender-separate education entails *per se* a situation that is intrinsically suspicious of gender-based discrimination and discrimination on the basis of sexual identity, and which, as already pointed out, have not been duly considered. These are: “(a) the reason for discrimination is sex, (b) sexual segregation is based on the “separate but equal” fallacy, (c) binary sexual segregation absolutely excludes intersex persons, and (d) sexual segregation is projected onto the public service of education, which is a space for the socialization of democratic values.”

He brings up again the “separate but equal” argument, previously alleged by VALDÉS DAL-RE in order to prove the unequal character underpinning the nature of gender-separate education. This principle, however, does not imply that educational segregation involves in any case a discriminatory treatment, provided that the condition of equivalence of benefits is properly met. Of course, he considers the referral to the *Brown v. Board of Education of Topeka* case and the ruling against this racial segregation in the educational field important; by analogy, also brings up other relevant United States case-law regarding school gender segregation<sup>191</sup>. This is why, in the opinion of XIOL RÍOS, “the resurrection of the idea that segregation in the rendering of a public service, if it does not presuppose a different level of performance, is not, at least, an intrinsically suspicious form of discrimination” becomes disappointing.

He reminds us that the strong argument of the majority opinion to deny the inherently discriminatory nature of gender segregation mainly justified by art. 2(a) of the relevant UNESCO Convention<sup>192</sup>. Therefore, the way he sees it: “the assumption by the aforementioned 1960 Convention of the principle “separate but equal” to justify sexual segregation in schools can only be interpreted phenomenologically as the acceptance of a lesser evil justified by the need to move from situations of radical denial of the need for schooling for women, or contemplated only for the fulfillment of the social roles reserved

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*temporary nature in favor of these disadvantaged groups must be made possible, aimed at overcoming this situation of postponement and achieving the objectives of real equality of opportunity and treatment”.*

<sup>191</sup> Specifically the *Mississippi University for Women v. Hogan* (1982) and *United States v. Virginia* (1996) judgments. In the former, it was declared the unconstitutionality of the all-female character of a state-subsidized nursing school; while in the latter, this was appreciated with respect to the all-male character of a publicly funded military educational academy.

<sup>192</sup> Nonetheless, it he considers that more weight has been given to the effectiveness of this provision confirmed by the General Comment No. 13 of the United Nations Committee on Economic, Social and Cultural Rights on the right to education (adopted in 1999), than to take into account art. 10(c) CEDAW. Furthermore, in this context, he mentions art. 10(a) CEDAW as indispensable, as the need to encourage coeducational education is expressly emphasized; as well as the UNESCO Resolution 1152 adopted at the fifteenth session held in 1969, which invites Member States “to recognize the principle of co-education in primary and secondary schools as a means of ensuring equal access [of women] to education”.

*for them, to their full access in normalized educational systems that, setting an example of sexual integration, show that women are an equal part of society”.*

With that in mind, the justification provided in the present case in order to legitimate gender-separate education in our country, according to him, is based on the cliché about the differences in aptitudes between men and women, which stems from a sexist stereotype and is, in itself, insufficient to exhaust the intrinsically suspicious nature of discrimination of this type of segregation. This is also true given the uncontroversial nature of the fact that, on the one hand, many of the state-funded schools (private schools (*colegios concertados*), that have implemented this type of model have followed it since the 1960s and, therefore, are founded in a regulatory and socio-cultural context based on sexism; and, on the other hand, a number of these centers were and are linked to ideologies that hold particularistic positions on the distribution of social roles between the sexes.

On top of this, he argues that this sex segregation does not only imply discrimination on the basis of sex, but also absolutely excludes intersex persons from the educational sphere by taking sex as an assumption from a binary male-female perspective, leading moreover to a discrimination linked to gender identity. Thus, a new prejudice arises with regard to the perception of the existence of only two sexes, and that every individual must fit into one of them. XIOL RÍOS qualifies: “*Any regulation based on the prejudice of sexual duality causes an immediate effect of total exclusion of those people, such as intersex people, who cannot be identified with either of these two sexes, thus causing a new form of discrimination, in this case not by segregation, but by exclusion*”<sup>193</sup>. In conclusion, he believes to have provided enough reasons to replace the majority opinion’s initial position that binary sex segregation in private state-funded schools is not in itself discriminatory with the reasoned idea that it is, instead, inherently suspect of discrimination.

It is undeniable that both the 2018 judgment and its concurring and dissenting opinions have given much to talk about. The controversy surrounding coeducation or gender-separate education has once again, NAVAS SÁNCHEZ<sup>194</sup> highlights, revealed the weakness of the supposed “consensus” on which art. 27 SC was drafted. As a matter of fact, according to SÁNCHEZ SOCÍAS<sup>195</sup>, the aim of the Constitutional Court, by means

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<sup>193</sup> XIOL RÍOS emphasizes at this point the numerous Autonomous Communities regulations that have developed anti-discrimination measures regarding the treatment of intersex people, among others, in the field of education here in Spain. Some examples are: arts. 22 to 26 of Act 2/2014 for equal treatment and non-discrimination of lesbians, gays, transsexuals, bisexuals and intersexuals in Galicia (*Ley 2/2014, de 14 de abril, por la igualdad de trato y la no discriminación de lesbianas, gays, transexuales, bisexuales e intersexuales en Galicia*), arts. 21 to 24 of Act 8/2017 regarding the recognition of the right to gender identity and gender expression in the Valencian Community (*Ley 8/2017, de 7 de abril, integral del reconocimiento del derecho a la identidad y a la expresión de género en la Comunitat Valenciana*), and arts. 26 to 29 of Navarre Act 8/2017 for the social equality of LGTBI+ persons (*Ley Foral Navarra 8/2017, de 19 de junio, para la igualdad social de las personas LGTBI+*), amid others.

<sup>194</sup> NAVAS SÁNCHEZ, M. M., “¿Diferenciar o segregar por razón de sexo? A propósito de la constitucionalidad de la educación diferenciada por sexo y su financiación pública. Comentario a la STC 31/2018 y conexas”, *Teoría y Realidad Constitucional (UNED)*, núm. 43, 2019, p. 492.

<sup>195</sup> SÁNCHEZ SOCÍAS, L., “La constitucionalidad de la educación diferenciada y de su financiación con fondos públicos”, Paper in *X Congreso de las Academias Jurídicas de Iberoamérica*, 2018, p. 12.

of the issuing of these rulings, was to remove gender-separate pedagogical model from the debate on the controversial freedom of education (art. 27 SC), which constitutes one of the great issues left unresolved since the 19th century. While it is true that neither the Constitution nor the international norms ratified by Spain, or any act, adopted under the current democratic regime in force, expressly declares that co-education (or mixed education) is the rule and gender-separate education should be limited to an exception<sup>196</sup>, certainly the reasoning provided by the dissenting judges may lead us to reflect on whether, in the absence of such clarification, it would be appropriate for one of the supranational judicial bodies<sup>197</sup> that oversee legality and human rights' respect in our constitutional system to pronounce itself otherwise, taking into consideration what is set forth in these detached opinions.

The analysis of constitutional jurisprudence portrayed, together with the aforementioned case-law of the Spanish Supreme Court, illustrates therefore the extent to which our constitutional model is flexible as regards the public funding of educational centers implementing the model of gender-separate education, as it seems, *prima facie*, that both positions of the legislator (that is, either to provide them with public funds or not) fit our constitutional model<sup>198</sup>. Nevertheless, regardless of the granting of public aid to these private educational centers, as a final remark in this issue and agreeing with the dissenting votes herein discussed, what cannot neglect the fact that the implementation of an educational model that teaches children and teenagers to live together (and to detect the power relations that are manifested among them and to articulate mechanisms and tools to resolve these conflicts<sup>199</sup>) is absolutely indispensable. Otherwise, by means of omissions of this character, the real and effective equality advocated under art. 9.2 SC will also find itself weakened and jeopardized.

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<sup>196</sup> CALVO CHARRO, M., “El tratamiento de la igualdad y la reforma de la enseñanza diferenciada en la LOMCE”, in FERNÁNDEZ RODRÍGUEZ, C. (Coord.), *Claves de la reforma educativa: a propósito de la nueva Ley Orgánica para la Mejora de la Calidad Educativa*, Editorial Colex, Madrid, 2015, pp. 153-194.

<sup>197</sup> In Spain certainly other judicial bodies aside from the Spanish Constitutional Court have dealt and ruled in these issues. In this respect, it becomes relevant to make a reference to the Supreme Court Judgment 5492/2012 of 23 July, which understood that there was a legislative innovation introduced by the Organic Act on Education (LOE) in 2006, incorporating sex as a suspicious category of discrimination in the selection of students, and consequently gave coverage to the Autonomous Communities provisions that ruled out the public financing of educational centers with a model of gender-separate education, by pointing out that: “while recognizing the legitimacy of the gender-separate educational system, these centers are excluded from the possibility of entering into agreements with the competent Administration to support them with public funds” (3rd legal basis). In the same vein, the Judgments of the Supreme Court of 24 July 2012 (appeal no. 5423-2011), of 9 October 2012 (appeal no. 5182-2011) and of 14 January 2013 (appeal no. 1303-2012), *inter alia*, have ruled accordingly.

<sup>198</sup> CELADOR ANGÓN, O., “El modelo de educación diferenciada en la reciente doctrina constitucional”, *Derechos y libertades*, n. 42, 2020, p. 59.

<sup>199</sup> CÁRDENAS CORDÓN, A., “Educación, género y democracia. Comentario a la Sentencia del Tribunal Constitucional 31/2018, de 10 de abril, sobre la constitucionalidad de la educación diferenciada por sexo”, *Paper in XVIII Congreso de la Asociación de Constitucionalistas de España (ACE)*, 2021.

#### **IV. Conclusions and final reflections: due regard for (and balancing of) all constitutional values involved**

There is no doubt that education is conceived as an individual and collective freedom, a State obligation and as a human right. There is also no doubt that it is a complex legal concept, hybrid in nature, and key for (and in) democracy. To offer, therefore, a global vision of educational rights and freedoms in the current context presents many diverse aspects of great legal relevance. The constitutional debate, and its subsequent legislative, jurisprudential and doctrinal development surrounding rights and freedoms in the field of education makes this constitutional (and, therefore, socio-political) relevance clear. The resulting legal scenario has been extraordinarily complex, as we have seen over the last forty years of our constitutional history, and this has made the integrating compromise of the values and principles involved and envisioned by the Spanish constituent power difficult to achieve.

In an attempt to answer the question that instinctively comes up in this debate (*is gender-separate education compatible with the principle of equality?*), many might instinctively and unequivocally reply with a no. They would not be necessarily right. They would not be necessarily wrong either.

On the one hand, it should be emphasized that equality, as the supreme value of the Spanish legal system, has an objective (or teleological) dimension due to its transcendence in the foundation and maintenance of a social and democratic rule of law, and a subjective dimension, as a fundamental subjective right, intrinsically linked to human dignity. In this sense, equality operates not only from a formal point of view (principle of equal treatment before the law), but also from a material point of view (principle of effective equality through mechanisms or special measures in favor of systemic discrimination situations). Equality as an idea intimately linked to justice constitutes a foundational pillar and guiding principle of our constitutional architecture. Not only has it been considered a plural principle, as a limiting and guiding principle for the actions of the public authorities, but it has also been considered a subjective right not to receive unequal treatment for any reason whatsoever. However, it is also worth recalling the need, at times, to differentiate, for the very sake of equality: it is sometimes necessary to treat equals equally and unequals unequally, depending on specific conditions and situations. Although it has not been dealt with in detail on this occasion, it is appropriate here, therefore, simply to refer to the debate generated around special education centers versus inclusive education.

For some authors the important practical question surrounding gender-separate education should not be focused on the existence (or inexistence) of discrimination, but rather in whether the pedagogical practice proposed by single-sex education, based on differences in learning and teaching on grounds of sex, is compatible with the constitutionally-

recognized educational ideology of the SC<sup>200</sup>. Precisely because the latter has been extensively studied and the former remains practically untouched, we offer a preliminary (and still basic) assessment concerning gender-separate education in the context of the right to (formal and material) equality and the principle of non-discrimination. Given that education is not only a process of knowledge transfer, but of values instillation and socialization, it finds itself often confronted with gender issues in the broadest sense of the term. There is still something to be said about educational equity from a “social justice” perspective, as parents who cannot manage to pay private, elite single-sex education (if that particular school has a pedagogical model compatible with their convictions-whether they are based on educational, philosophical or religious views-) deserve affordable comparable (public) educational options (equal access and equal opportunities).

On the other hand, it is worth reflecting on the mission of the State and whether it should consist in reconciling the diverse interests of the citizens who legitimize it, acting less as a dictator and more as a mediator, open to the different positions and bringing the parties closer to a commonly agreed solution. In the specific case that concerns us, the State, guided by values such as pluralism, must guarantee the freedom not only to think but also to express, individually and collectively, all ways of conceiving life in society and education (precisely through education as the best conduit to transmit and instruct such values and ideas). Just as there is an ideological neutrality enshrined in our constitutional order (*indiferentismo ideológico*), perhaps we should also understand that there is or should be educational neutrality (*indiferentismo educativo*), allowing, given the plurality and (religious, philosophical, cultural, linguistic, functional...) diversity not only different political positions (as we already do) but also different educational positions and “ideologies”, with the only limit of the effective injury (‘effective’ or ‘real’ being key words) of goods, values or rights of constitutional relevance. Education as a factor of political integration and social control can be a double-edged sword if it does not contemplate and respect different models for the achievement of its objectives.

No educational or pedagogical model is perfect. Otherwise, discriminatory practices would be a thing of the past and we would have reached material equality long ago. This is partly because the transfer of values is not only the exclusive job of educational facilities, but also, and primarily, of parents, and, ultimately, of society as a whole; and partly because there are still systemic and structural issues that affect attaining effective equality and total inclusion in our contemporary societies. Finally, it is obvious that no right is absolute. We all agree that the right to education and freedom of education limit each other. Bearing in mind that education, in a democratic system, refers both to the satisfaction of formative needs for the free development of the person (individual and subjective dimension) and to the contribution of socio-economic development and

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<sup>200</sup> ALÁEZ CORRAL, B., “El ideario educativo constitucional como fundamento de la exclusión de la educación diferenciada por razón de sexo de la financiación pública”, *Revista Española de Derecho Constitucional*, n. 86, 2009, p. 42.

achievement of constitutional values and objectives (collective and objective dimension), it is undoubtedly very difficult to clarify where one right ends and the other begins. Hence, it is also quite understandable that gender-separate education is one of those controversial issues, not only from an ideological point of view, but also from a strictly-legal point of view. There is no single correct resolution to this issue, on the contrary, it is possible to articulate several legally well-founded solutions that conflict with each other; as is demonstrated by international experiences and the dissenting opinions previously examined.

At crucial and critical moments in history, mankind has always tried to advance in the conquest of rights and freedoms, reaching consensus, at the broadest level, on basic rules of coexistence and the preservation of common interests. However, perhaps because of the inherently non-neutral nature of education, insofar as it is nourished by understandings and visions of life in society and the development of the person, intimately linked to specific and sometimes very different cultural, ideological and religious positions, it is probably more difficult than in other matters to achieve a true consensus and balance in weighing the interests at stake.

There is no (nor should there be) one single way of how to correctly educate. Equality is certainly the goal, but there are many ways to achieve it. Suspicion, however, is certainly raised when looking at the structure and history of certain educational practices. We find ourselves between a (legal) rock and a hard place. It is true that, in the field of education, sometimes, if the strengthening of freedom is not accompanied by measures to correct certain circumstantial or structural inequalities, this will be at the expense of equity; nurturing only the freedom of those who were already socially and economically in a better position to choose. However, because it affects the exercise and guarantee of values and rights so closely linked to individual self-determination, we must be very careful, and perhaps, in this very specific dilemma of the classic clash of collective vs. individual interests, we should err on the side of caution in favor of respecting all possibilities and different educational proposals, and therefore, in favor of respecting individual personal freedom to choose (and collective freedom to offer) teaching and pedagogical-educational methods in line with personal and pedagogical convictions and ideals, at least until we find a real universally agreed formula and discrimination-proof educational agenda.

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