ANALYSIS OF THE SPANISH EDUCATION LAW IN THE CONTEXT OF HUMAN RIGHTS AND DEMOCRATIC LEGITIMACY IN TIMES COVID-19

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ABSTRACT

This paper attempts to carry out an analysis of the new Law on Education approved in Spain, trying to go deeper into several interrelated topics: the timeliness of the legislative project at a time marked by the COVID-19; the omission of a series of procedures that should have been followed in the process of drafting the Law; the absence of citizen participation, both of experts in the field and of those directly affected by this legal amendment, such as parents and teachers; finally, the material content of the new legislative text is analyzed in order to demonstrate the violation of some fundamental rights, which is supported by comparing the Law with the most important international texts and the recent case law of the European Court of Human Rights. These four aspects, the timeliness of the Law, the violation of the democratic procedures for its approval, the absence of citizen participation in its drafting and the violation of fundamental rights, lead to the conclusion of the illegitimacy of the new Education Law within the scope of the Spanish democratic system.

Keywords: Legitimacy, Deliberative Democracy, Legality, Right to Education, COVID-19.

INTRODUCTION

In 43 years of democracy, the Spanish Parliament has passed eight laws on education. At first glance, this would suggest that education in Spain has been a fundamental right at the discretion of the political parties that have come to power. One can therefore say that the goal of its regulation has been its ideologization.

A clear example of this political trend has been the adoption of the most recent educational project of the Spanish government, Organic Law 3/2020, December 29, known as LOMLOE, which repeals the previous education law: LOMCE.

The purpose of this research work is to demonstrate that the parliamentary majority system is not a sufficient criterion to determine the legitimacy of a law. To support this assertion, the article analyses the recent Education Law approved in Spain, in order to determine the gaps that the new legislation presents and, from this, to establish the minimum criteria to be followed in order to achieve the democratic legitimacy that every legislative norm must prove. What are the gaps mentioned and, in turn, the requirements to be followed in order to be able to speak of legitimacy? There are four points that summarize this argumentation, covering different but closely related areas, such as the contextual, the formal, the democratic and the material.

The first criterion of analysis is the contextual one, where the inappropriateness of the Education Law project is defended taking into account the pandemic situation experienced worldwide due to COVID-19, and the limits to freedom that it has implied in the area of

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freedom, which suggests that the governmental proposal has a political background oriented to intervene in a matter, such as education, in order to reorient it according to ideological criteria, and not based on social needs, nor on the common good.

In the second criterion, which we call legal, the research tries to show how, throughout the process of approval of the Law, several parliamentary procedures were omitted, as articulated in the respective laws of the Spanish Congress and Senate, and necessary for the legislative item of the project to be adequate.

The third criterion, which is encompassed within the concept of participation, focuses on the fact that neither the contributions of experts in the field, nor the opinions of the people most affected by the content of the new Law, such as teachers and parents of students, were considered in the process of drafting the law.

Finally, the material criterion, which revolves around the idea of justice, is based on the analysis of the content of the new educational project, and it demonstrates the violation of fundamental rights, such as the right of parents to choose the education of their children, supporting this argument with the most relevant international texts on Human Rights, as well as with the recent jurisprudence of the European Court of Human Rights.

These four criteria, which are developed in the work, are intended to demonstrate, and this is the conclusion to which the study aims to arrive, not only the illegitimacy of the new Spanish Education Law, but also to mark the fundamental objective aspects that must be considered to guarantee the basic democratic criteria to be followed in future legislative projects.

The importance of the project lies in establishing a series of objective legal elements that can serve as criteria for the evaluation of future legislative drafting and approval processes, through which greater legal certainty can be achieved. Why at this particular moment? Because two extraordinary contextual circumstances converge, on the one hand, the approval of an Education Law that presents the legislative gaps that are going to be the object of study and, on the other hand, the validity of a worldwide pandemic such as COVID-19 that has meant a change of paradigm in many areas of society, among them the legislative one.

An Approach to the Idea of Legitimacy

What do we really mean when we talk about legitimacy? Let us begin by saying that although legality, understood as a result of the will of the majority, is a necessary condition of the democratic model of political organization, this does not imply the sacralization of that legality, or its total and absolute confusion with legitimacy (Diaz, 1981). It is necessary to distinguish between legality and legitimacy, since they are two different realities, so that there can be both a legitimate power regardless of its legality, as well as a non-legitimate legality (Herrero, 2003).

Two major theories have been constructed in the legal order to provide an explanation of legitimacy as regards forms of government, which can be extrapolated to the sphere of the drafting of laws, which is what concerns us in this paper. On the one hand, voluntarist theory is based on the idea that a political regime is legitimate if the citizen has effectively consented to it. On the other, contractual theory claims that a regime is legitimate if the citizen provides that consent in idealized but not concrete situations (Greene, 2016).

Greene (2016) distinguishes between voluntarism and sovereignty, and states that *"Voluntarism says that the threshold for consent to be legitimizing is when political agreements*

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are moral, while the conception of sovereignty has a lower bar. Essentially, consent is legitimizing when it does not conflict with the claim of a minimally competent government." At the same time, positivism claims that the legitimacy of a law derives less from its moral content than from its normative positivization, so that *"a norm may be valid without the need to be fair; moreover, it is fair through the mere fact of being valid"* (Castano, 2014). Thus, the actions the state performs are legitimate if they are provided for in positive law. That is why it would only be necessary to comply with procedural regulations for a law to be considered valid.

Hierro (2013) distinguishes between legitimacy of origin, understood as the grounds that justify the authority of the person who exercises it, and legitimacy of exercise, which *"lies not in the person who makes political decisions, in the substance of the authority held, but in whether they fulfil certain objectives or values. For this reason, it ultimately does not suffice for rulers to be democratically elected or for laws to be passed by a majority"*.

In this article, we will explore the idea of legitimacy in relation to the drafting of laws, specifically, the new Organic Law 3/2020, which addresses the issue of education and therefore delimits a fundamental right from a specific perspective, in the context of COVID-19. To this end, we begin with the premise defended by (Herrero, 2003), according to which, *"the law, insofar as it is diluted in politics, ceases to have an adequate relationship with it and morality, and loses its capacity to legitimize"*. Law, politics, and morals are three areas called upon to be understood, especially when dealing with issues related to human rights.

Lopez (2009) maintains that *"the legal notion of legitimacy is like a bridge that makes human society more habitable: it is the bridge that saves man, because it stretches between the two extremes of power and fear"*.

Authors such as (Beetham, 1991) point out that three components must exist for it to be possible to speak of legitimacy: legality, normative justification and express consent by those qualified to provide it. From the three elements mentioned above, it can be stated that, at least, the justification of the law does not seem to be posited as necessary, since it is a law that was drafted swiftly and in the context of a state of alert due to the COVID-19 pandemic.

Ultimately, the point is to permit what (Habermas, 2005) considered a mixed legitimacy, which he linked to the existence of a series of material contents of justice, in force in all-natural human rights, which, through institutionalized procedures, achieved a positivization that conferred both material and formal legitimacy on it.

For the author, legitimacy is a process of communication, through which an understanding can be reached which, following the legitimately established procedure, can lead to the approval of material contents of justice that are considered desirable for society (Lopez, 2009). In this way, *"only from a procedural rationality full of moral content can legality extract its own legitimacy"* (Habermas, 2005).

Unlike Habermas, who opts for a iusnaturalist trend, in which he denounces the validity of a positive law that is not based on a universal, objective law of a higher order but rather on the political autonomy of the citizen (Castano, 2014), other authors identify legitimacy from positive positions, which do not involve the moral judgement of the contents of laws, in such a way that legitimacy is absorbed by legality (Castano, 2014).

Sartori (1993) reduces the legitimacy of power to the way in which it is accessed, yet without ever considering a judgment on the exercise of that power. Conversely, Bobbio (2000) chooses to distinguish between legality and legitimacy in terms of access to power and the

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exercise of it, identifying legitimacy with the first option and legality with the second. However, is it possible to exercise legitimacy, based exclusively on positive laws, yet without taking into account the objective truth about the good of human nature? The answer, from our point of view, is no.

That is why, to overcome this situation, in which objective truths such as the right to political participation and freedom of expression are curtailed, both Habermas and Rawls defend the establishment of a deliberative democracy, a political theory advocating that the decisions adopted be made through a process of democratic deliberation, in which all interested parties must intervene in decision-making so that they can be regarded as legitimate (Marti, 2006).

This political conception must be protected from the dangers which, on occasions, can be entailed by the idea of liberal democracy, since, as Nagel (1987) points out, the neutrality requested of the state, when it comes to abstaining from making use of coercive power to impose a certain moral or religious conception, ends up encouraging precisely the opposite, so that declarations in favour of tolerance end up disguising a campaign in which the state ends up supporting a secular, individualistic, ideologically manipulated morality.

Legislative Journey in the Drafting of the New Spanish Education Law (LOMLOE)

The first criterion for analysing the shortcomings of the new Education Law is that of *"legality"*. Ordinarily, legislative proposals may already have been drawn up by the executive, and submitted for parliamentary approval subject to party discipline, as happens in Great Britain, or the draft bill may be submitted to a specialized Commission of Congress, as is the case in the United States (Waldron, 1995).

In the case that concerns us, the current Spanish Education Law, passed during the state of alert due to COVID-19, is part of an initiative by the Ministry of Education, which, after sending the project for approval by the Council of Ministers, submitted it for parliamentary processing, which has been subject to a series of procedural irregularities.

The draft bill was swiftly submitted to the Congress of Deputies, on November 27, 2018. The first irregularity is that the mandatory prior report that should have been issued by the Council of State was omitted, whereas it was issued for the two previous education laws (Guardia, 2020).

The current parliamentary term in Spain began in December 2019, and on March 3, 2020, just one week before COVID-19 was declared a pandemic worldwide, and Spain, through the Royal Decree 463/2020 on March 14, declared a state of alert and lockdown, the government once again submitted the education bill, which had already been approved by the Council of Ministers on February 15, 2019. Barely one month into the new parliamentary term, an amendment to the previous education law was proposed, and the report which was to have been issued by the Council of State was omitted (Guardia, 2020). Would it not seem that these circumstances were contributing to the aim of formulating an education project in the shortest possible time? Does not this speed suggest a markedly ideologies law based on party interests, rather than the common good of society?

The amendments made to the text by parties that supported the government in the parliamentary term, had not been agreed on by the other parliamentary opposition groups, or many of the Autonomous Communities, to which powers in the sphere of education were

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transferred in 2000, or the educational community, which brought together the general will of citizens through various organizations that not only had the necessary experience in educational matters, but also expressed the different positions in the field of education which represented the majority of the Spanish population. Moreover, three amendments to the entire bill were rejected, as well as 649 partial amendments registered with the Senate Education Committee (Guardia, 2020).

The Education Sector Conference, which, since the transfer of powers to the Autonomous Communities in education matters, has been tasked with discussing educational matters with the government that could affect the general interest, as was the case of the change of legislation, was not convened for this purpose (Guardia, 2020).

At the same time, Law 50/1997, November 27, which established the procedures to be followed for the submission of parliamentary initiatives, was not upheld. A legal procedure was sought to avoid the controversies which, in fact, were bound to happen in the State School Council, and to prevent the complaints that would undoubtedly arise regarding the public information procedure, the legal reports by the General Government Administration, and the contributions of the Autonomous Communities (Guardia, 2020).

Consensus, essential to an issue such as education, was omitted and everything was reduced to repealing the previous education law (LOMCE), in the shortest possible time, to set a new legal framework in motion. Moreover, the fact that the law was passed in the last plenary session of the Senate in 2020, without being submitted to the Congress of Deputies, highlighted the urgency of the proceedings and the lack of a genuine national debate on the subject (Briones & Onate 2021).

At the same time, all these procedural limitations have reduced citizen participation in a key issue, which will be explored below.

The Exercise of Freedom in Drafting the Law in the Context of COVID-19: The State of Alert

This section of the paper deals with the second criterion for evaluating the new legislative project on education. In the context of COVID-19, there are numerous limitations to which society as a whole has had to submit, and which have affected the area of freedom in all dimensions of the State, including the legislative dimension.

The constitution of public space by ensuring basic freedoms provides an adequate social structure for democracy. First, linking freedom of association and freedom of assembly with freedom of expression guarantees the framework for the different types of associations and actors to exert pressure on issues of interest and participate in shaping public opinion. Second, the basic rights that protect private space ensure freedom of conscience, freedom of movement, and the rights of the individual (Erman, 2018).

Nowadays, there is a consensus that the determining criterion of the majority must be reconciled with respect for individual freedom and that of minorities with the fundamental connection between freedom and true equality (Diaz, 1978). The idea of freedom not only refers to doing everything that the law does not prohibit, but, in this specific context, to freedom as active participation in the political process (Hierro, 2013).

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To understand the context in which the new Spanish education law was drafted, it is necessary to know what we mean when we speak of a state of alert. Article 116.2 of the Constitution stipulated that *"the state of alarm shall be declared by the government by means of a decree agreed upon in the Council of Ministers for a maximum period of fifteen days, reporting to the Congress of Deputies, meeting immediately for that purpose and without whose authorization said period may not be extended. The decree will determine the territorial scope to which the effects of the declaration extend"*.

As required by the first section of this article, both the state of alert, and that of exception and place, must be subject to regulation by an organic law of development. This law, passed on June 1, 1981, established in Section b of Article 4 that this legal instrument can be applied, among other spheres, to the situations in which *"health crises occur, such as epidemics and situations of serious contamination"*.

Based on the content of the law, it seems clear that the COVID-19 pandemic can be included within the scope that the law establishes as a serious health crisis. Where does the problem lie? In that Article 11 of this law speaks of the possibility of limiting the movement or permanence of people for the duration of the state of alert.

In Spain, the lockdown to which the population was subjected cannot be considered a curtailment of the right of movement, but a suppression of this fundamental right, an area for which the regulations provide for another legal figure, such as the state of emergency during which the government can *"prohibit the movement of people"*.

Beyond the advisability of one legal instrument or another, what remains beyond any doubt is that for the duration of the state of alert, the period when part of the procedure for the passage of the education law was developed, citizens' freedoms were suspended for the benefit of public health, which not only hampered the parliamentary processing of the law, by reducing deadlines and eliminating the procedures provided for in the regulations, but also the participation of citizens and specialized associations in the matter, by preventing them from exercising certain rights.

The Spanish Constitutional Court (Judgment) has repeatedly stated that *"non-observance of the precepts regulating the legislative procedure could render the law unconstitutional when such non-observance substantially alters the process of formation of will within the Chambers."* It therefore seems clear that this restriction of freedom of expression, both parliamentary and civic, constituted a major drawback in the drafting of the new law.

Based on all the above, logic called for postponing this reform to a more propitious moment and avoiding the risk that the Spanish might think that politicians wished to take advantage of the health crisis to pass the law with less social opposition.

The undermining of the fundamental right to freedom of expression, because of the state of alert, led, in turn, to another breach: the veto of the presence of independent experts and representatives of the educational world, employers, unions, and parents' associations in the Education Commission of the Congress of Deputies in accordance with Art. 44 of its Regulations. The parties comprising the executive and those who support it prevented it, despite requests from three parliamentary groups.

The success of any education reform must be subjected to a participatory, inclusive, and consensual process, with commitments from all the actors involved. The unilateral nature of the Spanish government with LOMLOE can be said to be a guarantee of failure and conflictiveness,

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because as declares, good governance in the education sector requires multiple alliances between government and civil society, and national education policy should be the result of a broad social consultation and national consensus, which Spanish law lacked during the context of the state of alert.

The Principle of Participation in the Drafting of Laws

The third criterion that serves as the basis for the analysis being carried out is that of citizen participation. The current representative system, which attempts to promote the idea that citizens fully participate in political life through the election of their representatives, is in crisis. It has gone from a parliamentary democratic state to a party state, where citizens perceive themselves as extremely distant from the current political class. As (Flores, 1990) notes, particracy has become a monopoly that has invaded the democratic order, and led to an eclipse of democracy, where the citizen is degraded to the subject of a political class that has become sacrosanct.

Ultimately, what really matters is *"the abstract idea of institutional provenance as the basis of the authority of law, rather than the substantive criteria of morality or justice"* (Waldron, 1995). What usually matters to people, however, is that they are not just told what they have to do, but are able to participate in the determination of all the rules that can directly affect them in their lives (Christiano, 2008), since *"[...] the people are not only the origin and ultimate holder of the power that exercises political dominance, but they themselves also exercise that power; they have it and must have it at all times. The people not only dominate; they also govern"* (Bockenfoorde, 2000).

What answer can be provided for this situation? From our point of view, two answers are possible: first, the establishment of a government with neutral technocrats, who seek the common good based on their experience in different matters, as opposed to a regime of particracy driven more by political and ideological ideals than by the common good. Secondly, only by encouraging more direct citizen participation in the formulation of the legal norms that must govern social coexistence will it be possible to gradually disengage from the current system and formulate laws more in keeping with the real needs of society, less mediated by the ideological criteria of the parties, rather than the people.

To this end, it would be useful to have a democratic system that efficiently combines the advantages of the representative model with those of the participatory model. Indeed, *"participatory democracy will emerge as an attempt to adequately combine the principle of representation with the increase in the political participation of citizens"* (Conejero, 2005), since political parties cannot become the only source of expression of the preferences of citizens but must also coexist with other organizations in which citizens band together to defend their interests (Martinez, 2010).

As Rawls (1973) points out, *"all citizens must have an equal right to take part in, and determine the outcome of, the democratic process that dictates the laws they must obey."*

Nowadays, governing must not be a one-way process, in which the government limits itself to establishing rules with which citizens must comply, using its coercive power, but a two-

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way one, in which interactions between the rulers and the ruled must be continuous, especially in matters that could affect fundamental rights (Kooiman, 2005).

To promote this participatory and deliberative process of citizens, the question should not be what principles or norms society in general will be able to accept, but what it would not be reasonable for them not to accept, in other words, agreements, institutions or requirements should not be imposed on other people for reasons that could reasonably be rejected (Nagel, 1987). As Rawls (1999) maintains in this public debate, common ground must be sought at all times, since public results that encourage it cannot be expected unless all parties in the debate previously seek it.

In this respect, fundamental rights must constitute a basic point of reference that enables the participation and formulation of legitimate laws with the capacity to impose moral obligations on citizens (Tasioulas, 2013). That is why the government should encourage the participation of public and private actors in the definition of policies and the regulation and provision of services (Martinez, 2010).

Another advantage of the participatory model is that, insofar as citizens feel heard and think that they have participated in the process of drafting a law, compliance with it will be more effective, without the need to resort to coercive means by those with political power, since involvement in drafting a law involves assuming the contents of the law as a personal commitment (Martinez, 2010), since *"once the arguments defended by citizens are taken into account in democratic deliberation, the feeling of links between the participant and the legal norm adopted are intensified"* (Cuesta, 2008).

This deliberative democracy involves three key ideas: first, decision-making must be based on an exchange of reasons, information, and evidence; second, citizens must participate in the process seeking to achieve justice and the common good of society. Finally, all those who participate in this deliberative process must be willing to adjust their beliefs, in those aspects that may be the object of interpretation, based on the search for a greater good (Boettcher, 2020), while being fully aware that *"the debate between people with diverse points of view can often be much more productive and effective than discussions between people who share similar perspectives and values"* (Vallier, 2015). It is necessary to draw from the premise that *"the pluralism of values is not necessarily exclusive, and that different values can be combined through deliberation"* (Elstub & McLaverty, 2014).

In the Spanish case, experience has shown how various legislative projects have been achieved through agreements made between the government and social forces. In addition, the law itself refers to the need for this citizen participation in various precepts (Marco, 1998). Article 44 of the Regulations of the Congress of Deputies states that *"commissions may request the appearance of persons competent in the matter, for the purpose of informing and advising the Commission"* and article 129.1 of the Spanish Constitutional refers, in general, to the cases of organic participation. It is, therefore, a matter of including certain social subjects in the consultation and control bodies or even those for the management and decision-making of certain public bodies, such as teachers, parents of pupils and students, in the case of educational institutions, as provided for in Article 27, sections 5 and 7 of the Constitution (Sanchez, 1979).

At the same time, Article 133 of the Law of the Common Administrative Procedure of Public Administrations establishes the procedure required for the participation of citizens, stating that prior to the preparation of the draft or preliminary draft of the law or regulation, a public

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consultation will be organized, through the website of the competent Administration in which the opinion of the subjects and the most representative organizations potentially affected by the future regulation will be obtained on:

1. The problems the initiative is intended to solve.
2. The need and timing of its approval.
3. The objectives of the law.
4. Possible alternative regulatory and non-regulatory solutions.

From this perspective, it seems clear that the public powers must promote the participation of citizens in the legislative process, a key aspect to be able to declare that a state is truly democratic. In this respect, one can say that *"deliberative or participatory democracy is more useful from the conceptual and normative point of view, since it is not based on a traditional numerical understanding of political representation, but on the representation of interests, values or discourses"* (Erman, 2018).

As Sanchez (1979) declares, *"Popular sovereignty, public freedoms and participation are thus incorporated as inseparable elements in a social and democratic state"*. In the context of the right to education, participation will be conducted through associations of parents and teachers, as experts in the field, on the one hand, and recipients of the exercise of the right in question, on the other. From this it follows that social pluralism at the educational level must be channelled through a participatory system that brings the law closer to the needs of society and orients it more towards the common good.

For this participatory process to be implemented a rapprochement between the parties is necessary in which inclusive language and ideas are used, with rapprochement and respect, providing reasons which one senses can be accepted by the other party, and recognizing the limits of that reasoning and the need not to impose one's own beliefs. To this mutual respect, one should add the need for confrontation, understood as the possibility for each party to freely express its position and differences to be discussed on an equal footing (Scalet, 2010). In fact, debates between extreme belief systems can lead to a stabilizing position (Talisse, 2006).

The need for this principle of political participation is aligned with the standards of the *"Transmission Belt Model"* whereby citizens contribute to the strengthening of political legitimacy by transmitting the preferences, beliefs, and opinions of the people from the public space to the space of power, thereby directly or indirectly influencing decision-making. Three fundamental spaces differ in this model, and the three must be connected to each other: the public space, where the will and opinions of citizens are formed in an informal way, the empowered space, where authorized collective decisions are made, and civil society, which acts as the transmission belt between these two spaces, which requires participation rights, collaboration rules and widespread recognition of their role as legitimate interlocutors in the political debate (Erman, 2018).

Kuyper (2016) speaks of the need for three basic criteria to be applied by civil society actors: inclusion, which implies acceptance under conditions of equality, of all opinions that arise in the public space; authenticity, so that the arguments of the actors connect, in a generalized way, with the interests of civil society, going beyond self-interest; and consequentiality, which requires that the results of the process reflect deliberative preferences.

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Matters of social interest, especially those that affect the fundamental rights of citizens, tend to polarize around two opposing points of view. Legislative political power usually represents one of these poles in its conception and enforcement of rights. However, within the framework of parliamentary majorities, how can the voice of all those who defend opposing points of view be heard? The *"Transmission Belt Model"* attempts to solve this problem, understanding that democracy can not only adhere to legitimacy when drafting laws regarding electoral processes, but also to the opinions of citizens which, represented by these civil actors (non-political groups or organizations) can establish areas of reasoned dialogue with political forces on an equal footing.

Political representatives are elected in general terms, while the laws they seek to pass are linked to specific aspects, which require citizen participation, through this transmission belt, which comprises civil organizations and associations, to represent the views of society on specific issues, such as the field of the right to education and the different spheres associated with this right. As Erman (2018) states, *"the public space is a sounding board that is totally open to the problems of society that must be dealt with by political leaders, in which everyone has the same right to express their opinions and the same opportunity to do so."*

Spanish law contains two fundamental mechanisms to channel citizen participation in the drafting of laws, in addition to the referendum and the popular legislative initiative, namely government consultations and parliamentary hearings. Both legal instruments, which are developed in the governmental and legislative phase, must be complementary (Larios, 2003).

Regarding the process of drafting the education law, the process of parliamentary hearings was of interest since it would have allowed all political parties with parliamentary representation to listen to the educational representatives affected by legislative reform. By this means, it would have been possible to raise any doubts and questions that might have arisen, while encouraging a deliberative environment that would have opened the door to the possibility of a consensus (Martinez, 2010). In addition, parliamentary hearings, which were not conducted within the process of drafting the education law, would not only have encouraged citizen participation in the drafting of laws, but also enabled debate in society about the matter in question (Aja & Larios, 1998).

The participation of citizens, directly, or through intermediate groups or associations that bring together all the approaches that are defended or assumed by each one, would make it possible to deliberate on the most appropriate measures to adopt on issues such as abortion, euthanasia, health, and education. It is not only about being able to present directly, or through intermediate groups, each of the positions that are defended on various issues, but also to be able to enhance initial positions through deliberation, to arrive at a consensus that will allow the individual good to be combined, albeit with some sacrifices, sometimes acceptable, for the common good.

But what if a consensus is not reached? One solution to be able to make a decision would be to vote, except that on this occasion, political representatives would not vote, as though they were the only ones capable of contributing all the ideas and points of view that are valid in society in a particular subject, and instead, *"voting would only be carried out after all those who wish to express their point of view have had the opportunity to do so, after all those who have spoken have been satisfactorily listened to and heard and after everyone's point of view has been*

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taken seriously" Campbell & Crittenden (2018), according to the criteria of equality and freedom, which guarantee legislative equity.

The Right to Education According to Article 27.3 of the Spanish Constitution and the Recent Jurisprudence of the ECHR

The last criterion used to analyse the legitimacy of the new Spanish educational project refers to the idea of justice which, in relation to the content of the norm, seeks to determine whether or not there is a violation of the fundamental rights of citizens.

We must begin with the fact that human rights are laws that must be obeyed so that the law of a society can be regarded as legitimate Rawls (1973), because otherwise, the relationship between rulers and the ruled would end up being more of a relationship of power than one of law (Williams, 2005). Whoever exercises political power is morally legitimate, *"if and only if they do a credible job of protecting at least the most basic human rights of all those over whom they exercise power, and provide this protection through processes, policies, and actions, which in themselves respect the most basic human rights"* (Buchanan, 2004).

Hierro (2013) states that *"it does not suffice for legal rules to be endowed with a merely formal validity; they are enforced by whoever has the power to do so and in accordance with the established procedure. It is also necessary for these norms to respect and ensure full satisfaction of the principles of freedom, equality, solidarity and legal security that constitute the substance of human rights, universally accepted as a paradigm of material justice."* Education is a universal right that serves as the basis to be able to guarantee the fulfilment of other rights (Briones & Onate, 2021). That is why *"the main function of public powers is to guarantee the effectiveness of the right to education"* (Asensio, 2020).

Although in the material field, the new Education Law addresses various issues, in this article we will focus, specifically, on a point that is explicitly included in the Spanish Constitution: the right of parents to have their children receive an education in keeping with their own convictions (Art. 27.3).

This right is based on the idea that parents are entitled to choose the educational center they deem most suitable for the education of their children. This right is enshrined in various international documents: Article 26 of the Universal Declaration of Human Rights, Article 13.3 of the International Covenant on Economic, Social and Cultural Rights, Article 18 of the International Pact on Civil and Political Rights, the Convention on the Rights of the Child, the European Convention on Human Rights First Protocol, the European Social Charter, and the Charter of Fundamental Rights of the European Union. These documents not only form part of internal law, as documented by Articles 10.2 and 96.1 of the Spanish Constitution, but the Constitutional Tribunal itself, in several of its rulings, acknowledges that these international agreements *"constitute valuable hermeneutical criteria for the meaning and scope of the rights and freedoms recognized by the Constitution."*

Nevertheless, to date, Spanish legislation has addressed educational issues from a partial perspective, eschewing a global vision capable of incorporating various points of view, which has constituted one of the most serious shortcomings in Spain's social policy (Correas, 2021).

And the 1985 organic law governing the right to education (LODE) recognized the right of parents to choose the educational establishment, whether public or different from those

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created by public powers (Art. 4.b), and for their children to receive a religious and moral education in keeping with their convictions (Art. 4.c).

To refer to this right, the previous law used the concept of *"social demand"* in other words; coordinated public centers should be able to offer their educational project provided it was demanded by families. The new law does away with this concept. What can one infer from this initiative? That there has been a shift in the choice of centers. If social demand is no longer considered, then the state, rather than families will choose where students receive their education, in which public centers will take priority over organized centers. In other words, the right to a place in education will turn into a place at a state school, which will attempt to gradually increase the number of places available. One could say that everything is tending towards a state teaching monopoly that destroys institutionalized educational pluralism (Briones & Onate, 2021). As Guardia (2020) points out, *"LOMLOE has gone from the paradigm of complementing the coordinated, state supply to one that is subsidiary to the one agreed on with respect to the government's one."*

The reference to the principle of subsidiarity is fundamental in the educational field, since parents are responsible for the education of their children, and the state must intervene in a subsidiary way, in other words, by implementing all the necessary policies and means only insofar as families cannot cope with their children's education on their own. If, based on this new law, the state decides which center the student should go to, the principle of subsidiarity will be replaced by the principle of governmental authority.

The new education law appears to have the role of ideologizing education, so that, as Bobbio (2005) declares, *"when a lay culture is transformed into secularism, it loses its fundamental inspiration, which is not to be reduced to a system of definitive ideas and principles. The lay spirit is not in itself a new culture but a condition for the coexistence of all cultures"*.Both Article 2.1 of the Organic Law on Religious Freedom and Article 27.3 of the Spanish Constitution provide for the right of parents to decide on the education of their children, *"a capacity to choose that does not necessarily mean having to satisfy all needs but does make it easier for there to be options. Just as it is regarded as natural for there to be different suppliers when one is buying a good, and for the existence of monopolies to be seen as negative, the same could be said of the educational sphere"* (Correas, 2021).

It should be noted that Article 27 of the Constitution was the precept that includes the most amendments in its formulation, which implied introducing a novelty in European constitutionalism: including the freedom of teaching together with the right to education (Correas, 2021).

What contents do the concepts of freedom of education and teaching encompass? These could be said to be general and abstract concepts, meaning that the doctrine has yet to reach an agreement on their specific content. An example of this situation can be found in Vidal (2018), who argues that *"Article 27 speaks of freedom of teaching when it actually refers to the choice of teaching based on an ideology. We should therefore instead speak of freedom of education, and the right to education, when it invokes the right to receive instruction, in other words, it should have been called the right to teaching or instruction."*

Drawing on both precepts, Ruano (2009) says that parents have the right "to choose for their children who have not yet left home or live with disabilities, who depend on them, both inside and outside the school sphere, the religious and moral education that are in line with their

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own convictions*" (Art. 2.1 of the Organic Law of Religious Freedom). This right must be guaranteed by the public powers due to the constitutional mandate of Art. 27. 3 of the Spanish Constitution, which derives from the duty inherent in the relationship of parentage of providing them with an all-round education and the essential contents of the fundamental right to religious freedom of parents and children."*

In its 1981 ruling, the Constitutional Court, recognized that *"the freedom of teaching explicitly recognized by our Constitution"* (Art. 27.1) could be understood as a projection of ideological and religious freedom and the right to freely express and spread the thoughts, ideas or opinions that also guarantee and protect other constitutional precepts (particularly Arts. 16.1 and 20.1 a). This connection is explicitly established in Article 9 of the Agreement for the protection of human rights and fundamental freedoms, signed in Rome on November 4, 1950, in keeping with which it is necessary to interpret the laws on fundamental rights and public freedoms enshrined in the Constitution, according to Article 10.2.

In addition, in a 2010 ruling (Judgment 133/2010), it said, regarding parents' choice of the type of education their children should receive, that *"This Constitutional right is restricted to the recognition of the freedom of parents to choose the teaching center and the right of parents for their children to receive a religious and moral training that agrees with their own convictions."* One can therefore say that *"Education at school is a prolongation of family education, with one consequence: parents have the right for their children not to receive a type of education at school that contradicts that which they receive in the family"* (Asensio, 2020).

This parental right has always been linked to parental authority, which will always be exercised for the benefit of the children. In the words of the Constitutional Court, *"Article 27.3 CE is not restricted to recognizing the fundamental right that enables parents to ensure that their children receive religious and moral training in keeping with their own convictions, but also contains a mandate that distinguishes it from other fundamental rights, addressed to the public powers and the educational Administration, regarding its specific guarantee."*

Another important precept in educational matters is Article 154.1 of the Civil Code. This precept, after the reform established by Law 11/1981, stipulates that parents with custody have the following responsibilities: *"To protect them, keep them in their company, feed them, educate them and provide them with an all-round education."* It follows from the article that *"educational duties are not parental rights exercised vis-à-vis children, but rights vis-à-vis the state or third parties attributed to them to facilitate the fulfillment of such duties towards children"* (Asensio, 2020).

Freedom of education, based on the right of parents to choose the education of their children in keeping with their beliefs and convictions, encompasses both a positive and negative dimension. The first comprises all those areas where parents decide to choose a type of education for their children, yet their request is rejected by the educational authorities. The second dimension would involve all those cases in which parents refuse to allow their children to receive a certain type of education or teaching provided in the educational field, because they contradict their beliefs or convictions.

In its extensive jurisprudence, the European Court of Human Rights has addressed both situations, offering a doctrine that must be examined in some detail, since it not only directly influences the legal and jurisprudential spheres of the countries that belong to the European Union, as in the case of Spain, but must also be compared with the content regarding educational

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matters enshrined in the main Human Rights Declarations. At the same time, it is necessary to analyze whether the new Spanish Education Law meets the criteria set by the Strasbourg Court.

The basis on which the jurisprudence of the European Court is developed revolves around Article 2 of the 1st Additional Protocol to the Convention, which states that *"no one can be refused the right to education. The state, in the exercise of the functions it assumes in the field of education and teaching, will respect the right of parents to ensure this education and this teaching in accordance with their religious and philosophical convictions."*

The central idea derived from the ECHR rulings is that states are not prevented from disseminating, through education, information, or knowledge of a religious or philosophical nature, provided such knowledge appears in the study program and is taught objectively, critically and pluralistically (Souto, 2011). This is what it establishes when it states that *"the purpose of Article 2 is to guarantee educational pluralism, essential in the preservation of democratic society"* (Cases, 1976). The school cannot become a space for indoctrination but must be the meeting place of different religions and convictions, where students can acquire knowledge of their respective thoughts and traditions.

The rulings that substantiated the subsequent jurisprudence of the Strasbourg Court were, primarily, Kjeldsen v. Denmark, Campbell v. the United Kingdom and Valsamis v. Greece, which bring together a series of principles such as the fact that the right of parents to decide the type of education to be given to their children is intricately linked to freedom of thought, conscience, and religion. The right of parents is also associated with the choice of educational center, so that the authorities must not hinder private enterprise in the field of education and must guarantee that the principles of pluralism and neutrality prevail in state schools. In the case of subjects in which content on religious aspects or diverse convictions is taught, this must be done in a neutral way and in countries where there is a state church regime, such as the United Kingdom, Denmark and Norway; parents must be able to object to their children attending these classes (Barrero, 2009).

In any case, states are not prevented from disseminating, through teaching, knowledge of a religious or philosophical nature, since the right parents have to choose the education of their children does not entitle them to *"oppose the incorporation of teaching or education of a philosophical or religious nature into the school program, since if this were the case, institutionalized teaching would run the risk of being impractical. Nor, consequently, does it allow children to be left in ignorance in matters of religion and philosophy"* (Cases, 1976).

Based on this doctrine, the rulings concerning (Flores, 1990) stress the conscientious objection of the parents to education with moral implications in compulsory religious teaching and declare that *"The state, by performing the functions it assumes in relation to education and teaching, must ensure that the information or knowledge included in the curriculum are conveyed objectively, critically and pluralistically. The state is prohibited from pursuing any objective of indoctrination that may be construed as failing to respect the religious and philosophical convictions of the parents. This is the limit that cannot be crossed"*.

The great difference with respect to the previous jurisprudence is that the ECHR, in this case, in order to justify the right of parents to choose the education of their children, focuses on the right to the respect for private life and the principle of secularism, without implying that the state cannot incorporate the compulsory nature of religious education into the educational

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curriculum, albeit from a neutral perspective, where religion is treated as a cultural element (Barrero, 2009).

The latest ruling by the Strasbourg Court on this matter concerns the Perovy v. Russia case. The Court examined the complaints filed by a seven-year-old boy and his parents from the point of view of the second sentence of Article 2 of Protocol No. 1, interpreting it in light of the freedom of religion guaranteed by Article 9 of the Convention, due to the performance of a classroom blessing rite by the father an orthodox priest of a new student, in response to a request by the remaining parents and teachers, prior to the start of the course at the first parents' meeting.

The ruling is unusual in that it includes the dissenting vote of three judges on the one hand and the concurring vote of the four majority judges on the other. The pronouncement of the Strasbourg Tribunl acknowledges that there has been no violation of Article 2 of Protocol No. 1 in relation to the parents. Regarding the third plaintiff, the child, who filed the complaint on his own behalf based on the violation of Article 9 of the ECHR, the European Court noted that performing the Orthodox rite of blessing does not entail the aim of indoctrination, but that it was an error on the part of the teacher and the school administration to fail to inform the child and his parents of the event ahead of time.

The three dissenting judges jointly ruled in the opposite direction, by declaring the existence of the violation of Article 2 of Protocol n º 1, since the parents were not warned in time, which therefore violated the principle of religious neutrality that should prevail in state education. The resolution explicitly states that *"it can be assumed that participation in at least some religious activities, especially in the case of young children, could affect the minds of pupils in a way that would give rise to a problem under Article 2 of Protocol No. 1."*

The current Organic Law 3/2020 not only constitutes a violation of major international declarations on human rights, but also overtly opposes the jurisprudence of the ECHR and the Spanish educational system *"which comprises centers created by the government authorities and private schools, both institutes of education being convergent and complementary to each other, which implies the non-existence of a state teaching monopoly and, in a positive sense, the existence of institutionalized educational pluralism"* (Briones & Oñate, 2021).

CONCLUSION

Throughout this article, a study of the legitimacy of the law-making process has been undertaken. Based on Habermas's postulates, four main criteria have been established that must be followed to be able to speak of legitimacy.

The first refers to the formulation procedure, which could be called legality, which must comply with a series of procedural requirements that are usually set in the positive regulations of the legal system in question.

The second concerns the participation of citizens in the legislative process, so that the new law can be described as fully democratic.

The third aspect that has been defended is that of the contents of the law, which, based on the criteria of justice, cannot contradict the internal regulations of the country, or the criteria established by the principal international declarations and treaties, particularly when the regulation of a fundamental right is involved.

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Finally, and this is the principal contribution of this paper, the need to thoroughly evaluate the specific context in which the law was passed has been defended. It is on this point that a series of conditions have been established, since the context is not always decisive when judging the legitimacy of a law, although it does, in exceptional circumstances, become an indispensable element for making that judgment. When we speak of the context of the law, we are not referring to an ideological sphere, but to extraordinary circumstances, such as those that have arisen due to the COVID-19 pandemic which has affected, among other aspects, the legislative sphere of many countries.

To demonstrate these criteria, a specific case has been analyzed: the new Spanish education law (LOMLOE). To speak of legitimacy, the four criteria mentioned must be met, such that, if any of them is violated or not respected, that law can be said to be unlawful. The development of our paper has shown that this law has not met any of the four criteria required, since procedural aspects have not been respected in its drafting, nor has the citizen participation of experts' associations and groups affected by the new law been promoted or allowed. Neither the aspects established in the Spanish Constitution, nor the main Declarations of Rights on the matter, have been fulfilled in matters of education.

But above all, the context in which the law was drafted was not considered. It was formulated during a global pandemic which, in the case of Spain, led to lockdown and a state of alert that prevented the timing, forms, participation or contents of the law from being developed under appropriate conditions.

From this perspective, on the one hand, the general criteria of legitimacy in the drafting of legal norms are established and, on the other, it is possible to declare the illegitimacy of the Spanish Education Law, through its failure to comply with any of the general criteria established for one to be able to speak about legitimacy.

How should this special situation be addressed? The answer to this question warrants a separate study, but it seems that, however much the illegitimacy of a law may be demonstrated, the current representative democratic system existing in many European democracies makes a proportionate answer to the illegitimacy of laws unfeasible, since particracy and the system of parliamentary majorities obviates any possibility of change, beyond the resources that can be used in court, which, in any case, is unlikely to happen.

The main contribution of this work lies in providing a series of objective criteria that serve as a basis for evaluating the legitimacy of a law. This data is also examined within the particular context that the COVID-19 pandemic has generated worldwide, and from which a series of consequences have been drawn, such as the limitation of the fundamental rights to freedom of expression and movement, which have had a negative impact on the democratic process of drafting the Spanish Law on education.

The results of this study may contribute to other studies to further examine the legitimacy of the legislative procedures followed in other States and thus be able to verify to what extent the criteria of legality, freedom, participation and justices that have been put forward can be of general application in the field of law in a democratic society.

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