# The regulatory quality of legal frameworks: A critical approach

## *La calidad regulatoria de los marcos normativos: una aproximación crítica*

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**Abstract:**

The regulation on education suffers from the lack of regulatory quality of many laws and regulations that has been denounced in many countries. The concern for the quality of the norms is old, but it has intensified in the face of "motorized" and "unbridled" legislation that is being the result of the exercise of the normative power by the social and democratic constitutional State under the rule of law. Some causes of the degradation of legislative quality, still limited by the fundamental role of constitutions and international treaties, can be identified. Among the means for remedying or, at least, alleviating or curbing the problem, Spain has, although still with limited effectiveness to date, the role given to the Council of State, the General Codification Commission, the Office of Coordination and Regulatory Quality and the Constitutional Court. Particularly noteworthy are some defects or aspects that could be improved on in terms of the quality of the legal framework formed by the main statutes (organic laws) regulating education in Spain.

The entire analysis focuses on the legal method, the basis of well-founded doctrinal opinions, legal information and some judicial decisions, under a concept of knowledge or legal science that assumes the integrity of its understanding from the Digest of Justinian Roman Law as *divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*, and which, therefore, is founded on ontological anthropology and includes due attention to logic and linguistics. The conclusion arises from the study as a whole: the goal of achieving legislative quality that arises from the outset as a substantive requirement of all legislation, and which is so lacking, cannot fail to be decisively and critically pursued.

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## Resumen:

La normativa sobre educación adolece de la falta de calidad regulatoria de muchas leyes y reglamentos que viene denunciándose en muchos países. La preocupación por la calidad de las normas es antigua, pero se ha recrudecido ante la legislación «motorizada» y «desbocada» en que se ha traducido el ejercicio del poder normativo del Estado constitucional, social y democrático de derecho. Cabe identificar algunas causas de la degradación de la calidad normativa, aun limitadas por el papel fundamental de las constituciones y por el de los tratados internacionales. Entre los medios para remediar el problema, o al menos paliarlo o frenarlo, se cuenta en España, aun con limitada eficacia hasta ahora, con el papel del Consejo de Estado, la Comisión General de Codificación, la Oficina de Coordinación y Calidad Normativa o incluso el Tribunal Constitucional. Son de notar en particular algunos defectos o aspectos mejorables en la calidad del marco normativo formado por las principales leyes orgánicas reguladoras de la educación en España.

Todo el análisis se atiene al método jurídico, sobre la base de fundadas opiniones doctrinales, datos normativos y algunas decisiones jurisdiccionales, bajo un concepto del saber o de la ciencia jurídica que asume la integridad de su comprensión en el Digesto del Derecho romano justinianeo como d*ivinarum atque humanarum rerum notitia, iusti atque iniusti scientia*, y que, por ende, toma como cimiento una antropología ontológica, e incluye una debida atención a la lógica y la lingüística. La conclusión se desprende del conjunto del trabajo: no puede dejar de perseguirse, decidida y críticamente, el objetivo de la calidad normativa que se plantea desde el comienzo como exigencia sustantiva de toda normativa jurídica, y que tanto se echa en falta.

**Descriptores:** calidad normativa, buena regulación, seguridad jurídica, legislación educativa, constitucionalidad de las leyes.

## 1. A long-standing concern, exacerbated in modern times

1. In the 13th century, on the subject of laws, Saint Thomas Aquinas stated under question 95, Article 3 of I-II *Summa Theologica*, the following famous words of Saint Isidore of Sevilla, the wise Spaniard of the 6th and 7th centuries, taken from his *Etymologiae*:

> The law has to be honest, fair, possible according to the nature and customs of the country, appropriate to the place and time, necessary and useful; it must also be clear, so that no tricks are hidden in the darkness; it has to be enacted not for private profit, but rather for the common benefit of all citizens[1].

In these Isidorian demands, some truly substantial ones can be found, such as, for example, that the law must be "honest, fair" and "not for private profit, but rather for the common use of citizens"; no doubt understanding such "private profit" not as

being contrary to common use — something that today we would say is not covered by the fundamental rights of people or, in reality, that contradicts it —, but rather, as is logical, as more awareness of the centrality, for the law as a whole, of human beings, their dignity and of their legitimate rights and individual freedoms, the just social conjunction of which, insofar as corresponding to all individuals, specifically constitutes the "common benefit of all citizens".

The other demands, however, look at how the law's essential aim must be achieved and from what, ultimately, its quality in meeting its raison d'être will derive. A complete programme, effectively, of legislative quality that so often may indeed be longed for despite the long-standing nature and authority of its formalisation[2].

2. The special importance granted to the law and its connection to popular will in the new constitutional rule of law –which emerges and largely materialises with the so-called contemporary age as from the revolution and independence of the United States of America in the later decades of the 18th century, and later, in Europe, as from the French revolution of 1789–, has come to test with increasing acuity in our era the standards of quality required of good laws.

The existence of certain permanent legislative powers, which are periodically renewed every few years via public representation, has generated a progressive legislative fever that increasingly entangles legal systems and constant changes and alterations, seemingly or in reality. In the first half the 1900s, Carl Schmitt spoke of the problem of "motorised legislation". Professor García de Enterría, at the peak of his authority, on receiving in 1999 an honorary doctorate from the University of Málaga, spoke of "a world of unbridled laws" (2006). Professor Aurelio Menéndez, along with Antonio Pau, took a seminar at the Colegio Libre de Eméritos, which gave rise to collective works published in 2004 called, *The proliferation of legislation: a challenge for the rule of law* (*La proliferación legislativa: un desafío para el Estado de Derecho).* Pendás (2018, p. 216) talks of "legislative hypertrophy" and legislative "inflation" with an effect of devaluing the legislation, similar to that on the value of money that produces its inflation. There is a growing feeling of unease and concern for the alarming decrease in the quality of laws and regulations, with its unavoidable consequences: insecurity, instability and divisiveness. Furthermore, focus regarding doctrinal[3] and official means, even in some legislative texts[4], is on the importance of 'better regulation' —expression that some use as the new Mediterranean—, even though it may occur that the same rules that urge it, in turn, totally contradict the most fundamental aspects of the scope of said notion.

## 2. Reasons

1. None of the political agendas competing to obtain public support refrains from promoting a bigger or smaller range of new laws and the consequential "indispensable" legislative changes. Furthermore, there is a widespread idea that a parliament or legislature that fails to pass a good

number of laws does not achieve its mission and, therefore, it is seen as evidence of the corresponding government's failure. And, naturally, majority changes have to be set out in new legislative packages, as though the laws were the pure 'balm of Fierabras', a magic potion for any economic, educational, healthcare or social problem at any time. The reality is evidence enough that, often, the problem is not in the laws themselves, but rather in how they are or are not complied with in administrative, financial and managerial actions, as well as in other diverse ethical, cultural and social factors, the improvement of which such laws provide little, and even less so when they are badly done.

Of course, there is also the case of going down in history, affixing one's signature to a new law, which continues to be one of the most influential reasons, despite now knowing that nothing is certain with regard to the permanency of laws, not to mention that of regulations. But one major cause of the imbroglio of many laws and of the excessive changes to them is the government's wish to "armour-plate" rules that should only be regulations by giving them the status of laws (Astarloa, 2021, p. 76). Many statutes contain an excess of intricate regulations; this tends to detract from what they should be, namely more abstract, basic and stable rules.

The "pet projects" of functionaries and politicians when exercising their regulatory powers have been discussed in writings on administrative law, but they are no less common in the laws themselves, despite statutes having more filters, which sometimes "encapsulate" the ideas of particular people, meaning that experts can put names and surnames to them.

The current process for drawing up laws and regulations provides a number of routes at all levels for the attentive and persistent activities of a wide variety of lobbying and pressure groups. These are wholly organised for this purpose and often achieve their goals, for good or ill depending on their aim in each case. In reality, few people have an understanding of such intricacies. Transparency is not always a feature and everything is so fast, heterogeneous and multi-layered, that it is hard to retain so many facts. They are soon superimposed on top of one another and become blurred in the memory, if there is any recollection. It has rightly been noted that "one problem with the low quality of the language of regulations is the challenge of finding the person responsible for the texts," as "there are hundreds of writers and intermediaries, and public participation adds to the confusion," something that "could explain why the linguistic form of the rule, which should be simple and coherent (…), is complicated, ambiguous and nebulous"[5].

2. Other generalised cultural factors now contribute to the confusion of the legislative framework. One that is especially important is the worrying lack of care for command of the language[6]. Another, is a growing decline in rational thought that follows a coherent conceptual logic. This is a consequence of the predominant excess of empiricism and pragmatism. It is in the field of law that we see the undermining of a genuinely scientific way of thinking that

aspires to concepts that are well-founded both aetiologically and critically and duly coordinated as part of a coherent system that can fully account for the enforceable interpersonal exigencies that underpin a just social order. This results in a tendency to multiply specific cases and particularised regulations in all of their complexity in the body of rules: there is no ability to exercise appropriate conceptual abstraction that would reduce this complexity to what, being shared by that diversity, could be formulated much more straightforwardly, simply, accurately, adequately and effectively.

In addition, fierce ideological clashes constantly flare up in our time and then continue. There are many countries – it is virtually a shared feature of the most developed countries – where deep social divisions are developing in the understanding of central anthropological and social matters. This undoubtedly results in deeply divergent ideas about social organisation, and there are often great difficulties in seeking and finding a way to approach and accommodate them with some degree of stability[7].

In this perspective and context, winning power in each electoral encounter comes to be seen as decisive, with the aim of being able to try to push through one's programme, even if only a narrow majority is obtained in the ballot, which so often does not even guarantee a minimum effective social majority. So, with frequent changes of fortune where the majority changes hands, governments attempt, to varying extents, to weave and then unpick the shroud of Penelope that they make in so many areas of legislation.

Also, many laws are set out as *measures* to promote one policy or another — *Massnahmegesetze* as Carl Schmitt would say (García de Enterría, 2006, p. 49-51) — and not to establish stable, lasting regulatory frameworks for liberties or for the obligatory fulfilment of one or other fundamental rights.

In short, successive changes to the same laws are not drawn up with the appropriate clarity and simplicity, legislative "packages" that simultaneously modify laws on a range of different matters are misused and the decree-law model has also been distorted with very worrying effects.

3. A well-established constitution that is guaranteed by a consistent supreme or constitutional court places significant limits on these swings and requires a qualified majority or a broad political consensus to change the most fundamental legal standards, at least in a number of aspects. However, theories about the evolving interpretation of the constitution could reduce the actual importance of the constitutional framework and allow approaches to flourish that for many go beyond the constitution, thus souring political life and hindering good legal order.

4. Another factor that limits — positively most of the time — confrontation about fairly basic aspects of the social order, is the way the state is bound by international or supranational treaties that constrain and guarantee certain options, commonly shared in the international order or within the sphere of supranational organisations like the European Union.

Treaties take precedence over laws and are hard to modify.

## 3. Remedies... or brakes

1. Even with the limitations we have noted, the problem of the poor quality of rules is still all too frequent and is hard to solve. The best remedies can only involve trying to solve the defects in culture, education, science, politics and reason that we have noted, but this is an enormous, long-term task. Meanwhile, the best organised states, as they have become more aware of the negative implications of what we have described, have created structural and procedural rules and mechanisms to try to lessen the process of regulatory degradation and to guarantee, as far as possible, greater reflection, justification and moderation, better drafting and good coordination in the exercise of regulatory powers, particularly those of the legislature.

2. There is ongoing discussion about whether the constitutionality of other aspects of the quality of the law can be subject to review — as well obviously as considering how their substantive content or competence and procedural requirements fit the constitutional order — at least in some of their components[8], and, obviously, primarily insofar as this might affect the *legal certainty* that section 9.3 of Spain's constitution guarantees as one of its principles[9]. It is important not to ignore the fact that "legislating clearly and effectively", using good "regulatory technique", is not just a question of "good practice" but can be very important for the effectiveness of this constitutional requirement of legal certainty[10]. Indeed, Spain's Constitutional Court has sometimes interpreted it in this way, although understandably it usually maintains a position of giving the fullest consideration to the different ways of shaping legislation that result from the plurality of Spain's democracy of liberties, as well as the fact that it is not itself responsible for ensuring the technical perfection of regulations, that is to say insofar as they do not neglect or harm constitutional requirements. But it is true that "confusing, obscure and incomplete legislation is difficult to apply and, as well as undermining legal certainty and public trust in it, can even obscure the value of justice," as the same court said in its judgment 150/1990, FJ 8[11]. Similar criteria can also be inferred from, for example, the principle of prohibition of arbitrary action in section 9.3 of Spain's constitution (Fernández, 2008, Astarloa, 2021, p. 77).

However, insofar as this review is possible, it will still always be ex post and occasional, even if what the constitutional court says on the matter will still have some influence on the composition of future laws. Restoring the abolished prior review for unconstitutionality in Spain would not change the fact that control by the constitutional court comes after the law, but it would take place before the law is published and takes effect and so this would undoubtedly increase its effectiveness[12].

It is also worth noting that the European Court of Human Rights has held itself to be competent to hear certain cases — particularly ones regarding the conditions of the power to discipline — concerning the quality of the law, as something

linked to its predictability and accessibility[13].

3. In Spain the Council of State has played an important role, as the government's supreme advisory body for many of the regulations it adopts, but also often for the bills it sends to parliament.

Even so, the Council of State — and, where applicable, the corresponding advisory bodies in the Autonomous Regions — only intervene when the text of the preliminary draft has already been shaped, in a very advanced phase of the drafting of the rule, before its final approval or it being sent to the legislative branch. Its options for having an impact are considerable, but limited: the structure of the rule, its general orientation and its formulation are already practically complete when they go to it for consultation, although it is true that the Council is sometimes able to persuade the executive to make significant changes. But it is never involved in the genesis of a project or its first steps.

4. The General Administration of the State also, notably, features two bodies entrusted with ensuring the quality of laws and even regulations to different extents.

The oldest of them, established in 1843, is the General Commission of Codification of the Ministry of Justice, to which "corresponds, in the field of competence of the ministerial department to which it is affiliated — and in that of the competences of others at their request — the preparation of pre-legislative and regulatory texts and any other tasks entrusted to it for the better orientation, preservation and protection of the legislative framework"[14].

It has traditionally focussed on private, civil and commercial, criminal and procedural or judicial law. However, since 1938 public law has also been assigned to it and is now the object of one of its sections, which covers constitutional, administrative and financial and tax law.

The importance of this Commission for the desired outcome of improving technical quality is potentially considerable, but in reality, it is limited or simply non-existent with regards to everything that pertains to the right of legislative initiative or the formulation of rules by ministries other than the Ministry of Justice, as happens in almost all of the legal-administrative and, consequently, educational spheres.

There have been attempts to expand its activities, including changing its name — something that happened in the Second Republic (1931-1939) — and make it a major permanent instrument of the government ensuring the highest possible quality of rules right from their origin and first formulations, similar to what is found in different forms in other countries. But no progress towards this important objective has yet been made.

In contrast, there have also been attempts to promote this objective through the Ministry of the President of the Government (under the various names this has gone by), in connection with its traditional important role as the seat of the secretariat of the government, to which preparing councils of min-

isters corresponds. Royal Decree 1081/2017, of 29 December, which covers improved compliance with what is provided for this purpose as basic legislation by Law 39/2015 regarding the Common Administrative Procedure and, for the state by Law 50/1997 regarding the Government (amended by Law 40/2015) established the Coordination and Regulatory Quality Office (OCCN) in the Under-Secretariat of that ministry, with the modest rank of a subdirectorate general. This royal decree also regulates its functioning. It is specifically entrusted with issuing advice on the areas stated in section 26.9 of the Law of the Government 50/1997[15], relating to preliminary bills, organic laws or ordinary laws, draft royal decree-laws, draft royal legislative decrees and draft regulatory royal decrees[16]. The subject matter of the draft general regulations that it must report on expressly include *education*.

We cannot go into detail, and indeed it seems unnecessary for the purposes of these pages, but this Office can — as its regulatory rules state (sec 6 of Royal Decree 1081/2017) — receive *qualified advice, if deemed necessary*, and, *in particular, request the cooperation of the General Codification Commission* — with which, incidentally, the second additional provision orders special cooperation — *(…) of the Centre of Political and Constitutional Studies (…) and of the Secretariat of the Council for Market Unity*. And it is notable (sec. 7) that the competent ministries have to request the advisory report from the Office *once they have a first text of the draft and the corresponding regulatory impact analysis report*, before other reports. Therefore, although this advisory report will not be binding, if it is not followed, *the reasons for doing this must be justified*.

This seems to be a major step, but to date we are not aware of it having born any fruit or whether the various ministerial departments — so numerous recently — and ultimately the government, actually use the services of this new Office. In reality, the texts of the numerous royal decree-laws from recent years or of the statutes that come from bills, or, ultimately, the texts of the abundant regulatory royal decrees, only seem constantly to increase the defects in legislative technique.

5. Besides that, various advisory bodies, attached to the different branches of the General Administration of the State — and of the regional administrations — intervene in the corresponding sectoral texts, although not in the specific area of their technical-legal quality, without forgetting the role that the ordinary legal advice services try to cover for these purposes, although they are usually in demand for a multitude of tasks and also do not usually have special qualifications for carrying out the function to which we refer even in a system with a minimal degree of collegiate performance, etc.

6. Finally, we should note the important proposals that have been made to ensure that the Spanish Parliament itself, with its qualified legal and technical services — which for this purpose would be concentrated in an Office for Legislative Quality — plays a significant role in preserving and raising the quality of laws (Astarloa, 2021, pp. 82-89).

## 4. This question in Spain's educational legislation

1. Basic educational legislation is the exclusive competence of the State, in accordance with sec. 149.1.30ª of Spain's constitution. It is also largely reserved — without prejudice to the necessary regulatory additions that are accepted — to organic law under sec. 81. It is now set out in a handful of organic laws currently in force – although not all of their content has that status – that comprise what we could consider the basic legal framework (the word basic here has its common meaning and not the technical legal-constitutional one) of education in Spain: the LODE (Organic Law 8/1985, of 3 July 1985, regulating the Right to Education), LOE (Organic Law 2/2006, of 3 May, on Education), LOU (Organic Law 6/2001, of 21 December 2001, on Universities) y LOCFP (Organic Law 5/2002 of 19 June 2002 on Qualifications and Vocational Training).

2. However, it is known that all of these laws, especially the first three, have undergone major modifications and reforms with virtually every change of majority in parliament and governing party. Layers of changes have built up, especially in the LOE, as one of the factors in their textual complexity. Since latest reform produced by the LOMLOE ((Organic Law 3/2020 of 29 December 2020, which amends Organic Law 2/2006 of 3 May on Education, promoted by the Minister Isabel Celáa), contains a major technical-legal flaw that still causes perplexity and uncertainty: in its political desire to make explicitly its complete rejection of the educational legislation enacted under the majority of the Partido Popular led by Mariano Rajoy seven years earlier, its single derogatory provision provides for the complete repeal of the LOMCE (Organic Law 8/2013, regarding the improvement of the quality of education). However, if we consider what the new organic law amends and maintains from the text of the LOE over the 99(!) paragraphs — including some numbered as *bis* or *ter* — of its extremely long single section, it is clear that altering in detail some of the precepts that had been modified by LOMCE was not proposed. Should the repeal be understood to impose a return to the original text of the LOE in such precepts?

An example: the single article of the LOMLOE does not in any way modify para. 3 of sec. 116 of the LOE, although para. 59 does modify other paragraphs from it. But the LOMCE added a brief second subparagraph to paragraph 3 by virtue of which: *Educational funding agreements will have a specific minimum duration of six years in the case of Primary Education and four years in other cases*. The consolidated version of the LOE published in the official state gazette still contains this text. This suggests that the LOMLOE's derogatory provision is to be interpreted as having limited effects with regards to the content of the LOMCE that was altered — eliminated or amended — by the LOMLOE's single section, but not the rest of it.

In any case, it displays clear failures of legislative technique.

3. There is no doubt that the content of the LODE primarily relates to the compulsory levels of education, but its most im-

portant precepts still have implications for other levels or stages of education. While it is true that university education and, perhaps even more so, vocational training have very distinctive features, partly thanks to their more direct relevance to various rights and liberties, or for aspects of general interest that differ from the strictly educational, the common application to all of education of the basic requirements of the Constitution regarding the right to education (especially but not only sec. 27) as well as some precepts of the LODE that try to make substantive requirements clearer, could easily justify the consolidation into a single legal text of what is currently governed by the four organic education laws discussed above, thus facilitating a useful simplified codification. Although, ultimately, steps could be taken to simplify and clarify this legislation by maintaining the current distinction between one law which is more general in character and principles — a LODE with all of that more basic and common regulatory part — and the three other organic laws that address what is specific to each of the three major areas of the educational system in general.

4. Of course, it would be essential for society as a whole, and more specifically political figures, to accept consistently and faithfully as an untouchable normative floor everything that is already established at a fundamental level by the Constitution as it has been interpreted in a consolidated and firm way by the Constitutional Court. This would not affect the right to promote constitutional reforms, but they would need a clear awareness of the very broad political consensus required and, therefore, could not include vain attempts to sneak in through the legislative route things that can only be done by changing the constitutional framework. There might be assertions by the top court that could be subject to review, but it cannot be denied that over time it has developed a well-founded set of precedents regarding many of the implications of the Constitution, which does not appear to be alterable without changes to the text of the Constitution, although it can of course be complemented and modulated as new incidents allow new perspectives and insights.

Furthermore, we should not ignore the compulsory principle of interpreting laws in accordance with the constitutional order, which Spain's Constitutional Court has clarified[17]. This is explicitly mentioned in sec. 5.1 of the Organic Law of the Judiciary (LOPJ), so that only when it cannot be applied will it be appropriate to bring proceedings regarding matters of unconstitutionality before the Constitutional Court against a legal precept that contravenes the Constitution or its interpretation by the court (sec. 5.3 of the LOPJ). It is no wonder that by this route, we so often find that the law, as eminent German jurists from the late 19th century said, is more intelligent or more reasonable than the legislator, although this might happen not only in these cases of necessary interpretation "consistent" with the Constitution[18] but, more generally, as a result of judicial interpretation, the principles of which are laid down in Spanish law sec. 3 of the civil code.

5. Greater sobriety in legal texts would be very welcome, avoiding undue repetition

and unnecessary explanations. A normative text is not and should not be a doctrinal or explanatory pamphlet or a political speech; it should limit itself to establishing properly normative rules as clearly and unquestionably as possible. And, as noted in legal scholarship (Santamaría Pastor, 2010; Rebollo Puig, 2010), particular care should be taken not to allow supposed "principles" to multiply without justification.

For this objective it is, of course, important to have a clear idea of what should be formulated as a rule or principle, in order for its fulfilment and for the consequent effective enforceability of the rights and duties that derive from it[19], and to arrange normative texts with a suitable rational, systematic structure, including anything with this character in the most general terms and saving for the more specific or special regulations that which is only strictly applicable to them.

It makes no sense, for example, for the requirement of non-discrimination in education to be specified with regards to admission to educational centres supported by public funds (LOE, sec. 84.3) since this is something that clearly must always apply in all of the field of education and so is a basic principle. It also cannot solely be linked, as sec. 1.a bis) of the LOE does now, to *quality of education*, even though the same law then somewhat obsessively repeats these requirements here and there, as though simply stating it as a fundamental principle were not sufficient, even listing the factors that cause this discrimination, as it does when referring to the purposes of education in sec. 2, just a few lines after it states them in the aforementioned sec. 1.a bis).

If we quickly look at the ever longer section 1 of the LOE, for example, with its 21 principles set out from a) to r) with some *bis* letters among them, several defects are already apparent in its formulation, as well as the general reiteration of the basic general formulations already found in the LODE. Still referring to specific cases, and without going into a more detailed analysis of all of art. 1 of the LOE that would not be possible here, we can immediately see the irrelevance of emphasising, for example, the *effective fulfilment* of the Convention on the Rights of the Child and its protocols as the first "principle" of Spain's education system since the LOMLOE. This is because this convention is only one of the various relevant *international treaties and agreements* relating to the subject of education that have been *ratified by Spain* in accordance with which sec. 10.2 of the Constitution states that *the rules relating to the fundamental rights and freedoms that the Constitution recognises* must be interpreted. Furthermore, it is not the most important of them. This is indeed a principle — and a constitutional one at that — of Spain's education system, but there is no need to restate it in a law. However, mentioning just this convention and not other international treaties and agreements could give the false impression that the other international instruments, some of which, as noted, are even more basic and general, do not share the principial character claimed for *effective fulfilment* of it.

The unsuitability of what is formulated in letter a) as an inspiring principle of the education system is shared by the specific explicit mention of recognition of

the *best interests of the child, of its right to education, not to be discriminated against and to participate in decisions that affect it and the obligation of the state to guarantee its rights*. These rights are established in sec. 27 of the Constitution and are already reiterated at the organic-law level by the LODE. The state's obligation to guarantee all of these rights is inherent to the very notion of the state and exists at the constitutional level. It is not a bad idea to include, explicitly if desired, the principial importance of the *best interests of the child*, the appraisal and valuation of which is placed by the Convention primarily in the hands of parents and guardians[20] — something that should be made explicit in its legal formulation, if wanted, to ensure legal certainty — but it is unnecessary to accompany it with something that is already proclaimed in its own right and is of higher value. In addition, this wording would in any case be better in the LODE.

There are many examples of rambling, repetitive, confused or unduly partial wording in Spain's organic education laws, especially in the LOE and its various regulatory levels.

It must be stressed that legal texts do not exist for the purpose of publishing ideological-political diatribes in the official state gazette, but rather to regulate behaviour and determine the legal standing of claimants and respondents that are effectively enforceable through administrative and/or judicial guarantees. When introducing new rules, legislators should ask themselves: what will change with this supposed new rule? what will be modified? what will its specific functionality be? So often, many of the reforms that fill pages in the official gazette do not result in anything, simply because in the real world they lack any legal effect. The people who passed many of these reforms were very satisfied because they had inscribed particular expressions for history, perhaps without realising that legal and institutional systems have mechanisms that can make the law more intelligent than the legislator, and so what they thought was new and transformative was actually not and could not be so, even if it did cause worry and uncertainty until the dust settled.

And, of course, what is established as a more general principle or rule, should not be repeated when formulating rules on more concrete, specific, or particular aspects, as we have already observed.

For example, what need is there for sec. 6.2 of the LOE regarding the curriculum to repeat, albeit partially, that the curriculum specifies the elements that education must cover (sec. 6.1), its very purposes, which are already set out exhaustively by the LOE itself? Also, mentioning only some of the aims of section 2 might raise doubts, even though many of the aims listed in section 2 are contained in others of more general scope that are also formulated in it, so that the ones reiterated in section 6.2 in reality probably comprise all of them.

Many rules could be made much more concise and much clearer simply by a little more logical rigour, starting with conceptual rigour, with subsequent good systematic order.

## Notes

[1] According to the version of Jesús María Rodríguez Arias in the Thomas Aquinas edition (1989, p. 743). We have allowed ourselves to change his translation of the word conveniens — which implies something more than proportionality —, as 'proportioned to', for 'appropriate to'. The text is a classic that is often used and referred to. Vide for example, Caravale (2018), p. 86.

[2] It has also been noted that "concern for the quality of legislative language has historical roots, given that the Siete Partidas of Alfonso X states that the writing of laws "must be done by wise and learned men" and that "they must be done with very good and well-chosen words" (Law 9, Title 2, Part One)" (Moreu Carbonell, 2020, p. 320).

[3] In 2019 a Yearbook of Good Governance and Regulatory Quality (*Anuario del Buen Gobierno y de la Calidad de la Regulación*) (Fundación Democracia y Gobierno Local) was even published, although the breadth of the subject matter of its first subject area could result in the second being somewhat sidelined.

[4] By a resolution of Spain's Council of Ministers of 22 July 2005, some extensive and specific *Regulatory methods directives* (Spanish Official State Gazette of the 29th) were approved in Spain, but we must particularly note Law 39/2015, sec. 129 (see Martínez López-Muñiz, 2016 and 2017), on which the Constitutional Court's judgment STC 55/2018 has imposed an arguably restrictive interpretation. Spain's Supreme Court has already used this ruling to annul some Government regulations by the Government: Supreme Court judgment STS 868/2020, of 24 June 2020 [ECLI:ES:TS:2020:1946], FFDD 1 y 3.

[5] Moreu Carbonell (2020, p. 321), following Gregorio Salvador (2004, p. 631).

[6] Various authors have drawn attention to this matter. "Law is language. (...) Therefore it is vital to take care of the 'words' of the law" (Pendás, 2018, p. 217); "good law is not possible without good language" (Moreu Carbonell, 2020, p. 344).

[7] It has been accurately observed that "different legal languages reflect different world views" and that "a language is not just a series of concepts with their corresponding words or labels: it is a way of seeing the world, irreplaceable and unrepeatable, even in more complex and abstract domains of language" (Moreu Carbonell, 2020, p. 329).

[8] Pendás (2018, p. 219); more broadly Cruz Villalón (2003), who in particular emphasises the requirements of coherence, systematicness and protection of trust (p. 160).

[9] Although all authors note this, García-Escudero (2014) in particular has analysed it.

[10] See García-Escudero (2014, in particular p. 10).

[11] Vide García-Escudero (2014, p. 11), who also illustrates the court's respect for pluralism, which is also made explicit in the judgment cited above after the quoted lines. This author has critically and in detail analysed defects considered irrelevant by various judgments for the purposes of the review that corresponds to Spain's Constitutional Court, even criticising them in many cases and urging legislators not to repeat them because of their risks, but also when in connection with certain constitutional requirements, such defects have been held to be unconstitutional.

[12] Vide in this regard, Cruz Villalón (2003, p. 164), although he does not appear to be in favour of the prior review (2003, p. 165). This type of prior review exists in other nearby European states, such as France (sec. 61 of its Constitution) and Portugal (sec. 278 of its Constitution).

[13] Judgment of the Grand Chamber, *De Tommaso v. Italy*, 23 February 2017, §§ 106-109. On this matter, before this judgment, Martín-Retortillo Baquer, L. (2003).

[14] Articles approved by Royal Decree 845/2015, of 28 September, sec. 1. Section 3 includes among its functions, technical correctness, clarity of legal language and style of preliminary bills and draft provisions that are entrusted to it by the Ministry of Justice. The adverse assessment of the codification in the earlier regulation of 1997, rightly criticised by García de Enterría (2006, p. 71 et seq.) has disappeared from its preamble.

[15] a) The technical quality and rank of the regulatory proposal. b) The consistency of the initiative with the rest of the legislative framework (...), with others that are being developed (...). c) The need to include the express repeal of other rules, as well as to consolidate other existing ones covering the same area in new ones.

[16] In particular: a) To evaluate the technical quality of the proposed rules, considering the correct use of language and compliance with the regulatory technique directives, as well as the suitability of the proposed regulatory rank. b) It will examine the consistency of the initiative with the Constitution and the rest of the legislative framework, (...), with others that are being drawn up (...) or which are to be drawn up (...), avoiding potential duplications and contradictions. (...) e) It will check that the content of the recitals and provisions of the bill are in accordance with the principles and rules laid down in Title VI of Law 39/2015, (...) and in Title V of Law 50/1997 (...). f) It will analyse the compliance or consistency of the initiative with any

projects to reduce administrative burdens or ensure good regulation that have been approved (...). (Sec. 2.2).

[17] Vide, in the doctrine, Arzoz Santisteban (2010).

[18] Which would the case be, in our opinion, with regard to the new wording of sec. 109 and additional provision 25 of the LOE since the LOMLOE, as we have explained elsewhere.

[19] Regarding the "phenomenon of promotional or programmatic rules", justified concern is caused by "the loss of the imperative character of the rules (...). It is not necessary to be an old-fashioned positivist to uphold a conclusive truth: the law only merits this honourable name if it includes a coercive element" (Pendás, 2018, p. 216-217).

[20] As can be seen in the analysis by Martínez López-Muñiz (1991, p. 424-427). Although the notion of the best interests of the child was not the specific object of the study, a consideration of how many references there are to it in the Convention (notably sections 3.1 and 2, 9.1, 18.1) also reflects the primacy of parents in their estimation and the additional status that might exceptionally correspond to public institutions.

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