1. Preliminaries

Education is a key issue in a juridical system, because it is an essential means to the transmission of values to the next generation. The time children spend in school, or broadly, in activities linked to their education, is by far much wider than the time devoted to any other occupation. Although mass media, internet and social networks also have a deep influence in children, school education is still one of the major concerns of parents regarding their offspring.

Decisions regarding the kind of education that the children will receive correspond to their parents. This is usually recognized as a fundamental right in the State Constitutions and International Treaties. The right mainly appeals to education on values because, obviously, all parents want the best scientific education for their children; they may differ, however, on the religious or moral values they want to be transmitted in school, or the type of education they want - for example, based on a certain pedagogical theory. This is the reason why the

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1 The parents' right to educate their children is considered, as a general rule, from the perspective of the children's right to receive an education. An exception is the German Constitution, which states that parents have a “natural right” to educate their offspring (section 6-2).

2 See the United Declaration of Human Rights (UDHR), section 26: “1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. 3. Parents have a prior right to choose the kind of education that shall be given to their children.” See also the International Covenant on Civil and Political Rights, section 18, the International Covenant on Economic, Social and Cultural Rights, section 13, and the Convention against Discrimination in Education, adopted by the United Nations Educational, Scientific and Cultural Organization on December, 14th, 1960. In Europe, see the European Convention on Human Rights (ECHR), Additional Protocol I, section 2, “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.”

3 The choice may affect also to other elements that set up the structure of education. In some regions from Spain, the language in what education is imparted aroused a harsh conflict not solved yet. Language of education was controversial also in Belgium, in this case decided on an early ruling of
right to education is strongly bound to ideological and religious freedom; and that is also the reason why the parents may choose; if education were independent of values, there would have been no reason to let them choose, as there is not a choice on other issues⁴.

Public authorities also have powers related to education, but they are different from the parents’ role. The State must foster the conditions that ensure that parents’ rights are effective, but it has not any power to decide itself the kind of education a child will receive. In recent times, this function of the State has been affected by a general trend to secularization in Europe. A misunderstanding on what secularization means and what it entails gave rise to some decisions that have had an impact on the laws regulating education and the way the parents’ right to education is understood.

I will briefly reflect on this trend to secularization and, afterwards, I will analyze some challenges that parents have to face with regards to the right to choose the education for their children in the European context.

2. Secularism and laicidad

It is not easy finding a proper translation for the word laicidad, or laicitè or laicità as they are used in Spain, France or Italy, and its relation to secular and secularism, as used in the Anglo-Saxon area. It is not either the aim of this paper solving a conceptual question regarding its meaning. For the sake of clarity, I will make some remarks on these items to best understand the problems they pose for education⁵.

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⁴ It is not unusual that the children’s right to education and all it implies (free education, compulsion in basic levels, and so on) were recognized independently of the parents’ right to choose the religious and moral formation for their children. For example, the Spanish Constitution of 1978 states in section 27: “1. Everyone has the right to education. Freedom of teaching is recognized (…). 3. The public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction in accordance with their own convictions (…)”⁴. In the same sense, for example, Belgian Constitution, section 24-1; Irish Constitution, section 42; Netherlands Constitution, section 23-3.

The term *secular* is used to indicate that something has not religious or spiritual basis. In this sense, secular is equivalent to *laico*, a word that, when referred to juridical or political issues implies a separation between Church and State and the neutrality of public authorities with regards to religious denominations. *Laicidad*, therefore, is a juridical principle that avoids any entanglement between the civil and religious powers. This is a typical continental construction, unknown as such in the Anglo-Saxon tradition; in fact, there has never been separation between Church and State in the United Kingdom, and there has never been entanglement between Church and State in the United States -due to the well known *wall of separation* that the Founding Fathers laid down from the very beginnings of the Union-.

The separation between Church and State is endorsed as a fair and reasonable principle in most continental countries, except for the Nordic Kingdoms. The Catholic Church also took a positive approach to the issue after the Second Vatican Council. The idea was more recently revisited in the words of President Sarkozy of France, echoed by Pope Benedict XVI, who developed the idea of a *laïcité positive*, as referred to a separation of Church of State which does not exclude cooperation on those fields of common interest.

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6 A comprehensive study on the origin and development of the term *secular* can be found in CATROGA, F., *Entre Deuses e Césares. Secularização, laicidade e religião civil*, Coimbra (2010), 47 ff (“A semântica da secularização”).


8 It must be noted that freedom of religion and separation between Church and State are closely related, but they are not interdependent, as the juridical regime of those countries demonstrate. Recently, in a judgment from the ECHR, one of the Judges wrote in a concurring opinion: “The Convention proves to be quite helpful with its detailed and exhaustive inventory of what freedom of religion and conscience really means, and we would do well to keep these institutional constraints in mind. Freedom of religion is *not* secularism. Freedom of religion is *not* the separation of Church and State. Freedom of religion is *not* religious equidistance – all seductive notions, but of which no one has so far appointed this Court to be the custodian. In Europe, secularism is optional, freedom of religion is not.” (See *Lautsi and others v. Italy*, judgment of March 18th, 2011, application no. 30814/06, concurring opinion of Judge Bonello, 2.5).

Laicidad, however, must be distinguished from laicismo, a political trend that pervades Europe and pushes for expelling religion from the public space. The secularization of society gave way to a secularist political agenda in some European countries\(^\text{11}\), which consider that religion is just a question of private concern and should not be allowed to participate in the public debate\(^\text{12}\). In the words of a well-known sociologist, “in the name of freedom, individual autonomy, tolerance, and cultural pluralism, religious people -Christian, Jewish and Muslim- are being asked to keep their religious beliefs, identities and norms private so that they do not disturb the project of a modern, secular, enlightened Europe”\(^\text{13}\). With an illustrative comparison, we could say that although religion is not considered any longer the opium or the people, and therefore it should not be persecuted, it is only tolerated as the “tobacco of the people”: smoke as less as possible, without disturbing anybody, and of course, out of any public space\(^\text{14}\).

Apart from expelling religion from the public realm, other way to shove that wrong way to understand secularism is trying to impose a civil ethic, that is to say, a common set of values, other than the constitutionals, that everybody should share and defend above all, including their own personal beliefs. That civil ethic would replace the religious ethics, giving way to a kind of secular establishment, where only those beliefs would be acceptable. That

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\(^{10}\) Certainly, the idea is not utterly new. In 1958, Pope Pius XII used the words *la legittima sana laicità dello Stato* (Alloc. Alla vostra filiale, March 23\(^\text{rd}\), 1958 Acta Apostolica Sedis 50, 1958, 220), and the expression got the favor mainly of the Italian juridical literature.

\(^{11}\) While secularization is “a social phenomenon that requires no political implementation” (see ROY, O., *Secularism confronts Islam*, New York, Columbia University Press, 2007, 12), secularism is “a political project with a set of normative claims as to the relationship between religion and the state” (ZUCCA, L., *The crisis of the Secular State*, in [http://ssrn.com/abstract=1343099](http://ssrn.com/abstract=1343099), 4)

\(^{12}\) In recent years, the debate on secularism was ignited by the draft of the European Constitution and whether it should mention its Christian roots (see ZUCCA, L., *The crisis of the Secular State*, cit.) Immigration from Islamic countries fuelled the controversy, which keeps on arising arguments all over Europe.


means that while religious people must be tolerant with some behaviours they find hard to accept, secularists refuse the same tolerance when it comes to religious behaviour which do not fit that civil ethic\textsuperscript{15}.

The State, however, cannot attempt to achieve a consensus on values other than those stated in the Constitution. The game, as it is currently conceived, is diversity and coexistence in the dissent -or, as more commonly said, pluralism- when we come to this field. The rules of the game are the constitutional principles and the bills of rights, and these rules are broad enough, and yet specific enough to include everybody without looking for an agreement on other background values\textsuperscript{16}. In other words, secularism is inclusive, not exclusive. It must not seek the exclusion of religion from public life, but the inclusion of all religious groups, without any preference, but also without reluctance or prejudice regarding religious or denominational values.

The debate on secularism also reached education, that as a matter of fact, is a fairly sensitive field. The secularist Governments seek, on the one hand, to extend their reach to all possible fields, and education is one of them. On the other hand, they are well aware that education is a crucial area to foster the idea of the civic common ethic. School systems are strongly centralized all over Europe, with very few exceptions, and public schools are not under the control of parents\textsuperscript{17}. As far as education is compulsory, teachers have a great power to inculcate secularism in children, as it happened in some European countries in the times of the Enlightenment. Thus, education serves as a major battlefield for the negotiation of religious matters\textsuperscript{18}.

However, there are some limits to political action. First, the right of parents’ to choose religious and moral education for their children is a fundamental right, and it must be respected and protected as that. Second, the State is often bond by deals that also target education, for example, agreements with religious denominations regarding religious education in public schools.

\textsuperscript{15} See BERGER, P., DAVIE, G., FOKAS, E., \textit{Religious America, Secular Europe?}, cit., 103-104.
\textsuperscript{16} ZUCCA, L., \textit{The crisis of the Secular State}, cit., 15.
\textsuperscript{17} See BERGER, P., DAVIE, G., FOKAS, E., \textit{Religious America, Secular Europe?}, cit., 19. This poses an important difference with USA education system, that remains mostly a local government-controlled system, which allows a wider intervention of parents.
\textsuperscript{18} See BERGER, P., DAVIE, G., FOKAS, E., \textit{Religious America, Secular Europe?}, cit., 81.
The dynamic of secularism in relation to education arouses some interesting questions, which deserve closer attention.

3. School choice: the positive side of the right

The right to get the necessary education for life is a fundamental right that public powers should guarantee and facilitate. Basic education is compulsory, and the State must establish a network of free schools wide enough to enable the enrolment of all children in order to achieve this goal.

However, education is more than the simple teaching of a series of subjects that qualify to carry out a job. It also conveys the transmission of certain values that inform the teaching, and, therefore, will shape the conscience of the children and their future way of acting and deciding. As mentioned above, the right to decide on the type of education belongs to the parents; the State cannot decide which kind of education a child will receive; it cannot establish the values that will inform the education. So, how can the State duties and the parents’ right be harmonized?

The best way to do it would be that parents could choose a school according to their values. The State, obviously, cannot assure that such a school actually exists, but it recognizes the parents’ right to create schools with a religious or ideological ethos, within a legal framework to guarantee that the schools meet all the requirements to impart the general education. The problem is that these private schools are not always financed or subsidized with public funds, so they have an economical cost for parents.

Apparently, we come here to an oxymoron. Everybody can send their children to public schools because they are free, but public schools in secular States cannot be ideologically or religiously oriented. Private schools may have a religious or ideological ethos, but they are not free. The State cannot provide for a free school that fits the preferences on education or all parents at a reasonable distance as to send their children there. That would be impossible from a practical perspective, because it would mean that there must be thousands of schools, as many as different values the parents have in a given town or village.

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19 It has not always been this way. For centuries, education, as other issues like healthcare and welfare, were part of the domain of the churches. In modern day Europe, the State has assumed the duty to ensuring that everybody has access to the educational facilities. See, among others, MC CREA, R., Religion and the Public Order of the European Union, Oxford (2010), 44-45.
Therefore, only wealthy parents would have a real choice—an effective right—regards to their children’s education. Also, as budgetary sources are limited, a fair balance on public funding of education seems far-fetched. If public resources aim to get a better and wider public education, then the right to choose the religious and moral education will be less effective, as private schools will keep their unaffordable fees. On the contrary, if public powers funnel resources to private schools, to ensure the right to choose school, then the free compulsory teaching for everybody will lose quality, and the right to education will be less efficacious.

This contradiction must not be seen as a well-know controversy between public and private education that can be solved only on religious or ideological biased bases: those who foster religious education would push for a broader public help for private education, and those promoting a non-religious education would lean towards a more powerful public education. First of all, it has not always been like that. For example, in Spain, during the confessional regime of General Franco, private education was the only chance to avoid the Catholic ethos that pervaded all public schools. Private education was then—as today—linked to the choice a certain kind of education, but in that case, a secular one. Secondly, public powers should look for a fair balance between the parents’ right to choose the kind of education and the State’s duty of providing free education for all. There is not a single way to do it. It depends on the history, the culture of the country, the political party in power, and so on; but it must be always remembered that the parents’ right to choose the religious and moral education of their children is a “prior” right, as clearly stated in the UDHR, that must be respected by the State.

Let us see some examples on how different countries deal with the right to choose, and its direct requirement: the conditions to permit schools other than State-run to exist and to get funds, and, as a consequence, allow a real choice of school.

United Kingdom has an official Church, but it also has a multireligious ethos and a secularized society. In this country, the government allowed public schools to become Academies, run by parents, churches, NGOs or enterprises, but remaining in the public sphere. Another country with an official Church, Sweden, has developed, since the 1990’s a school voucher program, that allows the choice between public and independent schools;

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21 See note 3. Also, ECHR, Additional Protocol I, section 2, already cited.
these last ones have rapidly increased from 1% to 14 % in primary schools and 44 % in secondary schools. The parents really choose the school that better fits their expectations, regardless it being public or independent. The system was so successful that the party on the opposition -that had opposed the program-, not only kept it when it got into power, but also raised the funds for the school vouchers.

Netherlands included in her Constitution the equality of public and private education, all funded by the State, so parents can choose whatever they want, without any kind of restriction. Following the “Pacification Act” of 1917, which ended a long controversy on public endowment of education, all religious denominations can establish and run their own schools, which received the same financial support that state schools.

France introduced in low developed areas the “schools under contract”, that will enjoy a wider autonomy to run the school; they will be able to hire the professors, but they must fulfil some targets, according to an innovation program. Also, since 2009, la Loi Carle allows the partial endowment of private schools under certain conditions. Other countries, like Spain, have private subsidized schools; they can have their own ethos, but they lose a part of its autonomy, because both in running and supervising the school there is a strong intervention of the public powers: the more endowment, the less autonomy.

As we can see, countries with very different traditions and cultures are dealing -of course, on different ways- with the parents’ right to choose the education they want for their children. It does not mean that the State must resign from its powers; only, it must be clear that it is up to the parents, no the State, deciding on the children’s education. So, allowing different kinds of schools has to do with a higher level of guaranteeing the parents’ right to choose.

4. Neutrality in public schools: the negative guarantee

22 See section 23 of the Constitution of the Netherlands.
23 See BERGER, P., DAVIE, G., FOKAS, E., Religious America, Secular Europe?, cit., 84. The system, however, has been questioned after the murder of Theo Van Gogh, since several Muslim schools had been created in the country in the previous decades (only 1 %, but still). The same concern aroused in United Kingdom, after State inspections showed that some state-funded Muslim schools have been promoting and teaching values called into question. See MC CREA, R., Religion and the Public Order of the European Union, cit., 47.
24 It is well known, on the other side of the Atlantic, the debate on the US charter schools. It began two decades ago and spread all over the country, with different levels of support, but, undoubtedly, as a way of making choice available for a larger number of people.
If the State cannot always guarantee the positive side of the parents’ right to choose a school with an ideological or religious ethos, it can, though, guarantee its negative side, that is to say, that parents who cannot send their children to the religious or ideological oriented school they would like (for example, because it is unaffordable for them), or do not want to (for example, because it is far away from their home) at least may send them to a school where the children will not receive any religious or moral formation their parents do not want. From this perspective, neutrality is the less bad substitute to the lack of freedom of choice.

In general terms, and setting aside some particular education systems, it means that public schools in secular countries must be neutral. The State guarantees that schools run by public powers are not ideological or religious oriented, and, therefore, the parents’ right - or, better, the negative aspect of this right- would be safeguarded. From this perspective, neutrality cannot be a situation achieved by chance, that is, that teachers enrolled in a school decide not to impose their beliefs. Neither is neutrality the result of different indoctrinations that counterbalance themselves in order to come to a zero point in ideological, moral or religious matters.

Although the exigencies of the principle of neutrality may be more ore less clear, there are some tough issues with regard to its implementation.

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25 In a broader perspective, this freedom would apply not only to religious or moral formation, but also to other particular choices regarding education, for example, coeducation. I will focus on religious and moral formation because it is the hardest question, and the one able to raise conflicts with the religious freedom and secularism. However, similar principles would apply to those other choices that have to do with parents’ freedom: if they were considered to be against any constitutional principles, the State must just forbid them, but if it they are not unconstitutional, the State cannot make any choice in favour or against them, precluding that kind of education from perceiving public foundation.


27 Ireland, for example, has a very particular education system. This country has a long tradition of separation between churches and State, yet a strong Catholic background. There is not a public education system, but a free establishment principle. Any entity may create and run a school, and the State will fund it, assuming there is a demand and the school fulfils the minimum required. Most schools are run by Catholic institutions, due to the social structure, but there is not any hindrance for the establishment of schools with another religious identity. In March 2011, Mr Ruairi Quinn TD, Irish Minister for Education and Skills, announced a forum on the future of Catholic patronage of primary schools, as a first step to reform the education system.

Neutrality in education is a delusion. Usually, public authorities set aside of the school curriculum the subjects with an explicit religious or moral content, or, at least, they are established as not compulsory, in order to comply with the exigencies of neutrality. But it is not enough. Education always relies upon and endorses some conception of the human person and human development. This is true even when we are talking about technical knowledge, let alone subjects like history, civic education or, in general, those so-called “humanistic”. Therefore, neutrality is almost impossible, as far as any transmission of knowledge implies an assumption of certain values  

If we take for granted that perfect neutrality in education is impossible to achieve, from a practical perspective there are three major threats to neutrality in public schools. 

The first one is quite simple. It happens when a teacher uses his or her lectures to indoctrinate children. He cannot rely on his freedom of teaching, because his right has the limit on the students’ religious and ideological freedom, and that limit cannot be trespassed. Although it is perhaps the most difficult threat to uncover (except very striking cases), the way to solve it, once it has been proved, is clear and easy: to penalise the teacher -including, in certain cases, his removal- according to the regulations in force. Nothing special comes out in this situation: it is the general answer of the Law to the abuse of a duty. 

The two other threats deserve a closer attention. One has to do with subjects supposedly neutral, but in fact carry on a chance of indoctrination. The other has to do with the subjects that explicitly have the aim of religious or moral formation. 

a) Controversies on not-so-neutral subjects

Public authorities have the power to set up the school curriculum. The setting and planning of the curriculum fall within the competence of the State, and all public and private

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29 “The education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development”. (Campbell and Cosans, at 33; see below).

30 This threat is mention in Zengin (see below), 53: “Certainly, abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism”. See also Kjeldsen, Busk Madsen and Pedersen, at 54.
schools must comply with it. When doing that, the State has to respect the parents’ rights to avoid indoctrination of their children, yet it enjoys a margin of appreciation in their efforts to reconcile the implementation of their powers and the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

This respect should be shown throughout the whole curriculum, not only with regards to the teaching of religion. In some school systems, certain subjects in the curriculum, or parts of them, deal with topics closely related to the philosophical, moral or religious realm. In these cases, the State must be extremely careful to respect parents’ rights. It is not difficult trespassing the limits, and in fact, a number of controversies on this matter arose in several European countries, some of them finally decided by the ECtHR. The controversies had to do mostly with two subjects: sexual education and Education for citizenship.

In 1976, the ECtHR ruled, in the highly contentious Kjeldsen case, that compulsory sex education in public schools was not against the parents’ right to choose the kind of education they want for their children, guaranteed in the Additional Protocol I of the ECHR.

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31 Lautsi and others v. Italy, at 61. The Council of Europe state with regards to section 2, Additional Protocol I of the ECHR: “Nothing in the wording of this provision would seem to suggest an obligation for states to organise a specific system of education and teaching, to favour one educational approach over another, or to assign a particular content to school curricula. Indeed, the Court holds that: (I) States are in principle free to determine the content of education, (II) but on condition that they respect the religious and philosophical convictions of pupils’ parents by ensuring pluralist education, or by guaranteeing the possibility for pupils to be exempted from lessons that would offend their parents’ sensibilities.” (Education, religion and philosophical convictions in the case-law of the European Court of Human Rights. Information document prepared by the Registry of the European Court of Human Rights, Strasbourg, 2 April 2008 DGIV-RD, 2008, 2)

32 Idem, at 69.

33 “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.” (Kjeldsen, Busk Madsen and Pedersen v. Denmark, at 53).

34 See, mainly, Kjeldsen, Busk Madsen and Pedersen v. Denmark, judgment of 7 December 1976, Series A no. 23; Campbell and Cosans v. the United Kingdom, judgment of 25 February 1982, Series A no. 48; Konrad et alt v. Germany, October 11th, 2006, application no. 35504/03; Folgerø and Others v. Norway, judgment of June 29th, 2007, application no. 15472/02; Zengin v. Turkey, judgment of October 9th, 2007, application no. 1448/04; Grzelak v. Poland, judgment of June 15th, 2010, application no. 7710/02. More recently, although not directly dealing with religious education, Lautsi and others v. Italy, judgment of March 18th, 2011, application no. 30814/06.

35 Eventually, other subjects could also be controversial. That is the case with physical education or music, which some Muslims consider should not be compulsory for their daughters -at least, as they are taught in public schools-. As far as these conflicts did not affect to a large number of students, they did not reach a high level of controversy both in public opinion and in the Courts.
section 2, as far as its aim was not indoctrination, but only transmit information. The Court understood that sexual education as stated in the Danish system fulfilled the requirements of objectivity, neutrality and pluralism. Besides, as the sexual education was not imparted as a specific subject, but integrated in several ones, it would be difficult to exempt the children of that subject.36

Sexual education was revisited in the ECtHR, twenty-five years later, on the occasion of a new demand, this time coming from Spain37. In a small village in the North of Spain, a teacher included sex education on the natural science lessons. A pupil’s father requested that his daughter were not liable to attend the explanations and take the exams. The petition was denied; he went to the Courts, that upheld the denial, and finally the case headed to the ECtHR. The action was dismissed on the grounds of the lack of foundation, but on the dismissal the Court uttered some interesting questions on this issue.

The rulings from the Spanish Courts considered that the parents’ protection against imposition of any ideas to their children was guaranteed because the Constitution recognizes the right to freely create private schools. So, if they did not like public education as imparted in that school, they might take their child to a private school with an ethos suitable for their ideas. However, public schools must be neutral irrespective of the right to choose between public and private schools, as the ECtHR remembers. The former right does not diminish the latter one; all parents, including those who choose public schools -or send their children there because they have no options- have the right to avoid indoctrination of their children.

The Spanish Courts also alleged, that those parents were trying to impose their own ideas on the others, and that was unlawful.38 It is clear, however, that they did not want to impose their ideas in the school; for that matter, neither were they asking for the withdrawal of those lessons. They just wanted their daughter to be exempted of the part of the subject they consider was trespassing the limits of their right because it had an ideological component. They were looking for what the North Americans would call the accommodation of their beliefs, not a change in the school curricula or the education laws.

36 In Denmark, sexual education will not be a subject itself, but will be transmitted through different subjects, including history, Christianity and family instruction.
A similar problem arose more recently in Spain with the introduction of a new compulsory subject in the syllabus of all schools, Education for citizenship. The subject, as defined by the European Council recommendations\(^{39}\), is worthwhile to be included in the school curricula. Its goal is the formation of children in the basic principles stated by the Constitutions and the International Treaties. The problem is that the Government included some topics in the contents of the subject that many parents deemed to be of moral nature, and therefore, their teaching will be indoctrination: again, sexual education, perceptions of certain social matters, principles of behaviour, and so on. Several Courts around the country have decided on the issue, with contradictory resolutions, both regarding the moral nature of the contents and the exemption of the subject. So, a final resolution from the Supreme Court or even from the ECtHR is expected.\(^{40}\)

I will make some comments on this issue.

The contents of the subject aforementioned are not neutral. Nobody complains about the study of human reproduction from a biological point of view or the constitutional values, but when they come to contents that may have a moral approach, we are not talking only about teaching; it is also formation, even if the State does not have any intention of indoctrination -a fact, on the other hand, very difficult to be proved-.\(^{41}\) It is clearer if we realize that Education for citizenship in Spain, for example, will be evaluated not only on the basis of what the students know, but also on how they internalize those values, or how they understand the Human Rights as the main ethical reference in human behaviour, and so on.\(^{42}\)

An important idea to be remembered is that a moral issue does not lose its nature just because public powers say so; the State cannot decide what is moral and what is not. It is important to realize that neutrality in school is different from neutrality in the moral

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\(^{39}\) See http://www.coe.int/t/dg4/education/edc/default_EN.asp?.


\(^{41}\) I may observe that parents did not complain because the contents of the subject affected uncertain beliefs they have. Both the Danish and the Spanish fathers were basing their complaints, as Justice Verdross said in a dissenting opinion in *Kjeldsen*, on a well established Christian doctrine, whereby “anything affecting the development of children’s consciences, that is their moral guidance, is the responsibility of parents and, consequently, in this sphere the State may not intervene between parents and their children against the former’s wishes”. See, also, *Folgerø*, cit., at 52.

\(^{42}\) This does not mean that I do not consider human rights of an extreme importance, and a reference in the interpretation and integration of Law. Only, some parents may think that the main ethical reference of human behaviour should be a religious system of values.
education. Public powers must refrain themselves from imposing any kind of moral or religious values, but it does not mean depriving certain issues from their moral value, and teaching them from a fake neutral perspective\(^43\). Thus understood, that is to say, teaching any essential question related to the human or social life deprived of any moral or religious value is itself an option, a relativistic one\(^44\).

Truly, as the ECtHR remembers, “it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature”\(^45\). However, there are some issues that *per se* demand a moral or religious position, and in these cases, the only option

\(^{43}\) See *Zengin*, cit., at 49: “Article 2 of Protocol No. 1 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”.

\(^{44}\) The aforementioned Justice Verdross also coped with this question in his dissenting opinion: “It seems to me necessary -sai the Justice- to distinguish between, on the one hand, factual information on human sexuality that comes within the scope of the natural sciences, above all biology, and, on the other hand, information concerning sexual practices, including contraception. This distinction is required, in my view, by the fact that the former is neutral from the standpoint of morality whereas the latter, even if it is communicated to minors in an objective fashion, always affects the development of their consciences. It follows that even objective information on sexual activity when given too early at school can violate the Christian convictions of parents. The latter accordingly have the right to object.”. More recently, a concurring opinion from Judge Power in *Lautsi* said, refering to the Chamber previous judgment: “The Chamber referred, correctly, to the State's duty to uphold confessional neutrality in public education. However, it proceeded, to conclude, incorrectly, that this duty required the effective preference or elevation of one ideology (or body of ideas) over all other religious and/or philosophical perspectives or world views. Neutrality requires a pluralist approach on the part of the State, not a secularist one. It encourages respect for all world views rather than a preference for one. To my mind, the Chamber Judgment was striking in its failure to recognise that secularism (which was the applicant's preferred belief or world view) was, in itself, one ideology among others. A preference for secularism over alternative world views—whether religious, philosophical or otherwise—is not a neutral option. The Convention requires that respect be given to the first applicant's convictions insofar as the education and teaching of her children was concerned. It does not require a preferential option for and endorsement of those convictions over and above all others.”

\(^{45}\) *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, at 53. The ruling continues: “The setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era. In particular, the second sentence of Article 2 of the Protocol (P1-2) does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.”
consistent with the neutrality of education and the due respect to parents’ right is setting aside the matter itself.

Even more, it is not up to the public powers to find a common moral, a widespread idea in the secularist States. That would be as totalitarian as trying to find a common ideology in the Nation: the State would be seizing the parents’ right to educate their children, and transforming it into a State power. The only values that must be shared in a democracy are those stated in the Constitution and in the international order. Moral values are deeply personal, and whatever intent to settle a common moral that trespasses those limits would be unconstitutional. As had been said, we can be sure that everybody would agree on the importance to foster and protect freedom, equality, justice whenever nobody ask about the definition of these concepts, what they mean and what they imply in a secular State.

Finally, I would like to highlight another issue that arose in some Courts when dealing with this question. It has been said that the parents’ right to choose the religious or moral education is not absolute, and public powers should find a balance with other rights and duties: the child’s right to receive education, the State’s right to set up the curricula. Certainly, all rights and duties related to education should be interpreted jointly, always looking for the best interest of children. But in finding the balance, some rulings considered that the right to education should prevail over the parents’ right to choose, assuming the former is so essential that cannot be surrendered at all.

On this matter, the first idea to underline is that the right to education is not weakened in this case. The exemption of the subjects aforementioned -sexual education and education for citizenship- will not impair children, because they are not the only means to achieve that formation, and this one is not essential. After all, those subjects are not always included in the syllabus as independent subjects, or not included at all, and that was deemed consistent

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47 The idea comes from J. Maritain, the French scholar who helped draft the UCHR, when asked how so many ideological and political opponents could agree on a charter of rights: “We agree about the rights but on condition no one asks why.” (Introduction, in UNESCO (ed) “Human Rights: Comments and Interpretations”, Allan Wingate, London (1949), 10.

48 See Konrad, cit.; in the same sense, the ruling from the Tribunal Superior de Justicia de Cantabria, cit., and Jiménez Alonso y Jiménez Merino v. Spain, cit.

49 See the appealing comments by by PRIETO SANCHÍS, L., Estado laico y educación en valores, cit., 42.
with the Constitutions and the European Convention of Human Rights\textsuperscript{50}. On the contrary, imposing those subjects would prevent another fundamental right to be efficacious, and it appears as a non-proportional sacrifice, given the non-essential nature of the controversial subjects.

Moreover, the right to choose is featured as a “prior right” both in the UDHR and in the European Convention of Human Rights\textsuperscript{51}; therefore, it is not biased or unfair to consider that the priority should be taken into account to find a balance when a controversy arises, that is to say, wherever a choice must be done. The ECtHR also stressed, regarding State’s obligation of respecting the parents’ right to choose, that “as is confirmed by the fact that, in the course of the drafting of Article 2 (P1-2), the words "have regard to" were replaced by the word "respect", the latter word means more than "acknowledge" or "taken into account"; in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. This being so, the duty to respect parental convictions in this sphere cannot be overridden by the alleged necessity of striking a balance between the conflicting views involved”\textsuperscript{52}.

\textit{b) Religious and moral education}

Religious education, mainly denominational, is widespread in European school systems. Unlike USA, there is a strong tradition that religion should be taught at school, which probably has much to do with the fact that education remained for centuries -and in some countries still remain- under the influence of the dominant Churches of the respective country\textsuperscript{53}. With very few exceptions -France, Albania, Belarus and Macedonia-, all countries

\textsuperscript{50} See \textit{Kjeldsen}, cit.

\textsuperscript{51} See note 2.


\textsuperscript{53} See the comparative analysis by \textit{BERGER}, P., \textit{DAVIE}, G., \textit{FOKAS}, E., in \textit{Religious America, Secular Europe?}, cit., 81-84. The authors note that in an essentially churchgoing country, as it is the USA, teaching of religion is a laudable activity, but it is not the responsibility of the Sate to ensure that such teaching takes place. That would be seen as threatening to the independence and separation of Church and State.
have some kind of religious education in public schools. Despite the differences on the features and contents of the subject all aimed to provide for religious education on school time. Let’s analyze the picture\textsuperscript{54}.

In twenty-four countries religious education is a compulsory subject. However, the scope of this obligation varies depending on the State. In five countries -Finland, Norway, Sweden Greece and Turkey- the obligation to attend lessons in religious education is absolute. All pupils who belong to the religious faith taught in the classes -Lutheran the former three, Orthodox in Greece and Islam in Turkey- are obliged to follow them, partially or fully. Some States allow for exemptions under certain conditions\textsuperscript{55}, while in others pupils are obliged to attend them unless they have opted for a substitute lesson proposed in place of compulsory religious education\textsuperscript{56}.

In a significant group of States religious education is not compulsory. It is generally authorised in the school system but pupils only attend those lessons if they have made a request to that effect\textsuperscript{57}. In some of these countries, children have the chance to attend a substitute lesson.

As affirmed by the E CtHR, this general overview of religious education in Europe “shows that, in spite of the variety of teaching methods, almost all of the member States offer at least one route by which pupils can opt out of religious education classes (by providing an exemption mechanism or the option of attending a lesson in a substitute subject, or by giving pupils the choice of whether or not to sign up to a religious studies class)”.  

It might be surprising that religious education in public schools is not widely questioned in a continent where the trend to secularization can be easily perceived. The E CtHR, as well as State Courts which dealt with this matter, usually reaffirm that parents’ freedom must be respected, but they do not consider unlawful the religious education in public schools\textsuperscript{58}. Public powers must guarantee that religious education is imparted respecting

\textsuperscript{54} Data regarding European religious education are based mainly on Zengin, cit., at 30 ff.

\textsuperscript{55} They are Austria, Cyprus, Denmark, Ireland, Iceland, Liechtenstein, Malta, Monaco, San Marino and the United Kingdom.

\textsuperscript{56} That is the case in Germany, Belgium, Bosnia and Herzegovina, Lithuania, Luxembourg, the Netherlands, Serbia, Slovakia and Switzerland.

\textsuperscript{57} Those States are Andorra, Armenia, Azerbaijan, Bulgaria, Croatia, Spain, Estonia, Hungary, Italy, Latvia, Moldova, Poland, Portugal, the Czech Republic, Romania, Slovenia, Russia and Ukraine.

\textsuperscript{58} “The Court notes that it remains, in principle, within the national margin of appreciation left to the States under Article 2 of Protocol No. 1 to decide whether to provide religious instruction in public
the parents’ rights and freedoms and according to the imperatives of equality and neutrality. So, let us see the limits of religion with regards to the school curriculum.

First of all, limitations have to do only with denominational religious lessons, or religion with a scope of indoctrination. It is possible -as seen above- to state a compulsory subject on general and objective knowledge of religion, whenever it is taught in compliance with the principles of the secular State, that is to say, making sure that the information or knowledge is conveyed in an objective, critical and pluralistic manner. Parents cannot object to such a subject, because it is aimed to educate the children in general culture, not to indoctrinate them. Moreover, the Council of Europe made a Recommendation on Education and Religion in 2005, where it encourages the Governments of member states to ensure that religious studies are taught at the primary and secondary levels of state education. Even in France, where laicité is stronger than in any other place in Europe, and where public schools have been a privileged tool to spread secularism, religion facts have been recently reintroduced in different parts of the syllabus.

When religious formation is included in the curriculum, it cannot be compulsory. There are several possible choices to set up this feature: there can be other non-religious schools and, if so, what particular system of instruction should be adopted. The only limit which must not be exceeded in this area is the prohibition of indoctrination”. (Grzelak, cit., at 104)

59 See Zengin, 52; Folgerø, cit., at 52.

60 See Recommendation 1720 (2005), adopted by the Assembly on October, 27th. It can be found at http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/TA05/EREC1720.htm

61 See BERGER, P., DAVIE, G., FOKAS, E., Religious America, Secular Europe?, cit., 82-83. See also on the issue the Lettre aux Éducateurs by Nicolas Sarkozy (September 4th, 2007), where he expresses his conviction that the study of the religious facts is a decisive tool to overcome religious fanaticism and foster interreligious and intercultural dialogue: “Je suis convaincu qu’il ne faut pas laisser le fait religieux à la porte de l’école. La genèse des grandes religions, leurs visions de l’homme et du monde doivent être étudiées, non, bien sûr, dans un quelconque esprit de prosélytisme, non dans le cadre d’une approche théologique, mais dans celui d’une analyse sociologique, culturelle, historique qui permette de mieux comprendre la nature du fait religieux. Le spirituel, le sacré accompagnent de toute éternité l’aventure humaine. Ils sont aux sources de toutes les civilisations. Et l’on s’ouvre plus facilement aux autres, on dialogue plus facilement avec eux quand on les comprend.” (page13)

62 The UN Committee on Economic, Social and Cultural Rights, in a General Comment regarding the Implementation of the International Covenant on Economic, Social and Cultural Rights (E/C.12/1999/10), stated: “The Committee is of the view that [the Covenant] permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression. It notes that public education that includes instruction in a particular religion or belief is inconsistent with article 13 (3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.”
subjects as a substitutive, other kind of activities, or simply an exception. However, arrangements for exception or choice are also important; they cannot bear an unnecessary burden for parents of pupils, on the contrary, they should facilitate the exercise of their rights. In this regard, partial exemption is not consonant with the respect of parents’ right to choose, as it carries out a heavy burden, with a risk of undue exposure of their private life and a potential for conflict.

Occasionally, the need to declare the preference for religious education was deemed a burden incompatible with the right not to declare the personal faith or convictions. However, it is not their faith what the parents declare. They just say that they want their children to receive religious lessons, regardless of their personal religious belonging or practicing. Parents who do not belong to any denomination may want that their children attend those lessons, or the contrary, other parents might consider that it is better that religious formation be imparted in the church or at home, and do not opt for religious education in schools. In none of these cases can parents be asked about their religious convictions, only about the choice of religious education for their children.

In some European countries, special settings on religious education are incorporated in Agreements with religious denominations, mainly with the Catholic Church. Sometimes, the problems regarding religious education have more to do with these special settings than with the general recognition of a right. For example, in Spain, where education is a highly controversial issue, problems on religious education are basically related to the compliance or not with the Agreement with the Catholic Church, or, lesser, with the Agreements with

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63 The ECtHR recalls that there is no an obligation for the States to provide for an alternative subject when non compulsory religious teaching is included in the syllabus. Section 2 of Additional Protocol I “is not to be construed as permitting parents to demand that the State organise a specific education” (Bulski v. Poland, November 30th, 2004 application nn. 46254/99 and 31888/02).

64 A substantial part of Folgerø is devoted to analyze this particular question. See also Zengin, cit., at 75-76.

65 See Grzelak, cit., at 92: “The Court takes the view that the provisions of the Ordinance which provide for a mark to be given for “religion/ethics” on school reports cannot, as such, be considered to infringe Article 14 taken in conjunction with Article 9 of the Convention as long as the mark constitutes neutral information on the fact that a pupil followed one of the optional courses offered at a school. However, a regulation of this kind must also respect the right of pupils not to be compelled, even indirectly, to reveal their religious beliefs or lack thereof”.

66 A number of Agreements between the Holy See and States from the former Soviet Union, or, in general, from East Europe, had been signed in the last twenty years. Most of them have dispositions regarding the establishment of Catholic schools or religious education in public schools. See MARTÍN DE AGAR, J.T., Raccolta di Concordati 1950-1999 (2000) and I Concordati dal 2000 al 2009, Libreria Editrice Vaticana (2010).
Evangelicals or Islamics. However, the most recent conflict, on Education for citizenship, applies to parents’ right to choose the religious or moral education of their children, recognized on section 27-3 of the Constitution.

5. Protecting the right to religious and moral education. Home-schooling and objection of conscience

In certain cases, parents may consider that the education imparted in public schools fails to respect their right to choose the religious or moral education they want for their children. Even if religion classes are not mandatory, and public powers—including the Courts—understand that the school curriculum do not comprise any moral or religious contents, some parents may find their freedom to choose the moral and religious education of their children disregarded by the statutes and bylaws of the educational system. Do these parents have any chance to safeguard their right? This is a delicate issue. Those parents deem that the contents of a subject damage their right, but they admit it may not damage everybody’s right. The problem, therefore, is to look for a way to protect their right without a change in the law. In other words, is there any way to accommodate beliefs in a highly secularist regulation on education?

The possibility to choose a denominational school is not always a solution. It would be so if religious education was free, and the school system allowed a real choice, without any inconvenience for parents. But this is not the case, as seen above, in most European countries, where religious schools usually are not free of charge. Other ways should be found to protect the parents’ right.

a) Home-schooling

A way to solve this conflict would be allowing home-schooling. That may be perhaps the best means to guarantee that no child would receive an education against their parents’ will. Of course, the protection of this right must be combined with the children’s right (and duty) to receive an education deep enough to qualify for pursuing higher education or to be engaged in the workforce. The debate is focused on whether the compulsory school attendance is a necessary tool for education, or education can be achieved without enrolment in a school. Some ideas with regard to this issue can be pointed out.
Mandatory school attendance was historically a means to guarantee that all children, without exclusion, had access to education. It was, therefore, a tool to facilitate social integration and to offer equal chances for everybody. That is not the case any more in Western countries, where access to education is granted to all children. The deep changes that took place in the last centuries, mainly the assumption of the responsibility of providing basic education by the State, led also to a change in the way that mandatory school attendance is perceived. Today it can be seen as a vehicle to impose a secularist ideology\(^{67}\); if parents cannot send their children to a private school, they would have no way to avoid a relativistic education they might not want for their offspring.

Thus understood, home-schooling is different from truancy, or failure of parents to fulfil their duties as guardians of their children. Hence, we are not dealing with any kind of parents’ reprehensible behaviour, but with an option they may want to choose. Because of that, and with the aim of guaranteeing that the children’s right to education is protected, when home-schooling is allowed public powers can set up a minimum standard that must be achieved, establishing the accurate means to control that all children obtain that minimum level of education. Parents who choose home-schooling would be responsible to provide, by themselves or by other persons, for at least that minimum level. The surveillance on home-schooling by the public authorities would also avoid other potential challenges, like the education of children by radical religious groups in isolated environments\(^{68}\).

If we come to the facts, we find that home-schooling is an option in some European countries, but not in all of them\(^{69}\). Some legislative or judicial powers understand that when the Constitutions say that basic education is compulsory, it means that school attendance, and not only education, is compulsory. That is the case in Germany and Spain.

Germany faced this matter in several tough cases, one of them finished with a ruling from the ECtHR, giving the reason to the State, and other with a more striking solution: a North American court granted political asylum to a German family, accepting their case that

\(^{67}\) See BERGER, P., DAVIE, G., FOKAS, E., *Religious America, Secular Europe?*, cit., 82-84.


\(^{69}\) Homeschooling is legal, among others, in Switzerland, Belgium, Czech Republic, Norway, Portugal, Finland, Denmark, Austria, Hungary, Poland and Ireland. With restrictions, in France, United Kingdom and Italy. However, even when it is permitted, in practice it is not at all as widespread as in USA.
difficulties with home-schooling their children created a reasonable fear of persecution\textsuperscript{70}. The former case refers to a family that educated their children at home for religious reasons. The Court denied the parents’ right to educate their children according to their own convictions because this right clashes with the children’s right to education; “this means -says the Court-that parents may not refuse a child's right to education on the basis of their convictions”\textsuperscript{71}. I understand that this affirmation is not completely accurate. Parents who refuse to send their children to school are not necessarily damaging their right to education; they may educate them at home, and they may do it properly. Public powers should check if the children receive the minimum level of education considered as suitable for their life, and if the parents fail to educate them, public powers must intervene, but that is not the problem at stake. The core issue, again, is that according to the ECtHR the right to education implies the compulsory school attendance.

Going further, home-schooling as a pedagogical option should be distinguished from home-schooling as a way of exercising the right to choose the religious or moral formation of children. As the ECtHR stated\textsuperscript{72}, it is within the powers of the State regulating how basic education will be provided for children and if home-schooling would be or not a general option for parents. Then, when parents who would choose home-schooling as a pedagogical option cannot do it, because the State bans that choice, they are not entitled to suit the State because it is lawful.

It is different, however, a situation where parents consider that school attendance will damage their right to choose the religious or moral formation for their children. Here there is not a dissension between different pedagogical options, but between a pedagogical option and a fundamental right. The solution, then, might be different, because the protection of a fundamental right must prevail over an organizational decision. Then, home-schooling should be allowed as far as the threat of failure in the protection of the parents’ right was proven realistic. It must be noted that the International Conventions or Treaties on Human Rights recognize the right to education, but they usually do not impose school attendance as an

\textsuperscript{70} See The Economist, February 4\textsuperscript{th} 2010. The Romeike family had been previously fined in Germany because they home-schooled their five children.

\textsuperscript{71} See Konrad, cit.

\textsuperscript{72} “The right to education as enshrined in Article 2 of Protocol No. 1 by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. Therefore, Article 2 of Protocol No. 1 implies the possibility for the State to establish compulsory schooling, be it in State schools or through private tuition of a satisfactory standard” (See Konrad, cit.)
essential part of that right. Besides, the parents’ right to choose the religious and moral formation for their children enjoys a special protection. As previously mentioned\textsuperscript{73}, it is a *prior* right, and therefore it must prevail in case of conflict with other rights, including a particular way of developing the right to education, whenever the children’s right are safeguarded.

Spain also had to deal with this matter in the Courts. A recent ruling from the Constitutional Court denied the right to home-schooling children, changing a previous statement made by the same Court. In 1994, the Constitutional Court said that home-schooling cannot be generally rejected if a reasonable level of quality education was guaranteed\textsuperscript{74}. In the most recent ruling, from December 2010, the Constitutional Court considered that Spanish Laws on Education do not allow home-schooling, and that ban was fair and consistent with the Constitution\textsuperscript{75}. But I understand there are some flaws in this ruling that deserve a comment\textsuperscript{76}.

As in the ECtHR case, the Spanish Constitutional Court ruled that, although home-schooling is not banned by the Constitution, it is within the State powers to decide on allowing this kind of education or not. It acknowledges that home-schooling in order to protect the right to religious or moral formation is different from home-schooling as a simple option, but it refuses to establish a further distinction between their respective juridical regime; according to the Court, home-schooling can be equally banned in both cases; it is a lawful restriction of the parents’ right because it aims to protect another right, the right to education. However, as mentioned above, a simple pedagogical option, as it is allowing or not allowing home-schooling, can never prevail over a fundamental right, when this is the best way -or even the only one- to protect it\textsuperscript{77}.

\textsuperscript{73} See note 2.
\textsuperscript{74} Constitutional Court, case 260/1994, October 3\textsuperscript{rd}.
\textsuperscript{75} Constitutional Court, case 133/2010, December 2\textsuperscript{nd}.
\textsuperscript{77} It should be noted that the Court recognized that the children, in this case, were receiving a complete education; apart from studying the main subjects corresponding to their level, they spoke five languages.
More disturbing, perhaps, is the decision of the Court -in the wake of the ECtHR\textsuperscript{78}- of setting a kind of \textit{concurrent right} of the parents and the State to educate the children. The State, it says, must fulfil its obligation to educate children, even if the parents do not agree, because, in any case, they can educate them “before and after school, as well as at weekends”\textsuperscript{79}. This is quite a strange way to understand education, as whether inspiring the children some ideas at home would neutralize the other ones they receive at school disliked by the parents. Education calls for a holistic interpretation; it can never be the result of a blended mixture of contradictory elements. In the end, the ruling betrays itself when states that this way “the parents’ right is not completely unknown”. Certainly, this is not the best approach to safeguard the parents’ fundamental right to choose the religious and moral education for their children; that right must be protected, not just tolerated or partially recognized. Similarly, it is not enough recognizing the parents’ right to create schools as the only means to protect the right to educate children on certain religious or moral values -or, at least, to avoid the indoctrination they do not want-. Many parents do not want, or cannot create a school according to their own wishes\textsuperscript{80}.

A further interpretation is still possible. According to the European Commission of Human Rights (the former entity with duties of defending and promoting the ECHR) although compulsory school attendance can be imposed by the State, it can be implemented both “in State or private schools of satisfactory standard”. This rationality, as somebody has suggested, can be rejected, in the sense that when parents home-school their children, they are creating their own educational centre \textsuperscript{81}. However, I understand that this idea will not be upheld by the Courts, because “school” or “educational centre” has a specific technical sense in the Law field, as fulfilling certain requirements, mainly related to the socializing of children.

The truth is that in the near future, no possible changes in this issue can be foreseen. Other solutions to protect the parents’ rights should be found in countries where home-schooling is not allowed or it raises serious inconveniences for parents.

\hspace{1cm} b) \textit{Objection of conscience}

\textsuperscript{78} See \textit{Konrad} and \textit{Jiménez Alonso y Jiménez Merino v. Spain}\textsuperscript{79} Constitutional Court, case 133/2010, p. 17.

\textsuperscript{80} See MARTÍ, J. M., \textit{El “homeschooling” en el Derecho Español}, cit., 33.

\textsuperscript{81} \textit{Leuffen v Germany}, Application No. 19844/92, July 9\textsuperscript{th}, 1992.
Objection of conscience presupposes a clash between an act and somebody’s conscience, based on religious or ideological grounds. When parents consider that the syllabus includes a subject that collides with their religious or moral ideas, we find a conflict between the act that imposes that syllabus and a fundamental right of parents. Therefore, asking for the judicial protection of their right would be the first step those parents should take on. But if both public authorities and courts agree that there is no conflict, and homeschooling is not allowed, the parents’ right to choose the religious or moral formation of their children will be left unprotected if no alternatives to avoid what they considered an indoctrination are offered to them; then, objection on religious grounds would be the only way to safeguard parents’ right. The public authorities can decide the subjects that must or must not integrate the school curriculum, but they cannot establish what people should or should not believe, and the freedom to believe is, precisely, the basis for their demanding of protection.

Objection of conscience poses some problems. The most important one is that it is not usually recognized in a particular law. Some scholars understand that objection of conscience is an essential part of the religious freedom, expressly protected in the Constitutions. However, others understand that the *interpositio legislatoris* is needed, and no objection is possible without a law that develops the constitutional statement. Besides, it requires an action from every father or mother who demands protection of their conscience, with the following inconveniences, and the potential for contradictory resolutions. On the other hand, parents may object on religious or non-religious grounds, and it raises another question: should all objections of conscience be given the same treatment, were they based on religious or ideological convictions? If objection of conscience always deserve protection, aren’t we leaving the efficacy of the educational system in the people’s hands?

Notwithstanding, it is the juridical path parents chose both in Germany and Spain when conflicts arose. In Germany, the educational authorities and the Courts upheld the petitions of several Muslims who refused to participate in the sports classes on religious grounds -they should wear special clothes they deemed contrary to their religious tenets, especially if people of the opposite sex were present-. The Courts stressed the positive obligation of the State to accommodate their students’ religious beliefs, and when
accommodation becomes a too big deal, the students should not be compelled to attend those classes.  

A similar problem arose in Spain when Education for citizenship was compulsorily introduced in all schools, and no option was offered to those parents who understood that the contents of the subject clashed with their religious or moral beliefs. They decided, then, objecting on grounds of conscience. The objection of conscience on religious basis was endorsed by the Catholic authorities, who issued a statement declaring that the subject directly collided with the Catholic doctrine. Still, the educational authorities refused to recognize the objection of conscience, even though thousands of parents all over Spain had objected. Some of them turned to the Courts, who pronounced contradictory rulings on the matter; certain courts uphold the parents’ claim, while others overturned it.

As expected, the case headed towards the Supreme Court, which gave a final judgment in 2009. The Supreme Court did not recognize the objection of conscience to this subject, although it permits new demands if parents demonstrate that certain schools, books, teachers, and so on, indoctrinate children on occasion of teaching this subject. It means, plainly, that no objection of conscience will be allowed at all; indoctrination will be, if proved, grounds to persecute the school or infractor, not to allow parents to object. The main reason not to uphold parents’ demands is the lack of a law on objection of conscience, which leaves in the hands of public powers the possibility to exercise it.

In conclusion, the current Spanish school system is one of the most dramatic cases of indoctrination that can be found in democratic countries. It combines a compulsory subject

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82 See the references and comments in NAVARRO-VALLS, R., and MARTÍNEZ-TORRÓN, J., Conflictos entre conciencia y ley. Las objeciones de conciencia, cit., 277.
83 See note 39; also, PRIETO SANCHÍS, L., Estado laico y educación en valores, cit., 26-33.
84 The Declaration can be found at http://www.conferenciaepiscopal.nom.es/documentos/Conferencia/LOE2007.htm. This statement asserts the seriousness of the beliefs, an important requirement to take into account the petitions of objection of conscience, as far as it will not be attainable a general recognition of objection of conscience to any subject the parents may ask for.
85 It is not easy finding an accurate rough calculation of the total amount of parents who objected. According to different sources, they will be over 40,000; others estimated this number too high, but recognize that they are thousands. Anyhow, it is a considerable amount.
86 NAVARRO-VALLS, R., and MARTÍNEZ-TORRÓN, J., Conflictos entre conciencia y ley. Las objeciones de conciencia, cit., 285 ff.
87 In fact, it was not a single ruling, but four, all of them issued on February 11th, 2009. See a comment in RUANO, L., Las sentencias del Tribunal Supremo de 11 de febrero de 2009 sobre objeción de conciencia a la Educación para la ciudadanía, en Revista General de Derecho Canónico y Derecho Eclesiástico del Estado, [on line] n.20 (2009) (available at http://www.iustel.com)
with moral contents imposed by the Government that clearly goes against the doctrine of a religious denomination, with the prohibition of home-schooling and objection of conscience. However, there is still a long way ahead in the fight; parents and institutions turned to the Spanish Constitutional Court and to the ECtHR looking for an efficacious protection or their rights. The final judgments of these Courts will provide, hopefully, for a final solution.