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Overview

“The first responsibility of the public authorities with respect to education,” writes a distinguished Spanish legal authority, “is to provide for its effective guarantee as an activity which is truly free, which can only be accomplished by ensuring the liberty of the two indispensable poles of this activity: the one teaching and the one being taught.”¹ The *Constitution* of 1978, he adds, provides a perfect statement of this radical position in the two brief sentences that make up the first section of article 27, on education:

Everyone has a right to education. Educational freedom is recognized.

But educational freedom depends upon the opportunity to create and maintain schools which express a distinctive approach to education.

Spain has made an enormous effort in education over the past three decades, and the effects may be seen, for example, in the rapid increase in the number of students going on to university education. This effort has been made possible, in large part, by a significant expansion in the activity of government, both nationally and in the autonomous communities (regions). Has this been at the cost of educational freedom,

both on the part of the sponsors of independent schools and also on the part of those who wish to teach in or send their children to a school with a distinctive character?

Freedom and justice are always in a certain tension; this may be especially evident in the recent history of Spanish education. The efforts to eliminate *inequalities* have tended, at some crucial points, to suppress *differences* which have an appropriate place in a pluralistic society, despite the recognition, by the Constitutional Court, that educational freedom presupposes the institutionalisation of educational pluralism.² “Social solidarity binds every liberty.”³

The structure of schooling

The former geographically centralised model has been replaced by a new model in which other administrative bodies, like the 17 Autonomous Communities of Spain or the local administration, may assume certain domains.⁴ Legislation contains a detailed division of power between several levels of state dealing with education.⁵

The overall goals for education are defined by national authorities, but the seventeen regional communities have executive responsibility as well as the authority to define additional requirements, especially those which have to do with the promotion of regional language and culture.

National government reserves to itself the authority to ensure the equivalence of academic certificates and degrees at all levels, define la parte común del currículum nacional the core curriculum (“enseñanzas mínimas”), plan the investment strategy for education nationally, and regulate the teaching of Spanish nationwide. Provincial authorities oversee the operation of schools and personnel matters.⁶

Most of the Autonomous Communities have designed their own educational policy. The government of each Community holds administrative title to the establishments in its region and the functions deriving from it. It can create and administer public educational establishments or authorize private educational establishments, and administer the personnel and construction of public establishments. The services attending to pupil needs are organized by each Community. The responsibilities that the legislation assigns to local corporations do not grant them Education Authority status, but rather recognize their capacity to co-operate with the State and Autonomous Communities in the field of education.

The decentralisation process has not only affected the various administrative levels. It has granted public and *centros concertados* (private establishments funded with public and private resources under a contract) autonomy to define their own organisational and pedagogical model. This must be spelled out in the school’s *proyecto educativo*, a

document with the basic principles identifying the school).⁷ “The *proyecto educativo* of the school brings together the values, goals, and priorities of its implementation. It also incorporates in a concrete way the curriculum established by the administration, as determined and approved by the faculty, as well as the integration of topics, materials, and modules of education in values and other aspects of education” (art. 121 LOE).

In addition to public and unsubsidised independent (private) schools (serving about seven percent of pupils nationwide in 2008-09⁸), there are also independent schools which receive public subsidies under an agreement with the regional education authorities (about 26 percent of pupils in that year).

A sociological study of independent (private) schools in Catalonia, some years ago, found that 98 percent of the religious schools were state-subsidized, contrasted with 73 percent of the secular schools, and that the rate of subsidization tended to be higher for the religious schools. There were 1,962 secular and 105 religious independent schools that received no subsidy.⁹ Presumably this reflected the existence of a demand for economically-selective elite schools. These private educational establishments must meet the minimum lawful standards, similar to all schools. They may be owned by private natural or legal persons.

There are thus two sorts of private schools, those funded under contract (*concierto*) with the government (*centros concertados*) and those not publicly supported (*centros no concertados*).

The *centros concertados* are financed with the public funds available for compulsory level schooling; these funds do not, however, in most cases cover all the necessary expenses of the schools; in fact, the per-pupil funding provided by public authorities to public schools is almost twice that provided to private schools under contract. According to a study published by the Forum for Quality and Freedom of Education (FERE¹⁰), the public expenditures per pupil amounted to 3,518 euros in public schools and 1,841 in private schools under contract. The report adds that “while the present economic situation of the *centros concertados* is maintained, it is not possible nor fair to speak of obligatory education as being free-of-charge. If there were no contracts, the public sector would have to make an additional effort of 1,677 euros per pupil, which would amount to 3,206 million euros, without including the cost of facilities required to replace the 3,049 elementary schools and 2,793 secondary schools that are at present supported by the system of contracts.” That is, in general a new *centro concertado* must itself assume the costs of construction, equipment, and so forth. In order to do so, sometimes it is necessary to create structures such as associations, parent cooperatives, foundations, and other sources of private funding to deal with the costs of creation and maintenance of a new school.

The *centros concertados* may provide schooling on any of the established educational levels or stages and have many features in common with public schools such as cost-free

education; teacher, parent and pupil participation in the control and management of the establishment; the admission system; the non-profit nature of their extracurricular activities and services; and the optional nature of religious education. They may not require parents to pay any sort of fees, which are explicitly forbidden, with penalties, by the LOE article 88.1: "In order to ensure the schooling of all pupils without socio-economic discrimination, in no case may public or contracted private schools charge families for free instruction, impose on families the requirement of payment to foundations or associations, or establish required services connected with instruction which require the families of pupils to make payments." This prohibition does not apply to extra-curricular activities or to school services which are completely voluntary.

Centros no concertados, private schools that are not under contract and funded by government, may also provide schooling on any of the established educational levels or stages. They are free to establish their own internal rules, select their teaching staff, set out admission procedures, and establish their own rules and regulations.

While the overwhelming majority of religious independent schools are Roman Catholic, the government signed agreements in 1992 with Protestant, Jewish, and Muslim leaders that strengthen the right of schools of these traditions to receive public subsidies through a contract with regional authorities.¹¹

Between 1990-91 and 2010-11, the number of teachers in public schools increased from 317,316 to 496,407, and the number in independent schools from 128,026 to 184,775¹². Eleven percent of all schools are private schools without contract, attended by seven percent of pupils; another 19 percent are private schools under contract and thus publicly-funded, attended by 26 percent of all pupils. Thus one-third of pupils in elementary and lower secondary education attend non-government schools, while OECD estimates that only 16 percent of public education expenditure is for these schools.

In recent years, education legislation has changed quite frequently, in part as the result of lack of an agreement about education between the major political parties. Thus, during the first period of the Socialist government (1982-1996) the law organizing the educational system (LOGSE) was enacted in 1990. In 1996 there was a change of government, and the Popular Party government (1996-2004) adopted a new law in 2002 on the quality of education (LOCE). However, the Socialist victory in May 2004 prevented the implementation of this law and led to a successor in 2006, the Ley Orgánica de Educación (LOE), which is currently in force. In November 2011 the Popular Party returned to office with an absolute majority and an electoral program calling for the reform of the LOE, including prolonging the last stage of secondary schooling by a year, reform of teacher training, a new model for selecting teachers, and the guarantee of instruction through Spanish throughout the country (an issue in Catalonia).

At present there appears to be consensus on the need for an agreement among all political groups on the direction to take in education, but it is very difficult to actually achieve such an agreement.

The 2006 education law (LOE) organizes primary education into three two-year cycles (continuing the structure set by the LOGSE). Public schools providing primary education are called *colegios de educación primaria* (Primary Education schools). All schools providing primary education, whether public or private, must comply with minimum requirements set by the Ministry of Education. Private establishments are subject to administrative authorisation, which is granted if these minimum requirements are met. Publicly funded institutions are usually coeducational, private ones may be single-sex, though most are not. Teaching materials are chosen by each school.

Lower secondary education, *Educación Secundaria Obligatoria* (ESO), consists of four school years divided into two two-year cycles and marks the end of compulsory education. They can be publicly or privately funded. Most—public and private alike—are coeducational. Teaching materials are chosen by each school.

The 2006 LOE stipulates that post-Compulsory Secondary Education is divided into the academic or general branch and the vocational branch. All establishments regardless of sponsorship must meet minimum standards which are compulsory nation-wide. Public and private schools alike are ordinarily coeducational.¹³

The legal framework

The 1978 Constitution establishes the basic legislative principles for education. Article 27 provides (in part) that:

1. Everyone has a right to education. Freedom of instruction is recognized.
2. Education will have as its goal the full development of the human personality in respect for the democratic principles of common life and for the fundamental rights and freedoms.
3. The right of parents to ensure that their children receive religious and moral instruction in accordance with their own convictions, is guaranteed.
4. Basic education is compulsory and free of charge.
5. The freedom of physical and legal persons to establish schools, subject to respect for constitutional principles, is recognized.

6. Teachers, parents, and (as appropriate) pupils will take part in the control and management of all schools supported by the government with public funds, under the terms established by legislation.
7. The public authorities will inspect and ensure the equivalence of [*homologarán*] the educational system in order to guarantee compliance with the laws.
8. The public authorities will assist schools that meet the requirements established by law.¹⁴

Other laws with an impact on both public and independent schools include the 1990 law restructuring education (LOGSE) and the 1995 law regulating evaluation of schools and participation of teachers, parents and students in the management of schools (LOPEGCE: *Ley Orgánica de la Participación, la Evaluación y el Gobierno de los centros docentes*). The former applies to all pre-university schools, the latter only to those funded by government. However, the LOE (2006) places more emphasis on this, with a section on participation, autonomy, and governance of schools, another on evaluation of the educational system, another on inspection, and yet another on equity in education.

The LOE's broad aims are: 1. Providing an education of high quality to all citizens of both sexes, at all levels of the system, reducing the drop-out rate, guaranteeing effective equal opportunity, and reconciling quality with equity. 2. Ensuring that all elements of the educational community collaborate to achieve those objectives. 3. Committing strongly to the educational objectives established by the European Union for the coming years (improvement of quality and efficiency, facilitation of general access to schooling and vocational training, and strengthening connections with the world of work, with research, and with society in general).

Freedom to establish non-state schools

According to art. 13 and 21 of LODE, private schools are founded by private individuals or legal entities and are registered with the competent education administration.

Schools may not claim to be providing a recognized form of instruction unless they have received administrative authorization, which must be given if the school meets the stated criteria.¹⁵ The criteria defined by LODE, article 14.2, for authorization of a school providing schooling at the compulsory level are the certified qualifications of teachers, the ratio of pupils to teachers, the adequacy of instructional and physical education facilities, and the number of classes.

The LODE imposed a wide range of detailed norms on the aided private schools, including on the composition of the school councils. These consist of a principal elected by council members, four teachers elected by their colleagues, a representative of the administrative staff, four elected parents and two students. Consequently the original owner of the school—typically the Catholic Church—lost a huge part of its previous control.

The general provisions of the Royal Decree 1537/2003 stipulate that educational establishments must be located in buildings used for educational purposes, comply with existing legislation relating to health and safety, be designed so as to allow access for physically handicapped pupils, in accordance with the relevant legislation.

Independent schools that seek authorization to operate are, at the same time, seeking recognition of the educational qualifications which they provide and certify. Until 1970, in fact, the control of public authorities over examinations and qualifications was very strict. The 1970 Law and LOE, however, provide that authorized schools will enjoy full academic authority.¹⁶

Schools may apply for a funding agreement (*concierto*) at the same time that they apply for the authorization to operate. In this case, they must reach an agreement with the administration in which they spell out the conditions for constituting the School Council (Consejo Escolar), the appointment of the principal, and the recruitment of teaching staff. If, however, they initially apply only for authorization, then they must operate for five years before becoming eligible for public funding (Disposición adicional quinta de la LODE).¹⁷

Homeschooling

According to the Constitution and since the Ley General de Educación (1970), schooling is compulsory in Spain.¹⁸

Home education is allowed for children whose circumstances do not allow them to attend school.¹⁹ In practice, this refers to children whose physical condition makes it inadvisable for them to attend school.

School choice not limited by family income

By providing that basic education is compulsory and free (27.4) and that “the public authorities will assist schools that meet the requirements established by law” (27.9), the *Constitution* opens the way to subsidy of the pupils of the schools chosen by parents though without going as far as the international treaties that explicitly assert an obligation

to promote the exercise of that right. But article 9.2 of the Constitution says: “It is incumbent upon the public authorities to promote conditions, which allow for the liberty and equality of the individual and of the groups to which he belongs, to be real and effective, to remove the obstacles which nerent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.” Article 10.2 says: “The standards, relative to the fundamental rights and liberties, recognized by the Constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.” The mechanism chosen for providing this support while defining and enforcing requirements is the “agreement” (*concierto*) between the education authorities and the sponsor of a school. This arrangement, “born in the middle of a great polemic,” is explicitly modeled upon that in France under the *loi Debré* and the *loi Guermeur*.²⁰

The purpose of the public funding of independent schools is not to assist the schools but to ensure that the constitutionally-guaranteed of parental choice is not limited by the poverty of any parents.²¹ The public funding provided does not cover the full cost of the schooling and, since schools under contract are not allowed to charge tuition, there are constant financial difficulties in maintaining them. Teachers in schools under contract are, on average, paid only between 87 and 97 percent (varying by region²²) of the salaries of those in state schools. It is significant, also, that secondary school teachers in schools under contract must teach 25 hours a week, contrasted with 18 hours in public schools (during the 2011- 12 school year the financial crisis led some regions (comunidades autónomas) to increase the teaching load of their teachers to 20 hours, which led to many protests by the unions). This means that private schooling supported with public funds is significantly less expensive than public schooling.²³

Recent legislation contained actions directed to compensate for inequalities in education affecting persons, groups or territories in a position of disadvantage because of social, economic, ethnic or personal factors of any kind.²⁴

In order to be accepted for public subsidy, independent schools must agree to provide tuition-free education for whatever grades are subsidized, to allow teachers and parents to play a role in the management of the school, to allow pupils to be excused from religious instruction on the grounds of conscience (on the same basis as in non-subsidized schools), to follow the national curriculum objectives, and inform the public about the subsidy and about the school’s distinctive character, if any.

The public funding provided to subsidized schools include the salaries and benefits of the teachers, operating expenses (including administrative staff) at a level negotiated with government authorities, and assistance with capital costs.

Subsidised schools are required to provide the instruction described in their agreements with the government free of charge. Subsidised schools are also eligible for tax and other advantages granted to charitable organisations²⁵ (art. 50 LODE).

Non-subsidised private schools have complete financial autonomy.

In reality many independent schools have developed major financial problems because the government did not make the necessary grants in full.

School distinctiveness protected by law and policy

The LODE protects the right of parents to select a school different (*distinta*) from those created by the public authorities (article 4b). This implies a right to distinctiveness which is further affirmed in article 21, which guarantees the right of Spanish citizens to create and *direct* private schools. The Constitutional Court held, in its 1981 decision, that this was fundamental to the exercise of educational freedom, while pointing out that it had to be limited by respect for other constitutional and human rights protections.²⁶

Distinctive character

Article 68 of the LOCE (2002) stated that “The educational program of a school under contract must incorporate its distinctive character.” In a similar way, the preamble of the LODE states that educational freedom “must be understood in a broad and unrestricted sense as the concept that encompasses the full range of freedoms and rights in the field of education. It includes, without a doubt, the freedom to establish schools and to endow them with a distinctive character or educational program.” The present law (LOE) says, with respect to distinctive character, “The sponsors of private schools have the right to establish their distinctive character which, in every case, must respect the rights guaranteed to teachers, parents, and pupils by the Constitution and the laws. The distinctive character of the school should be publicized by the sponsor of the school to the various sectors of the educational community as well as to those who might be interested in accessing it. The matriculation of a pupil implies respect for the distinctive character of the school, which should in turn respect the rights of pupils and their families recognized by the Constitution and laws.”

A sociological study in Catalonia found that most teachers in the independent schools (which form a majority of all schools in Barcelona) strongly agreed that their schools were characterized by an explicit “educational project” (*proyecto educativo*), were managed on the basis of that project in a way that provided a unity of approach, and enjoyed a coherent commitment to that project on the part of the teachers. In some cases this direction-setting project was religious, in others it was pedagogical, and of course in many it was both.²⁷ Galán notes that schools, and especially public schools, are considered “loosely structured” organizations.²⁸ This lack of structure, together with a high degree of individual

autonomy, where the norms for forming the organization are almost random (selection of the school by the teacher, seniority, and so forth), makes extremely difficult any group decision over the goals of the school. The results of a study by OECD on educational effectiveness shows that, in Spain, only a minority of schools have articulated explicit objectives which, in addition, are in line with those of the educational system as a whole.²⁹

An independent school is almost inevitably more free to be distinctive than is a public school, and therefore is more likely to expect staff and pupils to conform themselves to its worldview and educational approach. This is possible only within limits in subsidized independent schools, which explains the fact that most schools which follow a really distinctive pedagogy are not eligible for public funding.³⁰ These schools do, however, possess autonomy to define their distinctive character without threatening their contract and thus public funding, provided that this is in accord with constitutional principles. Some conflict has arisen, on this basis, in establishing subsidized schools that are single-sex. The courts have consistently decided in favor of the sponsors of such schools, however, concluding that this is an educational option that does not violate any constitutional right. The Socialist government, just before losing the elections in 2011, was not in time to enact the Comprehensive Law for Equal Treatment and Nondiscrimination, which would have led to elimination of contracts with schools that provided single-sex education.³¹

The 2006 education law (LOE), article 1, specifies to some extent the pedagogical principles which should be used by all schools, including (c) “transmitting and implementing values (liberty, citizenship, tolerance, equality),” (e) “flexibility to adapt education to diversity,” (f) “educational orientation and guidance of students” (g and h) “effort,” and (k) “education to prevent conflicts and resolve them peacefully.” On the other hand, the same section provides for (j) “autonomy to establish and adapt the organizational and curricular activities within the framework of the powers and responsibilities of the Nation, of the Autonomous Communities, of local government, and of schools.”³²

An important question has arisen, whether the protection of the distinctive character of an independent school is limited to its provision of religious and moral instruction, and thus whether other aspects of its curriculum and instruction are subject to government prescription. The Constitutional Court rejected this interpretation in 1985, referring to language in its 1981 decision pointing out that the worldview of a school can extend to the ways in which it carries out its various activities.³³ After all, to require that the religious and moral worldview promoted by the school remain on a theoretical level and not be applied to all aspects of the curriculum and of school life would be to condemn it to irrelevance.³⁴ A school’s distinctiveness may well extend to the climate that a school seeks to establish, relationships among adults and children, management practices, and orientation toward the surrounding community.³⁵

In fact, religious practices are an essential part of creating the coherent educational experience that has been chosen by parents when they opt for a faith-based school. If the school is forbidden to make and maintain this connection, it has been argued, the rights of those who prefer such an experience for their children is frustrated. Religious activities are inseparable from the character of certain valued educational alternatives.³⁶ In choosing a school with a religious *ideario*, it is argued, parents are accepting the religious instruction and related practices on behalf of their children, and these are no longer a voluntary matter as they are in a public school.³⁷

Some legal scholars believe that the conditions which have been attached to the receipt of the government subsidies, through the mechanism of the *concierto*, have intruded upon the distinctive character of independent schools to an unconstitutional extent.³⁸ There are a number of schools which have chosen not to seek subsidies in order to retain more control over staffing and curriculum decisions. Today, however, despite the difficulties just discussed, the system of school contracts is quite established and the mistrust toward this system has decreased, so that more private schools have accepted contracts with the authorities. The political character of the governments of the autonomous regions, however, has a significant effect on decisions to allow new contracts with private schools or to terminate existing ones. Thus for example Madrid, governed by the Partido Popular since 1995, had 40 percent of its pupils enrolled in schools under contract in 2008-9, almost twice as many as in Andalucía, where the Socialists have governed since 1978. In short, the freedom to create and to choose schools and the principle of subsidiarity are understood and implemented very differently according to the ideology of the regional government.

If public funding is provided to independent schools in furtherance of a constitutionally-protected right to free choice of schools on the part of parents, does that justify more government regulation of those schools than of non-subsidized independent schools? All public financing . . . should be subject to effective public control to ensure that it is applied to the appropriate ends, but it should not permit adding restrictions or limitations, whether direct or indirect, to educational freedom... Public economic assistance, whatever its nature, does not justify its being made an instrument to impose in any way educational models, structures, or options which are not justified in a general way by reasons which are distinct from the provision of resources which fund the costs of the instruction.³⁹

Decisions about admitting pupils

Decisions on admission of pupils in public schools and in subsidized private schools under contract are made by the school council (*consejo escolar* art. 127e, LOE), which includes participation by members of local government to ensure that the requirements of law have been complied with (arts. 56 y 57 LODE).

Subsidized independent schools must admit pupils on the same basis as public schools, without applying religious criteria, but schools have the right to demand that pupils and their parents show respect for the school's *ideario* (the LOGSE dropped the term "ideario," applying only to private schools, for "educational plan" (proyecto educativo), which should be developed by both private and public schools. LOE article 84.1 specifies that "educational authorities will regulate the admission of pupils to public and subsidized private schools in a manner that guarantees the right to education, equal access, and the freedom of choice of schools by parents or guardians." In cases of over-subscription of a school, criteria are spelled out to determine which applicants should be given priority, based upon such considerations as siblings already in the school, place of residence or of employment of the parents, financial need, and handicaps of any member of the family (art. 84.2). In no case may there be discrimination on the basis of place of birth, race, sex, religion, opinions, or any other personal or social condition or circumstance (art. 84.3).

The autonomous communities (regions) can, and do, establish additional criteria. In fact, the Community of Madrid, which is one of those with the best results on international evaluations like PISA, approved in 2012 a change in the norms for admission of pupils to schools receiving public funding,⁴⁰ facilitating the choice of a school without regard to place of residence and for preferences for siblings and for applicants whose parents are former pupils of the school.

In order to ensure the quality of education for all, social cohesion, and equal opportunity, education authorities are to guarantee the adequacy and equitable schooling of pupils with special need for instructional support. To this end, it is to determine the proportion of pupils with these characteristics who must be enrolled in each public and subsidized private school, and to guarantee the staff and financial resources needed to provide that support (art. 87.1 LOE sobre el equilibrio en la admisión de alumnos).

Efforts to establish residential attendance zones for subsidized independent schools have been struck down by the courts as inconsistent with the constitutionally-guaranteed freedom of school choice for parents.⁴¹

Independent schools which are not subsidized are free to establish admission criteria, though without illegal discrimination.

Under some circumstances, even independent schools which are not subsidized by government may be required to admit a pupil if they have space available and if there is no space available in another school at a reasonable distance from the pupil's home. Under such circumstances, the parents may be required to agree to comply with the

worldview and the educational approach (*al ideario y al proyecto educativo*) of the school.⁴²

A source of tension over the maintenance of the distinctive character of independent schools is whether they can make religion classes a regular part of the required curriculum. The laws are in conflict: while, on the one hand, they forbid schools to make religious education mandatory, on the other, they protect the right of schools to develop and implement a distinctive character, which is recognized as extending to the entire curriculum. The argument is made that requiring participation in a religion class (in a school which has been chosen voluntarily) is not a violation of rights of conscience, since it does not require any sort of act of faith or acceptance of particular beliefs.⁴³

Decisions about staff

Private schools have complete freedom concerning recruitment of teachers, limited only by the requirement that candidates hold the necessary qualifications for teaching a certain subject at the particular level for which they are appointed. Basically, the legal status of teachers in private schools is contractual. Personnel working in a subsidized private school are also covered by collective labour contracts.⁴⁴

The level of this remuneration is subject to collective bargaining between the unions and the organizations representing the sponsors [*la patronal*], even though everything then depends upon what the [national] Education Administration accepts, since it must approve the annual [salary] model in order to include it in the Budget Act [*Ley de Presupuestos*]: the State sets the minimum salary level and each Autonomous Community establishes what will be applied in its region, which may not be less than that set by the Government (art.49 LODE). In fact, then, the position of the Education Administration conditions the collective bargaining on working conditions in the schools under contract. The pay of teachers in schools under contract has been progressively approaching that in public schools, so that it now varies between 79 percent in Extremadura and 99% in Valencia, as determined by the Autonomous Communities.⁴⁵

Teachers in independent schools are required to possess the qualifications established for teachers in the public sector (LODE article 25), which includes success on competitive examinations. Some critics suggest that this represents a threat to the possibility of real educational freedom.⁴⁶

Teachers in public schools have a recognized “teaching freedom” (*libertad de cátedra*), though this does not extend to the right to promote any particular ideology through their instruction; they are obligated to maintain a neutral posture. Those in independent schools have an additional obligation, to show respect for the distinctive character or worldview (*proyecto educativo, ideario*) of the school which employs them. The *proyecto educativo* defined by the sponsors of the school is legally significant since it may form the basis for selecting particular teachers and for insisting that teachers not undermine the mission of the school; for example, a teacher mocking Catholic doctrine would be dismissible from a Catholic school, though he or she could not be dismissed for refusing to endorse such doctrine contrary to conscience. [But note that a school’s distinctive character must be consistent with Spain’s constitutional principles of “liberty, equality, justice, pluralism.”]

There are those who argue that the growing pluralism of beliefs and values in Spanish society should find its counterpart within each school, and that only a morally-neutral school can teach the lessons essential to democracy . . . indeed, that only in such a school is there real educational freedom. This, others counter, is to use the idea of educational freedom to undermine its reality, as expressed in a diversity of educational offerings. It is absurd, they point out, to contend that, in contemporary society, the control (*dominio*) of a religious organization over youth can be anything like as extensive as that of the State, or that a church could be as much of a threat to freedom as a government with monopoly of the power to tax and to punish.⁴⁷

The right of the sponsors of independent schools to require such respect, and to fire teachers who fail to comply with this obligation, has been upheld by the Constitutional Court several times. In 1981, the Court pointed out, in upholding an education law against an attack by the Socialists, that conflict was possible between the distinctive character of a school and the teaching freedom of a teacher, but concluded that

The existence of a worldview [*ideario*], accepted by the teacher upon freely joining the school . . . does not oblige him, obviously, to become an apologist for that [worldview] or to transform his teaching into indoctrination or propaganda . . . [but] the teacher’s freedom does not entitle him to direct open or surreptitious attacks against that worldview. . . . The concrete effect [*virtualidad*] of the worldview will no doubt be greater when it comes to the explicitly educative or formative aspects of the instruction, and less when it has to do with the simple transmission of knowledge . . .

In another decision, in 1985, the Court reiterated that “the existence of the school’s distinctive character obligates the teacher to an attitude of respect and of not attacking that character.”⁴⁸ This second decision grew out of a case brought by a teacher who had been fired by a private school because, according to the school authorities, he had not conformed his professional activities to the worldview of the school. The teacher complained that he had been discriminated against on ideological grounds, but he lost in the lower courts. The Constitutional Court ordered the teacher reinstated on the grounds that his failure to conform to fundamental aspects of the worldview had not been demonstrated clearly in his external behaviour (*exteriorizado*), but upheld the principle that, with appropriate documentation, this would be an appropriate cause for disciplinary action.⁴⁹

Martínez López-Muñiz points out that “[a]n educational program which is definite and stable will permit a larger degree of identification than will a program in which there can be no single established and permanent orientation, as is the case in public schools, which “must be open to all tendencies of thought and all standards of conduct which are allowed by law.”⁵⁰

The freedom of non-public schools to express a distinctive ethos and character is thus the guarantor of the freedom of those teachers who wish to teach in a way consistent with that ethos and character; public school teachers are not free to do so. As a result, “the internal pluralism of public schools is not a model which guarantees in itself the right to education in its full sense, nor the freedom of those who teach; in this way they are denied the possibility of adhering voluntarily to a specific educational project.” It is therefore possible to speak of “the *collective* freedom of teaching or, what is the same thing, the right to direct the school which belongs to the sponsor of the school” and which supports the freedom of teachers to the extent that they work in a school which corresponds to their own convictions about education.⁵¹

Subsidized independent schools are required to establish a structure for the participation of teachers, parents and, as appropriate, of pupils. Since 2006, when the LOE was enacted, this *consejo escolar* must also include a representative of the municipality within which the school is located. The *consejo escolar* has a right to be consulted about the criteria for selection of new staff, and involved in the process, which creates ample possibilities for conflict with the school’s sponsor. The latter, exercising its authority to maintain the school’s distinctive worldview and character, may well want to give considerable weight to an applicant’s own convictions.⁵² In the case of disagreements between the council and the school’s sponsor, an arbitration process gives the third vote to the public education authorities, which again could result in an unconstitutional limitation of the freedom to base the school upon a distinct *ideario*. In short, the requirement to consult with the council with respect to

staff and program could well compromise the conditions necessary for the exercise of educational freedom on the part of those parents and teachers who want a school that is really distinctive. For this reason, it is significant that the Constitutional Court, in a 1987 decision, recognized that the role of a *consejo escolar* in an independent school, even one subsidized with public funds, could not be identical with that in a public school.⁵³

Salaries for teachers in subsidised schools are met from the government's general budget. The Administration of the Autonomous Communities pays these salaries directly to teachers on behalf of the school proprietor as their employer.⁵⁴

Accountability for school quality

Inspection of both public and independent schools is a responsibility of public education authorities, and includes ensuring compliance with the laws, guaranteeing the rights and enforcing the duties of those who take part in the educational process, improving the quality and equity of the educational system and of instruction.⁵⁵ Evaluation of the educational system, is regulated by Title IV of the LOE. It is carried out by the Instituto de Evaluación and is concerned with the processes of learning and the results for pupils, the activities of teachers, the educational procedures, the role of school leadership, the functioning of schools, government inspection, and the educational administrations themselves (art. 141). Among other goals, the evaluation of the educational system seeks to improve quality and equity, shape educational policies, and increase transparency and efficiency.

The State's Higher Inspection Service ensures that plans, curricula and pedagogical guidelines, as well as teaching materials, are suitably adapted to the core curriculum and that such curriculum is taught in accordance with State regulations. It verifies that the areas of study conform to State legislation for the intents and purposes of issuing academic and vocational diplomas and certificates that are valid nation-wide. It ensures basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and duties in educational matters, of their linguistic rights and the right to be taught in the official State language.⁵⁶ However, since responsibility for education has been transferred from the national government to the regions (*comunidades autónomas*), there have been serious problems with implementation of Castilian Spanish as language of instruction. In Catalonia and the Basque Country (transfer of responsibility in 1981) there has come to be what is referred to as a "linguistic inversion," in which elementary instruction is no longer provided through Spanish but through Catalan or Basque, and it can be virtually impossible to find a public or subsidized private school where the students can study the curriculum

entirely in Spanish, even though many are from homes where Spanish and not Catalan or Basque is spoken. The school inspectorate is used to check whether instruction is being provided through the regional language and to penalize schools that instruct in Spanish. The same situation has developed to a considerable extent in Galicia, the Balearic Islands, and Valencia.

This localism on the part of the ‘nationalistic’ governments of several regions has led to much polemic and appeals to the Constitutional Court. In December 2010, the Tribunal Supremo issued three rulings in response to appeals from parents of three pupils in Barcelona and Tarragona to whom the Catalan government (the Generalitat) had denied the right to instruction in Spanish on an equal basis with Catalan. Regional authorities, the Court ruled, must adopt measures to make Spanish a language of instruction together with Catalan. However, in March 2012 the regional Tribunal Superior de Justicia de Cataluña (TSJC) gave its approval to the present model of immersion in Catalan, while ordering that authorities ensure that individualized instruction through Spanish be provided to pupils whose parents made a formal request. It does not appear that there will be a solution any time soon between the regional authorities and families for whom Spanish is the home language and wish their children to be taught through Spanish.

Publicly-funded independent schools must comply with government requirements as to materials and programs, minimum and maximum class sizes, the levels to reach for graduates, and the means of evaluation of graduates.

Inspection is done by the Administration of the Autonomous Communities, through their Technical Inspectorates for Education. The Corps of Inspectors have a dual function: to oversee the activities in schools, to which they have free access, and to examine and assess academic, pedagogical, and administrative documentation (arts. 152 y 153 LOE).

There has been considerable controversy over whether these requirements trespass upon the right of those operating such schools “to define their distinctive character and to ensure effectively that this is carried out as necessary in the educational process.”⁵⁷

The issue of the autonomy of independent schools was brought before Spain’s Constitutional Court, which ruled that the government could set standards but should do so with careful respect to the constitutional guarantee of educational freedom. While the schools were required to “conform to the minimums set by the public authorities with respect to the content of the various subjects, the number of hours of

instruction, etc.,” they were free to do so in a way that gave expression to the educational concepts on the basis of which the school had been established.⁵⁸

Pupils in primary education are promoted from one cycle to the next providing they have reached basic expectations for performance at each cycle; classroom teachers are responsible for this assessment, which should be global and continuous. No academic certification is granted at the end of this level.

In lower secondary education, assessment must be continuous and differentiated according to the various subjects in the curriculum (art. 28.1 LOE). All the pupil’s teachers have to decide on the promotion in a collegial way. Pupils finishing ESO are awarded the *Graduado en Educación Secundaria Obligatoria* certificate, that qualifies them for access to Bachillerato (Baccalaureate) and intermediate level Specific Vocational Training. At the end of the stage all pupils receive a certificate stating the years of attendance and the grades earned in the various subject areas.

The essential characteristics of pupil assessment in upper secondary education are applicable nation-wide, although each Autonomous Community establishes its own assessment criteria as part of its curriculum criteria. The examinations are single-subject and grades are given. There was a serious debate between the Partido Popular (LOCE, 2002) and the Partido Socialista (LOGSE, 1990 Y LOE, 2006) regarding the level of requirements and evaluation of pupils, especially in secondary education to obtain the Bachiller diploma and thus to have access to universities. The Partido Popular sought to raise the level of expectations and to establish new national exams. With the repeal of the LOCE when the Socialists took power, this effort was abandoned. The repeated failures of Spain in the PISA reports, most recently in 2011, in comparison with most European countries and with OECD members, reopened repeatedly the discussion about the weaknesses of the Spanish educational system.

Teaching of values

LODE required that schools (whether subsidized or not) include among their goals (a) the full development of the personality of the students, (b) their shaping [*formación*] in respect for the fundamental rights and freedoms and in the exercise of tolerance and freedom within the democratic principles of common life,⁵⁹ and (g) their shaping for peace, cooperation, and solidarity among peoples (art. 2).

The LOE (2006) defines, in article 1c, the following educational principle: “The transmission and implementation of values which favor personal freedom, responsibility, democratic citizenship, solidarity, tolerance, equality, respect, and

justice, and which help to overcome every type of discrimination.” Among the goals of education, we can single out the following in this regard: “Training for peace, respect for human rights, life in common, social cohesion, cooperation and solidarity among peoples as well as the acquisition of values that promote respect for living beings and the environment, in particular the value of wooded areas and sustainable development” (art. 2 e).

Elementary schools must seek to ensure that pupils “know and appreciate the values and norms of common life, learn to work accordingly, prepare for the active exercise of citizenship and respect human rights, together with the pluralism characteristic of a democratic society.”⁶⁰ Education in values should be infused into all areas of the curriculum.

Among the objectives of Compulsory Secondary Education is the development of capacities allowing the pupils to meet their duties responsibly, to know and exercise their rights while respecting those of others, practice tolerance, cooperation, and solidarity among persons and groups, take part in dialogue about human rights as common values of a pluralistic society, and prepare themselves to be active citizens of a democracy. Also to value and respect the differences between the sexes and their equal rights and opportunities. To reject stereotypes that lead to discrimination between men and women. In addition, to know, value, and respect the basic aspects of their own culture and history and those of others, as well as the artistic and cultural patrimony.

Under the terms of a 1979 treaty with the Vatican, the government agreed that religious instruction would be included as part of the curriculum at all levels of schooling below the universities. The agreement specifies that other religious activities may also be organized within the school day, but that no teacher may be obligated to teach religion classes.⁶¹ LOE provides that religious education, while it must be offered, is a voluntary subject for all students.⁶²

During the period 2006-2012, under the Socialist government, there was a new debate about moral education in schools. The government included in the official curriculum for elementary and secondary schools a new required subject called “Education for Citizenship and Human Rights” (*Educación para la Ciudadanía y los Derechos Humanos*).⁶³ The content of this subject aroused alarm, especially in Catholic schools, on that part of those who considered that the State was interjecting itself into the moral education of pupils, which is the responsibility of parents according to article 27 of the Constitution and a fundamental aspect of educational freedom. A fierce debate ensued about the presumed intention of the new subject to indoctrinate pupils, thus imposing upon the Spanish people a whole vision of the world in such aspects as the nature of humanity, the family, secularity, or life itself. This material began to be taught during the school year 2007-2008 in several regions, and in Andalucía some parents brought plaint before the Tribunal Superior de

Justicia, charging that the subject “wounded their rights of free choice, education, and religion.”

In addition, nationwide a movement developed to protest as a matter of conscience against this subject, with 55,000 families appealing.⁶⁴ Demonstrations took place against what some considered an invasion of their freedom on the part of the public authorities. The Tribunal Supremo ruled, in January 2009, that the examples presented did not support an objection of conscience, while leaving the door open for parents to object to the manuals implementing the subject or to the form which it took in a particular school. It specified also that neither the educational authorities nor teachers might impose upon pupils moral or ethical criteria that are the subject of discussion in society. The content of the subject must be focused on education in constitutional principles and values.

There is also the serious problem that this involves a subject which is graded and in which the “correct” answers could be in conflict with the principles and beliefs of pupils and their families. With the change of government at the end of 2011, the new Minister of Education announced that the subject “Education for Citizenship and Human Rights” would be replaced by another called “Civic and Constitutional Education” which—he affirmed—would be “free from controversial questions and ideological indoctrination.”⁶⁵ This is yet another example of the continued lurching (what in the United States has been called “policy churn”) arising from the alternation of political parties in power and the lack of a shared understanding about the goals and appropriate limitations of the interventions of government in education.⁶⁶

Endnotes

¹ Martínez Lopez-Muñiz, 21.

² 1985 decision, discussed below, cited in Riu i Rovira, 180.

³³ Martínez Lopez-Muñiz, 26.

⁴ <http://www.eurydice.com/>

⁵ Marina Solé, “Education et principe de la subsidiarité en Espagne”, in *Subsidiarity and Education: Aspects of Comparative Educational Law*, edited by Jan De Groof, Leuven (Belgium): Acco, 1994, p. 271-278. José Ortega-Esteban, “Les principes de subsidiarité et diversité régionale en matière d’enseignement”, in *Subsidiarity and Education: Aspects of Comparative Educational Law*, edited by Jan De Groof, Leuven (Belgium): Acco, 1994, p. 279-280.

⁶ Solé, 274-75; a list of laws establishing the scope of authority of each of the autonomous communities may be found in Riu i Rovira, 203.

⁷ <http://www.eurydice.com/>

⁸ Datos referidos a las enseñanzas no universitarias de régimen general (educación oficial reglada), exceto la educación infantil (0 – 6 años): http://www.educacion.es/mecd/jsp/plantilla.jsp?id=310&area=estadisticas&contenido=/estadisticas/educativas/een_u/result_det/2008/resultados.html

⁹ Dardat, 49.

¹⁰ Foro Calidad y Libertad de la Enseñanza. *Libertad y financiación de la enseñanza: condiciones y exigencias*. Ed. Federación Española de Religiosos de Enseñanza (FERE). Madrid, 2005.

¹¹ Jach, 349.

¹² <http://www.educacion.gob.es/horizontales/estadisticas/no-universitaria/profesorado/estadistica/2010-2011-avance.html>

¹³ <http://www.eurydice.com/>

¹⁴ Text in Riu i Rovira, 28.

¹⁵ (LODE 23).

¹⁶ Díaz Lema, 78.

¹⁷ De los Mozos, 458.

¹⁸ The 1970 Law also established compulsory education until 14. La *Ley Orgánica del Ordenación General del Sistema Educativo* (LOGSE), 1990 afirma (art. 5): “1. La educación primaria y la educación secundaria obligatoria constituyen la enseñanza básica. La enseñanza básica comprenderá diez años de escolaridad, iniciándose a los seis años de edad extendiéndose hasta los dieciséis. 2. La enseñanza básica sera obligatoria y gratuita.” La LOE (2006) mantiene esta misma estructura.

¹⁹ private correspondence, Ministerio de Educación y Ciencia, 17.10.88

²⁰ Aisa Sola, 237; de los Mozos, 314-23.

²¹ Riu i Rovira, 224.

²² Estudio del sindicato UGT en 2005.
http://www.feteugt.es/CM_Fete/uploads/2006/Boletin01-Privada.pdf

²³ Email from Martínez Lopez-Muñiz, March 2002.

²⁴ Trayter (1997), 167.

²⁵ Trayter (1998), 142-143.

²⁶ De los Mozos, 263.

²⁷ Dardat, 167-68; 51.

²⁸ Galán, 44-45.

²⁹ Cerdán, 1996, citado por Galán (2004: 45).

³⁰ Jach, 347.

³¹ Danielle, L. (2011, May 28). El Gobierno cierra el grifo a la educación diferenciada. *ABC*. Retrieved August 23, 2011, from <http://www.abc.es/20110528/sociedad/abcp-gobierno-cierra-grifo-educacion-20110528.html>

³² General Law.

³³ Riu i Rovira, 172; text 107.

³⁴ De los Mozos, 176, 264.

³⁵ Riu i Rovira, 197.

³⁶ De los Mozos, 577.

³⁷ Riu i Rovira, 229.

³⁸ See de los Mozos, 645.

³⁹ Martínez Lopez-Muñiz, 44-45.

⁴⁰BOLETÍN OFICIAL DE LA COMUNIDAD DE MADRID. B.O.C.M. Núm. 63.
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⁴¹ Riu i Rovira, 191.

⁴² De los Mozos, 163.

⁴³ De los Mozos, 568-70.

⁴⁴ Trayter, 139-173.

⁴⁵ FETE-UGT. Retribuciones de los centros sostenidos con fondos públicos. Estudio comparativo Año 2008.
[http://fete.ugt.org/Estatal/Varios/PRIComparativa_retribuciones.pdf]

⁴⁶ Martínez Lopez-Muñiz, 28-29.

⁴⁷ De los Mozos, 255-58.

⁴⁸ Text and commentary in Riu i Rovira, 135;

⁴⁹ Riu i Rovira, 168-69; de los Mozos, 305..

⁵⁰ Quoted by de los Mozos, 248.

⁵¹ Martínez Lopez-Muñiz, 29.

⁵² De los Mozos, 583-88.

⁵³ Riu i Rovira, 181.

⁵⁴ <http://www.eurydice.org>

⁵⁵ LOE 148.3

⁵⁶ <http://www.eurydice.org>

⁵⁷ Riu i Rovira, 53.

⁵⁸ Ruling of the Tribunal Constitucional on February 13th 1981, reprinted by Riu i Rovira, 107.

⁵⁹ Text in Riu i Rovira, 109, 166; it is worth noting than at official translation of this provision tones down the implication the schools should shape the worldview of students: “knowledge of basic rights and liberties . . .” *General Law*, 21.

⁶⁰ *LOGSE (art. 13, e)*, italics added.

⁶¹ Text in Riu i Rovira, 86-95.

⁶² *LOE*, disposición adicional segunda, punto 1.

⁶³ REAL DECRETO 1513/2006, de 7 de diciembre,. por el que se establecen las enseñanzas mínimas de la Educación primaria y REAL DECRETO 1631/2006, de 29 de diciembre, por el que se establecen las enseñanzas mínimas correspondientes a la educación secundaria obligatoria

⁶⁴ Efe. (2012, Jan 31). Educación De la EpC a la ECC. *El mundo*. Retrieved March 2, 2012.

⁶⁵ Díaz, P. (2012, Jan 31). Educación sustituye Ciudadanía por una materia ‘exenta de cuestiones controvertidas’. *El mundo*. Retrieved March 2, 2012, from <http://www.elmundo.es/elmundo/2012/01/31/espana/1328013728.html>

⁶⁵ See Glenn.

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