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Public order: limit or value? Inequality and poverty in the relationship between credit concession, child support, manners, education and accomplishment of the human being

Abstract

Inequality and poverty are frequent topics in the modern debate. Despite, in fact, global opulence is in constant increase, it is known to all that the contemporary world continues to deny basic freedoms to a high number of human beings. Such evidence, moreover, is set to stay that way, since civil society will continue to obstruct the access to one of the fundamental requirements for a full professional success, which is represented by the opportunity to achieve an adequate education. An opportunity that, in turn, is strongly linked to the family environment, in which one lives, as well as to the level of income that one possesses. The purpose of research is to show that in a finance which is proclaiming itself respectful of ethical values, the purpose of research is to show that in a finance which is proclaiming itself respectful of ethical values, possible requests for financial support, which are intended to allow the full accomplishment of the individual, must be always considered worthy, finding directly in the order's fundamental principles their right foundation., which are intended to allow the full accomplishment of the individual, must always be considered worthy, finding directly in the order's fundamental principles their right foundation.

Keywords: public order, credit, education, schooling

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Francesco Torchia
University of Calabria, Italy

Correspondence: Francesco Torchia, University of Calabria, Italy, Tel +3934733311172, Email francesco.torchia@unical.it

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Introduction

Inequality and poverty are common themes in modern legal literature. In fact, faced with the opulence (constantly increasing) of few, the contemporary world continues to deny basic freedoms to many human beings. And such evidence, however, is bound to remain so, as long as civil society will continue to hinder access to one of the basic conditions for the complete professional affirmation of the Human Being, that is the opportunity to achieve an adequate training. Opportunities that, in turn, depend on both the family environment in which you live and the level of income you have. In order to understand and combat inequality and poverty, therefore, we need a more careful practical evaluation of inequality and of economic and social policies, without forgetting that the principle of freedom and the principle of equality cannot be examined separately from the complementary principle of difference. Given that social and economic inequalities have always existed and will always exist, it is necessary, in fact, to regulate them, ensuring the most disadvantaged a satisfactory quality of life[1].

In addition to what has been said, the concept of Public Order assumes absolute importance for the realization of the intended purpose, whose function has been the object of revision by some scholars. In particular, on this point it is interesting to highlight that, according to authoritative doctrine, the general clause of public policy: "*regardless of the traditional reconstruction in a merely negative key, that is, from its dutiful anchorage to superior principles, often of constitutional rank, it stands as the main instrument able to orientate the interpreter in the delicate work of comparison between order and systems of different rules, in a direction that is not at all neutral, but axiologically and functionally oriented. Public order, in other words, constitutes the normative place in which to recognize both the principles underlying the powers of autonomy in a sense, just saying, positive and the correlative limits of exercise of the same*"[2]

Given this, there is also no doubt that equality is an absolute value both for our system and for the international order, so much so that, as the Universal Declaration of Human Rights prohibits any form of discrimination and conceives equality as a criterion for the attribution of ownership of fundamental rights, also the International Treaty on Civil and Political Rights, applied in New York on December 16, 1966, by the Assembly of the United Nations, at the same time as the International Treaty on economic and social rights, which entered into force for Italy on December 15, 1978, moves in this direction.

Equality, however, does not mean egalitarianism [3]. And this, whether we consider equality as a prohibition of discrimination, or if we consider it as a commitment by the State to remove the de facto conditions that hinder the development of the individual. Hence the further corollary on the basis of which control over the justification of differentiation must be based on the principle of equality understood as a different treatment for differentiated situations. By doing so, it will be possible to agree with those who claim that only unjustified differentiation, that is, those that are not based on the nature of things, cannot be allowed. In the same way, it will be possible to agree with

[1]P PERLINGIERI, *l'ordinamento vigente e i suoi valori,* Napoli, 2006. 280 p., according to which «…equally important in the study of the family is the attempt to define the role of public order. A non-rigid public order that is able to combine equality and diversity. In some cases, it is even more important the diversity than equality: not the culture aimed at standardizing the kind of relationship that must exist in the field of feelings, or in the sector of the organization of one's life, but the culture of respect and tolerance. It is important to bring economic systems, production systems closer, but not necessarily the way of living or conceiving the family..».

[2]F Sbordone, *Contratti internazionali e lex mercatoria*, Napoli, 2008. 58 p. which also refers, L. Lonardo, *Diritto civile italiano e ordinamenti stranieri. Il problema del confronto*, Napoli, 1984. 256 p.

[3]P Perlingieri, *Manuale di Diritto Civile*, Napoli, 2007. 44 p.

those who attribute to the political, social and judicial institutions the fundamental role of promoting the proper functioning of market mechanisms, expanding them and facilitating their fair use. The task of assessing the plausibility of these differentiations is up to the Judge, who must legally equate the specific facts and evaluate them, formulating a judgment of equality or inequality. To do this, however, we need a scale of values if we want to avoid taking the risk of putting this delicate operation back to mere arbitrariness and ending up, in this way, to empty the value of equality. In our system, however, in or order the reference value, at the peak of the values of the Constitution, on which the legitimacy of the legal system and the sovereignty of the State is founded, is the "Individual". A value that, in addition to being inseparable from that of solidarity, plays an absolutely important role in assessing the reasonableness of different treatments for different situations. From this a first assessment that leads us to affirm *ex post* that the national policies, aimed at favoring or encouraging employment, have not always given the desired results, being, often, regulatory interventions that have based their legitimacy, more than anything else on the urgency and need to solve isolated situations of economic crisis and that (especially for the South of Italy) have been linked, even economically, to the national development plans for the South, as in the case of the law num. 64 of 1986.

Moving on to a more specific examination, it should, however, be noteworthy that, with regard to youth employment, a decisive role is played by the instrument of training and work contracts. In fact, in Italy, from the early nineties onwards, it seems to have changed the perspective from which to try to solve the problem of unemployment, passing from a policy of economic incentives (aimed at facilitating the recruitment of some particular categories of people) to a policy that concentrates a large part of the economic resources in financing projects of companies or cooperatives tout court. If, however, the problem of unemployment is characterized by its drama in all countries with a capitalist economy, in some states, among which Italy stands out, it has disturbing proportions. In this regard, it has been observed that unemployment has three fundamental origins: unemployment from restructuring, development, and underdevelopment. The diversity of the origin of unemployment in different local labor markets suggests applying different therapies in the various territorial situations. This, from the point of view of active policies, requires an understanding of the characteristics of the phenomenon that must be attacked, given that, if we were to treat unemployment from development and underdevelopment in the same way, the results could only be unsatisfactory. And if it is true that in the case of restructuring unemployment it seems appropriate to apply intense therapies of active labor policy, qualification of the workforce and assistance to companies, on the contrary, to face unemployment from underdevelopment, it is instead a matter of applying development therapies, while in the case of developmental unemployment it is necessary to take note of this large amount of work excess, knowing that the outlet for many unemployed can no longer be the industry or the sector immediately productive in the traditional sense. In other words, if it is true that Italian unemployment is fundamentally juvenile, feminine and southern, these characteristics cannot be neglected in the elaboration of the recipes to get out of the *impasse*. As well as, if it is true that the dualism of labor market reflects the growing dualism of the country, we cannot but deal with the employment issue in the context of an overall project of economic - social cohesion. It is no coincidence that if it proves that the prevailing youth characterization of unemployment in our country reflects the patriarchal characteristics of our system of industrial relations and our society, it would be impossible to overcome the current system, rightly defined as excluding (in the sense that remain outside employment the same sociodemographic categories, women, and young people) and punitive (because once someone is cut off from the citadel of the status nothing is up to that person, not even the unemployment benefit). Despite, however, the less than encouraging picture and taken for granted the diversity of the labor market compared to other markets, it is the task of politics to try to bring equilibrium to the economy and the market.

In this context, a first valid element of judgment comes from the experience gained in the subject of Socially Useful Works. In fact, the LSU subsidy cannot be considered a surrogate for unemployment benefits, an instrument for providing care income. If so, we would witness a dangerous re-release of the discrepancy between economic function and legal structure. The income disbursed for LSU is filled, instead, by a peculiar *fumus* of correspondence, connected to an element of real usefulness, which is certainly not the mere economic utility, but also the utility deriving from parameters of effectiveness and efficiency in the management and in the organization of public service in which the performance is inserted. It is a matter of a different kind of utility, measured in social and collective terms, understood as the suitability of socially useful performance to effectively satisfy not abstract needs, but the concrete objectives of public policies, with a strong social connotation, pursued in a given historical moment by policymakers. Then, from this first level of social utility, another level comes into being: the possibility to satisfy also the needs of vital income by individuals' categories in a position of weakness in the labor market. It follows that socially useful jobs, in the sense accepted by Italian legislation, were useful to face need situation of jobless or unemployed workers through their employment in public service jobs and the establishment of a precarious relationship with the user entity. Through this tool, the aim was to achieve multiple objectives, some referring to the labor market as a social institution; others aimed at protecting the individual worker who is temporarily jobless or unemployed. The idea of subordinating the provision of a subsidy, to the jobless or unemployed, to the execution of useful activities for the community, as already mentioned, however, does not represent a novelty in the Italian experience nor in the experience of other countries. And this, even if the notion of LSU (which refers to that of Work for Welfare) was inevitably contaminated by the peculiarities of the Italian welfare model. A Welfare that strongly favors the position of the person who managed to obtain the pass for the Citadel of status, thus discriminating against those who, on the contrary, remained excluded. The law, in the matter of LSU, had in fact, as the main point of reference, workers on lay-off or mobility and only residually jobless or unemployed workers, without social security protection. This state of affairs, however, has changed, given that the regulation's evolution on the subject has meant that this form of work became an incentive to the creation of new business activities, capable of creating stable employment over time, and only in a residual way, a measure of income support.

The underlying philosophy that drives the discipline, therefore, is clear in the attempt to give a first response of working activity to the hundreds of thousands of young long-term unemployed people, who cannot enter the production processes, and at the same time, redesign the whole system of social services, which cannot be entrusted solely to the market[4]. It follows that, among the many answers elaborated by scholars to ease the drama of unemployment in modern societies, there was the one that, starting from the fact that, if it is true that a satisfactory answer to the problem of unemployment must derive, first

[4]A. PIZZINATO, *Lavori socialmente utili: modalità di funzionamento dell'istituto*, in M. BIAGI (a cura di), *Mercati e rapporti di lavoro*, Milano, 1997. 299 p.

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of all, from a consistent recovery of the world economy, it is equally true that it is necessary, even before, to identify job opportunities, leaving the mere mercantile logic. In doing so, however, the crisis is not measured in the right way, first of all financial, that crosses the Welfare State and the Keynesian theory of full employment, that is to say, the theory according to which it is good to pay the non-employed a salary outside the market, in the face of off-market but socially useful jobs. As an alternative to this, it was, therefore necessary to take note of the existence of a different scale of priorities in the discussed, without denying social value to work. And that's what happened with the so-called social work, where the social consequences of work represent the fundamental reason for the worker's commitment, as well as an indirect consequence not always desired by the person employed. The LSU, therefore, have returned - without consuming it - in the same category of jobs with generic social utility (think for example to prison work, voluntary work, employment in the social cooperatives), and have had an immediate social fallout, as they are aimed at committing in the provision of socially useful services, subjects otherwise at serious risk of marginalization. It is not by chance that the idea of committing the unemployed in public service jobs is not an exclusive idea either of the current Italian landscape, or even less, of the European one; just think that in the Republic of Salò, within the social policy elaborated by the "Duce", it was decided to establish a « role of workers in temporary availability » to be assigned for the execution of public utility works [5] or, if we go back in time, it is enough to remember the experience of the workhouses required by the English legislation of 1834. It should also be considered that in the scenario in which we move, the large number of socially useful jobs is composed of many types of work with a social implication, namely prison work, done by conscientious objectors and, finally, volunteering. It follows that, for an analysis of the topic, attention must be directed to the real effectiveness of an employment policy based on social work. Especially since the judgment in terms of utility cannot be placed in the abstract or simply close to the normative data, if it is true that it can only be a trace for a judgment that can be formulated ex post in relation to the intrinsic quality of the objectives pursued and achieved through this tool. In other words, the effective management and administration of the institution (verifiable only ex post) become a salient element of its legal qualification and this regardless of the normative qualification. But that's not all because, in order to access the labour market, you need the necessary education and the economic means necessary to achieve it. Careful exegesis of the concept of inequality and poverty in the new legal order, therefore, cannot ignore the identification of the relationship that exists with the activity of granting credit. And, in this regard, it is good to identify, preliminarily, the significance to be attributed to the concept of trust, as well as, consequently, to establish the entity of the reciprocal rights and obligations acquired by the trustor and the trustee. This is because trust is a concept that has always known a plurality of meanings, all of them, from time to time, anchored to a different reference value. As proof of this think about, next to the traditional way of understanding trust as a behavior corresponding to the given word[6], it has gradually gone on to affirm concepts, anchored to values such as loyalty, honesty, and probity, which have ensured that trust could take on other connotations. To this, we add that the term trust is repeatedly referred to regarding legal figures such as the donation, the mortgage, the transfer of shares, the endorsement of a promissory note [7], the testamentary disposition, the companies, the bank credit and the administration [8], with the consequence that, when it is regulated by law, the fiduciary shop becomes typical [9].

Trust, therefore, is anything but an element characterized by extreme generality [10] and lacking a specific meaning. However, it should also keep in mind that legal concepts do not represent fixed patterns but must be adapted to legal reality in its development [11]. The concept of trust is, in fact, the qualifying element of two juridical figures, which have arisen and developed gradually and in different ages, the Roman type of trust and the Germanic type[12], that, alongside the

[5]Legislative Decree Duce 20 Gennaio 1945-XXIII, num. 13.

[6]Cicerone, *De off*., 1, 23 « *… fit quod dicitur : dictorum conventorumque constantia et veritas…* »,.

[7]VM Trimarchi, Negozio giuridico (negozio fiduciario), Enc. Dir., XXVIII, Milano, 1978. 32 p.

[8]art. 1564 civil code. : « In the event of the failure of one of the parties relating to individual services, the other may request the termination of the contract, if the non-performance is of considerable importance (c. 1455) and it is such as to impair trust in the accuracy of subsequent obligations »

[9]S. PUGLIATTI, *Diritto civile, metodo – teoria – pratica*, o.u.c., pag. 248, where the author states: «the so-called legal trust denies the noun with the adjective; at least in the sense that it makes less those typical problems of construction that are characteristic of the phenomenon of trust, and refers to the common problems of application and interpretation of the law. Tradition, however, could influence the sense of determining the customary physiognomy, which has become typical, of the fiduciary case: so that, if this presents the characteristics of the case of the Roman trust, the assumption of the Roman-type fiduciary construction would be plausible, suitable to determine the discipline of the phenomenon in our positive order».

[10]G. MESSINA, *Negozi fiduciari,* Milano, 1910, pag. 1 e ss.; T. Ascarelli, *Il negozio indiretto e le società commerciali* in *Saggi giuridici*, Milano, 1949, pag. 165; E. Betti, *Teoria generale del negozio giuridico,* 2° ed., Torino, 1960, pag. 324; L. Campagna, *Il problema dell'interposizione di persona*, Milano, 1962, pag. 134; L. Cariota Ferrara, *I negozi fiduciari,* Padova, 1933, pag. 2; U. Carnevali, *La simulazione,* in Bessone (a cura di) *Istituzioni di diritto privato,* Torino, 1996, pag. 697; U Carnevali, *Negozio giuridico fiduciario,* in Enc. Giur., XX,1990, pag. 1; F. Ferrara, *negozi fiduciari,* in *Studi in onore di Scialoja*, II, Milano, l905, pag. 713; A. Gentili, *Società fiduciarie e negozio fiduciario*, Milano, 1978, pag. 117; C. Grassetti, *Del negozio fiduciario e della sua ammissibilità nel nostro ordinamento giuridico,* in Riv. dir. comm., 1936, I, pag. 345; C. Grassetti, *Deposito a scopo di garanzia e negozio fiduciario,* in Riv. dir. civ., 1941, pag. 97; A. Graziani, *Negozi indiretti e negozi fiduciari,* in Riv. dir. comm., 1933, I, pag. 414; P. G. Jaeger, *Sull'intestazione fiduciaria di quote di società a responsabilità limitata,* in Giur. comm., 1979, I, pag. 181; N. Lipari, *Il negozio fiduciario,* Milano, 1964, pag. 146; U. Morello, *Fiducia e trust, due esperienze a confronto,* in Quadr., 1990, pag. 239; S. Pugliatti, *Fiducia e rappresentanza indiretta,* in , *Diritto civile, metodo – teoria – pratica*, Milano, 1951, pag. 218; G. Pugliese, *la simulazione nei negozi giuridici,* Padova, 1938, pag. 35; Salv. Romano, *L'accordo fiduciario e il problema della sua rilevanza,* in *Studi in onore di Scaduto,* III, Padova, 1967, pag. 33; D. Rubino, *Il negozio giuridico indiretto,* Milano, 1937, pag. 3; V. M. Trimarchi, *Negozio giuridico (negozio fiduciario)*, Enc. Dir., XXVIII, Milano, 1978, pag. 32; E. Caterini, *Il principio di legalità nei rapporti reali,* Napoli, 1998, pag. 136 e ss.; E. Caterini, *Il* trust *anglosassone e la «corruzione» della situazione proprietaria,* in *Le Corti Calabresi,* 2002, III, pag. 777; C. Varrone, *Il trasferimento della proprietà a scopo di garanzia,* Napoli, 1968, pag. 79.

[11]S. Pugliatti, *Diritto civile, metodo – teoria – pratica*, Milano, 1951, pag. 218 e ss. where we read it textually: « Juridical science must construct and elaborate concepts (definitions, distinctions, etc.) which, with respect to the juridical order to which they belong, maintain that theoretical and practical value together, which characterizes the function of that science. The construction of concepts exclusively for didactic or mnemonic purposes would be reduced to an exercise in teaching and memory; vain exercise if both should tend to unveil and keep alive the annotation of a reality, and not keeping the individual faculties in practice ».

[12]S. Pugliatti, *Diritto civile, metodo – teoria – pratica,* o.u.c., pag. 242, according to which both the modern trust of the Roman type and that of the Germanic type have detached and turned away from the respective traditional schemes. This would have happened because the sources are missing and because it is not easy to determine if there have been (and what were the) relations between the Roman and Germanic discipline. This is why even if we can not say with certainty what the constructive procedure has been followed, we have come to the identification of two typical schemes.

common element, represented by the concession of an excess medium compared to the purpose, they present an element of differentiation which is given by the different limit of the juridical power conferred on the trustee[13]. In other words, while in the Roman trust the trustee is given with unlimited *real* power and the purpose, for which this power is conferred, operates only through the obligatory intercourse, by virtue of which the trustee must make of the right the established use, in the Germanic type trust, the trustee acquires a right subordinated to a resolvent condition and, therefore, any abuse (use contrary to the purpose) provokes the return of the good to the trustee[14]. The solution indicated by the second type of trust, however, in our legal system meets at least two obstacles. The first obstacle is represented by the fact that there is no solvable and temporary property in our system; the second obstacle is the fact that, although admitting such a form of property, the problem of fiduciary reconstruction remains to be resolved with reference to those companies where the transfer of the right does not take place for an interest that is also of the trustee (*fiducia cum amico)*. In this second hypothesis, in fact, temporary ownership implies for the owner the power to use it within the limits of his own interest. In our legal system, therefore, the only usable construction seems to be still today that of Roman style, for which, however « the means used is more extensive (than what should normally be used for the achievement) of the specified purpose»[15] and the concept of excess remains, always and in any case, not very comprehensible [16]. Among the basic elements that make up the pattern of trust generally understood, the most frequent is represented by the alienation of a real right. It is, however, an alienation with reduced effectiveness, as it occurs for the achievement of a further goal, and therefore should be seen as an instrument to achieve only some of the effects that belong to it. In other words, the parties aim to achieve a practical purpose that is not that of the company[17]. Since, however, this is the same element that also characterizes the hypothesis of the indirect shop, one must be careful to keep separate and not to confuse the trust deed with the indirect one, whose cause represents an insurmountable limit.

The parties, if it is true that they can adapt the company to their practical needs through specifics and determinations, must always remain within the limits of the random scheme. This is why a typical company for an indirect purpose is used, which can be achieved by using clauses that do not go beyond the causal scheme, or a plurality of companies are used where the accomplishment of the end of each type of negotiation represents the overall result, or - in the final analysis - it must be admitted that we are in the presence of a mixed contract[18]. Hence the impossibility of using the alienation of the real right as an essential element for the construction of a scheme of trust in general. It follows that trust understood as reliance on the fact that the trustee will not make use of the power transmitted to him in contrast with the economic purposes[19],occurs not when the practical purpose is accomplished through the functioning of legal mechanisms, but when it is accomplished by virtue of the fair behavior of the parties. In this regard, however, it is necessary to clarify that trust is a specific element, the technical cause of the trust deed, so when it comes to trust deeds it is necessary to distinguish them from the fiduciary relationships *latu sensu*, that means from those relationships where quality personnel of the parties rises only to the rank of determining reason for the conclusion of the company[20]. This is even more so if we think that it is not yet clear whether there exists (and if) what the cause of trust is for our system and, therefore, if we can speak of a unitary negotiating scheme to be identified through the cause. From a strictly theoretical point of view, in fact, it is not correct to talk about a trust deed but rather a negotiating link. In doing so, however, it would not make sense to go in search of a single cause. And this, without saying that neither our autonomy nor, even less, the abstraction of the act of disposition is in our normative system, that would inevitably occur when forced to hypothesize an act of disposition as the fulfillment of a mere obligation to give and independent of the productive company of the asset allocation. In conclusion, we cannot think of constructing the trust deed as an autonomous legal category, without admitting the existence of a *causa fiduciae unica*, rather than a cause *venditionis* or *donationis*, to which a *fiduciae* cause can be subsequently grafted or overlaid. Hence the need to overcome the boundaries within which it constrains a limited private autonomy of the parties, given that, in order to speak *fiduciae* cause, we cannot be satisfied either with an ambiguous social typification or with the unified will of the parties. In fact, an idea of trust deed as a functional property is unsustainable, since functional property can only be spoken of in relation « to particular situations in which the law imposes certain obligations on the owner, and with reference to those obligations, without the possibility of evasion or extension. »[21]. In conclusion, the trust deed is a figure, in some respects, inconceivable for our system, if not even more distant than the figure of the Anglo-Saxon Trust[22], unless talking about apparent property only[23], with this, however, determining a sort of causal unification of the real effects with the mandatory effects.

From the foregoing, it is obtained that, with reference to trust, the only company eligible in our legal system is one having an unitary structure based on the *fiduciae* cause[24] and, therefore, the only valid

[13]L Cariota Ferrara, *I negozi fiduciari*, Padova, 1933, pag. 10.

[14]Actually, in the current legal system, thanks to the introduction of the specific implementation of the obligation to make, this difference is greatly mitigated, since the trustee has the possibility of repairing a possible default by the trustee. Hence the further consequence that also leads to ease the meaning of the initial statement by virtue of which Germanic trust is not trust in the technical sense, given that there is a full correspondence between the intent of the parties and the legal means used by them.

[15]S. Pugliatti, *Diritto civile, metodo – teoria – pratica,* o.u.c., pag. 251.

[16]Actually, these difficulties of comprehension do not fail even when, in speaking of excess, reference is made to quantitative relationships, or when it is said that the trustee is attributed to a stronger power than what would normally be sufficient for the attainment of the practical purpose, since it is not known on the basis of which unit of measurement determine the degree of strength or weakness of a right, a power or a position.

[17]D. Rubino, *Il negozio giuridico indiretto,* Milano, 1937, pag. 62 e ss. From this reconstruction, however, comes the further consequence of having to distinguish the trust deed from the indirect one, a category that some believe would be entirely finisched by that of the trust deed.

[18]D. Rubino, *Il negozio giuridico indiretto,* Milano, 1937, pag. 35 e ss.; T. Ascarelli, *Il negozio indiretto e le società commerciali,* Città di Castello, 1930, pag. 3 e ss., idem, *Contratto misto, negozio indiretto* negotium mixtum cum donatione*,* Milano, 1930, pag.1 e ss.; G. De Gennaro*, Sul valore dommatico del negozio indiretto*, Milano, 1939, pag. 31 e ss.; R. Cicala, *L'adempimento indiretto del debito altrui: disposizione "novativa" del credito ed estinzione dell'obbligazione nella teoria del negozio,* Napoli, 1968, pag.3 e ss.; P. Greco, *Le società di comodo ed il negozio indiretto,* Milano, 1932, pag. 1 e ss..

[19]C. Grassetti, *Del negozio fiduciario e della sua ammissibilità nel nostro ordinamento giuridico,* o.u.c. , pag. 354.

[20]The reference is to relationships such as the mandate, the deposit and the leasing of works.

[21]S. Pugliatti, *Diritto civile, metodo – teoria – pratica,* o.u.c., 274 p.

[22]S. Pugliatti, *Diritto civile, metodo – teoria – pratica,* o.u.c., 275 p.

[23]E. Caterini, *Il* trust *anglosassone e la «corruzione» della situazione proprietaria,* in *Le Corti Calabresi,* 2002, III, pag. 777, where it is claimed that « the constitution of the trust transfers the legal ownership of the goods conferred in the trustee's patrimony, producing the division of the proprietary right (legale – di *Common law* – ed equo – *di Equity Law* -). It is this last effect that gives attention to its impact on the principle of typicality of real relationships and for the introduction of a proprietary conformation not known in the continental legal systems.»

[24]This, however, if on one hand solves the problem concerning the arbitrariness of the combination of two abstract companies, on the other hand, it seems to

point of reference is, to the State, offered by the example provided of the relationships between trust and mandate. Reference that is made necessary by the fact that when we speak of trust in a general sense without specifying the legal figures in which this phenomenon is engaged, the other term of the relationship can also be used in a generic way. On the other hand, when trust becomes part of a scheme which one wants to attempt to delineate the physiognomy, it is also necessary that the other term of the relationship takes on characteristics of specificity and homogeneity with the first[25]. At this point, all that remains is to try and investigate whether a direct relationship between credit and trust is admissible in our legal system. It is no coincidence that trusts in a technical meaning is already present in banking dealings. Think (pe) what happens with the bank credit which is nothing but the commitment that the bank takes to put a sum at the disposal of the customer, to hire or guarantee on his behalf an obligation. In fact, the bank credit is a promise on the basis of which the bank undertakes to provide a certain amount of credit to the customer and the terms of this promise concern the terms according to which the beneficiary can use the credit made available to him. However, in the hypothesis of granting credit, which must be linked to the assessment of the merits of the application rather than to the guarantees offered by the applicant, the proposed approach cannot be reasonably doubted. Even more so if one thinks that trust deeds must always be kept distinct from companies that give rise to trust terms. In both the prospected figure of granting credit and in the mandate, in fact, the obligation (of the agent in one case and of the debtor / applicant in the other) can be linked to the source (the contract) and, even more, to the relation (effect of the contract), so that both the company and the relationship can be defined as fiduciary. However, as in the relationship between trust deed and mandate also in the case of the relationship between trust deed and credit granting, the fiduciary character can only be determined at the time of execution. In fact, the agent, or the debtor, not acting formally in the name of the mandator, or the creditor, may also not perform the deed that he is obliged to make. It is evident, therefore, that the trust position is more easily linked to a moment of the relationship rather than to the company. Which is truer than what we think with regard to the mandate [26], the trust position is not always the necessary effect of the contract but of the concrete unfolding of the relationship. Indeed, even more precisely, we can say that the trust position is - in the aforementioned hypothesis - a reverberation of indirect representation.

Nor, in the opposite meaning, is it useful to consider that the reference to the mandate should be excluded for the hypotheses of trust *cum creditore.* Although, indeed, the distinction between mandate without representation and trust deed is suggested by the recourse, or otherwise, of so-called real interposition in person, actually such interposition can be found so much in case the intermediary does not have any particular quality, as in the event that the intermediary carries out an activity which assumes in him the status of owner or holder of a credit rights[27]. It follows that there is no reason to distinguish between the mandate without representation, in the first case, and the trust deed, in the second case, since the interposed is « placed in a real position entirely similar to that determined by the trust deed » and « the legal regulation of the two institutions remains the same »[28]. Especially since in both cases there are at least two elements of identity:

1) the purchase always occurs in the intermediary's name who acts in his own name, and therefore the final recipient must be able to rely on his loyalty [29];

2) in both cases, the task of modifying the real situation of the intermediary is entrusted to the obligation to (re) transfer, an obligation that finds its source in the same contract with which the intermediary received the assignment.

To this, we must add that if, on the other hand, it was possible to justify the distinction in the premise, it should be assumed that the figure of the mandate to alienate in the proper name of the mandatory could not find a reason to exist in our current legal system. The only point of difference, then, is the fact that in the hypothesis of the mandate the trust has a generic character, while in the hypothesis of the trust deed it, which is the essential and characterizing element of the *causa fiduciae*, has a specific character. In doing so, however, we must agree with those who believe that a clear and extensive equation between the figure of direct representation and that of indirect representation is realized in substance. Equalization that supports the idea that with the simple reliance on the subject and with the use of existing mechanisms, the achievement of the goals of trust can be guaranteed.

In conclusion, in the current legal system it is possible to talk about trust d of deeds rather than trust deeds and, in this context, the inclusion of a particular credit granting hypothesis is well justified, with a unitary scheme and its own cause *fiduciae*[30], where trust in

leave unchanged the question concerning the inadmissibility of the trust deed. Indeed, according to S. Pugliatti, *Diritto civile, metodo – teoria – pratica,* o.u.c., pag. 279: « not only does it seem that the attempt has not had a happy outcome, due to the insurmountable difficulties that have been pointed out; but rather it seems the same attempt inopportune. In fact, it becomes concrete in the division of the nucleus of the fiduciary phenomenon, which can instead be understood and appreciated only as an unitary phenomenon. This phenomenon, as we have seen, is characterized by the teleological element considered in all its extension and in its precise configuration. Not from the presence of a generic fiduciary element, but from the incidence of the trust element, and even as a predominant element, in the nucleus of the causal scheme. This conclusion led to the revaluation of the two principal doctrinal tendencies, which gravitate towards the same center, in view of the recent doctrines on the cause. In fact, those tendencies assert more or less explicitly the need for unity of the phenomenon, with reference to the willing of the parties or to the intention conceived under the subjective point of view; or with reference to the intent conceived objectively, and degraded to a simple awareness of the incongruity between means and purpose. According to our conception of the negotiating cause, therefore, it was possible to find a suitable ground for the reconciliation of the two tendencies, reaching the determination of the *fiduciae* cause, as a means of identifying the fiduciary company as an unitary scheme.…*(omissis)*... in this way the cycle can be said to be closed, and after going through it entirely, we can quickly summarize the results of the analysis: the division, apart from its arbitrariness, opens the way to the inadmissible combination, we do not know how it's implemented, of two abstract companies; the unitary consideration necessarily leads to the difficulty of the trust deed. Abstract companies and trust deeds are, as general figures, totally unrelated to our positive system ».

[25]S. Pugliatti, *Diritto civile, metodo – teoria – pratica,* o.u.c., 282 p.

[26]In this regard, think about when the order does not cover purchases for the mandator, or when the purchase of the mandator is not necessarily linked to an act of transfer by the mandate (art. 1706 civil code).

[27]F. Ferrara, *Della simulazione nei negozi giuridici*, Roma, 1922, pag. 230 e ss. In both cases, the intermediary acts as a medium for a purchase of rights for others: «In the first category of acts, the interposition takes place at the first moment, and it follows the execution of the assignment by the interposed one, in the other, the interposition occurs at the moment of the execution of the disposition, while it precedes the investiture of the alienating right. In the first case, the company starts from the contractor, which puts the person interposed in the possibility of carrying out the act for which he requires his meddling».

[28]F. Ferrara, *Della simulazione nei negozi giuridici,* o.u.c., pag. 230 e ss..

[29]This is also the reason why it is given to include the mandate between the trust deeds in technical meaning.

[30]R. RUOZI, *Economia e gestione della banca,* Milano, 2002, pag. 2. In this respect it is important to be careful that the depositor/credit company

technical meaning is configured as an expectation on what can be achieved in a system of relationships outside legal constraints.

Having clarified in general the extent of trust in a credit relationship, at this point it is necessary to see, in sightt of the principles contained in our Constitution, what the importance of credit (in the broadest meaning of the term) can be for the realization and maintenance of human persons, and above all, it is necessary to see whether it is ethically licit and possible to include the immaterial needs of the individual in the justification of the granting of credit (without at the same time leading to the failure of the entrepreneurial character of the credit activity). In other words, it is necessary to ask whether it is explainable that a company undertaking credit activity may decide to grant certain forms of credit in the absence of guarantees and on the sole basis of an adequate assessment of the needs on which the application is based; and still, in the case of a positive answer to the previous question, if the credit granted for the maintenance, education, and schooling of children is a form of worthy credit. With regard to the first question, in view of the above, it seems that, at this point, a positive response is easy. To this we must add that, if anything, contrary to that which predominantly inspires the actions of credit institutions, it has been shown that it is precisely the policy of small loans at extremely low interest rates (and nothing else) to favor the full return. A postulate that does not concern only the so-called microcredit for production, that is the credit provided to carry out a business activity. In this regard, it is sufficient to think, using the experience accumulated by the bank Grameen, of the credit granted for social purposes or to build a house deserved of being defined as such. In all these cases, even without the support of a productive activity, the loan applicant has always managed to return it. It follows, as a logical deduction, that microcredit does not exclude profit and that, even when the loan is granted without any form of guarantee and on the sole basis of evaluation of the merit of the project or the need (regardless of the circumstance that it is credit for production or consumption), microcredit offers more possibilities for return.

To answer the second question, on the other hand, it is necessary to start from the principles expressed in the Italian Charter of Fundamentals. Particularly, the art. 2 of the Constitution, which, in paragraph 1, establishes the obligation of the Republic to recognize and guarantee the inviolable human rights, and art. 3 of the Constitution, which, in paragraph 2, imposes on the Republic the task of «removing the economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the human being and the effective participation of all workers in the political, economic and social organization of the country». Two inviolable principles that, as regards the question posed, are specified in other constitutional norms as fundamental as the art. 9, 33 and 34 of the Constitution, with which, after expressing (Article 9) the principle of promotion of development and culture: « The Republic promotes the development of culture and scientific and technical research », the constitutional legislator proclaims the freedom of teaching (Article 33) and, therefore, dictates the following art. 34, which states: « The school is open to everyone. The lower education, given for at least eight years, is mandatory and free. The capable and deserving, even if without means, have the right to reach the highest levels of studies. The Republic makes this right effective with scholarships, family allowances, and other provisions, which must be awarded by competition. From these rules, if read together, one can derive the existence of a right to obtain an adequate education and to enjoy the necessary education.[31], despite every possible obstacle of economic or social order with which individuals can clash[32]. From this, therefore, the importance of the credit granted to these ends can be inferred with immediate perception and, consequently, the positive content of the answer to the question posed.

Nevertheless, a reason for greater clarity also imposes a more detailed examination of the topic starting from the constituent phase and from the works of the 1st subcommittee. Works that with the Moro report have glimpsed the first references to a duty from the state to: refer to those moral institutions that are inside the family environment and give education and schooling in a manner accordant with the guidelines and wishes of the natural representatives of children », as well as a right of children: to be educated and schooled ». If we add to this that even in the Dossetti report there are many explicit references to education as a freedom as well as a fundamental task of the State, we understand that, given the importance and the severity of the task performed by those who play the role of educator[33], the task of the state must, among other things, consist in the complete elimination of economic inequalities, which in fact can obstruct access to the highest levels of education. Significance that remained intact also following the transmission of the proposal to the Constituent Assembly, when the debate focused mainly on the distinction between the educating State and the organizing State of education and on the nature of the school's function or public service, without excluding the references to some form of assurance for the right to education[34].

It follows that in a state like ours, which aims at allowing everyone the full development of personality, the right to education is not only the freedom of the individual to consecrate his activity to the acquisition of knowledge and attitudes according to his own choice,

is already characterized as a trust relationship, given that banking is based on a fundamental element: «represented by people's trust and especially by customer reliance. The latter turns to the banks, especially as a creditor of the same because he trusts banks, that is because he thinks that they will always be able to honor their commitments. This trust relationship concerns all customers of all banks and is characterized by a kind of indifference towards one or the other. In this sense, if, for one reason or another, the trust in a bank is lost, it is very likely that the wave of distrust would be transmitted more or less quickly and more or less intensely to other banks with damages for all.».

[31]F. Ruscello, *L'istruzione tra scuola e famiglia. Tecniche di tutela della persona,* Napoli, 1992, pag. 48 and so on., which states that it is precisely from the task attributed to the Republic to dictate norms on the instruction the inseparability between education and schooling is derived and, particularly, to pag. 51 the author, also referring to the thought of V Crisafulli, expresses himself literally in these terms: «If we consider that the general regulations also include those governing teaching programs, for all schools other than universities, the possible impact of the State on the educational process is evident in the limits in which it does not seem disputable that, through the prescription of programs, the State has a very effective tool to give, albeit indirectly, a certain content rather than another to teaching».

[32]F. Ruscello, *L'istruzione tra scuola e famiglia. Tecniche di tutela della persona,* o.u.c., pag. 38, where the author textually states the following: «For this purpose the Republic sanctions the right of the capable and deserving, even if without means, to reach the highest levels of culture, ensuring their effectiveness with scholarships or other provisions (Article 34, paragraphs 3 and 4, cost.), to the evident purpose of completing, and making possible, the cultural maturation of the individual, the accomplishment of his personality. »

[33]A. Mura, *commento agli artt. 33 e 34 Cost.* in G. Branca (a cura di) *Commentario della Costituzione,* Bologna, 1976, pag. 210 and so on.

[34]In this regard, textually compare the words expressed by G. Colonnetti during the morning session of April 18, 1947: « it is necessary that all citizens without distinction of status or condition can count on the economic assistance of the State, whatever is the school in which they perform their studies ». and more anyways, those provisions that will also be devised by us with the dual purpose of making the school mandatory up to 14 or 16 years of age and then ensuring that the most deserving of the studies continue in the field of professional preparation or high culture must be attributed to the person with full and absolute right to use them in any public or private school, in which intends to carry out its education ». In the Chamber of Deputies (edited by) *Atti dell'Assemblea costituente*, II, pag. 81.

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but it is above all a right to obtain, directly or indirectly from the public authorities, the services necessary for this activity to be carried out profitably. Here, then, that (as happened for the right to work) also the right to education, born as a right of freedom, becomes a social right with the limits of the rights in which it is rooted. To this we add that the guarantee is made effective, not only in relation to the person concerned but also in relation to the family, for which, however, the art. 34 must be read, having as a reference parameter also the articles 30 and 31 Cost. In other words, the State is called to intervene if, and to the extent that, the parents do not have the capacity to fulfill their functions of maintenance, education and schooling, facilitating the fulfillment of these functions also with economic and other provisions. Especially since it is now known and confirmed by both the doctrine and the jurisprudence that the obligation to maintain children, understood as the obligation to give a patrimonial support to the duties of education and training, lasts until the children have achieved full economic autonomy and, therefore, also for a long time after reaching adulthood[35]. An increasingly important function, given that nobody no longer doubts the fact that it should not be arbitrary, but must be carried out in the interests of the child, promoting his personality within the framework of the irrepressible values expressed in the Italian Constitution. Values expressed in rules that, by unanimous recognition, are immediately operative, that is to say, they directly represent a subjective situation immediately operative, regardless of the mediation of other normative instruments. This, both because they are regulations that are an expression of what has been defined as the phenomenon of formal constitutionalisation of regulations and institutions belonging to other branches of law[36], both because they are rules that express a design with precise tasks both for the State and for the citizen[37].

As proof of this, consider, again, that the abrogated art. 147 civil code, which qualified the education of young as a real obligation of the parents, was accompanied by the art. 731 of the Italian Civil Code, which imposes a sanction of a penal nature in the event of non-fulfillment without due cause of the duty to give the child adequate and proper education. From this, the further corollary that, despite the repeal of the art. 147 civil code, sees in the parents the holders of a situation qualifiable as of right - duty. If it is true, actually, that receiving a minimum education is an inviolable right of the person, it is also true that this right is constituted with the birth of the person[38]. Therefore, parents have the obligation to put their children in a position to reach the minimum degree of culture that cannot be renounced and inviolable and, therefore, to decide whether to continue considering their natural implications and abilities. An obligation which, in the event of non-fulfillment, makes parents exposed, pursuant to art. 333 civil code, to the sanction of the loss of their power since in this regard, there is no doubt that the prejudice is such as to legitimize the intervention of the judge. This prejudice, actually, is inherent to an existential situation of the minor, among which, precisely, the right to education is also enumerable. In this way, however, the statement according to which the function entrusted to the parents emerges from the strictly individual spheres in order to merge into the social is also justified. An adequate education is, actually, a necessary and indispensable premise in order to participate later in the political, economic and social organization of the State, which, in this meaning, is also mandatory to the individual.

Results of the study

It follows that Articles 30 and 34 of the Constitution do not place themselves in a position of antinomy but both contribute to guaranteeing the right and duty of education, given that the Constitution looks to people in their «becoming», this is why the final result, to which we must aim, is not so much the formal achievement of a qualification, but rather the learning of a culture that makes the person aware of his role in society and gives the guarantee of an effective participation, as provided by the art. 3, 2nd paragraph, of the Constitution. Family education and school education do not represent two different types of education, but only two instruments set up by the Constitution for the achievement of the only and final purpose, which is education. The articles 30 and 34 of the Constitution, therefore, provide for concurrent or alternative guarantees for the accomplishment of the interests of the children.

To this, it can be added that the function of promoting culture, which compulsory and gratuitousness assume, is significant of such recognition of right. While compulsory nature is, actually, a fundamental sign of the importance of education, gratuitousness covers everything that is necessary to satisfy the right, but not other services which, although they support teaching, do not represent the essential points. Consider, in this regard, the supply of textbooks, office supplies, and transportation[39]. In this respect, therefore, the gratuitousness of education is an autonomous principle compared to the compulsory nature which, irrespective of the individual economic conditions, recognizes general access to educational institutions. It follows that education and schooling are the means by which the values placed at the foundation of society can be fully achieved and, therefore, the family and the school must also be understood as social expressions with the function of creation of new generations.

Having said this, it is clear that, even more so in a society and in a finance that claims to be respectful of ethical values, any such request for economic support, aimed at allowing the full accomplishment of the individual, finding directly in the founding principles of the Italian legal system their right foundation, they should always be considered worthy.

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None.

Conflicts of interest

The authors declare that there is no conflict of interest.

[35]G.B. Ferri, *Diritto al mantenimento e doveri dei figli,* in *Diritto di Famiglia. Raccolta di scritti in onore di Rosario Nicolò,* Milano, 1982, pag. 378.

[36]P. Perlingieri, *Norme costituzionali e rapporti di diritto civile,* in *Rass. dir. civ.,* 1980, pag. 95 and so on.

[37]P. Perlingieri, *Norme costituzionali e rapporti di diritto civile,* in *Rass. dir. civ.,* 1980, pag. 95 and so on.

[38]F. Ruscello, *L'istruzione tra scuola e famiglia. Tecniche di tutela della persona,* o.u.c., pag. 240, as he quotes: «This cannot be [to make children understand the importance of education], a task entrusted exclusively to the school: the family, the parents, must support it because the education referred to in art. 30 of the Cost. is not in an antinomy position with respect to the education referred to in Articles 33 and 34 of the Cost. but a competitor. Both, even in the diversity of the places in which it takes place and of the people who give it, find their point of confluence in a personality in the making…».

[39]See Constitutional Court verdict of February 4th, 1967, num.7, in *Giur. it*, 1967,I, pag. 1, c. 1089 and so on., where it is stated that: «these last two items [office supplies and transportation] concern collaterals of a merely material and instrumental nature; while with regard to textbooks, even if these have a much higher qualification for the help they offer as a reminder for the students of the lesson given by the teacher, it cannot be said that their stock is strictly within the ambit of the public school service and of the correlative administrative performance».