25th IVR World Congress

LAW SCIENCE AND TECHNOLOGY

Frankfurt am Main

15–20 August 2011

Paper Series

No. 036 / 2012

Series B

Human Rights, Democracy; Internet / intellectual property, Globalization

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Connections between Education for Citizenship and Equality between Women and Men (Analysis of the Claims against this Subject before the Spanish Courts and their Rulings)

URN: urn:nbn:de:hebis:30:3-248943

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Connections between Education for Citizenship and Equality between Women and Men (Analysis of the Claims against this Subject before the Spanish Courts and their Rulings)[1]

Abstract: This paper seeks to analyse the debate on equality between women and men found in the claims against the subjects related to Education for Citizenship. These claims were resolved in the Spanish Supreme Court and High Courts of the Autonomous Communities. In this debate, there is a strong rejection of antidiscrimination law assumptions, namely that the different roles and social roles of women and men have a cultural and social base and it is unnatural, as evidenced by the concept of gender. But many appellants and judgments defend the difference between women and men as if it was informed and legitimated on human nature. Hence gender is considered an ideology, that is, a category of analysis by means of which the reality of true human nature can be concealed or distorted. But these arguments are opposed to recent legal reforms since they are questioning its normative value, by prioritizing certain moral principles against these laws. We are talking about the Organic Law for Effective Equality between Women and Men, the Law on Integrated Protection Measures against Gender Violence and the Law on Education. However their arguments are not fully justified.
Keywords: Education for citizenship, equality, gender

I. Legal Context of Education for Citizenship and its connection with the equality of women and men

The Organic Law 2 / 2006 on Education and its Development Regulations (Royal Decrees 1513-1506, 1531-1506 and 1467-1407) have introduced three specific subjects known together as Education for Citizenship. They are taught in primary and secondary school. But there has been strong opposition which has resulted in the proliferation of lawsuits brought by many parents, through which they have demanded the annulment of certain parts of the developing legislation of the subjects, and / or recognition of a hypothetical right to conscientious objection to them. If we take into account the period between 2008 and 2009, there have been no less 817 judgments on this subject. Of all these judgments, 350 have referred, more or less directly, to the contents of the Education for Citizenship related to so-called gender ideology. During 2010, about 155 judgments have been given, among which 17 referred expressly to gender ideology.

[1] This text communication has been realised within the framework of the research Project "Multiculturalidad, Género y Derecho" (National Plan of R+D+I), reference DER 2009-08297 (Subprogramme JURI).

These challenges question some of the elements that define today the principle of equality between women and men and could ultimately affect the effectiveness of the rules implementing that principle. The analysis of the judgments on Education for Citizenship is important for two reasons: the first, more general, is the connection between education and the development of a more democratic society, which is based on the respect for human rights and principles such as pluralism, freedom or equality. The second, more specific, is that the many legal actions and appeals brought against the subjects of Education for Citizenship argue against certain contents and skills that would be learned in them. These contents and skills are directed to learning that the functions traditionally attributed to men and women are not natural. According to these functions, women deal with procreation and care of children, and men are the breadwinners. By contrast, those subjects convey that this division of labor has placed women in a situation of dependence and subordination to men, with an imbalance between their expectations, choice and implementation, as enjoyed by men, and this situation is reversible because it is not a question of nature but responds to certain socio-cultural conditioning.

Giving a conventional character to these roles, which is an aspect that has led to social science to distinguish between sex (a biological term), and gender used to describe socio-cultural aspects), has generated a profound rejection between the litigating parents, because, as they have indicated, this point of view conflicts with their moral and religious beliefs. In any case, it is important to note that these distinctions refer to those words sex and gender, have been taken in important international and EU laws, for example, Directive in 2004, which incorporates the term "gender equality", as shown in paragraphs 7 and 16 of its introduction; or the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, its acronym in English), adopted by the UN in 1979 and ratified by Spain in 1983. Its Article 5 provides that States take all appropriate measures to

> "A) modify social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either sexes or on roles for men and women;
> b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, on the understanding that the interest of the children is the primordial consideration in all cases. "

The Spanish Law of Equality follows this Convention as well as the Nairobi Conference of 1985 or the Beijing Conference of 1995, which invite States to include gender perspective in

their programs and actions. This is a perspective which the European Commission suggests all EU member states should adopt. So the Spanish Law of Equality recognizes a new conception of equality and discrimination between men and women inspired by the distinction between natural and socio-cultural roles. It is a conception of equality that extends the borders of the socio-economic equality that guided the intervention of the Welfare states, which had expanded, in turn, the borders of formal equality or equality before the law, recognized in the first legal texts of modern democracies. The current sense of equality between women and men continues and widens the presuppositions of modern anti-discrimination law, which originated in the legal measures to end racial discrimination in the US after the riots in the sixties of last century. It also contributed to the development of numerous concepts such as *indirect discrimination*. In any case, the antidiscrimination law marks a qualitative change for the demands of economic redistribution that accompanied the claims of class, to focus on social demands for recognition, bearing in mind the influence of cultural elements in the coexistence of democracies.

The Spanish government has followed the international and European law, to which it is linked. And this requires reinterpretation of Articles 9.2 and 14 of the SC. It can be said that democratic countries have accepted that certain functions assigned to women because of gender have contributed to their subordination to men, and these functions cannot be justified by biology or the immovable natural order. Twentieth century social science has shown that they are mainly due to socio-cultural roles assigned to each gender. And these roles contradict the basic demands of justice and the very essence of modern democracies: the emancipation of individuals from those natural and social obstacles that prevent them from developing their autonomy. Nowadays, these obstacles are cultural as well.

On the other hand, it must also be remembered that Spanish law has expressly recognized the link between democracy and education. This is a connection highlighted by Plato, Kant, Constant and Mill. Specifically, Article 27. 2 of the SC states that "the objective of education shall be the full development of the human personality, in respect for the democratic principles of coexistence and the basic rights and liberties". And in paragraph 5 it says that the public authorities guaranties "the right of all to education, through a general educational program, with the effective participation of all the sectors affected and the creation of educational centers". The regulations implementing this article, now embodied in the Organic Law 2 / 2006 on Education and its Development Regulations, has introduced Education for Citizenship.

In any case, the new Education Act follows the educational policy being developed in other Western democratic countries. This policy is within: a) Recommendation (2002) 12 of the Committee of Ministers to member States of the Council Europe on education for democratic citizenship and adopted on October 16; b) Recommendation of the European Parliament and the Council of 18 December 2006 on key competences for lifelong learning, and c) Recommendation of the European Parliament and the Council of 23 April 2008 on the Establishment of the European Qualifications Framework for lifelong learning.

Concretely, Recommendation (2002) 12 Council of Europe considers that education for citizenship should be a priority objective of educational policy, given the high levels of corruption, racism, xenophobia, aggressive nationalism, intolerance against minorities, discrimination and social exclusion. And specifically, this recommendation also establishes a connection between Education for Citizenship and the guarantee of equality between women and men. It states "Education for democratic citizenship is a factor of social cohesion, mutual understanding, intercultural and interfaith dialogue, and solidarity, which helps to promote the principle of equality between men and women."

Following these assumptions, the Council of Europe declared 2005 "European Year of Citizenship through Education", with the intention of promoting, among Member States, a set of actions that encourage responsible citizenship. In this context, the Council of Europe defines education for citizenship as the "set of practices and activities designed to help all people, children, youth and adults to be better equipped to participate actively in democratic life, taking on and exercising their rights and responsibilities in society."

And as regards the European institutions, the recommendation of December 18, 2006 of the European Parliament and the Council states that education "contributes to maintaining and renewing the common cultural heritage of society, and to learn fundamental social and civic values such as citizenship, equality, tolerance and respect, and is particularly important at a time when all Member States address the question of how to address the growing social and cultural diversity."

On the other hand, this recommendation on lifelong learning, encourages the acquisition of skills defined "as a combination of knowledge, skills and attitudes appropriate to the context." Among these skills are the so-called "social and civic skills." However, the appellants have challenged that the subjects of Education for Citizenship can be directed to the acquisition of such skills: they consider it a manifestation of state indoctrination, when in fact it has been taken directly from this Recommendation, which includes a detailed and extensive description of those skills. And the Recommendation of the European Parliament

and the Council of 2008 set out that all subjects in general -which also includes the Education for Citizenship-, 'target not only the acquisition of knowledge but also skills and competences".

Furthermore, the so-called Lisbon strategy adopted by the EU has set Europe on the path to the knowledge economy, and this is a process where social inclusion and active responsible and democratic citizenship features prominently within the three objectives of the education systems and training, adopted by the European Council in March 2001. These objectives are quality, access and openness of European education to the world. In this context, the educational system is considered the most important tool to communicate and teach the principles of equity, inclusion and cohesion, because the central concern of European institutions is the elimination of socio-economic and political exclusion.

Thus, the European concept of an active and responsible citizenship, which leads to the broad concept of education for citizenship, has inspired the current Spanish legislation, which seeks to meet the demand for equity and the inclusion of women in the educational system. Women have traditionally been excluded and absent from the exercise of citizenship. This law supports the connection between equality of men and women, democracy and education. This is the triad of elements which has aroused strong opposition shown by these appeals against the Education for Citizenship. But this connection has been recognized by other Spanish laws. Concretely, in Title I of the Organic Law of 2004 on Integrated Protection Measures against Gender Violence, Among its measures are those to raise awareness, prevent and detect violence, extending such measures to all educational levels, ie, Primary, Secondary schools and universities, and urging education authorities to eliminate gender stereotypes and discriminatory school materials. It also entrusts the education inspectorate to ensure compliance with its measures. In addition, the Organic Law of Equality has also introduced a set of guidelines in different Articles (23-25), relating to the integration of equality between women and men in education, with a "special" attention in curricula and all stages of education, emphasizing the elimination and rejection of sexist conduct and discrimination, and stereotypes involving women and men, with special attention to textbooks and educational materials (art. 24. 2 b). Moreover, Article 15 lays down the mainstreaming of the principle of equal treatment between women and men in developing public policy, such as education, and Article 21 provides expressly that the autonomous administrations collaborate in guaranteeing the right to equality between women and men.

Finally, it should be remembered, in regard to the connection between education, democracy and equality of women and men, the Preamble to the Education Act includes,

among the aims of education, "training in respect of fundamental rights and freedoms, and effective equality of opportunities for women and men, the recognition of emotional and sexual diversity, and critical appraisal of inequalities, in order to overcome sexist conduct." It continues to assume the contents of the statement about the L. O. 1 / 2004. As it was passed before the LOIMH, the Education Act does not refer to it explicitly, but they are connected. This is the conclusion which the legislator brought about when it states that "equal treatment and opportunities between women and men -as can be read in Article 4 of the LOIMH- is a principle that informs the legal system and as such, it shall be established and observed in the interpretation and application of legal rules. "

II. Appeals against the Education for Citizenship in relation to equality between women and men

Despite this regulatory background, there has been a strong resistance to Education for citizenship, especially towards those contents that argue that the differences between men and women are not only due to nature. This challenge to Education for Citizenship is based on the denial that the set of rights and principles enshrined in the Constitution are considered a morality that all citizens must respect. And such a rejection is based on the following assumptions: a) the state cannot impose these principles because then it would be indoctrinating students; b) it cannot claim that legal rules constitute morality, because that would be to fall into positivism; c) if the values and rights that the legal rules establish are considered a minimum and beyond that there can be other moralities, then it is falling into relativism.

For all these reasons, the appellant parents seek the recognition of their right to conscientious objection to allow their children no to study the subjects of Education for Citizenship. We must remember that Spanish Constitution only recognizes conscientious objection in relation to the obligation of compulsory military service, as reflected in Article 30.2, but in several judgments, the Constitutional Court (CC) has connected conscientious objection to ideological freedom, enshrined in Article 16.1, although CC has not always followed its own doctrine on the matter.

In any case, the Constitutional Court has maintained the doctrine established by two cases in 1987, in which the connection between conscientious objection and freedom of thought and conscience was held not to be enough by itself to free the citizens from their legal duties. It requires a procedure regulated by the legislator. At the moment, there is no procedure in the field of Education for Citizenship. And Art. 10 of the Charter of

Fundamental Rights of the European Union has indicated that the right to conscientious objection must be in accordance with national laws governing its exercise, which requires enabling legislation to deploy its effects.

These assumptions explain the arguments of the lawsuits and appeals. To recapitulate, their arguments are that the State and / or regional governments are imposing an illegitimate indoctrination because: a) they impose a moral set of values, such as human rights, which are included in the Spanish Constitution and the international treaties signed by Spain; b) they impose positivism, because they consider that public morality is within a written text, that is, the Spanish Constitution; c) they impose relativism, since they support a plurality of moral standards that can exist in a democratic society; d) they impose individualism, since these subjects encourage students to develop a critical reasoning which allows them to choose as conscious individuals, independently of their families. Moreover (e) this legislation introduces the so-called "gender ideology", which, as deduced from the arguments made by parents, would be characterized by stating that there are no distinctions between men and women and that all emotional and sexual orientations have the same value.

It is noteworthy to point out how the introduction into the curricula of the abilities to choose, to consider alternatives and to submit them to ethical analysis, or the ability to recognize and accept differences, are considered especially serious interferences of the state in the morality of the parents (although all these abilities have been established by the European recommendations, referred to above). These parents also consider that the competencies that foster empathy and solidarity with those suffering from discrimination, for example, for their sexual orientation, and to encourage the commitment to reverse the injustices that are related to the functions assigned to each sex, are also a serious interference. It seems that they do not accept that social and cultural behaviors connected with biological sex can come be due to anything other than nature, For example, they exclude the influence of socialization, and that humans can choose a sexual orientation or behavior as a man or woman other than those determined by their biological sex. They consider that this view of cultural-sexual behavior is an ideology because it denies human nature and the family relationships based on it, and they note that it also lacks scientific support and public consensus.

As for the so-called gender ideology, there is a concept developed by Catholic theorists, for whom gender is a construction that is unscientific and that hides from reality, which for them is the natural. In any case, gender ideology is seen as a construction resulting from a branch of feminism (gender feminism), steeped in postmodern philosophy, and with Judith Butler as its most important representative. However, it is unclear if they use the term

"ideology" in the Marxist sense (which would be a paradox, of course, among those who have always rejected it). But this is not the most pressing issue, but rather what they understand by nature. It is not exactly the biological, which is subject to the laws of necessity that science reveals, but something that coincides with what the natural law understands to be the nature of human beings. The point is that this natural law is also considered as a necessary law, emanating from a universal legislator, a superior being. All nature, all the universe is determined in its form and function under this Law that humans cannot alter –they can only alter the laws that they themselves create-. Sex and its social role are considered to be determined in this way also. Science cannot discover such a normative order by its methods, but through other knowledge, such as philosophy or religion. This same concept of the natural order of the universe, which reflects the unchanging natural law explains a peculiarity of human rights, whose grounding is not individual freedom but the duties imposed by that order. In this way, rights exist to perform duties, not to contribute to freedom and individual self-realization.

At this point, it matters little that the influence of socio-cultural aspects (which are conventional and can be changed) in the creation of sex-related behaviors does have scientific support. In addition, endorsing the opponent lacks scientific objectivity that devalues the objectivity of his claims, and instead giving no importance to the scientific nature of their own claims, if an asymmetry which is contrary to the rules of dialectical discussion. Nevertheless, it may be useful to review the scientific studies that have helped to strengthen the hypothesis that socio-cultural factors influence in human identities, including their sexual identities. Thus, for a reputed international sociologist Manuel Castells, identity is a sense-making process around a cultural attribute, or a related set of cultural attributes, which are given priority over other sense sources. For the well-known anthropologist Clifford Geertz, the mind has a cultural nature and culture has a mental nature. According to Geertz, culture is, from a semiotic perspective, a web of significant plots in which the human being is embedded and that he himself has spun, hence the importance of words and discourses by means of which the others or we ourselves are introduced.

Moreover, as the psychologist Silvia Tubert has pointed out, the distinction between sex and gender is due not feminism, but to the behaviourist John Money, a specialist in child endocrinology and counselling sexologist, who in 1955 introduced the concepts of gender and gender identity to explain how individuals, like hermaphrodites, can build a sexual identity at odds with his or her body sex. For Money, gender role is the role that social biography, parent behavior and social environment play in relation to the sex assigned to the newborn.

In this regard, we should note that social psychologists say that the way others perceive us is a key element in shaping individual identities. And gender is articulated on notions such as *identity* and *culture*, although that does not mean that gender is a form of culture. But these notions have an emancipating potential useful in the field of ethics and philosophy as shown in the paradigm of justice, based on the recognition of others. This is a paradigm, which is defended by the philosophers Charles Taylor and Axel Honneth, supports the claims of communitarianism and multiculturalism and raises the recognition of others to the basic content of justice.

The distinction between sex and gender helped to visualize the influence of socio-cultural aspects in shaping identity and people's sexual roles, although this does not mean ignoring the influence of the biological and the natural. But, above all, it has enable us to detect and denounce the infamous, derogatory or dehumanizing manner in which many people have been (and still are) treated and perceived because of their sexual identity and role assigned (like women or homosexuals). Nor is it true that highlighting the socio-cultural elements associated with sex goes against the family and motherhood, but rather allows us to recognize other forms of family, apart from the familiar model assumed by the religion of those who criticize the notion of gender, a model they considered to be the only possible one because it is *natural*. And, ultimately, treating equally those other forms of family models is something that emanates from the very beginning of formal legal or formal equality enshrined in Article 14 SC, which had already forced, in turn, the elimination of the distinction that law had recognized between children born in wedlock and those born out of wedlock.

Moreover, when the appellants allege a lack of consensus on the distinction between sex and gender, they do not take into account that the international and EU legal instruments that introduce a gender perspective are based on a fairly widespread international consensus, evidenced, for example, by the number of countries that have signed these texts, drafted at the behest of the UN. Nor can we forget that national legal texts as LOIMH, the Education Act or the Domestic Violence Act were adopted in Parliament, that is, they were the result of a democratic procedure whose operation is based on parliamentary debate and the principle of the majority. Alleging, as they have done, that this is due to the pressure of certain lobbies requires, of course, better evidence. Nor do they take into account that article 9.2 of the SC requires the State to promote the conditions for freedom and equality of individuals and groups to which they belong to make equality real and effective, removing obstacles that prevent or hinder the full enjoyment and participation of all citizens in political, economic, cultural and social life.

Through the appeals argued before it, the SC has established case law on this issue. These sentences, even with dissenting votes, had the full backing of the majority. All of them are dated from 11 February 2009. In all of these decisions, the SC considers that there is no indoctrination in gender ideology, and it is not harmful, according to the LOIMH or the Council of Europe. The SC says also that the appellants do not explain what they mean by gender ideology or prove its negative effects. It also indicates that state regulations and regional governments are moving within the scope of the recommendations set by the EU. And finally, SC says that there is no right to conscientious objection to these subjects that can be deduced from Articles 16 and 27.3 of the SC or from other provisions of our law. However, some dissenting opinions justify the recognition of this right by judicial interpretation in the style of common law, although there are no specific rules permitting it - interpositio legislatoris. Moreover, the judges deny that State is guilty of indoctrination, because its activity is within the limits of paragraphs 2 and 5 of Article 27 of the SC, according to which State should guarantee the respect of democratic principles and fundamental rights and freedoms.

III. Conclusions

Although, as is commonly accepted, legal rules can only establish minimum requirements for human behavior, while the maximum are the competence of morality (which may or may not be connected to a religion), that does not mean that legal rules cannot establish moral values. In the case of democratic systems, values are essential for its very existence, such as freedom, equality, justice and pluralism (which is recognized in SC). To understand this, we must keep in mind that positivism and iusnaturalism have been left behind in Europe since the end of World War II, instead to adopt constitutionalism. It means legal systems may incorporate moral values, which are typical of modern democracies. Precisely because they establish a minimum, necessary to guarantee democratic coexistence, such minima must not be crossed. And today the eradication of gender discrimination is already part of the minimum. The prohibition of such discrimination should be framed by article 14 and the often forgotten 9.2 of SC, the CEDAW, the EU Directives and the case law of the CC on this issue as well as the ECHR and the ECJ.

The ultimate question to which the discussion points is whether morality is independent of all political bargaining, agreement or rapprochement of positions. Some moralities present themselves as entrenched positions, intending to be the very last word of every human action. However, it is questionable whether they should prevail at the expense of democratic values,

which rely on the principle of dialogue and mutual understanding. Certainly, we must conclude that democracy may be incompatible with some moralities, especially those emanating from certain religions. But this is not new, as the spokespersons for these religions have shown, stressing that inconsistency and even working so that democracy shall not be the political regime that frames the relationships of their believers.

If we seek to reverse legal rules and social customs that have supported discrimination against women, we should ask if these moral convictions also justifying and encouraging the subordination of women to men can stand apart from these changes.

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