

Education in Italy and the development of the student's personality: a complex interaction between liberties, rights, duties and onuses

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I. Introduction: the Importance of Education for Public Law

The study of education from the perspective of public law raises a series of relevant issues, most notably those relating to the freedom of teaching, learning and the establishment of schools. Additionally, many other legal issues come to light such as the relationship between territorial public entities and other autonomous public entities (such as public schools), the organizational framework, public service, the relationship between private and public law, the legal status of the main actors of the educational system, the assignment of responsibilities at the state and regional level with particular attention to the limits set by the European Union in the same.

Education has both a legal dimension and significant political implications: it is, indeed, at the top of every political agenda and it frequently expresses ideological choices representing an instrument of: consent, absorption of dissent, formation of the ruling class and the processing of culture. Hence, the “instability” that usually characterizes the regulatory measures pertaining to education whose validity is often determined by the ruling political majority.

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The importance given to education for the future development of a nation is indisputable; an importance perhaps even greater than a change in the institutional structure of the Republic, given that schooling is an essential means of ensuring full citizenship, a conscious management of rights and duties and, on a more general level, the development of a society. This is even more true when you consider that the school, among other forms of public power with which the individual interacts, is perhaps the most permeable in relation to society and its problems. Indeed, the school is the first social group that welcomes the individual after leaving the family and before joining the work force.

Within the school system, even the principles, the institutions of the legal framework and the common themes, change and become even more difficult to apply. Consider, for example, the different approaches within the school regarding the issue of paternalism. While individuals and society are often reluctant to accept the paternalistic posture of the State, the role of the latter, within limits, but especially in the early years, may be deemed necessary in the education system. Additionally, one must consider the difficulty for teachers in dealing with problems of discrimination, equality among pupils and the interpretation of the principle of authority.

II. Education in Italy: Historical Background

A description of the stages of development of the Italian educational system is a worthwhile endeavor. An important stage in the historical evolution of education in Italy is an outgrowth of decree n. 3725/1859 (“Casati law”). It differentiated between higher education, secondary education (classical and technical) and free primary education, which is divided into two biennial programs. The Casati

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law also gave important administrative functions to municipalities as they applied to technical schools and primary education. With the advent of fascism, the school system was centralized at the state level. Consequently, the municipalities lost their function in that realm and the school system evolved as one directly organized by the State, since education was conceptualized as the nation's goal¹.

During the 20's, the "Gentile reform" was realized². Among its most important measures we remember the following: an increase of up to fourteen years of compulsory schooling; the introduction of a state exam; the strengthening of the head of the Institute chosen by the Minister; the distinction between gymnasiums and high schools (for élites and ruling class training) on the one hand, and normal schools and vocational training colleges on the other, in addition to the complementary three-year school. Law n. 899/1949 ("Bottai law") gave rise to the establishment of the three-year middle school.

In 1948, the Italian Constitution came to full implementation but did not represent a discontinuity with the past³. Moreover, the Constitution does not say anything about the the management of education and takes no interest in giving importance to the role of local authorities in this regard.

From the 60's, one can remember other important measures such as: the transformation of technical schools in professional institutes; the liberalization of access to a university; the restructuring of final exams; the establishment of the state nursery school; the strengthening of the prerogatives of the education department. Special mention must also be made of the reform of the governing bodies and the season of participation in the 70's, which partially weakened the "monolithic" public school system due to the manifestation of new interests, needs and pressures at the school district level⁴.

In 1994, the entire regulation was systematized by the enactment of legislative decree n. 297/1994. In the late 90's, some measures were taken to extend the school's autonomy and to give the schools a legal personality. An attempt to generate some innovation in the formative nature of education was advanced by the "Berlinguer reform". In particular, that reform included a cycle of nursery school, a primary cycle of seven years and a secondary cycle of five years⁵.

In 2003, the "Moratti reform"⁶, in light of the challenges posed by globalization and to offer equal opportunities to all, proposes a rethinking of the architecture of the concept of cycles. To be more precise, it consists of: a cycle of nursery school (not compulsory) of three years; a first cycle that includes primary school (five years: a first year and two biannual periods) and secondary school (three years: a biennial period plus another year); a second cycle that includes high school and professional education. The Moratti legislative initiative also features the characteristics and objectives of every cycle.

The "Moratti reform" was substituted in 2008 by the "Gelmini reform"⁷. The second cycle of studies in particular was divided into three parts: high schools, technical schools and professional schools, all consisting of two biennial periods and a fifth year⁸. Additionally, the Gelmini reform grants more autonomy to schools by allowing them to develop training plans that meet the needs of the user to user and consistent with the curriculum provisions enacted at the national level.

From a general point of view, the large number of reforms that began at different times (in different political contexts) and involved several legal sources and different segments of the educational system (cycles, administrative organization, autonomy), is at the origin of the "precariousness" of the discipline

1 For a complete analysis of the historical context of this period, see Sandulli, A. (2003), *Il sistema nazionale di istruzione*, Bologna, 41 ff. In general, see also Rossi, G. (1974), *La scuola di Stato. Problemi storici e giuridici nella prospettiva di riordino dei pubblici poteri*, Roma.

2 The reform was implemented through several legislative decrees issued on the basis of law n. 1601/1922.

3 See Cassese, S. (1974), *La scuola: ideali costituenti e norme costituzionali*, in *Giur. cost.*, 1974, 3614 ff.

4 Cf. Gigante, M. (1988), *Iamministrazione della scuola*, Padova, 16, 221.

5 See law n. 30/2000.

6 Cf. law n. 53/2003 and the following legislative decrees: n. 76/2005; n. 77/2005; n. 226/2005; n. 227/2005.

7 Cf. law n. 133/2008.

8 Cf. presidential decree n. 89/2009.

we are examining since the implementation of legislation does not always take place in a timely and appropriate manner.

The problem, therefore, grows and is exacerbated by the recent financial crisis and the shortage of funds necessary to support the reforms.

III. The Framework of the Legislative Powers in Education: An Outline

Art. 117, para 2, section *n*) of the Italian Constitution attributes to the exclusive legislative competence of the State the matter of “general education standards”, a term also used by art. 33 of the Constitution. However, art. 117, para 3 adds that the matter of “education, subject to the autonomy of educational institutions with the exception of vocational education training” devolves to the concurrent legislative competence, under which the State dictates the fundamental principles of education, while the Regions adopt the discipline of detail. As can be seen in the same art. 117, para 3, is the matter of “education and vocational training”, which is attributed to the residual legislative competence of the regions.

Legitimacy is further granted to the State to intervene in educational matters in art. 117, para 2, section *m*), Const., which gives the State the exclusive legislative competence in determining the basic level of benefits as it relates to civil and social rights to be guaranteed throughout the national territory⁹.

The Italian Constitution paints, therefore, a rather “jagged” picture not only with respect to the unclear distinction between “general education standards” stated in art. 117, para 1, section *n*) and “fundamental principles” of the same relating to the concurrent legislative power (art. 117, para 3 of the Constitution)¹⁰, but also – more generally – with respect to the precise lines of demarcation of the legislative powers between the State and the Regions as they relate to education.

Regarding the first point, the Constitutional Court, with decision no. 200 in 2009¹¹, has specified that what belongs to the category of “general education standards” are those provisions which define the main structure of the national education system and that are needed to be applied in unity and uniformly throughout the country, thus ensuring the substantial equality of treatment of users who do benefit from educational services (a primary interest of constitutional significance), as well as the freedom to establish schools and parity between state and non-state schools as required by law. Belonging, instead, to the category of “fundamental principles,” are those provisions which are not directly aimed at ensuring the existence of basic common elements throughout the country as regards the use of the educational service.

In particular, these include criteria, objectives, guidelines, or disciplines, which are not, in a sense, attributable to the essential structure of the educational system that characterizes the general provisions of education; on the other hand, they require, for their implementation, the intervention of the regional legislator who must conform his actions as to comply with the fundamental principles; among the sectors of concurrent competence should be included, for example, regional school planning and the sizing of the territory concerning the school network.

9 Cf. Corte cost. 15 luglio 2005, n. 279 in *Prev. e assist. pubbl. e privata*, 2005, 603.

10 See Morzenti Pellegrini, R. (2004), *Istruzione e formazione nella nuova amministrazione decentrata della Repubblica: analisi ricostruttiva e prospettive*, Milano, 84.

11 *Foro it.*, 2009, I, 3285. Cf. Corte cost. 15 luglio 2005, n. 279, cit.

IV. Fundamental Principles of the Constitution and Educational System: the (necessary) Dimension of “Duty” and “Right”

Education is generally invoked as a “right” of the individual¹² whose fulfillment is considered decisive to ensure the achievement of formal and substantive equality (art. 3 of the Italian Constitution). More precisely, education is often treated as a right of access to schooling and equal opportunities (art. 3, para 1 of the Italian Constitution: formal equality)¹³ in order to achieve a status of equality (art. 3, para 2 of the Italian Constitution: substantial equality)¹⁴. The same Constitution also points to the fact that there is a level or a dimension of education that is strictly connected to “right” and “equality”: in particular, art. 34 of the Italian Constitution states that “Schools are open to everyone”, confirming the right of access to education.

The same provision adds: “Capable and deserving pupils, including those lacking financial resources, have the *right* to attain the highest levels of education. The Republic renders this *right* effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations”. With reference to such services, we should speak of a “right to study” rather than a “right to education”¹⁵, which encompasses the right to eliminate all economic inequalities in order to ensure school attendance by the student. The reference to the perspective of rights is also present in Italian legislation, in the by-laws of the European union and in the international order relating to the same¹⁶, even though in these contexts the term “right” appears to assume, above all, a descriptive and evocative meaning¹⁷.

Although the role played by “right” and “equality” was essential (especially when it was necessary to fight against barriers and exclusion) at the time in which education was a privilege of the few, the legal discipline of education nevertheless cannot be reconstructed by making reference only to this dimension; we should, indeed, consider the perspective of duty which is intrinsically linked to the educational system¹⁸: art. 30 of the Italian Constitution, for instance, states that: “It is the *duty* and right of parents to support, raise and educate their children, even if born out of wedlock”; it is also the duty of the State to provide public education; the onus is on the pupil to study and it is the student’s duty to attend school (so called “compulsory schooling”); it is, again, the duty of “equal” schools to respect and comply with certain standards.

On the other hand, focusing only on the relationship between equality and education might push the system dangerously towards: the impersonality of teaching, the centralization of the State’s role (focused on eliminating inequality without giving so much importance to the pupil’s efforts to study), the standardization of the educational offer and contraction of autonomous projects. All of these consequences might materialize in a period in which, otherwise, our system appears to be more open to autonomous spaces and to the assignment of more importance to regional and local decisions.

12 See in particular Pototschnig, U. (1973), *Istruzione (diritto alla)*, in *Enc. dir.*, XXIII, Milano, 96 ff.

13 Art. 3, para 1 states: “All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions”.

14 Art. 3, para 2 states: “It is the duty of the Republic to remove all economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the individual and the participation of all workers in the political, economic, and social organization of the country”.

15 Pototschnig, U. *Istruzione (diritto alla)*, cit., 97.

16 See art. 14 of the Charter of Fundamental Rights of the European Union; the Preamble of the Treaty on the Functioning of the European Union in which the Member States declare to be “determined to promote the development of the highest possible level of knowledge for their people through a wide access to education [...]”; art. 2 of the first additional protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); art. 26 of the Universal Declaration of the Rights of Man (1948); art. 28 of the UN Convention of the Rights of the Child (1989).

17 See Freeman, M.D.A. (1986), *The Rights and Wrongs of Children*, 42. See also Sandulli, A. *Istruzione*, in: Cassese, S. (directed by), *Diz. dir. pubbl.*, IV, Milano, 3309.

18 See Marzuoli, C. (2003), *Istruzione: libertà e servizio pubblico*, in: Marzuoli, C. (ed), *Istruzione e servizio pubblico*, Bologna, 19 and Corso, G. *Principi costituzionali sull’istruzione, ibid.*, 38.

Methodologically speaking, the dimension of duty in education - taking also into account the relevance of the topic¹⁹ - should be developed primarily around the analysis of the fundamental principles of the Italian Constitution. Subsequently, the analysis should be focused on the articles of the Constitution which expressly deal with this theme. This methodological choice also allows the identification of a “constitutional statute” for education.

Even if not expressly mentioned, the constitutional foundation of the dimension of duty in education is invoked in art. 2 of the Italian Constitution which demands the fulfillment of binding duties of political, economic and social solidarity²⁰. The core of these duties corresponds to the idea of being responsible for both the current most disadvantaged generations and the future ones in order to leave them a world which is not worse than the one we have lived in.

By extending the sphere of applicability to the concept of sustainable development, it is possible to perceive, as a basis of education, a binding inter-generational duty of solidarity²¹, which ensures both the “resistance” of the entire system and its economic and social development.

In light of this assumption, the organization of the educational offer on the part of the Republic – which acts on behalf of the entire community – represents a kind of fulfillment of the duty of solidarity. The foundation of this duty is not only found – as we have already pointed out above – in art. 2, but also in art. 9 of the Italian Constitution which states that: “The Republic promotes the development of culture and of scientific and technical research”²².

To avoid limiting education as an instrument configured exclusively in favor of society, it is necessary to consider that it is also and, above all, an element directly linked to the individual, his growth and his development. Indeed, one must not forget that, on the basis of articles 2 and 3 of the Italian Constitution, the fulfillment of duties as it relates to education (on the part of public powers, teachers and pupils)²³ constitutes an assumption for the realization of the constitutional program pertaining to “the development of the individual”²⁴.

Furthermore, in pursuing this general and fundamental objective, the two dimensions mentioned (individual and collective) tend to converge: on the one hand, education is useful for the individual to ensure the development of his personality; on the other, it benefits the entire society since only individuals who have attained a certain degree of education can guarantee, under the solidarity perspective, the survival of a democratic society and ensure the economic and social growth of the same. In other words, the development of the individual through education represents, at the same time, an “instrument” for the development of society and an “objective” of inter-generational solidarity.

19 Cf. para 1.

20 Art. 2 states: “The Republic recognizes and guarantees the inviolable human rights, as an individual and in the social groups within which human personality is developed, and “ensures the performance of the unalterable duty to political, economic, and social solidarity”.

21 This problem has been dealt with within the American debate: see the opinions of Mann and Madison reported by Alexander, K.- Alexander, M.D. (2001), *American Public School Law*, ed. V, West/Thomson Learning, Belmont, CA, 24, 25. For a detailed analysis of the sustainable development principle and its consequences in the environmental field, cf. Fracchia, F. (2010), *Lo sviluppo sostenibile. La voce flebile dell'altro tra protezione dell'ambiente e tutela della specie umana*, Napoli.

22 Cf. Mura, A. (1990), *Istruzione privata*, in: *Enc. giur. Treccani*, XVIII, Roma.

23 See *infra*.

24 Cf. Sandulli, A. (2004) *Scuola e università tra concorrenza ed eguaglianza sociale*, in: *Lattuazione del Titolo V della Costituzione. Atti del 50° Convegno di Studi amministrativi. Varenna, Villa Monastero, 16-18 settembre*, Milano, 301 ff.

V. Continued: the Dimension of Duty in the Articles of the Constitution which deal Expressly with the Education Issue

Having examined the fundamental principles of the Constitution that permeate education, we shall now analyze those provisions of the Constitution that are specifically dedicated to the theme in question: that is, articles 30, 33, 34, which establish and tipify some forms of fulfillment of the duty of solidarity, identifying the subjects who can be charged with the duty of ensuring education.

Art. 30²⁵ of the Italian Constitution assigns to the parents (in the absence of issues of incapacity present in them) the duty of educating their children (apart from supporting and raising them). This duty must be fulfilled prior to the beginning of school age and continue – with a different intensity - during (and even after) school attendance. The peculiarity of this kind of duty is that there are no penalties where violation of the same is evident, provided that compulsory schooling has been carried out.

Art. 30 is also relevant to better define the characteristics of education which distinguish themselves from many other public services since the legal system aims to ensure both a public and a private service and require the right/duty of parents to teach their children. Hence, we can assume that there is an area in the educational system which cannot be eliminated by public power. Moreover, both the private element (the family) and the public one come together as a collective effort on the same goal of the educational system which is the development of the individual's personality.

Art. 33²⁶ mentions a plurality of functions and dutiful tasks, which are related to both public and private entities: the institution of state schools, the regulation of education and free teaching. Consider that the provision begins by regulating not education but teaching (“The Republic guarantees the freedom of the arts and sciences, which may be freely taught”) thus demonstrating the close link between these two sectors in the sense that teaching is a precursor to the attainment of education.

Art. 34²⁷ decrees the open nature of education, the limits of its obligations and the right of capable and deserving pupils to attain the highest levels of education. The rule of compulsory schooling for at least eight years confirms the dimension of duty highlighted in our analysis, while the right of capable and deserving pupils to attain the highest levels of education expresses the fact that instruction must be coordinated to achieve specific results.

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VI. The “Duty” Perspective as related to Educational Demand

From the specific point of view of the pupil, the duty perspective is also more persuasive than the dimension of “right” as it pertains to education. Indeed, the fulfillment of the right to education, intended as a guarantee of being able to make use of statutory services, does not ensure the achievement of the essential aim of education, which is the development of individual's personality (articles 2 and 3 of the Constitution).

25 “It is the duty and right of parents to support, raise and educate their children, even if born out of wedlock. In the case of incapacity of the parents, the law provides for the fulfilment of their duties. The law ensures such legal and social protection measures as are compatible with the rights of the members of the legitimate family to any children born out of wedlock. The law shall establish rules and constraints for the determination of paternity”.

26 “The Republic guarantees the freedom of the arts and sciences, which may be freely taught. The Republic lays down general rules for education and establishes state schools of all branches and grades. Entities and private persons have the right to establish schools and institutions of education, at no cost to the State. The law, when setting out the rights and obligations for the non-state schools which request parity, shall ensure that these schools enjoy full liberty and offer their pupils an education and qualifications of the same standards as those afforded to pupils in state schools. State examinations are prescribed for admission to and graduation from the various branches and grades of schools and for qualification to exercise a profession. Higher education institutions, universities and academies, have the right to establish their own regulations within the limits laid down by the law”.

27 “Schools are open to everyone. Primary education, given for at least eight years, is compulsory and free of tuition. Capable and deserving pupils, including those lacking financial resources, have the right to attain the highest levels of education. The Republic renders this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations”.

To achieve this objective, it is necessary that the requisite amount of instruction be accompanied by the ability, the attitude and commitment of the learners, taking into account that the duty to study can take on many different shades and intensity with respect to the formative learning undertaken; moreover, this duty, once having fulfilled the so called requisite of "compulsory education", recedes with respect to the freedom of the student to "outline" his own personality profile depending on his abilities and personal inclinations²⁸.

In reality, in order to better identify the subjective position of the learner, it would be more appropriate to speak of "onus" of study, rather than "duty", where "onus" means behavior that a person must exhibit to achieve a particular practical purpose (in this case, the development of his own personality achieved through education, in turn reached with the benefit of a coordinated set of teachings).

One must also take into account that as age progresses, the importance (also legal) of the student's onus of study, is strengthened gradually, while the "claim" to a commitment attenuates with respect to other components of schooling (primarily, families and teachers) and the community at large. The duty to apply oneself to achieve a goal is inherent in the system and enshrined specifically in reference to the duty to comply with compulsory education²⁹.

In light of the above, the complexity of the topic of education with respect to the pupil cannot be adequately understood if we consider the static and limited perspective of the element of "right". On the contrary, it is necessary to take into account the plurality of legal situations involved (pertaining not only to students, but also to teachers) who, despite their differences, move within a common binary aimed at the "development of the person".

In particular, as regards the pupil's perspective, the following are relevant: the striving for academic success, the duty to work to achieve it (onus), the right to be successful under predetermined conditions, the right to certain benefits (for example, scholarships, subsidies and organizational content); from the teacher's perspective, however, it can be viewed as a freedom (relating to the guarantees recognized by the legal system) or a duty (reciprocal solidarity).

Consequently, it does not appear correct to identify education with performance (in regard to which, at most, one could speak of "right"); the latter rather being a goal that requires the commitment and diligence of those who enjoy the benefit, by interacting with the organization and the teacher.

The provision which confers a legal relevance to bilateral commitments (of teachers and students) and offers the advantage of "calibrating" the extent of the commitment depending on the specifics of the case (avoiding, at the same time, rigid standardization) is, once again, art. 2 of the Constitution.

This provision, unlike art. 3, allows, in fact, the justification of the legal relevance of the education plan, aimed not at the achievement of a result characterized by abstract universalism, but at a degree of development tailored to the needs of the person. The dimension of solidarity aligns itself well with the particular characteristics of the activity of the teacher, whose personal performance is irreplaceable, characterized by aspects of trust and mutual generosity, and calibrated on the basis of the needs of the student³⁰.

In addition, the solidarity issue invests the relationship between the learner and society as a whole with reference to the value placed on the development of talents, in the sense that the school system

28 After fulfilling compulsory schooling, the law may not impose the duty to "develop" one's personality (from this point of view, the freedom ... to not educate ourselves prevails), neither to develop it "in a certain way".

29 Cf. art. 1, para 622, l. 296/2006 and art. 1 of the ministerial directive n. 101 of 2010 that states that education is mandatory from the age of 6 to the age of 16.

30 Cf., *ex multis*, Pototschnig, U. (1961), *Insegnamento, istruzione, scuola*, in *Giur. cost.*, VI, 381, who stated that teaching is a personal activity rather than a public function.

should undertake the additional and essential task of empowering individuals to ensure a proper “management” of talents which may have positive consequences for society as a whole.

From the above, therefore, emanates the opportunity to envision education as an individualized (and not standardized) growth project, a project that will allow to flourish - at least above a minimum level - the capabilities of each individual.

VII. The Freedom of Teaching: Nature and Limits

As regards the perspective of the development of the person and of solidarity between generations, what is relevant is education as an end, while the issue of freedom of teaching or the freedom to establish schools remain more blurred.

As for the freedom of teaching, it is inherent in the personality of the teacher’s performance, an expression of freedom of conscience, which excludes beyond certain limits the presence of constraints that require specific behaviors of solidarity, even if it is a subject that is an “expression” of (or related to) public power.

Art. 33 of the Constitution would seem to state that teaching refers exclusively to art and science, with the result that the paths of solidarity, which are not related to these two areas, would not be teaching. This argument is not convincing when one considers that even the most elementary notions are both scientific and artistic, which would incorrectly limit teaching to locations in which art and science may be taught, such as universities and high schools³¹.

It would also appear, but worth rejecting, the notion that identifying a strong correlation between freedom of teaching and school excludes the existence of freedom outside of the school³². Indeed, education is not only imparted in schools: art. 30 of the Constitution assigns to specific individuals (the parents), who are unrelated to the formative education organized and imparted by schools, a duty of education to which the freedom of teaching is necessarily correlated.

From the above, it seems therefore preferable to maintain that freedom of teaching, solidly finalized in educating (and, hence, the development of the individual), must be protected regardless of the fact that it constitutes a duty that is legally binding or a spontaneous fulfillment of the duty of solidarity. Freedom of teaching is directed in the first instance to the development of the personality of the pupil and not, directly, to the protection of the teacher or to the development of the society³³. Such freedom protects the individual against any form of public or private interference.

Nevertheless, there are certain constraints to teaching due to its placement within an organization aimed at imparting education. The question relates, in particular, to the respect for a program which is in part already laid down. The program, in fact, far from attacking the freedom of teaching, identifies a sort of ‘track’ along which it becomes explicit, predefining the characteristics of the offer which is guaranteed throughout the national territory, without interfering with the concrete methods and personal contribution of the teacher.

The respect of the program constitutes, therefore, an essential condition to teach students who enroll in school trusting both its specific path and its relative “promise”. In light of this, it is possible to identify the existence of an “implied” limit to the freedom of teaching, consisting in the need to adequately consider the beliefs and personality of pupils³⁴; this limit can be found in art. 2 of the Constitution

31 See Crisafulli, V. (1965), *Autonomia e libertà nella scuola*, in: *Riv.giur.scuola*, 26.

32 Cf. Pototschnig, U., *Insegnamento (libertà di)*, cit., 725.

33 Freedom of teaching as freedom of the teacher in the interest of pupils, cf. Pototschnig, U. *Insegnamento (libertà di)*, cit., 730.

34 Cf. Mattioni, A. (1993), *Insegnamento (libertà di)*, in: *Dig. disc. pubbl.*, VII, Torino, 424, 427.

(which protects the inviolable rights of the person, both as an individual and in the social groups where one's human personality is expressed) and in statutes³⁵.

More generally, the functional nature of teaching requires respect for the dignity of the student, without restricting his personality³⁶. This limit has a variable intensity depending on the type of teaching one is exposed to, the school, the age of the pupil, and so on. It should also be kept in mind that together with the intrinsic limits of the teaching activity, one must also consider those pertaining to the student's freedom of expression³⁷. Freedom of teaching can find more rigorous limits within schools managed by private entities³⁸. It should be noted that in these schools respect for "tendency" is ensured by a specific contractual commitment.

Nevertheless, freedom of teaching does not appear to tolerate compression, regardless of the context in which it is to be developed; it can only be limited by the need to respect the personality of pupils (and not by the need to preserve the organization of the school itself), who— along with their parents — have chosen a certain school based on the educational opportunities that it has promised to ensure³⁹.

Therefore, an incision on the legal relationship that binds the teacher to the school (think, for instance, of the layoff of the teacher) is justified only if it originates from the need to protect the pupil's aspiration to develop his personality in a certain way.

A similar conclusion may also be extended to public school as well (whose presence - see the following par. - satisfies the need of individuals to enjoy an education that is "not leaning"), in which a leaning behavior of some teachers might constitute a justified order of dismissal in order to provide legal protection to pupils and their families⁴⁰. All of above confirms once again the intrinsic limit of the freedom of teaching, which is tied to respect of the pupil's personality, which has a varying consistency depending on the context, public or private, in which the teaching act is performed.

VIII. The Private and Public "Educational Offer": Which Difference?

Art. 9 of the Constitution states that: "The Republic promotes the development of culture [...]". Similarly, art. 33, para 3 of the Constitution establishes that: "Entities and private persons have the right to establish schools and institutions of education at no cost to the State". Thus, the Constitution clearly excludes the presence of a state monopoly in providing education.

In fact, the freedom of teaching guaranteed by the Constitution includes the freedom to set up private schools in order to achieve certain results with the respect to education. For this reason, education in Italy is (objectively) characterized as a public service, which is managed by a plurality of subjects, both public and private.

Nevertheless, one needs to question the necessary presence of a public organized educational offer outside of the family whose answer lies mainly in the special autonomy enjoyed by the public school with respect to any political and ideological influence⁴¹. On the other hand, such autonomy is not

35 Cf. art. 2, d.lgs. 297/1994, in which the implementation of a pupil's personality is pursued in accordance with the moral and civil conscience of pupils. See also art. 147 of the Civil Code which states that: "The marriage commands to both the partners the duty to support, teach and educate their children in account of the abilities, the natural predisposition and the aspirations of the children".

36 Thus, it should be banned the acritical spread of ideology, political propaganda and indoctrination.

37 For this issue see, for instance, *Bethel School District v. Fraser*, 478 U.S. 675 (1986), in which the Supreme Court stated that students cannot use an offensive language in a public debate.

38 Cf. Sandulli, A. *Il sistema nazionale di istruzione*, cit., 291. For the thesis on prevalence of freedom of the teacher, see Pototschnig, U., *Insegnamento, istruzione, scuola*, cit., 385. *Contra* Crisafulli, V. (1957), *La scuola nella Costituzione*, in: *Studi in onore di G.M. De Francesco*, II, Milano, 279 ff. Cf. also Corte cost. 195/1972.

39 Cf. Corte cost. 14 dicembre 1972, n. 195, in: *Foro it.*, 1973, I, 6 ("Cordero case") and European Court of Human Rights, *Lombardi-Vallauri v. Italy*, n 39128/05 of October 20th 2009.

40 Cf. Mattioni, A. (1997), *Scuola privata e pubblica*, in: *Dig. disc. pubbl.*, VIII, Torino, 642 ff.; Guarini, C.P. (2006), *Insegnamento (libertà di)*, in: Cassese, S. (directed by), *Diz. dir. pubbl.*, IV, Milano, 3155.

41 See art. 117 of the Constitution, which refers to the autonomy of educational institutions.

found, by definition, in the so-called “school with leanings” run by private entities where it is normal for an ideological orientation to be clearly visible⁴².

Accordingly, a peculiar character of a public educational offer emerges, that is to say, its neutrality. However, it is not easy in practice to imagine an educational offer that is neutral because it runs counter to the necessary freedom of teaching whose only limit is respect for a pupil’s personality and not to ensure an (impossible) neutrality: the standardization of teaching is, in fact, incompatible with one’s way of being in the encounter with “the other”. Nevertheless, with respect to moral and ideological issues, it can be asked of the public school teacher to adopt the criterion of “the suspension of judgment” (or, at least, to clarify the personal nature of some judgments), giving directly to the pupil the assumption of responsibility⁴³.

Additional characteristics of the public school include a plan of study that does not reflect a particular leaning and a teaching staff that is not chosen because of their adherence to a specific cultural program “of a particular leaning”, but are instead selected through open competition. In private schools, however, the “leaning” has legal significance in the complex relationship between teachers, pupils and families.

Therefore, the presence of public schools – deemed necessary by the legal system - is justified not to ensure the neutrality of what is taught, but to guarantee an education that is “not leaning” based on the assumption of autonomy on the part of the public school. One must now question the reasons that support the necessary presence of a public education alongside that of the private.

The most plausible response to such a question would appear, once again, to be that of guaranteeing a “place” of instruction which is not of a particular leaning in order to protect the freedom of people to be able to go through a period of growth and solidarity in a context that is not associated with the presence of a particular “leaning” which is legally relevant.

IX. Conclusion

One can legitimately ask at the end of this survey the reason, at both the national and supranational level, that the perspective here described (education as a duty), is unlikely to be found in the case law, both administrative and constitutional. The explanations are many, including the one that dismisses the proposed thesis as invalid.

First of all, the courts usually apply specific norms dealing with education (often put together as claims) while the perspective outlined above considers the general principles of the entire legal system, which are perhaps more useful to “build” a theoretical paradigm rather than to define a specific legal framework in which to place disputes. Secondly, the tradition and vocation (even proven by their names) of the Courts is, however, to promote rights without relying on the fact that, with respect to procedural mechanisms, it is much easier for individuals to focus on their rights as opposed to the fulfillment of their duties. Thirdly, the argument set forth here also values a situation, that of the onus of the learner, which hardly emerges in the field of judicial disputes.

Indeed, the theme of duty (the ultimate aim of which is respect for the learner’s personality) could have quite naturally emerged in disputes relating to the conflict between freedom of teaching and freedom of “leaning” schools, vice versa resolved in a bipolar relationship tying precisely such situations without expressly considering the essential position of the final terminal of education, which is the pupil and his family.

42 This tendency is less distinguishable in vocational education and training.

43 On pluralism and impartiality in public school, cf. L. Zannotti, *La libertà di insegnare nella scuola che cambia*, in C. Marzuoli (a cura di), *Istruzione e servizio pubblico*, cit., 261 ff.

In some measure, though not so evident, the perspective of duty does work in disputes in which the right to an education cannot turn into a claim to change a cultural context or to interfere with it, since the position of pupil and family requires the duty to respect the context in which the solidarity path, which is developed in school, is located; in any case, that position cannot be separated from the relationship with others (including the society in which the educational system is the expression and the result of historical, cultural and social events, that cannot be eliminated with the stroke of a pen). We are referring here to the sensitive issue of the crucifix in class⁴⁴: the “right” to an education as a “container” in which the claim to eliminate the crucifix is filed, which is weak before the variety of cultural values that are brought forth in the case being examined.

In conclusion, it can be said that “right” is a much stronger instrument than “duty” when it is necessary to break down barriers and overcome discrimination. Only in a mature society, where the rights of the individual are already vested, is it easier to physiologically turn to the duties; thus, the fact that we continue to think of education in terms of rights is certainly not encouraging. However, even abandoning the paradigm of duties, it may be useful to identify the role played by the various subjects involved in the educational experience (society, public authorities, teachers, families and pupils), in order to define, for instance, who is responsible for transmitting values (even looking beyond the school walls, considering the internet, facebook and television); who takes care of the need to protect the pupil's personality; the extent to which this demand is really respected; and the goals pursued by the educational system.

Probably it will be found that education has a “hard core” aimed at developing the personality of the individual to which are ascribed different and historically varying meanings, such as the need to provide tools to contribute to the development of society (education, thus, is configured as a public or common good, rather than exclusively as a private good)⁴⁵, or, again, the urgency to produce european citizens.

44 Cf. European Court of Human Rights, *Lautsi and others vs. Italy*, March 18th, 2011.

45 Education as a public or common good is less visible when talented individuals, who have benefitted from the educational service of the country, use their capacities abroad without returning to their country of origin.