

The Long Way Home: Recent Developments in the Spanish Case Law on Home Education

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Contrary to what is common in other Western legal cultures, Spanish education law does not contemplate home education or non-institutional teaching as an alternative to attendance to public or private schools. However, homeschooling is becoming a widespread—although still limited—phenomenon in Spain that is increasingly calling for the attention of educators, jurists, and policy makers. A recent judgment by the Spanish Constitutional Court has dealt a serious blow to the proponents of homeschooling by establishing that constitutional parental rights over the education of children cannot be construed to foster non-institutionalized or home-based forms of education without a previous statutory regulation. Even as the judgment has provided the arguments to successfully deal with homeschooling at court level, it has also started a public debate on whether it would be convenient to modify the current education system in order to legalize home education. The purpose of this article is to analyse the 2010 judgment by the Constitutional Court in the context of current legislation and past and present judicial experience and to advance some proposals on how situations of non-institutionalized education could be tackled in Spain in the future.

1. A Preliminary Approach to Home Education in Spain

Since its resurgence in the second half of the 20th century,¹ home education has become one of the most controversial²—as well as one of the

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¹ The 20th century witnessed the birth of contemporary homeschooling as part of a progressive movement that advocated a less structured educational system in which parents had greater autonomy. Inspired by American educator, Professor John Holt, this movement was very close to what is now known as ‘un-schooling’, and was based on the belief that children have a natural predisposition to learn that makes them particularly receptive when they are encouraged to pursue their own interests. However, homeschooling, which had initially been a phenomenon of the counter-cultural left, rapidly became in the United States a movement against compulsory school attendance based on religious beliefs. Numerous religious conservative families, mainly Protestant, watched with growing apprehension the introduction and implementation in American public schools of new progressive educational philosophies that departed from their interpretation of the Scriptures. Thus formulated, homeschooling acquired a new dimension, as it meant that the legal duty of mandatory school attendance collided with the free-exercise clause of the First Amendment and the preferential right of parents to choose the education of their children. See Catherine J Ross, ‘Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling’ (2008–2009) 18 *William & Mary Bill of Rights Journal* 994; Kimberly A Yuracko, ‘Education Off the Grid: Constitutional Constraints on Homeschooling’ (2008) 96 *California Law Review* 125; and MA Asensio Sánchez, ‘La objeción de conciencia al sistema escolar: la denominada educación en casa’ (2006) 6 *Laicidad y Libertades* 11.

² See for instance Haley J Conard, ‘The Constitutionality of Teacher Certification Requirements for Homeschooling Parents: Why the Original *Rachel L.* Decision was Right’ (2006) 2 *Drexel Law Review* 206;

fastest-growing—contemporary education phenomena, and different forms of non-institutional instruction are being embraced all over the world by families covering the whole social and ideological spectrum for an increasingly varied number of reasons.³

As plural as homeschooling as an education phenomenon is, so are the different responses that states have provided to the demands of parents who, based on their fundamental right to choose the education of their children, call for the implementation of increasingly flexible education systems that while fully guaranteeing the best interests of the child and his or her right to education, are likewise able to accommodate alternative educational methods that do not necessarily contemplate school attendance as the only or even the best option: whereas in North America homeschooling is legal both in the United States⁴ and Canada,⁵ the picture is significantly less uniform in Europe, as different educational sensitivities have shaped quite unique national legal frameworks.⁶ There are several countries where home education enjoys constitutional coverage—Ireland, Denmark, and Finland⁷—and others such as Germany where non-institutional instruction is prohibited and punished⁸; some countries, including the United Kingdom, Austria, Belgium, France, Italy, and Portugal, have opted for a statutory regulation of home education, whereas in several others—Bulgaria, Croatia, Greece, the Netherlands, or Romania—the law remains silent on the subject. Finally, there are other European countries where recent modifications to education statutes have significantly changed their approach towards out-of-school teaching—in Sweden, a country which had been

T Brandon Wadell, 'Bringing it All Back Home. Establishing a Coherent Constitutional Framework for the Regulation of Homeschooling' (2010) 63 *Vanderbilt Law Review* 541; R Reich, 'Why Homeschooling Should Be Regulated' <<http://www.stanford.edu/group/reichresearch/cgi-bin/site/wp-content/uploads/2011/01/Reich-WhyHomeSchoolsShouldBeRegulated.pdf>> accessed 5 January 2013, 1–17; LA Greenfield, 'Religious Home-Schools: That's Not a Monkey on Your Back, it's a Compelling State Interest' (2007) 9 *Rutgers Journal of Law and Religion* 1; K Bartholomew, 'Avoiding Implicit Acceptance of Bigotry: An Argument for Standardized Texting of Home-schooled Children' (2006–2007) 92 *Cornell Law Review* 1177; and JG McMullen, 'Behind Closed Doors: Should States Regulate Homeschooling?' (2002–2003) 54 *South Carolina Law Review* 75.

³ D Monk, 'Regulating Home Education: Negotiating Standards, Anomalies And Rights' (2009) 21 *Child and Family Law Quarterly* 155; R Kunzman, 'Homeschooling and Religious Fundamentalism' (2010) 3 *International Electronic Journal of Elementary Education* 17 and R Morton, 'Home Education: Constructions Of Choice' (2010) 3 *International Electronic Journal of Elementary Education* 46; and JM Martí Sánchez, 'Objeciones de Conciencia y escuela' (2007) 15 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 22.

⁴ For a thorough analysis of the legal standing of homeschooling in the United States, see the recent work by IM Briones Martínez, *La libertad religiosa en los Estados Unidos de América. Un estudio a través del sistema educativo y de la educación en familia* (Atelier 2012) 111ff.

⁵ See Patrick Basham, Claudia R Hepburn, and John Merrifield, 'Home Schooling: From the Extreme to the Mainstream' in *Studies in Education Policy* (2nd edn, The Fraser Institute 2007) 6ff.

⁶ See Ana Maria Redondo, *Defensa de la Constitución y enseñanza básica obligatoria. Integración educativa intercultural y homeschooling* (Tirant Lo Blanch 2003) 138–40; Amanda Petrie, 'Home Education in Europe and the Implementation of Changes to the Law' (2001) 47 *International Review of Education* 477; and Colin Coons, 'Education on the Home Front: Home Education and the Need for Unified European Policy' (2010) 20 *Independent International & Comparative Law Review* 145. On France and the United Kingdom, see Irene Maria Briones Martínez, '¿La escuela en casa o la formación de la conciencia en casa?' (2003) 3 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 1. Also Daniel Monk, 'Problematising Home Education: Challenging 'Parental Rights' And 'Socialisation'' (2004) 24 *Legal Studies* 572.

⁷ See art 76 of the Constitutional Act of Denmark; art 42 of the Constitution of Ireland; and art 16 of the Constitution of Finland.

⁸ Franz Reimer, 'School Attendance as a Civic Duty v. Home Education as a Human Right' (2010) 3 *International Electronic Journal of Elementary Education* 6; and Aaron T Martin, 'Homeschooling in Germany and the United States' (2010) 27 *Arizona Journal of International & Comparative Law* 228.

relatively open to homeschooling, new legislation has *de facto* banned non-institutional education,⁹ whereas young eastern European democracies like the Czech Republic, Hungary, Poland, Slovenia, and Russia have rapidly legalized different forms of out-of-school instruction.¹⁰

Although Spain is among the countries where the choice of educating children outside state-approved schools is neither constitutionally nor statutorily envisaged, in the last few years homeschooling has gone from being a virtually non-existing practice to becoming the education choice of over 2000 families, and one that increasingly demands the attention of educators, sociologists, policy makers, jurists, and the media.¹¹ The reasons for the growing demand of parents—wary of the increasing tendency of the state to monopolize all things educational—to have a larger say in the formal upbringing of children,¹² may be traced back to the generalized perception of the failure of the Spanish education system,¹³ a failure that is arguably rooted as deeply as the political context in which statutory legislation on education has been passed since the democratic transition and the Constitution of 1978.¹⁴

⁹ The 2010 Swedish Education Act [Education Act—for knowledge, choice and security (Govt. Bill 2009/10:165)] has limited home education to situations where ‘special circumstances’ concur and no longer contemplates religious or philosophical convictions as grounds for homeschooling. The Swedish example seems to have become a model for other neighbouring jurisdictions <<http://www.hslsda.org/hs/international/Norway/201206110.asp>> and <<http://www.hslsda.org/hs/international/Finland/201207170.asp>> accessed 25 December 2012.

¹⁰ For more information on the current legal situation of home education in eastern European countries, see Yvona Kostecká, ‘Home Education in the Post-Communist Countries: Case Study of the Czech Republic’ (2010) 3 International Electronic Journal of Elementary Education 29.

¹¹ In Spain there are two important organizations of homeschoolers, *Asociación de Libre Educación* <www.educacionlibre.org> and *Asociación OLEA* <www.asociacionolea.org>. There are also several web pages dedicated to free-education and homeschooling (<<http://www.libertadeducativa.org>> and <<http://www.homeschoolingspain.com>>) and a very active blog, *La Opción de Educar en Casa* <<http://madalen.wordpress.com>>. In the last two years, both national and international conferences on homeschooling have been organized by the Universities of Valencia and Navarra (see <<http://www.ulia.org/fichv/homeschooling/>> and <<http://www.unav.es/congreso/homeschooling/programa/>>), and a third one hosted by the Universidad Complutense of Madrid took place on November 2012 (<<http://www.ulia.org/ficv/homeschooling/tercercongreso.html>>). All URLs were accessed on 28 December 2012. There is also a growing academic interest in homeschooling. Some of the most recent articles on the subject can be found in José M Martí Sánchez, ‘El Homeschooling en el derecho español’ (2011) 25 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 1; Borja Barragán Calvo, ‘Neutralidad liberal y libertad religiosa. Consecuencias de la STC 133/2010 para la práctica del home schooling’ (2011) 59 *Estudios de Deusto* 11; and Víctor J Vázquez Alonso, ‘Home schooling y Constitución. Consideraciones sobre un puente jurisdiccional constitucional’ (2011) 59 *Estudios de Deusto* 259 (1); Teófilo González Vila, ‘Educación obligatoria y escolarización voluntaria’ (2011) *Análisis Digital* <www.analisisdigital.org> accessed 5 January 2013; and M José Valero Estarellas, ‘Homeschooling en España. Una reflexión acerca del artículo 27.3 de la Constitución y del derecho de los padres a elegir la educación de sus hijos’ (2012) 28 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 1.

¹² Rafael Navarro-Valls and Javier Martínez-Torrón, *Conflictos entre conciencia y ley. Las objeciones de conciencia* (2nd edn, IUSTEL 2012) 258–59.

¹³ The high rates of dropouts, which according to recent surveys already amount to 30% of the students under 16 years of age, the marked ideological bias of some of the subjects included in school curricula, the ever growing number of kids being bullied in school, the difficulties met by children with special needs to find within the institutional education system a proper response to their learning demands or a growing immigrant population are only some of the reasons that account for the rising interest of parents in home education. Briones Martínez (n 6) 2. For more data on the deficiencies of the Spanish education system, see the 2009 PISA (Programme for International Student Assessment) report by the Organisation for Economic Co-operation and Development (OECD) <http://www.oecd.org/document/61/0,3746,en_32252351_32235731_46567613_1_1_1_1,00.html> and the more recent 2012 Key Data on Education in Europe released by EUROSTAT <http://eacea.ec.europa.eu/education/eurydice/documents/key_data_series/134EN.pdf> both URLs were accessed on 28 December 2012.

¹⁴ If there is one word or concept that is crucial for understanding the political transition of Spain from dictatorship to democracy in the late 1970s to early 1980s it is that of ‘consensus’ (*consenso*). In the attempt to overcome two centuries of an open political antagonism between liberals and conservatives that had cost the country a devastating civil war and a long dictatorship under the rule of General Franco, the drafters of the

As it has also been the case in other European states, during the last few decades education has been used—or rather misused—by Spanish governing political parties as an ideological battlefield, and the ensuing seemingly endless succession of education acts and reforms has done little towards consolidating a quality education system.¹⁵ This legal profusion, along with a notable lack of sufficient funding to implement education policies, has caused what many families believe to be a gradual degradation of educational standards that is showcased by poor academic achievement and a generally unmotivated body of students and teachers. In the current context of apparent decline of the traditional school system,¹⁶ home education is seen by some parents as a valid and desirable alternative to traditional schooling that has proved to be successful—if not devoid of controversy—in other Western democracies.

On 2 December 2010, overruling what had so far been the preponderant tendency in the few homeschooling cases that have reached the Spanish courtrooms, the Constitutional Court argued that parental rights over the education of children cannot be construed to foster non-institutionalized or home-based forms of education without a previous statutory regulation.¹⁷ Surprisingly, while this judgment has had the effect of creating a new public awareness about homeschooling, thus opening a multidisciplinary debate over the convenience of reforming the current Spanish education system in order to

Constitution assumed the challenge to produce a text that would satisfy the aspirations of the majority of the Spanish political spectrum. It is common ground that one of the clearest examples of the spirit of consensus under which the Spanish constitution was drafted and approved is the regulation of the fundamental right to education, enshrined in art 27. Indeed, the drafting process of art 27 encountered the added difficulty of having to voice the preferences of very different understandings of educational rights. The subsequent interpretation and statutory enactment of art 27 has proven that a constitutional formula ample enough to abstractly satisfy diverging educational philosophies does not suffice to ground a solid education system, when not accompanied by a political compromise not to turn it into the perfect ideological arena. See José María Martínez de Pisón, *El derecho a la educación y a la enseñanza* (Dykinson 2004) 125; A Fernández-Miranda y Campoamor, *De la libertad de enseñanza al derecho de educación. Los derechos educativos en la Constitución Española* (Centro de Estudios Ramón Areces 1998) 18; and AJ Montoro Gómez, 'El derecho a la educación en la democracia española (1978-2004)' in MA Sancho Gargallo and M de Esteban Villar (eds), *Educación y democracia. II encuentro sobre educación en El Escorial (UCM)* (Comunidad Autónoma de Madrid. Servicio de Documentación y Publicación 2004) 30. Also Javier Martínez-Torrón, 'Religious Freedom and Democratic Change in Spain' (2006) 3 Brigham Young University Law Review 777.

¹⁵ Only at state level, there have been five statutes on education: *Ley Orgánica 5/1980, de 19 de junio reguladora del Estatuto de Centros Escolares*; *Ley Orgánica 8/1985, de 3 de julio reguladora del Derecho a la Educación*; *Ley Orgánica 1/1990, de 3 de Octubre, de Ordenación General del Sistema Educativo*; *Ley Orgánica 10/2002, de 23 de diciembre, de Calidad de la Educación*; and *Ley Orgánica 2/2006, de 3 de mayo, de Educación (LOE)*. The new centre-right Spanish government is currently working on yet another education act. The draft version of the *Ley Orgánica de Mejora de la Calidad Educativa (LOMCE)* has not included any reference to home education. For more information on this draft, see <<http://www.mecd.gob.es/portada-mecd/>> accessed 30 December 2012.

¹⁶ Ana Alemán Monterreal, 'Una crítica al sistema educativo español: de la enseñanza secundaria obligatoria al primer curso de la licenciatura de derecho' in Pedro Mena Enciso, Fatima Pérez Ferrer, Ramón Herrera de las Heras and Pedro Martínez Ruano (eds), *Derecho y educación* (Dykinson 2010) 56; and Asensio Sánchez (n 1) 13.

¹⁷ *Sentencia del Tribunal Constitucional 133/2010, de 2 de diciembre* [RTC 2010/133]. The reasoning of the Court in this judgment surpasses the mere factual scope of home education, as it takes sides with what has been to date the tendency of the European Court of Human Rights (ECtHR) to interpret in a very restrictive sense the scope of the right of parents to choose the moral and religious education of their offspring. See Carolyn Evans, *Freedom of Religion under the European Convention of Human Rights* (OUP 2001) 88–92; Javier Martínez-Torrón, 'La objeción de conciencia a la enseñanza religiosa y moral en la reciente jurisprudencia de Estrasburgo' in María Domingo (ed), *Educación y religión. Una perspectiva de derecho comparado* (Comares 2008) 123; and Lourdes Ruano Espina, 'El derecho a elegir, en el ámbito escolar, la educación religiosa y moral que esté de acuerdo con las propias convicciones, en el marco de la LOLR' (2009) 19 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 3.

legally permit forms of non-institutionalized instruction,¹⁸ it has simultaneously provided courts with sufficient arguments to decide cases concerning home education in favour of the mandatory schooling of the children.

The purpose of this article is both to analyse the 2010 judgment by the Constitutional Court on homeschooling—in the context of international human rights law and of national legislation and judicial experience—and to advance some proposals on how situations of non-institutional education could be tackled in the future at statutory or court levels. Section 2 proposes a first inquiry into the imbrications of out-of-school formal education and parental educational rights in European human rights law, whereas Sections 3 and 4, respectively, present the reader with an analysis of the current legal situation of home education in Spain and of how homeschooling cases have been resolved by Spanish courts. Finally, Section 5 looks into the possible future developments of home-based forms of education in Spain.

2. *The Right of Parents to Choose the Education of their Children: the European Human Rights Law Perspective*

The universal unanimity over the crucial importance of the right to education and over some aspects of its basic content¹⁹—including the important role of parents in the instruction of children—is amply acknowledged in international human rights law: it is recorded in Article 26 of the 10 December 1948 Universal Declaration of Human Rights (UDHR); in Articles 13 and 14 of the 1966 International Covenant on Economical, Social and Cultural Rights; in Article 18 of the also 1966 International Covenant on Civil and Political Rights; in Article 2 of the First Protocol (P1) to the 4 November 1950 European Convention on Human Rights (ECHR)²⁰; and, more recently, in Article 14.3 of the European Charter of Fundamental Rights included in the 2007 Treaty of Lisbon.

Although parental rights over the education of children are mentioned in all of these international documents,²¹ upon closer reading it is possible to perceive how differently they are regarded in the international and in the

¹⁸ This was even expressly mentioned by the 2 December 2010 judgment by the Constitutional Court (see n 17 above, FJ 9°): '[t]hus, in view of article 27 [of the Spanish Constitution], other statutory options that incorporate a certain flexibility to the education system, particularly to basic education, may not be excluded, provided they do not impair the fulfillment of the purpose which must preside its legal configuration (art. 27.2 CE).'

¹⁹ Juan Andres Muñoz-Arnau, *Derechos y libertades en la política y la legislación educativas españolas* (Universidad de Navarra 2010) 51.

²⁰ Unlike the UDHR, which in art 26 recognizes and develops the fundamental right to education, the drafters of the ECHR were unable to reach an agreement on how this particular right was to be structured until two years after its proclamation, and consequently, the Convention does not include any reference to educational rights. However, highlighting the inseparable relationship between education and freedom of conscience, art 9.1 of the ECHR does include an explicit reference to education, which as a manifestation of freedom of thought, conscience and religion, can only be subject to those restrictions set forth in para 2 of art 9 ECHR itself, ie those that are 'prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others'. See Javier Martínez-Torrón, 'El derecho de libertad religiosa en la jurisprudencia en torno al Convenio Europeo de Derechos Humanos' (1986) 2 *Anuario de Derecho Eclesiástico del Estado* 475; also Lucia Millán Moro, 'El derecho a la educación en la jurisprudencia del Tribunal Europeo de Derechos Humanos' in G Suárez Perterra and JM Contreras Mazarío (eds), *Interculturalidad y educación en Europa* (Tirant Lo Blanch 2005) 120.

²¹ Art 26.3 of the UDHR; art 13.3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); art 18.4 of the International Covenant on Civil and Political Rights (ICCPR); second sentence of art 2 P1 of the ECHR; and art 14.3 of the European Charter of Fundamental Rights.

European context: whereas Article 26 UDHR generally recognizes in parents a preferential right to choose the education of their children, Article 2 P1 seems to be geared towards setting a limit on state action in educational matters rather than on recognizing any prior parental right to educate children according to personal convictions.²² This different conception can be particularly traced in the doctrine that the ECtHR has consolidated over the years concerning the actual content and scope of the rights recognized in Article 2 P1—most notably on the restrictive outlook that the Court has taken regarding the scope of the right of parents to ensure that the education and teaching of children is done in conformity with their convictions—and which has had a major impact on the 2010 judgment on home education by the Spanish Constitutional Court.

Amongst the several cases where the ECtHR has concerned itself with educational matters, two judgments have been particularly relevant in shaping the basic jurisprudential lines that have marked so far, even with certain qualifications, the interpretation that the ECtHR has made of the second sentence of Article 2 P1: *Kjeldsen, Busk Madsen and Pedersen v Denmark* and *Campbell and Cosans v the United Kingdom*.²³

In *Kjeldsen*,²⁴ three families with children attending public schools objected to the compulsory integrated sex education included in the curriculum by Danish law. The Court, which found in favour of the State, began by recognizing that the second clause of Article 2 P1, which is binding upon the Contracting States in the exercise of every function in the sphere of education and directly linked with the primary responsibility of parents to ensure the overall education of children, must be respected throughout the entire education programme.²⁵ However, the ECtHR also stated that although the second clause of Article 2 P1 is aimed at safeguarding pluralism in education,²⁶ 'it must be read together with the first clause which enshrines the

²² The main concern during the drafting process of art 2 P1 was to ensure that States would not use educational institutions as means for the ideological indoctrination of minors. Actually, the word *prior* is not even included in art 2 P1. See Jorge Otaduy, 'Neutralidad ideológica del Estado y del sistema educativo público', *Jornada de Estudio sobre Educación para la Ciudadanía*, Conferencia Episcopal Española, 17 November 2006, 6. <<http://www.conferenciaepiscopal.nom.es>> accessed 28 December 2012.

²³ Other noteworthy judgments by the ECtHR on art 2 P1 include the *Belgian Linguistic Case* of 23 July 1968; *Efstathiou v Greece* and *Valsamis v Greece*, both of 18 December 1996; *Hasan Zengin and Eylem Zengin v Turkey* of 6 June 2006; and *Folgerø v Norway* of 29 June 2007.

²⁴ *Kjeldsen, Busk Madsen and Pedersen v Denmark*, 7 December 1976.

²⁵ *ibid* s 50: '[t]he second sentence of Article 2 (P1-2) is binding upon the Contracting States in the exercise of each and every function - it speaks of "any functions" - that they undertake in the sphere of education and teaching, including that consisting of the organization and financing of public education'; *ibid* s 51: '[a]rticle 2 (P1-2), which applies to each of the State's functions in relation to education and to teaching, does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme'; and *ibid* s 52: '[i]t is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.'

²⁶ *ibid* s 50: '[f]urthermore, the second sentence of Article 2 (P1-2) must be read together with the first which enshrines the right of everyone to education. It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions.... The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention.' See Javier Martínez-Torrón, 'Los límites a la libertad de religión y de creencia en el Convenio Europeo de Derechos Humanos' (2003) 2 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 13.

right of everyone to education' and consequently parental rights over the education of children only operate when States attempt to indoctrinate minors through the school programme—thus breaching the right to education—but not when 'the curriculum is conveyed in an objective, critical and pluralistic manner'.²⁷

The ECtHR has also clarified the meaning of the terms *respect* and *convictions* mentioned in the second paragraph of Article 2 P1 in order to define the limits of parental educational rights under the ECHR—whereas an overly broad interpretation of these terms would render impracticable almost any kind of normalized education, a severely restrictive one would effectively leave the right accorded to parents void. In *Campbell and Cosans*,²⁸ a case concerning the controversial issue of corporal punishment in British schools, the ECtHR opted for a broad interpretation of the verb *to respect*, stating that it implies a degree of positive obligation on the State beyond the mere acknowledgement or taking into account. By contrast, the Court understands that the term *conviction* should be interpreted narrowly, since convictions are not mere opinions or ideas, but beliefs that denote a certain level of cogency, seriousness, cohesion and importance, whereas the qualification added by the adjective *philosophical* implies that these convictions must be worthy of respect in a democratic society, not incompatible with human dignity and not contrary to the fundamental right of the child to education.²⁹

This restrictive view of the ECtHR on the scope of the second clause of Article 2 P1 can be clearly perceived in the only two cases where, to this day, the Strasbourg jurisdiction has been faced with parental opposition to

²⁷ *ibid* s 53: '[t]he second sentence of Article 2 (P1-2) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.' This narrow interpretation of the right of parents over their children's education was challenged, rightly in my view, by the separate opinion cast by judge Verdross, who held that art 2 P1 does not limit State action to a prohibition of indoctrination, but generally 'requires the States, in an unqualified manner, to respect parents' religious and philosophical convictions; it makes no distinction at all between the different purposes for which the education is provided'. See Martínez-Torrón (n 17) 123; and María José Roca Fernández, 'Deberes de los poderes públicos para garantizar el respeto al pluralismo y ideológico y religioso en el ámbito escolar' in José Luis Requero Ibáñez and José Luis Martínez López-Muñoz (eds), *Los derechos fundamentales en la educación* (Consejo General del Poder Judicial 2008) 279ff.

²⁸ *Campbell and Cosans v The United Kingdom* (25 February 1982) Series A no 48, 4 EHRR 239, 40.

²⁹ *ibid* s 36:

[i]n its ordinary meaning the word "convictions", taken on its own, is not synonymous with the words "opinions" and "ideas", such as are utilized in Article 10 (art. 10) of the Convention, which guarantees freedom of expression; it is more akin to the term "beliefs" (in the French text: "convictions") appearing in Article 9 (art. 9) - which guarantees freedom of thought, conscience and religion - and denotes views that attain a certain level of cogency, seriousness, cohesion and importance. As regards the adjective "philosophical", it is not capable of exhaustive definition and little assistance as to its precise significance is to be gleaned from the *travaux préparatoires*. The Commission pointed out that the word "philosophy" bears numerous meanings: it is used to allude to a fully-fledged system of thought or, rather loosely, to views on more or less trivial matters. The Courts agrees with the Commission that neither of these two extremes can be adopted for the purposes of interpreting Article 2 (P1-2): the former would too narrowly restrict the scope of a right that is guaranteed to all parents and the latter might result in the inclusion of matters of insufficient weight or substance.

Finally, the court argues that '[t]he applicants' views relate to a weighty and substantial aspect of human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails. They are views which satisfy each of the various criteria listed above; it is this that distinguishes them from opinions that might be held on other methods of discipline or on discipline in general.'

compulsory schooling: *Leuffen v Germany*³⁰; and *Konrad v Germany*.³¹ Since both cases were deemed inadmissible, neither of the decisions analysed in depth the question of home education. However, connecting some of the statements contained in these two decisions with the Court's general doctrine in the field of education,³² it is possible to infer a certain positioning of the ECtHR favourable to considering that admitting forms of home-based education falls within the legislative discretion of the states and is unrelated to the parental right recognized by the second clause of Article 2 P1 except in cases where indoctrination is appreciated and the principle of state neutrality is breached.

Two arguments seem to underpin the position of the Court: first, the freedom to set up an education system that only contemplates compulsory school attendance falls within the powers of the state. Secondly, parental convictions cannot deprive children of their right to education and, therefore, the only limit for the State in relation to the second clause of Article 2 P1 is any attempt at indoctrination. Consequently, it would appear that where the option of home education has not been legally envisaged by a particular state, the Court will not be inclined to consider homeschooling as an option for parents derived directly from their right to choose for their children an education that is consistent with their religious and philosophical convictions.

3. *Home Education in Spain: the (Almost) Absent Educational Alternative*

In Spain, the choice of educating children outside state-approved schools is neither constitutionally nor statutorily envisaged, although recent legislation

³⁰ *Leuffen v Germany*, no 19844/92 (Commission Decision, 9 July 1992). In *Leuffen*, the applicant was a German Catholic mother who refused to send her child to school on the grounds that God had given her the exclusive responsibility and authority to educate him. The now extinct ECmHR interpreted art 2 P1, as already anticipated in *Kjeldsen*, in the sense that the right of children to education prevails over the right of parents to have their children receive an education that is consistent with their religious and philosophical convictions. The ECmHR understands that the right of children to education entails a necessary State regulation which may optionally only contemplate compulsory schooling, and that the convictions of parents 'must not conflict with the fundamental right of the child to education, the whole of Article 2...being dominated by its first sentence'. Therefore, the ECmHR concludes, a parent cannot 'refuse the right to education of a child on the basis its convictions'. See Monk (n 6) 579ff.

³¹ *Konrad and others v Germany*, no 35504/03 (Court Decision, 11 September 2006). In *Konrad*, several parents who belonged to a Christian group strongly attached to the Bible refused to enrol their children in regular schools on religious grounds. The ECtHR, going back to the arguments already used in *Leuffen*, states that the two paragraphs of art 2 P1 must be read together, so that respect is only due to parental convictions 'which do not conflict with the right of the child to education, the whole of Article 2 of Protocol No. 1 being dominated by its first sentence'. The ECtHR places special emphasis on the fact that Member States provide different solutions to the obligations vested on public authorities regarding education, and that an education system of compulsory schooling that excludes home education is a perfectly valid alternative. In addition, the ECtHR values the double argument provided by the German courts that school attendance is not only essential for the acquisition of knowledge, but also incorporates an element of social integration that is lost in homeschooling, and that nothing prevents parents from educating their children outside school hours. In conclusion, the ECtHR considers that in Germany the right of parents to choose for their children an education in accordance with their religious or philosophical convictions does not include a right not to school them, since the right to education of the child is paramount. Monk (n 3) 161–62ff.

³² See Malcolm D Evans, *Religious Liberty and International Law in Europe* (1st edn, CUP 2008) 342–62; and Evans (n 17) 88ff.

has seemingly opened a narrow gate for a future legal recognition of home education at local level.³³

In the absence of more specific provisions, the first question that needs to be addressed is whether some forms of non-institutional education find coverage even when they are not expressly mentioned in the Spanish Constitution, a question which calls for a brief analysis of the extent to which the right to education, the right to freedom of education and parental rights over the education of children, are constitutionally framed and protected.³⁴

Article 27 of the Constitution—dedicated to educational rights—is probably one of the best exponents of the consensus that presided over the drafting of our current Constitution,³⁵ and represents a quantum leap in the constitutional treatment of education by simultaneously acknowledging two fundamental and differentiated rights: the right to education and the right to freedom of education.³⁶

The right to education is basically structured as a fundamental right that places upon the State the obligation to guarantee universal access to school, and which goal is to fully develop the child's personality—with due respect for democratic principles and basic rights and freedoms—through a quality and

³³ Education is highly de-centralized in Spain, and the Spanish autonomous regions (*Comunidades Autónomas*), as well as lower local corporations, have been awarded competences concerning the statutory regulation and administration of education and teaching. The Constitution of 1978 provides a basic regulatory framework and a distribution of competences between State and autonomous regions that is developed in State and local legislation. Succinctly, the State is responsible for the basic organization of education in Spain in order to safeguard a minimum homogeneous system, whereas the autonomous regions are concerned with the development of State norms and with the management of the education system in their own territories. For a historical overview on this subject, see Rogelio Medina Rubio, 'La distribución de competencias, en material de educación, entre el Estado y las Comunidades Autónomas' (1981) 31 *Aula Abierta* 71; Luis López Guerra, 'La distribución de competencias entre Estado y Comunidades Autónomas en materia de educación' (1983) 7 *Revista Española de Derecho Constitucional* 293; and Antonio Embid Irujo, 'La ampliación de competencias educativas' (1989) 7 *Revista Jurídica de Navarra* 13. More recent, Francisco Javier Díaz Revorio, *Los Derechos Fundamentales del Ámbito Educativo en el Ordenamiento estatal y autonómico de Castilla La-Mancha*, (1st edn, Cortes de Castilla La Mancha 2003) 44–46 and 157ff; and J Blanch 'Descentralización y autonomía en el sistema educativo en España' (2011) 2 *Italian Journal of Sociology of Education* 11.

³⁴ For a more detailed analysis, see Valero Estarellas (n 11) 19–24.

³⁵ See n 14 above. Also Martínez de Pisón (n 14) 72; and Fernández-Miranda y Campoamor (n 14) 18. The drafters of the Spanish Constitution were aware of the convenience of underpinning a constitutional frame that would satisfy the aspirations of two diverging political and ideological notions of education: that held by the more left-oriented proponents of a right to education that was to be primarily guaranteed by the State, and that of a more right-oriented perspective that placed less emphasis on the role of the State in education and favoured social initiative and freedom of education. See also Joaquín Mantecón Sancho, 'El derecho de los padres a la educación de sus hijos según sus convicciones', *Jornada de estudio sobre Educación para la Ciudadanía organizada por la Conferencia Episcopal Española* el 17 de noviembre de 2006, 2. (<<http://www.conferenciapiscopal.nom.es/Dossier/ciudadania/padres/pdf>> 10, accessed 30 December 2012).

³⁶ See n 14 above. Art 27 of the Spanish Constitution:

1. [e]veryone has the right to education. Freedom of education is recognised. 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 centres. 6. The right of individuals and legal entities to set up educational centres is recognised, provided they respect Constitutional principles. 7. Teachers, parents and, when appropriate, pupils, shall share in the control and management of all the centres maintained by the Administration out of public funds, under the terms established by the law. 8. The public authorities shall inspect and standardise the education 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 recognised, under the terms established by the law.

adaptable education system tailored to meet his or her specific educational needs.³⁷ The realization of the right to education is constitutionally guaranteed by a double-faced duty/obligation to complete at least primary compulsory instruction, but the Constitution neither enforces compulsory school attendance nor expressly foresees the right of parents to provide children with formal education outside institutional schools.

Since education is achieved through the teaching of technical skills and constitutional values and principles, alongside the minimum mandatory content of compulsory education and the obligations placed on the state on educational matters, the Constitution also acknowledges a right to freedom of education or to freedom of teaching that guarantees an ample scope of liberty to the private parties involved in education—social groups, parents and educators.³⁸ Indeed, as the Spanish Constitutional Court has pointed out, freedom of education is a manifestation of the rights to freedom of conscience, religion and speech³⁹ and one of the keystones of the education system, as well as the guarantor of social pluralism in the sphere of education.⁴⁰ Since social pluralism in education is achieved when it is possible to teach from the standpoint of diverse convictions,⁴¹ freedom of education becomes a defence mechanism for parents, students and teachers against the monopolistic tendencies of the state.⁴²

Regarding parental rights in education, it is surprising that at first glance Article 27 seems to omit any reference to a general right of parents to choose the kind of education they want for their children,⁴³ narrowing it to a more restricted power to choose a religious and moral instruction that is in accordance with their own convictions and connecting it with the fundamental

³⁷ See Alejandro González-Varas Ibáñez, 'La libertad de enseñanza' in Miguel Angel Jusdado Ruiz-Capillas (ed), *Derecho Eclesiástico del Estado* (1st edn, Colex 2011) 174. Also Fernández-Miranda y Campoamor (n 14) 85ff; Victor García Hoz, 'La libertad de educación y la educación para la libertad' (1979) 6 *Persona y Derecho* 17.

³⁸ The limited scope of this article does not allow a comprehensive analysis of the fundamental right to freedom of education, which has been the subject of extensive academic research in Spain, particularly in the 20 years after the Constitution was adopted. Freedom of education would comprise academic freedom, freedom of educational choice and a right to learn in freedom. Francisco Javier Díaz Revorio, 'El derecho a la educación' (1998) 2 *Parlamento y Constitución*. Anuario 277; Martínez de Pisón (n 14) 129; also Isabel de los Mozos Touya, *Educación en libertad y concierto escolar* (Montecorvo 1995) 48–50; and Fernández-Miranda y Campoamor (n 14) 71. A summary of the doctrine on freedom of education and art 27.1 of the Spanish Constitution can be found in Germán Gómez Orfanel, 'Derecho a la educación y libertad de enseñanza. Naturaleza y contenido. (Un comentario bibliográfico)' (1983) 7 *Revista Española de Derecho Constitucional* 411.

³⁹ Judgment by the Spanish Constitutional Court 5/1981, 13 February 1981, FJ 7°.

⁴⁰ MD Ferre Fernández, 'El derecho de los padres a elegir la educación de sus hijos en España' in Santiago Catala (ed), *Sistema educativo y libertad de conciencia* (Alderabán 2009) 63; Antonio Embid Irujo, *Las libertades en la enseñanza* (Tecnos 1982) 238; MJ Gutiérrez del Moral, 'Reflexiones sobre el derecho de los padres a decidir la formación religiosa y moral de sus hijos y la enseñanza de la religión en los centros públicos' (2007) 14 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 5; and Ana María Vega Gutiérrez, 'Objeciones de conciencia y libertades educativas: los conflictos de conciencia ocasionados por determinados contenidos curriculares' in María J Roca and others (eds), *Opciones de Conciencia. Propuestas para una ley* (Ministerio de Justicia 2008) 339.

⁴¹ Religious, philosophical moral or otherwise, as long as the individual derives from them the obligation to conduct his or her life in a certain manner. See Javier Martínez-Torrón, *Religión derecho y sociedad* (Comares 1999) 135.

⁴² J Ferrer Ortiz, 'Los derechos educativos de los padres en una sociedad plural' (2006) 3 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 3. Some researchers even affirm that freedom of education is a direct consequence of the right of parents to choose the education of their children rooted in the rights to freedom of conscience and religion. See Fernández-Miranda y Campoamor (n 14) 14 and 59; Embid Irujo (n 40). On the interplay between freedom of education and homeschooling, A Valero Heredia, *La libertad de conciencia del menor desde una perspectiva constitucional* (Centro de Estudios Políticos y Constitucionales 2009) 214; and Martí Sánchez (n 11) 33.

⁴³ Also the Spanish Constitutional Court seems to have forgotten this general right of parents when defining the limits of freedom of teaching. See *Sentencia del Tribunal Constitucional 5/1981, de 13 de febrero*, FJ 7°.

rights to freedom of conscience and religion of Article 16.⁴⁴ However, this omission is only apparent.⁴⁵ It is spared in the first place by paragraph 2 of Article 10 of the Constitution, which was specifically added to the original single-paragraph drafting with the intention of validating the absence of express constitutional reference to the generic right of parents to choose the kind of education of their children through a referral to Article 26.3 of the UDHR,⁴⁶ and secondly, by the general recognition of freedom of education.

Therefore, rather than comprehensively organizing a specific education system, the Constitution recognizes the fundamental right to education—delineating its goals and limits—and the right to freedom of education, generally defines the roles of parents and State in educational matters and provides policy makers with ample powers to implement a flexible legal framework that can be fine-tuned to changing variables and needs and that must always take into account the educational preferences of parents, not only in what concerns the religious or moral upbringing of their children, but, more generally, in their overall educational preferences.

With these considerations in mind, in Spain there appears to be sufficient constitutional basis for forms of non-institutional or home education, but, contrary to what has been commonly understood, in my opinion this basis is not grounded in the right of parents to have their moral and religious convictions respected in the education of their children (Article 27.3), but rather in the broader right to freedom of education of Article 27.1 and in the parents' right to choose an education akin to their convictions—without qualification. Moreover, my understanding is that granting the right to home-educate only to those parents who have religious or philosophical reasons to do so would be clearly discriminatory and inconsistent with the Constitution, since freedom of education entails freedom of choice, without any further inquiry into causes, motives, or methodologies other than those which are necessary to verify the child's well-being and the fulfilment of his or her right to education. The Constitution is drafted so that parents should be free to choose whether they want their children to attend state-owned schools, faith schools, private-run schools with a specific ethos or ideology, or whether they want to home-educate them, as long as these choices provide the child with an education that is consistent with the content and limits set forth under Article 27.

Although the Constitution does not identify elementary education with compulsory school attendance, Spanish legislators have consistently

⁴⁴ Art 16 of the Spanish Constitution: '1. [f]reedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law. 2. No one may be compelled to make statements regarding his religion, beliefs or ideologies. 3. There shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and shall consequently maintain appropriate cooperation with the Catholic Church and the other confessions.'

⁴⁵ See Alfonso Fernández-Miranda y Campoamor, 'El artículo 27 de la Constitución Española' in *Educación y democracia* (n 14) 78–80.

⁴⁶ Art 10.2 of the Constitution reads: '[t]he principles relating 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.' See Jaime Nicolás Muñiz, 'Los derechos fundamentales en materia educativa en la Constitución española' (1983) 7 *Revista Española de Derecho Constitucional* 346; and Díaz Revorio (n 38) 270. For a comprehensive study of the drafting process of art 10 of the Spanish Constitution, see Rosa María Satorras Fioretti, *La libertad de enseñanza en la Constitución española* (Marcial Pons 1998) 21ff.

considered mandatory schooling as the best way to fulfil the obligation vested on the State to ensure minors' access to basic instruction,⁴⁷ and education statutes, both national and local,⁴⁸ have established a legal duty for children between 6 and 16 years of age to attend public or private institutional schools.⁴⁹ Also, since educating one's children is considered to be one of the main obligations attached to parental guardianship,⁵⁰ and breach of custody or familial duties can constitute a criminal offence,⁵¹ compulsory school attendance is particularly reinforced by the statutes that deal with child protection: lack of institutional schooling is considered to be an indicator for potential situations of child abuse or neglect and may consequently trigger the intervention of social or educational authorities and, ultimately, even courts.⁵²

However, the growing presence of homeschooling in Spain, particularly in certain regions, can already be perceived in some recent local legislation on education and children welfare: whereas Article 55 of the 2009 Education Act of Catalonia⁵³ has included wording that seems to exceptionally allow for alternatives to compulsory school attendance,⁵⁴ the most recent legal instrument for the evaluation of children's welfare in the Basque Country has arguably exempted non-institutionalized education from being considered a

⁴⁷ See above art 27.4 of the Spanish Constitution. However, some forms of official offsite education are permitted through the CIDEAD (*Centro para la Innovación y Desarrollo de la Educación*) for Spanish students abroad or for those who, living in Spain, cannot attend ordinary school facilities (for instance, the children of itinerant families). <<http://cidead.cnice.mec.es/present.htm>> accessed 29 December 2012.

⁴⁸ See n 33 above. Today, all Spanish autonomous regions (*Comunidades Autónomas*) have enacted their own local education statutes according to the distribution of competences set forth in art 149 of the Spanish Constitution.

⁴⁹ ss 1 and 2 of art 4 of LOE state that '(1) [t]he basic education provided in art 3.3 is mandatory and free for all people. (2) Basic education comprises 10 years of schooling and normally expands from 6 to 16 years of age....'

⁵⁰ Article 154 of the Spanish Civil Code states that the guardianship of mother and father over their children includes the duty to '[w]atch over them, feed them, educate them and provide them with an integral upbringing'; whereas art 170 of the same legal text stipulates that '[t]he mother or the father may be deprived totally or partially of guardianship by a court judgment based on the non-fulfilment of the duties inherent to it, or pronounced in criminal or matrimonial proceedings. Courts may, in the benefit of the child, decide the reinstatement of guardianship when the cause for the removal has ceased.'

⁵¹ Art 226.1 of the Spanish Penal Code stipulates that '[w]hoever ceases in the fulfilment of the legal duties of assistance inherent to parental custody, guardianship or temporary foster care, or ceases to provide the legally established necessary assistance for the sustenance of its offspring, parents or spouse in need, shall be convicted to 3 to 6 months of prison or to a fine of 6 to 12 months.'

⁵² Art 13.2 of the 1996 Minor's Legal Protection Act (*Ley Orgánica 1/1996, de 15 de enero de Protección Jurídica del Menor*) states that: '[a]ny person or authority who knows that a minor is not schooled or does not regularly attend school without justification, during the obligatory period, must communicate this fact to the competent public authorities, who shall undertake the necessary measures to school the child.'

⁵³ Education Act of Catalonia (*Ley 12/2009, de 10 de julio, de Educación de Cataluña*). Art 55.2 reads that '[p]ost-mandatory teachings, those that do not conduce to titles or certifications valid in the whole State, preparatory formation courses for exams that allow access to the education system, the formation in basic competences, occupational formation and permanent formation may be imparted off-site. Also, mandatory teachings and other teachings that in certain circumstances may be established by the Department [of education] may be exceptionally imparted off-site.'

⁵⁴ The actual scope of this statutory provision is still uncertain, since the wording included in the preamble of the Act that restricts offsite education to students above the age of compulsory school attendance seems to contradict the language included in the last section of art 55.2 that states that mandatory education may also be provided on an off-campus basis when approved by the Catalan Department of education (see n 53 above). Moreover, art 55.7 seems to anticipate the mechanisms for the control of off-campus elementary education when it states that '[t]he department must create and regulate a registry which compiles the data of the students that are following off-site education in teachings of elementary education.' Therefore, it is still early to have a clear notion of the actual scope of these provisions.

situation of serious child neglect.⁵⁵ According to this new regulation, and if no other indicators of lack of protection concur, children who are not registered with a regular school or who do not follow an homologated education programme shall not be deemed to be in a vulnerable situation if parents have requested and been denied an individualized and adequate alternative education programme.

4. *Shifting Currents: the Spanish Case Law on Home Education*

The fact that Spanish education law does not to provide a home-based alternative to school attendance has not prevented more than 2000 families from homeschooling on the legal argument that Article 27 of the Constitution acknowledges both freedom of education and the right of parents to choose the moral and religious education of children.⁵⁶ The intervention of education and welfare authorities in several situations where minors were being formally educated at home or within small religious communities has resulted in a small body of jurisprudence on home education that can be clearly divided into two periods: before and after the 2010 judgment by the Constitutional Court.

A. The Spanish Case Law on Home Education before the Constitutional Court Judgment of 2 December 2010

Until the judgment of 2 December 2010, Spanish courts had never fully analysed the constitutional implications of home education, deciding only on the practical penal or civil consequences of non-schooling.⁵⁷ In the absence of other specific legal provisions, courts had based their judgments on a case-to-case joint interpretation of Articles 226 of the Penal Code, 154 of the Civil Code and 27 of the Constitution,⁵⁸ applying the principle of proportionality⁵⁹ and balancing the concurring rights of minors and parents by paying special

⁵⁵ Decreto 230/2011, de 8 de noviembre, por el que se aprueba el instrumento para la valoración de la gravedad de las situaciones de riesgo en los servicios sociales municipales y territoriales de atención y protección a la infancia y adolescencia en la Comunidad Autónoma del País Vasco (BALORA). Section C Part I—Neglect of formative needs—considers that a child of mandatory school age (6–16 years) is at serious risk when he or she are not registered, nor are foreseen to be registered, with any educational centre and are not provided with an alternative homologated education programme. This assertion is qualified by n 22, which states that '[i]f (1) the father and mother or those who exercise its guardianship or custody wish to provide the boy, girl or teenager with an adequate and individualized education program, (2) have requested the homologation to the corresponding body and have received a negative answer because this possibility is not contemplated in any case, and (3) there are no other indicators of lack of protection, the file shall be closed. Under these circumstances, this type of situations shall not be considered lack of protection.' Full original text available at <http://www.euskadi.net/cgi-bin_k54/bopv_42?c&f=20111212&a=201105937> accessed 29 December 2012. The cited paragraph and footnote are on page 39.

⁵⁶ See Section 3 above.

⁵⁷ Ruano Espina (n 17) 30ff.

⁵⁸ See Section 3 above.

⁵⁹ The principle of proportionality operates as a standard for the constitutionality of the judge's activity, who when interpreting the legal norms does not create law, but merely investigates the inherent and preexisting limits of constitutional precepts that acknowledge different rights. See Maria del Camino Vidal Fueyo, 'Cuando el derecho a la libertad religiosa colisiona con el derecho a la educación' (2004) Número extraordinario Revista jurídica de Castilla y León 309ff. Ferrer Ortiz (n 42) 1.

attention to the best interests of the children and to the actual impact of home education on their moral or material support.⁶⁰

The first homeschooling case to be ruled by the Spanish courts—the case of the ‘Children of God’⁶¹—bore a vague resemblance to the famous 1972 case *Wisconsin v Yoder* decided by the Supreme Court of the United States of America.⁶² In 1990, the authorities of Sabadell⁶³ were alerted to the situation of several minors who were educated within a religious group suspected of being a sect. Fear for their mental and physical health triggered the intervention of the local welfare services. The children were declared to be in a legal state of abandonment and their guardianship was assumed by the authorities. The parents’ appeal against the removal of custody was the starting point of four years of criminal and civil proceedings that culminated in judgments by both the Constitutional and the Supreme Court.⁶⁴

The Constitutional Court, in a decision rendered on 3 October 1994,⁶⁵ avoided any pronouncement on the constitutional implications of educating children in independent learning environments⁶⁶ and simply ruled on the compliance with Article 27 of the Constitution of the judgments that had restored the parents’ legal guardianship of the children.⁶⁷ However, one of the panel judges wrote a dissenting opinion that eventually strongly influenced the 2010 judgment by the Constitutional Court.⁶⁸ Judge Gimeno Sendra argued that the minors’ rights to guardianship and education prescribed in Article 27.1 of the Constitution had been breached by the parents, since the substance of the constitutional right to education consists in the right of the child to be schooled. Therefore, when the will of the parents and the interests of the child conflict, parental freedom of religion may not be interpreted to foster the right

⁶⁰ J Egea Fernández, ‘La doctrina constitucional sobre la oposición judicial a la declaración de desamparo hecha por la entidad pública (Sobre la SSTC 298/1993, de 18 de octubre, y 260/1994, de 3 de octubre)’ (1995) 5 *Derecho Privado y Constitución* 277.

⁶¹ *Niños de Dios* in Spanish.

⁶² *Wisconsin v Yoder*, 406 US 205. This case, which is still a source of continuous academic reference, has been unanimously recognized as one of the keystone judgments in the case law of the Supreme Court of the United States on the accommodation of religious beliefs as part of the constitutional right of ‘free exercise’. See R Palomino, *Las objeciones de conciencia. Conflictos entre Conciencia y Ley en el Derecho Norteamericano* (Montecorvo 1994) 44 and 237; and Navarro-Valls and Martínez-Torrón (n 12) 261–62.

⁶³ Sabadell is a town of the Catalan province of Barcelona, in north-east Spain.

⁶⁴ By means of several decisions dated 6 November 1991 the Court of First Instance of Barcelona dismissed the appeal filed by the parents and upheld the forceful schooling of the children, but decided to restore the parents in the mere guardianship of the minors. The parents appealed once more before the ordinary courts and went as far as the Supreme Court, whereas the Government of Catalonia (*Generalidad de Cataluña*) lodged an appeal for the protection of the constitutional right to education before the Constitutional Court (*recurso de amparo*).

⁶⁵ *Sentencia del Tribunal Constitucional 260/1994, de 3 de octubre*. See JM de Torres Perea, *Interés del menor y derecho de familia* (Portal Derecho 2009) 129ff; and Ruano Espina (n 17) 30ff.

⁶⁶ The public prosecutor had both prior to the admission of the appeal and during the actual proceedings spoken in favour of an interpretation of art 27 of the Constitution that did not envisage formal schooling as the only means to provide an education oriented to the full development of the child’s personality in accordance with the moral and religious convictions of the parents. As the judgment quotes, the public prosecutor argued that neither the State’s educational alternatives are exclusive nor do they preclude other possibilities which deliver education in a manner that produces the results foreseen in art 27.4 (*ibid Antecedentes* 4 and 8).

⁶⁷ According to the local government (*Generalitat de Cataluña*), the decisions that reinstated the parents into the custody of the children violated the latter’s right to education (see n 62 above). The Constitutional Court, on the contrary, found that since these decisions had neither prevented the children from being schooled, nor tampered with the State’s prerogatives to ensure the adequate schooling of the minors, they had not breached art 27 of the Spanish Constitution (*ibid* FJ 2°).

⁶⁸ See Section 4B below.

not to school children on the argument that parents have sole responsibility for imparting the education they deem convenient.⁶⁹

The Criminal Chamber of the Supreme Court ruled on the same case on 30 October 1994,⁷⁰ evaluating whether the group's practices and educational preferences were constitutive of several criminal offences.⁷¹ Although it did not engage in deep reflection about the legal underpinnings of homeschooling in Spain, this judgment did shed some light on the interplay between the constitutional rights of parents and children in educational matters. The court argued that the legal provisions on education are founded on the right to freedom of education, the right of parents to provide their children with the moral and religious education of their choice and the right to create educational centres. This legal framework allows for different educational options all subjected to one insurmountable limit, namely that any activity connected with teaching and education must be strictly bounded by the principles set out in the Constitution. Educational techniques or pedagogical methods can be varied, but they must not exceed the necessarily unchangeable limits of respecting constitutional values⁷² and protecting youth and infants. Although the fundamental right to education engages public authorities in the task of cooperating and contributing to its effective realization, it does not necessarily interfere with the right of parents to choose for their children the religious and moral instruction that is in keeping with their own convictions. Consequently, the educational options provided by the state do not preclude other formative alternatives, and home-based educational methods cannot be *a priori* ruled out as long as they provide minors with suitable instruction.⁷³

This interpretation of the Supreme Court seems to have in practice blocked the criminal path as an effective way to forbid home education when the actual welfare of the homeschooled child is not compromised. Lower courts, when faced with criminal proceedings for breach of familial duties brought against parents who have chosen to educate their children outside the regular school system, are reluctant to assimilate family abandonment or child neglect with lack of formal schooling without a prior inquiry into the real educational and social situation of the children.⁷⁴ Home education is considered to breach the legal duty of compulsory school attendance, but is not *per se* synonymous with

⁶⁹ *Sentencia del Tribunal Constitucional* 260/1994, de 3 de octubre, Dissenting opinion (*voto particular*).

⁷⁰ *Sentencia del Tribunal Supremo (Sala de lo Penal)* 1669/1994, de 30 de octubre.

⁷¹ These were fraud, injuries, founding of illegal educational establishments and illicit association.

⁷² *Sentencia del Tribunal Supremo (Sala de lo Penal)* 1669/1994, de 30 de octubre, FJ 2°.

⁷³ *ibid* FJ 4°.

⁷⁴ This tendency can be also seen in civil proceedings. In 1999, the Court of Appeal of Seville had to overview the situation of a young boy who was receiving education in a non-certified boarding education facility. Although the argumentative focus of the case was not so much on homeschooling—before the proceedings the boy and the rest of the children in the boarding facility had been registered with a local public school—but on family abandonment, the court argued that a child cannot be considered to be in a legal situation of neglect only because its parents have decided to have it educated in a manner which differs from what is perceived as 'normal', provided there are no other indicators that the chosen form of education is physically or psychologically detrimental to the child. On the contrary, the court viewed the father's decision to provide the child with what he considered to be a better and more thorough instruction as an indicator of his particular interest in the education of his offspring. Such motivation, according to the court, is covered under the right of parents to educate one's children in accord with personal moral convictions acknowledged by art 27.3 of the Spanish Constitution. (*Sentencia de la Audiencia Provincial de Sevilla [Sección 6ª]* 829/1999, de 23 de noviembre FJ 3°).

family abandonment if the child is not at social risk and is otherwise provided with adequate teaching.⁷⁵

This approach to home education can be seen in the proceedings for potential breach of parental duties heard two years later before the Court of Appeal of Granada.⁷⁶ The mother of three children of compulsory school age was brought before the court for having her children taught in a non-approved learning association that employed alternative teaching methods but whose curricula, however, quite similar to the official ones. The court acquitted the mother on the argument that her particular way of providing for her children's education, no matter how peculiar or atypical it was, was not equivalent to abandonment or neglect.⁷⁷ The Constitution modulates the right to education by also acknowledging a right to freedom of teaching that comprises, for lack of specific wording, the right of parents to choose the method or type of education they want for their children as long as minimum legal requirements are met.⁷⁸ The court, however, declared itself incompetent to decide whether the constitutional right to create educational centres can be interpreted to include the freedom to set up uncertified educational establishments or whether it only comprises the right of parents to choose from officially approved schools.⁷⁹

The same reluctance to assimilate non-school attendance with neglect or family desertion can be seen in a more recent judgment of 16 December 2009 by the Criminal Section of the Court of Appeal of Teruel.⁸⁰ Again, the court was called to intervene in a case where parental resistance to formal schooling had raised the question of whether the children were in a situation of neglect and the parents in breach of their guardianship duties. The court, even though it avoided any pronouncement on whether in Spain there is a parental right to educate children outside the official education system, did state that non-attendance is not by itself constitutive of family abandonment.⁸¹ The judgment further argued that the absence of formal schooling, when it originates in the free parental choice of an alternative education system based on pedagogical or academic considerations, does not fit the penal type of family abandonment if it does not go hand in hand with a situation of neglect or social risk.⁸²

Although it may be argued that none of the judgments analysed so far were brave enough to methodically tackle the core implications of non-institutionalized instruction and the fundamental right to education in Spain, they all seem to add ancillary and supporting arguments to the basic interpretation that

⁷⁵ *Sentencia de la Audiencia Provincial de Teruel 51/2009, de 16 de diciembre de 2009*, FJ 2°; and *Sentencia de la Audiencia Provincial de A Coruña (Sección 2ª) 594/2011, de 27 de diciembre de 2011*, FJ 1°.

⁷⁶ *Sentencia de la Audiencia Provincial de Granada (Sección 2ª) 112/1996, de 29 de febrero de 1996*.

⁷⁷ *ibid* FJ 5°.

⁷⁸ The judgment also supported its decision on art 26.3 of the UDHR and art 13.3 ICCPR. *ibid* FJ 2°.

⁷⁹ *ibid* FJ 4°.

⁸⁰ *Sentencia de la Audiencia Provincial de Teruel 51/2009, de 16 de diciembre de 2009*.

⁸¹ Interestingly, the judgment reflected on the fact that 'to educate' is to develop the intellectual and moral skills of a person, and that such development may be achieved within or outside the institutional State education system, whereas 'to school' is a more restricted term that in the Spanish legal system aims at providing the individual with a specific and previously stipulated body of knowledge and skills to be imparted and evaluated by the State through homologated education facilities. Therefore, the obligation to attend school has a more restricted meaning than the obligation to educate (FJ 2°).

⁸² *Sentencia de la Audiencia Provincial de Teruel 51/2009, de 16 de diciembre de 2009*, FJ 2°.

Article 27 of the Constitution provides sufficient coverage for alternative methods and venues of education that answer to the legitimate right of parents to choose the education of their children. The only requisites seem to be the observance of the content and the respect for the limits of the right of the child to be educated. In other words, Spanish courts had been in favour of interpreting that the fundamental right to education did not exclude non-institutionalized forms of home instruction as long as these fulfilled the child's constitutional right to be educated in a way that fully developed his or her personality.⁸³

B. *The Judgment of 2 December 2010 by the Constitutional Court*

The journey that culminated in the judgment of 2 December 2010 by the Spanish Constitutional Court began in 2003 in the Court of First Instance of the Andalusian town of Coín. After it became known to the social services that several families were not schooling children of compulsory age, the public prosecutor started civil proceedings for presumed breach of familial duties—Article 154 of the Civil Code—requesting the forceful registration of the minors with a public school. The court upheld the prosecutor's demand, finding in favour of the official schooling of the children on the main argument that the joint interpretation of Article 27 of the Constitution—which states that basic education is obligatory—and Article 9 of the Education Act in force at the time—which stated that basic education comprised 10 years of mandatory schooling⁸⁴—necessarily imposed an unquestionable parental duty to provide for the regular schooling of children.⁸⁵ Even though it had been proved that the children were happy, lived in functional environments and had families that were deeply involved in their learning processes, there was no cause for assessing whether or not they were receiving a suitable education, because the whole case came down to the simple fact that parents could just not ignore the constitutional and legal precepts that required them to school their children.⁸⁶

Two years later, the Court of Appeal of Malaga confirmed the judgment by the Court of First Instance, dismissing the parent's appeal that claimed that mandatory schooling was unnecessary under Article 27 of the Constitution when an alternative suitable education was already being given at home.⁸⁷ Accepting the dissenting opinion issued in the case of the 'Children of God' by Judge Gimeno Sendra,⁸⁸ the court argued that schooling is incardinated in the basic concept of education, and that a home- or group-based instruction is not *au par* with what society permits today in view of the progress made in social matters. The judgment interpreted that Article 27.1 of the Constitution does not entail complete parental freedom to guide children towards the religious or moral convictions parents deem most convenient for the minor's intellectual

⁸³ Ruano Espina (n 17) 57.

⁸⁴ *Ley Orgánica 10/2002, de 23 de diciembre, de Calidad de la Educación.*

⁸⁵ *Sentencia del Juzgado de Primera Instancia número 2 de Coín, de 5 de mayo de 2003, FJ 1°.*

⁸⁶ *ibid* FJ 2°.

⁸⁷ *Sentencia de la Audiencia Provincial de Málaga 548/2005, de 6 de junio de 2005, FJ 1°.*

⁸⁸ See Section 4A and n 69 above.

development, but consists in the child's right to be schooled. Any conflict between the will of the homeschooling parents and the interests of the children in being schooled must consequently be decided in favour of the latter.⁸⁹

Finally, the parents appealed these earlier decisions before the Constitutional Court ('Court') for breach of Articles 27.1, 27.2, 27.3 and 27.4 of the Constitution. The defence adopted by the parents basically sustained that the forceful schooling of the minors interfered, first, with the constitutional right to choose for one's children an education that is in accord with personal pedagogical convictions, and second, with the minors' own right to education as a result of being denied an adequate learning process at home.⁹⁰ The appeal was dismissed in the controversial judgment of 2 December 2010, on the following two arguments: (i) that in this particular case the imposition of the legal duty of compulsory school attendance does not have any constitutional implications⁹¹ because the pedagogical motives alleged by the parents fall outside the religious or moral convictions protected by Article 27.3; and (ii) that even if the alleged motives had been amongst those to which Article 27.3 gives coverage (ie religious or moral), the imposition of a legal duty of compulsory school attendance is a statutory limit valid under Article 27 of the Constitution which does not disproportionately restrict the right of parents to choose the moral and religious education of their children.⁹² At the end of the day, what the judgment has resolved is that although the Spanish Constitution can be interpreted to support alternative forms of non-official education that fulfil constitutional standards, in practice they cannot be allowed as a valid educational option and a lawful manifestation of the fundamental right of parents to choose for their children an education that is in accord with their convictions, *as long as they are not statutorily regulated*.

The judgment certainly raises several questions about the consistency of the rationale of the Constitutional Court when analysing constitutionally relevant issues such as the actual scope of the educational rights of children, parents, and state and the recourse to the principle of proportionality for balancing concurring fundamental rights.⁹³ Among the main arguments used by the Constitutional Court, I would emphasize those which have resulted in a restriction—in my opinion, not sufficiently justified—of the fundamental right of parents to project their convictions and beliefs on the education of their children, and in a reinforcement of the prerogatives of an increasingly monopolistic state in everything connected with education.

When grounding its preliminary argument that pedagogical educational options fall outside the protection of Article 27.3 of the Constitution, the Court first defines the constitutional scope of parental rights over the education

⁸⁹ *Sentencia de la Audiencia Provincial de Málaga 548/2005, de 6 de junio de 2005, FJ 2°.*

⁹⁰ *ibid Antecedentes 3.*

⁹¹ *Sentencia del Tribunal Constitucional 133/2010, de 2 de diciembre, FJ 6°.*

⁹² *ibid FJ 7°.*

⁹³ See n 59 above.

of children⁹⁴ before moving on to support its interpretation in international law.⁹⁵

From the very beginning, the Court seems to take a very restrictive view on the actual content of Article 27.3, in light both of the right to education and the right to freedom of education. According to the judgment, pedagogical preferences are not even *prima facie* included in any of the liberties defined in Article 27: first, they are not protected by a constitutional right to freedom of education that would only legitimize parents to educate children outside regular school hours and, where basic education is concerned, to create schools that would have to be ultimately homologated by the state⁹⁶; and second, they are not included either in a universal right to education that, in the Court's interpretation, would only entitle parents to a choice of school and the prerogative to guarantee that their children receive in the chosen school an education that conforms to their moral or religious convictions. The right to education, the judgment affirms, does not support a parental decision not to school children, particularly for pedagogical reasons.⁹⁷

It is surprising that the Court seems to vest on the legal duty of mandatory schooling a constitutional relevance that is absent from the Constitution itself. Indeed, what the Constitution does not support, under any circumstances, is a parental decision not to *educate* children, which is significantly different from a decision not to *school* children. What the Constitution seeks to ensure is that every child on Spanish soil is provided with an education that consists in, at least, the basic elementary education set forth under Article 27,⁹⁸ but it remains conspicuously silent on whether this goal necessarily has to be achieved through compulsory school attendance.

The judgment seeks to find additional support for the constitutional irrelevance of pedagogical preferences in international human rights law, starting with an interpretation of Article 27.3 of the Spanish Constitution in light of sections 1 and 3 of Article 26 UDHR. The Court concludes that pedagogical options cannot be considered to be included in the Spanish Constitution even through a referral to Article 26.3 UDHR, which recognizes a prior and unqualified right for parents to choose the education of their children that is not limited to decisions based on religious, moral, or philosophical preferences. According to the Court, Article 27.3 cannot be taken to be a sub-species of the more general right enshrined in Article 26.3 UDHR that would allow for pedagogical preferences to be taken into consideration, and must on the contrary be only interpreted in light of the statement included in Article 26.1 UDHR which provides that 'elementary education shall be compulsory'.⁹⁹ It is noteworthy that the Court seems to make the not infrequent mistake of assimilating *compulsory elementary education* with *compulsory school attendance*, the latter being a concept generally absent from the UDHR.

⁹⁴ *ibid* FJ 5°.

⁹⁵ *ibid* FJ 6°. Particularly arts 26.1 and 3 UDHR; art 18.4 CCPR; art 13.3 ICESCRs; art 2 P1; and art 14 of the European Charter of Human Rights.

⁹⁶ *ibid* FJ 5 a).

⁹⁷ *ibid* FJ 5 b).

⁹⁸ See nn 36 and 81 above.

⁹⁹ *ibid* FJ 6°.

Although it is true that in the Spanish Constitution there is no specific wording that provides for a general right of parents to choose the education of children, this does not mean that such general and prior right is devoid of constitutional coverage as it has been argued in Section 3 above. First, it is implicitly included in the right to freedom of education¹⁰⁰ and directly connected with the freedom of conscience of Article 16.¹⁰¹ Second, the Court obviates the fact that the referral to the UDHR included in Article 10.2 of the Spanish Constitution was primarily included by its drafters to compensate for this omission.¹⁰² Therefore, in my opinion Article 27 should be interpreted, in the wider sense of Article 26.3 UDHR, as acknowledging a prior right of parents to choose the type of education they want to provide for their children, including the possibility of choosing between different moral, religious, or even pedagogical educational alternatives.¹⁰³

The Constitutional Court also finds pedagogical preferences alien to the 'religious or philosophical convictions' mentioned by Article 2 P1 and from the interpretation thereof made by the ECtHR. Again, the Court takes a simplistic approach to the complex doctrine elaborated over time by the ECtHR on the scope of Article 2 P1. It is true that the ECtHR has consistently found that Article 2 P1 provides coverage for religious and philosophical convictions that have attained a certain level of cogency, seriousness, cohesion, and importance,¹⁰⁴ meaning those directly connected with Article 9 ECHR (freedom of thought, conscience, and religion), but it is likewise true that it has not necessarily excluded from protection educational options based on pedagogical considerations. In fact, in *Campbell and Cosans* the ECtHR affirmed that parental rejection of corporal punishment in school amounted to a philosophical conviction under Article 2 P1, although opposition to corporal punishment is, above all, an exclusion of a specific pedagogical method.¹⁰⁵

Finally, the judgment incorporates the additional international law argument that the express reference to pedagogical preferences included in Article 14 of The Charter of Fundamental Rights of the European Union has to be interpreted in a restrictive manner, since the Charter is influenced by Article 2 P1 and, as has been noted in the previous paragraph, these preferences are neither mentioned nor covered under the Protocol.¹⁰⁶ I personally find this argument to be rather weak. Once the Charter has listed pedagogical

¹⁰⁰ Also in the judgment by the Constitutional Court 5/1981, 13 February 1981, FJ 7°.

¹⁰¹ See n 42 above.

¹⁰² See Section 3 above.

¹⁰³ Art 14 of the most recent international document on human rights, The Charter of Fundamental Rights of the European Union, seems to support this argument, as it expressly mentions the pedagogic convictions of parents as having to be respected in the education of their children. Art 14.3 of the Charter reads: '[t]he freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.' (Emphasis added.)

¹⁰⁴ See *Campbell and Cosans v the United Kingdom* (judgment of 25 February 1982, s 36); *Valsamis v Greece* (judgment of 18 December 1996, s 25); and *Folgerø and others v Norway* (judgment of 29 September 2007, s 84 c).

¹⁰⁵ In fact, when the now extinct European Commission and the ECtHR decided the inadmissibility of the two homeschooling cases of *Leuffen* and *Konrad*, the grounds for the dismissal were not the inadequacy of the motives alleged by the appellants—who by the way were both religious—but the absence of a purpose of indoctrination in the legislator's decision to prohibit home education in Germany. See nn 30 and 31 above.

¹⁰⁶ FJ 6° d). See n 103 above.

educational preferences alongside the traditional religious and philosophical variables, it seems only consistent to interpret this article—which ultimately refers to a basic human right—in the wide sense included in the text, and not in the restrictive way reflected in the judgment.

After reaching the conclusion, based on both domestic and international law, that pedagogical preferences cannot cause parents to opt out of the institutional school system, the Constitutional Court extends this same consideration to religious or moral convictions, even though, as opposed to pedagogical educational considerations, these are expressly included in Article 27.3 of the Constitution. The Court argues that the imposition of a legal duty of compulsory school attendance is a statutory limit consistent with Article 27 of the Constitution which does not disproportionately restrict the right of parents to choose the moral and religious education of their children; and that mandatory schooling is the most efficient way to provide minors with elementary education.

The Court reasons that compulsory school attendance is a statutory limitation of parental rights over the education of children that finds coverage in sections 2, 4, 5 and 8 of Article 27 of the Spanish Constitution¹⁰⁷ and is, therefore, constitutionally acceptable. Even more, upon further analysis, the Court also finds this statutory limitation to be wholly admissible from a constitutional point of view because it does not disproportionately restrict the fundamental right of parental freedom in educational matters enshrined in the Spanish Constitution.¹⁰⁸ Consequently, this constitutionally acceptable legal duty of mandatory schooling admits no exceptions, regardless of whether the decision to home educate—based on a hypothetical constitutional right of parents not to school minors—is founded on pedagogical preferences or on moral or religious convictions,¹⁰⁹ because mandatory schooling is considered by the Court to be the ‘most efficient’¹¹⁰ way for the state to fulfil its constitutional duty to provide children with an adequate elementary education that aims at the full development of their personality.

The main question raised by this second argument is if this supposedly higher effectiveness of compulsory school attendance suffices to justify a limitation of the fundamental right of parents to choose the moral and religious education of their children. Indeed, the main criticism of this judgment is that it deliberately seems to ignore the fact that a reflection on the constitutional implications of homeschooling cannot focus only on how the goals of education are *more or less efficiently* satisfied, however important this may be, but should primarily dwell on trying to unveil the adequate balance of the fundamental rights of the main players in the field of education—children, parents, state. Or in other words, the Constitutional Court seems to have no qualms about restricting fundamental rights of conscience through a simplistic application of the principle of proportionality that stems from a seemingly biased approach to home education.

¹⁰⁷ *Sentencia del Tribunal Constitucional 133/2010, de 2 de diciembre*, FJ 7º a).

¹⁰⁸ *ibid* FJ 8º.

¹⁰⁹ *ibid* FJ 7º b).

¹¹⁰ *ibid* FJ 8º b).

Instead of methodically proving the constitutional indispensability of mandatory school attendance, the Court, even after stating that home education could be less restrictive with the parental rights acknowledged in Article 27.3,¹¹¹ takes its arguments one step further and burdens home education with a negative value judgment for which a Constitutional Court is arguably incompetent. The judgment places on homeschooling parents the unmasked suspicion that the education their children receive is deficient in the teaching of democratic principles, rights, and liberties, and that it will ultimately be detrimental to the development of a child's individual personality. The Court's judgment is based on the single—and to some extent prejudiced—statement that mandatory schooling favours a model of delivering basic education in which 'contact with the plurality of society and with the diverse and heterogeneous elements that compose it, instead from being occasional and fragmented, are part of everyday experiences'.¹¹² In other words, the Constitutional Court abstractly takes a general and sparsely motivated negative outlook on home education¹¹³ that runs parallel with an idealized—and often unrealistic—vision of institutional education.

The judgment goes beyond a prejudiced approach to homeschooling. When analysing the reasonability of mandatory schooling, the Court is content to proclaim that the parental rights on education enshrined in sections 1 and 3 of the Constitution 'are not completely disregarded'¹¹⁴ in an education system that does not contemplate homeschooling as an alternative educational option because parents can still influence the education of children both in school and at home. At this point, it is perhaps essential to recall that the right of parents to choose the religious and moral education of their children, as a projection and manifestation of the broader right to freedom of conscience and religion, may not be subjected to any limitations other than those that protect the right of others to exercise public liberties or fundamental rights, and are justified and necessary in a democratic society. The limit to parental rights over the education of children is the child's own right to education. If the measure of the whole education system is the right and best interests of minors to be educated—for both the development of individual personality and the assimilation of values and technical skills¹¹⁵—the logical point of departure for any serious constitutional analysis of home education would seem to be the attempt to define the boundaries of that educational middle ground that accommodates, with the least possible limitations, the concurring rights of parents and children. The Constitutional Court seems satisfied instead with besmirching home education and brandishing a decisive defence of the constitutional underpinnings of mandatory schooling and the virtues of school attendance.

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ The Constitutional Court renounces to take into account—as the lower courts before it—the actual learning environment and social situation of the children of the appellants.

¹¹⁴ *Sentencia del Tribunal Constitucional 133/2010, de 2 de diciembre*, FJ 8^c), as they are still free to influence their children's moral and religious education both in school and at home.

¹¹⁵ Navarro-Valls and Martínez-Torrón (n 12) 217.

Some scholars have accurately reflected on how the State perverts its role when instead of being supportive of its citizens, it places obstacles to the full development of their personality. And this is exactly what happens when the State tries to define what is to be deemed education and attempts to measure everyone by its own pre-established standards.¹¹⁶ Between the widest possible recognition of the fundamental right of parents to choose the education of their children, and the seemingly resigned statement that this right is not completely ignored by Spanish education law, there is an ample middle-ground that the Spanish Constitutional Court deliberately refuses to explore, thus raising doubts about the way it uses the proportionality test necessary to justify the legal limitation of a fundamental right.¹¹⁷

It certainly may be difficult to coordinate the nuanced and sometimes diverging interests that concur in education, but what is hardly acceptable is that the actual content of a fundamental right is disfigured or diluted¹¹⁸ under the pretext that it is not wholly disregarded.

C. The Spanish Case Law on Home Education after the Judgment of 2 December 2010

Despite the short time that has passed since the 2010 judgment by the Constitutional Court, its effects can already be perceived in the outcome of the few homeschooling cases decided by local courts in the last two years. These judgments show that although the criminal approach to prevent or stop homeschooling still seems to be effectively blocked, civil proceedings have begun to produce the desired effect of forcefully schooling home-educated children.

To the best of my knowledge, after December 2010, three homeschooling cases have been decided by local Courts of Appeal—one criminal and two civil—and there is a fourth one pending resolution before the criminal section of the Galician *Audiencia Provincial* of Pontevedra.¹¹⁹ The two cases that have followed the civil judicial path¹²⁰ have resulted in almost identical decisions that, largely quoting from the Constitutional Court's judgments, have commanded the schooling of the children. In both instances, the courts have refused to discuss the educational context of the minors, arguing that the cases had to be decided strictly on the legal consideration that both State and local legislators have clearly opted for a system of mandatory elemental education that is delivered onsite in educational establishments.¹²¹

¹¹⁶ Franz Hengsbach, 'Libertad de enseñanza y derecho a la educación. El Estado democrático y la educación' (1979) 6 *Persona y derecho* 91.

¹¹⁷ Vidal Fueyo (n 59) 318–19.

¹¹⁸ Mantecón Sancho (n 35) 10.

¹¹⁹ See <<http://www.farodevigo.es/sucesos/2012/06/21/fiscalia-recurre-sentencia-madre-educa-hijo-casa/658969.html>> accessed 30 December 2012.

¹²⁰ *Sentencia de la Audiencia Provincial de Girona (Sección 1ª) 88/2011, de 3 de junio* and *Sentencia de la Audiencia Provincial de Alicante (Sección 6ª) número 5/2012, de 17 de abril de 2012*. In the first case, the children were taught at home by their parents, whereas in the second one the boy was registered with the Californian homeschooling academy of West River.

¹²¹ *Sentencia de la Audiencia Provincial de Girona (Sección 1ª) 88/2011, de 3 de junio, FJ 2º*; and *Sentencia de la Audiencia Provincial de Alicante (Sección 6ª) número 5/2012, de 17 de abril de 2012 FJ 1º*.

The criminal cases¹²²—both decided in Galicia—have followed the well-trodden path of not assimilating homeschooling with a criminal offence for inobservance of familial duties. However, the influence of the judgment by the Constitutional Court can also be perceived in that both judgments have warned that civil, and not criminal courts, are competent to solve cases that refer to controversies regarding the choice of alternative models of teaching.¹²³

5. *Future Perspectives of Homeschooling in Spain*

Notwithstanding the fact that the judgment of the Constitutional Court of 2 December 2010 has been a turning point in the jurisprudence on homeschooling, there is still much to be debated and much to be legislated on this particular subject in Spain. The recent developments in the Basque legislation on child protection and welfare and the outcome of the latest homeschooling cases heard in local lower courts seem to support this statement. In any event, it would be nothing short of naïve to believe that a judgment contrary to the interests of the proponents of home education will result in more than 2000 families abandoning homeschooling in Spain, or that it will dissuade any more parents from educating their children outside certified schools in the future.

There is no doubt that educating children at home raises many concerns in societies where, as in Spain, the norm is to clearly differentiate formal education and family education, and to assimilate formal education with school attendance. The suspicion that a nominal home-based education may be a facade for truancy, neglect, family desertion, or even child abuse, the fear that children educated at home may have little or limited social interaction with their peers, and the doubts raised about the actual content of the instruction received at home—in both technical skills and civic values—are open ground for the discussion of experts on education. But the social demand exists, it is organized, and its voice begins—slowly but increasingly clearly—to be heard, and it is the duty of a social state to be responsive to the legitimate demands of its citizens.

Taking as starting point the fact that the Spanish Constitution does not pre-determine the specific legal configuration of the education system but rather draws the fringes of a constitutional strip that allows for a varying plurality of educational options, the legal configuration of home-based educational formulas as a third-way alternative set on equal footing with the traditional public–private school options, may not be immediately discarded. The legal regulation of homeschooling becomes in Spain a matter of decision for policy makers to reorganize the education system in a manner that is increasingly accommodating of the fundamental right of parents to choose the education of

¹²² *Sentencia de la Audiencia provincial de A Coruña (Sección 2ª) 594/2011, de 27 de diciembre de 2012 and Sentencia del Juzgado de Primera Instancia número 2 de Vigo, de 11 de junio de 2012.* The latter has been appealed before the Court of Appeal of Pontevedra and is pending resolution (see n 119 above).

¹²³ *Sentencia de la Audiencia provincial de A Coruña (Sección 2ª) 594/2011, de 27 de diciembre de 2012, FJ 1º.* The original text of the *Sentencia del Juzgado de Primera Instancia número 2 de Vigo, de 11 de junio de 2012* is not officially available yet. However, it has been largely quoted in the media. See for instance <<http://www.farodevigo.es/sucesos/2012/06/21/fiscalia-recurre-sentencia-madre-educa-hijo-casa/658969.html>> accessed 30 December 2012.

their children. Any regulation of homeschooling shall, however, necessarily respond to two basic criteria, both perfectly compatible with the highest degree of pedagogical adaptation to the circumstances of each child which is characteristic of non-institutionalized education: least possible restriction of the freedom of conscience in its specific manifestation of the parents' freedom of education, and maximum guarantee of the minors' rights to receive an education that consists in, at least, a basic and mandatory primary instruction that is respectful with the content, goals, and limits established in Article 27 of the Constitution. Educational pluralism cannot justify a waiver of the competences on education that the Constitution vests in the state, and public authorities would be responsible for a statutory regulation of forms of home-based education that fully comply with the constitutional aims and objectives of the right to education stated in Article 27.2.

In the task of organizing the education system to meet the requirements of true educational freedom, lawmakers shall have to be necessarily accompanied and supported by the courts. Whether for lack of specific legal recognition, or as the interpreters of the scope and content of any norms on home education, the jurisprudential criteria when faced with situations of non-schooling should be that of maximum recognition of the parental right to choose the education of their children always subjected to the limit of the *favor minoris*, the best interests of the child and his or her right to receive an education within the parameters established in the Constitution. At the end of the day it shall be a matter of striking the balance between two fundamental rights: parents' freedom of education, as an extension of their right to freedom of conscience and religion; and children's right to education, which is part of their own right to freedom of conscience and to free development of their personalities.

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