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THE RIGHT TO COLLECTIVE BARGAINING AND THE RIGHT TO STRIKE IN ITALY – AN OVERVIEW OF THE CONSTITUTIONAL AND LEGAL FRAMEWORK*

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Summary: 1. Italian Constitution and Labour Law - 2. The right to collective bargaining - 3. The right to strike - 4. Conclusion - 5. Bibliography

Abstract:

This study addresses the treatment granted to the right to collective bargaining and the right to strike (as perhaps the most important expression of workers' collective rights) by the Italian Constitution and ordinary law.

Beginning with a brief presentation of the Italian Constitution and the treatment it serves to labour as an engine of social development and progression, this study then proceeds to analyse how the right to collective bargaining and the right to strike are viewed by the Italian constitutional law and, also, in ordinary law, as a way of materialising the former.

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1. Italian Constitution and Labour Law

As a product of social and cultural development, the Constitution acts as a guarantor of the fundamental rights of citizens. In this sense, after the introduction of liberty rights in the eighteenth century, which were a product of liberalism and the idea of the liberal state and had their origins in the French and North American Revolutions[3], the nineteenth and especially the twentieth centuries were marked by the demand and acquisition of economic, social and cultural rights that decisively shaped labour relations, so that one can even speak of a "constitutional basis of labour law"[4,5].

The phenomenon of social constitutions was, to an extent, in line with the new international approach to labour issues, which led to greater harmonisation of general principles in the field of employment[6]. The movement toward the adoption of social constitutions

[3] It may be said that the constitutions of the nineteenth century concerned themselves primarily with proclaiming rights and freedoms, and, as a general rule, ignored the function of guarantees (PIERRE BON, *La Protection Constitutionnelle des droits fondamentaux: aspects de Droit Comparé Europeen*, Separata da Revista da Faculdade de Direito, Lisbon, 1990, p. 10).

[4] RICCARDO DEL PUNTA, *Diritto del lavoro*, 12th edition, Giuffrè, Milan, 2020, p. 140.

[5] A paradigmatic example of constitutional enshrinement of employment rights is the Mexican Constitution of 1917, which proclaimed significant rights for workers, notably the freedom of labour and the right to the proceeds of labour (Article 4), limitation of the working day (Article 123, I. to IV.), right to minimum wage (Article 123, VI.) and to equal pay (Article 123, VII.), freedom of association (Article 123, XVI.) and the right to strike (Article 123, XVII.).

[6] Prior to the founding of the International Labour Organization, there had been movements in the nineteenth century calling for "international legislation", such as that led by Robert Owen, in the second decade of the century, the creation of the International Working Men's Association (1864, the First International) and also, in 1876, the attempt by the Swiss federal government to organise an international congress for the protection of working men – cfr. PAUL PIC, *La Protection Légale des Travailleurs et le Droit International Ouvrier*, Félix Alcan, Paris, 1909, pp. 153 et seq.; GIULIANO MAZZONI, *Corso di Legislazione Comparata del Lavoro, La Legislazione del Lavoro in Generale la Disciplina Giuridica del Mercato del Lavoro*, Giuffrè, Milan, 1936, pp. 25-26.

was therefore a milestone in the development of social rights and the consolidation of the democratic state; these tendencies received new impetus with the end of World War II.

Italy was no exception to this movement, and three years after the end of the fascist regime, the new Italian Constitution was completed in 1947, to come into force on January 1, 1948. The text represented a "constitutional settlement" between political currents of Christian, socialist, communist and various shades of liberal inspiration[7].

The Italian constitutional text belongs to the modern constitutional movement and following the example of the Weimar Constitution and inspired by Roosevelt's New Deal, marks the transformation of a classical liberal state into a democratic liberal state on the political level and into a welfare state on the economic level[8]. This ushered in a new era of labour law, placing it on a "new and stronger" foundation and setting the course for its development[9].

[7] FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, 8th edition, Utet, Milan, 2018, p. 31; FERRUCCIO PERGOLESI, "The Place of Labour in the Constitution of the Italian Republic", *International Labour Review*, volume 61, 1950, no. 2, p. 122.

[8] ILO Conventions 87 and 98 were ratified by the Italian State in 1958 (*Legge 23 marzo 1958*, n. 367, www.normattiva.it). FERRUCCIO PERGOLESI, "The Place of Labour in the Constitution of the Italian Republic", cit., p. 122, notes various influences, especially on the basic principles and Part I of the Charter, the American and French declarations of the late 18th century (on the articles on political relations), the European constitutions drawn up in the post-World War I period, especially the German Basic Law of 1919 (on the articles on ethics and social relations); there are also original features, especially in Part II, while referring to the precursors of the French Constitution of 1946.

[9] RICCARDO DEL PUNTA, *Diritto del Lavoro*, cit., p. 68.

The Italian Constitution begins with the proclamation of the fundamental principles, declaring that "Italy is a democratic republic based on labour" (Article 1, paragraph 1), and highlights the position of workers as protagonists of a new social order[10].

Subsequently, the right to work is enshrined as the Constitution states, in Article 4, paragraph 1 that "the Republic recognises the right of all citizens to work and promotes the conditions that make this right effective", thus affirming the special position of work in the constitutional text and providing for an obligation on the part of the State to 'promote' work[11]. Paragraph 2 adds that "Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society".

In Part I, Title III, which deals with economic relations, the Italian Constitution grants a wide range of rights and guarantees relating to labour and workers.

Article 35, the first in this title, asserts that "The Republic protects work in all its forms and practices" (paragraph 1), "provides for the training and professional advancement of workers" (paragraph 2), "promotes and encourages international agreements and organisations which have the aim of establishing and regulating labour rights" (paragraph 3) and "recognises the freedom to emigrate,

[10] ORONZO MAZZOTTA, *Diritto del Lavoro*, 7th edition, Giuffrè Francis Lefebvre, Milan, 2019, p. 11. As RICCARDO DEL PUNTA points out, this provision is not about emphasising the "duty of labour" (which is affirmed in Article 4), but about recognising the historical value of labour as the cornerstone of the state model proposed by the Constitution (RICCARDO DEL PUNTA, *Diritto del Lavoro*, cit., p. 142).

[11] RICCARDO DEL PUNTA, *Diritto del Lavoro*, cit., p. 149.

subject to the obligations set out by law in the general interest, and protects Italian workers abroad" (paragraph 4).

The Fundamental Law also guarantees workers the "right to a remuneration commensurate to the quantity and quality of their work and in any case such as to ensure them and their families a free and dignified existence" (Article 36, paragraph 1), specifies that maximum working hours shall be determined by law and guarantees the right to "weekly rest day and paid annual holidays", which cannot be waived (Article 36, paragraphs 2 and 3).

Article 37 addresses gender equality and the reconciliation of women's working lives with "their essential role in the family" (paragraph 1) and the work of minors (paragraphs 2 and 3).

Article 38 establishes the right to welfare support for all citizens who are unable to work and do not have the means to support themselves, protection in case of accident, illness, disability, old age and involuntary unemployment, and the right of the disabled and invalids to education and vocational guidance (paragraphs 1 to 3).

In the area of collective labour rights, which are the subject of this article, the Italian Constitution regulates freedom of association and collective autonomy (Article 39) and states that "trade unions may be freely established" (Article 39, paragraph 1). It also prohibits imposing obligations on trade unions other than registration under the law (Article 39, paragraph 2); a prerequisite for registration is that they have democratically constituted statutes (Article 39, paragraph 3). Finally, the law provides that registered trade unions have legal personality and provide for unified representation in relation

to their members, enabling them to conclude collective agreements that are effective *erga omnes* (Article 39, paragraph 4).

The right to strike is granted by Article 40 of the Italian Constitution, which provides for its exercise "in compliance with the laws regulating it".

The constitutional text also establishes economic enterprise (Article 41) as the "cardinal rule of the economic constitution"[12] and recognises private property (Article 42, paragraph 2); it thus enshrines a model of "'institutionalised pluralism'"[13].

Lastly, with the aim of the "economic and social betterment of workers and in harmony with the needs of production", the Fundamental Law recognises "the right of workers to collaborate in the management of enterprises" (Article 46).

The Italian Constitution of 1948 therefore occupies an important position in the hierarchy of sources, and it may even be said that it is in the Fundamental Law and in the compromise, it succeeded in reaching between Catholic, secular Republican and social-communist ideals that we find the institutional foundations and values on which the social market economy is built[14].

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[12] GIUSEPPE PERA, *Introduzione al Diritto del Lavoro Italiano*, Cedam, Milan, 2002, p. 29.

[13] FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., pp. 13 and 32. For a general analysis of the Constitution as regards labour issues, FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *op. cit.*, pp. 13 et seq., and 31 et seq.; GIUSEPPE PERA, *Introduzione al Diritto del Lavoro Italiano*, cit., pp. 28 et seq.; FERRUCCIO PERGOLESI, "The Place of Labour in the Constitution of the Italian Republic", cit., in particular, pp. 131 et seq.; ANTONIO VALLEBONA, *Istituzione di Diritto del Lavoro, I, Il Diritto Sindacale*, 11th edition, Cedam, Milan, 2019, pp. 16 et seq..

[14] RICCARDO DEL PUNTA, *Diritto del Lavoro*, cit., p. 140.

2. The right to collective bargaining

Article 39, paragraph 1 of the Italian Constitution states that "trade unions may be freely established", with paragraph 2 adding that "no obligations may be imposed on trade unions other than registration at local or central offices, according to the provisions of the law"[15].

As a development of the general freedom of association enshrined in Article 18 of the Italian Constitution[16], it assures this form of self-protection of workers[17], through the set-up of trade unions, viewed as a free and spontaneous association of workers, set up with the purpose of protecting the professional interests of its members.

Freedom of association therefore amounts to [i] the freedom to set up trade unions (including more than one per occupation), [ii] the freedom to choose the union that the workers decide to join and also [iii] the freedom to exercise union rights and to publicise them, including at the workplace.

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[15] See the analysis, for example, of EDOARDO ALES, "Italia", various authors, *Libertad de Asociación de Trabajadores y Empresarios en los Países de la Unión Europea*, director Valdés Dal-Ré, «coleccion informes e estudios, serie general, núm 18», Ministerio de Trabajo y Asuntos Sociales, Madrid, 2006, especially, pp. 460 et seq.; FRANCO CARINCI, "Il Lungo Cammino per Santiago della Rappresentatività Sindacale (dal Titolo III dello Statuto dei Lavoratori al Testo Unico sulla Rappresentanza 10 Gennaio 2014)", *Diritto delle Relazioni Industriali*, 2014, no. 2, pp. 309 et seq.;

[16] For a comparative assessment of free establishment of trade unions (Article 39) and the freedom of association (Article 18), MATTIA PERSIANI, *Saggio sull´Autonomia Collettiva*, Cedam, Padua, 1972, pp. 42 et seq..

[17] Arguing that Article 39, paragraph 1 of the Italian Constitution applies equally to workers and employers, see EDOARDO ALES, "Italia", cit., pp. 459 and 460; FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., pp. 106-107; taking a different line, cfr. the observations made by MICAELA VITALETTI, "La Rappresentanza Datoriale. Riflessioni Intorno alla Costruzione di un Modello Contrattuale Simmetrico", *Labour & Law Issues*, vol. 4, 2018, no. 2, https://labourlaw.unibo.it, pp. 153 et seq..

Article 39, paragraph 2 states, as mentioned, that trade unions may not be subject to any obligation other than to register with local or central authorities, as established in law[18].

As a condition for registration, the Constitution provides for the need for unions to adopt "internal regulations, based on democracy" (Article 39, paragraph 3), thereby requiring unions to be organised democratically.

Under paragraph 4 of this article, "registered trade unions are legal persons".

Article 39, paragraph 4, of the Italian Constitution, also provides that unions "may, through a unified representation that is proportional to their membership, enter into collective labour agreements that have a mandatory effect for all persons belonging to the categories referred to in the agreement".

As mentioned above, despite the constitutional provisions on the establishment of trade unions and the conclusion and effectiveness of collective agreements concluded by them, the constitutional model proved to be unworkable, as trade unions refused to register with the authorities and continued to conclude collective agreements outside the constitutional provisions, thereby , the legal model of collective bargaining, the very backbone of the system of industrial relations in Italy[19], was able to favour the "emergence and

[18] Notwithstanding the constitutional requirement that trade unions be registered, this model proved unworkable because unions, which were already private, refused to register with the authorities, which is established as a constitutional prerequisite for enjoying legal personality.

[19] BRUNO VENEZIANI, "Collective Bargaining in Italy", various authors, *Collective Bargaining in Europe*, Coord. OJEDA AVILÉS, Comisión Consultiva Nacional de Convenios

development of a network of collective relations in a context of absolute freedom"[20], thus constituting the inter-union order, which was in line with the fundamental idea of the plurality of orders and the doctrinal framework[21].

This means that the elimination of the corporative order did not destroy the provisions of the corporative collective agreements which existed alongside the collective agreements under ordinary law[22].

Within this framework, doctrine commonly identifies four types of collective agreements.

The first category identified are *corporative* agreements, concluded by the fascist social organisations under the corporative regime, generally effective, which remained in force, despite the end of the regime, by operation of the *Luogotenenziale* Decree-Law no. 369, of 23 November 1944.

Secondly, doctrine identifies collective agreements which formed the subject matter of Law no. 741, of 14 July 1959[23], having

Colectivos, *relaciones laborales, núm 70*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2005, p. 170.

[20] BRUNO VENEZIANI, "Collective Bargaining in Italy", cit., p. 163.

[21] As construed by GINO GIUGNI, *Diritto Sindacale*, with contributions from LAURALBA BELLARDI, PIETRO CURZIO and GIOVANNI GAROFALO, Cacucci Editore, Bari, 2014, pp. 17 et seq., within the framework of democracy, despite a number of reservations, such as those of GIUSEPPE PERA, "*Sulla Teoria dell'Ordinamento Intersindacale*", 1991, published in *Scritti di Giuseppe Pera*, II, *Diritto Sindacale*, Giuffrè, Milan, 2007, pp. 1641 et seq., stating that his doubts arise from his view that "it is impossible to identify self-sufficiency in the supposed inter-trade union order", which is assumed (p. 1643).

[22] In addition to the provisions contained in *Codice Civile* for corporative collective agreements, these are also governed by the rules on contracts in general provided by *Codice Civile*, their relevance being based on Article 39 of the Constitution of the Republic (GIOVANNI NICOLINI, "A Contratação Coletiva no Ordenamento Italiano", *Relações de Direito Coletivo Brasil-Itália*, Coord. YONE FREDIANI and SÁVIO ZAINAGHI, LTr, São Paulo, 2004, p. 80).

[23] The Law of 14 July 1959 had a duration of one year (Article 6); but it was extended

an effect identical to that achieved, in other legal systems, by a government extension order, for which there is no provision in Italy.

A third category that is identified are collective agreements provided for in Article 39 of the Constitution, which to date have not been filled out by regulations.

Finally, doctrine identifies collective agreements existing under ordinary law, the only one of the four types still operational, governed by the rules established for (general) contract law, with a scope of application defined by the agreement itself[24].

Italian labour law has evolved simultaneously on the basis of two sets of regulations: that of the State and that of the trade unions, the former being the legislation for the protection of workers, which in a certain way supplements and fills out the direct protection provided by collective agreements, which are the work of the trade unions and are more closely linked to the development of production[25].

As far as collective bargaining is concerned, "in a climate of repeatedly disappointed hope for the existence of a legal trade union system"[26] that implements the constitutional framework, the "abstentionist model"[27] has continued to be a reality, leading to a turn

for a further fifteen months by Law no. 1027, of 1 October 1960, which was later ruled to be unconstitutional by the Constitutional Court (*Corte Costituzionale*) in judgment no. 106, of 19 December 1962.

[24] For example, FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., p. 236; LUISA SANSEVERINO, "Contratto Collettivo di Lavoro", *Enciclopedia del Diritto*, X (contratto-cor), dir. FRANCESO CALASSO, Giuffrè, Milan, 1962, pp. 65-66.

[25] GIULIANO MAZZONI, "Italie", *Revue Internationale de Droit Comparé*, vol. 19, 1967, no. 1, p. 61, whose position, asserted in 1967, remains valid today.

[26] FEDERICO MANCINI, "Libertà Sindacale e Contratto Collettivo «Erga Omnes»", *Rivista Trimestrale di Diritto e Procedura Civile*, 1963, p. 570.

[27] GIANNI LOY, "Sobre Algunas Anomalías y Convergencias del Sistema de Relaciones

to civil law, which some, referring to trade union law, describe as an "essential guarantee against the risk of the system becoming captive as a result of a public conception of collective bargaining,"[28] while others emphasise the need for heteronomous intervention[29].

In short, we face a permanent and current twofold legislative omission: a) criteria of representativeness and b) a general framework for collective bargaining. This situation should leave to doctrine, courts and social actors, not to mention to the selective interventions of the legislator[30,31], the task of reconciling reality with the

Laborales en Italia", various authors, *Representación y Representatividad Colectiva en Las Relaciones Laborales. Libro Homenage a Ricardo Escudero Rodríguez*, Coord. CRUZ VILLALÓN, MENÉNDEZ CALVO and NOGUEIRA GUASTAVINO, Bomarzo, Albacete, 2017, p. 135.

[28] PIETRO ICHINO, *Il Percorso Tortuoso del Diritto del Lavoro tra Emancipazione dal Diritto Civile e Rotorno al Diritto Civile - Convegno dell'Associazione dei Civilisti Italiani su Il Diritto Civile e "gli altri"*, Università "la Sapienza" di Roma - 2 December 2011, https://archivio.pietroichino.it, p. 37.

[29] LUCA TAMAJO, "Incertezze e Contraddizioni del Diritto Sindacale Italiano: è Tempo di Regolamentazione Legislativa", *Rivista Italiana di Diritto del Lavoro*, 2018, no. 1, cit., § 9. Cfr. the above text, on the need for legislative intervention.

[30] FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., p. 18.

[31] The absence of a specific framework, however, did not prevent the legislator from intervening in certain areas by resorting to concepts of representativeness and to the terminology used in collective bargaining, which led legal scholars to speak of a "legal recognition of the self-legitimised contractual system", cfr. on the subject of unions in the workplace, MASSIMO D´ANTONA, "Il Quarto Comma dell'Art. 39 della Costituzione, Oggi", *Giornale di Diritto del Lavoro e di Relazioni Industriali*, no. 80, 1998, § 5, giving examples of several pieces of legislation, that use *Sindacati maggiormente rappresentativi* and *sindacati comparativamente più rappresentative*. LUCA TAMAJO, "Incertezze e Contraddizioni del Diritto Sindacale Italiano: è Tempo di Regolamentazione Legislativa", cit., § 2, identifies: a) "rappresentatività «presunta»" ('presumed' representativeness), based on the concept of the most representative or comparatively most representative union, for which the criteria have been filled out by the case law, and dating back to the 1970s, when it was found in several provisions, such as 'comparatively most representative union' in *Decreto Legislativo 15 giugno 2015, n. 81, Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, n. 183*); b) "rappresentatività «verificata»", ('verified' representativeness) concerning the conclusion of a collective agreement applicable in the production unit (Article 19, *Statuto dei Lavoratori*); c) "rappresentatività «quantificata»" ('quantified' representativeness) resulting from formal data, RSU election result.

Constitution, leading to a "refoundation of labour law" [32], to the incorporation of trade union practise into the legal framework and to the adaptation of the latter to the reality of everyday collective relations, with particular importance given, in the field of collective agreements, to general contract law, given the distrust of legislative interventions behind which lurked (behind the declared intentions), it was feared, the danger of an erosion of freedom[33].

These legal conditions led collective bargaining to develop essentially on the basis of the rules of general contract law and the contractual practises established by the various inter-confederal agreements, consolidated over time with the help of legal theory and jurisprudence; this situation still exists today. And despite "the general context of informality or low institutionalisation of collective relations, collective bargaining plays an important role in the social and economic structure of Italian labour relations" [34].

The actual structure of collective bargaining is the result of a process that began with the end of the corporative regime and resulted from the tendency of unions and employers to conduct centralised collective bargaining as it was conducted under the fascist regime, which gained strength due to the economic situation after

[32] MATTIA PERSIANI, "Osservazioni sulla Dottrina Giuslavoristica nel Trentennio dopo la Costituzione", *Argomenti di Diritto del Lavoro*, no. 2/2010, p. 331.

[33] GIANCARLO PERONE, "A Liberdade Sindical na Itália", *Relações de Direito Coletivo Brasil-Itália*, Coord. YONE FREDIANI and SÁVIO ZAINAGHI, LTr, São Paulo, 2004, p. 40.

[34] BRUNO VENEZIANI, "Collective Bargaining in Italy", cit., p. 178. See also, TIZIANO TREU, "Regole e Procedure nelle Relazioni Industriali: Retaggi Storici e Criticità da Affrontare", *WP C.S.D.L.E. "Massimo D'Antona".IT* – 396/2019, csdle.lex.unict.it, pp. 1 et seq., especially, pp. 6 et seq.

World War II[35]. It should also be recalled that the collective bargaining model provided for in the Constitution (Article 39, paragraph 4) has not been continued by subsequent legislation[36], which means that collective agreements are not legally concluded by recognised associations[37], nor are they effective *erga omnes*, since the provision of the Basic Law is not enforceable, creating a "state of uncertainty that undermines the stability of the system and even pollutes the behaviour of the different parties" [38]; and thus "the field was left free for self-regulation by the unions and employers' organisations based on the principle of 'mutual recognition', which in practise meant the creation of a negotiating oligopoly in favour of CGIL[39], CISL[40] and UIL[41]" [42], despite the call to intervene, for example, in matters of representativeness[43].

[35] BRUNO VENEZIANI, "Collective Bargaining in Italy", cit., p. 178.

[36] Although it my be argued that, several decades on, the parameters for interpretation of Article 39 have changed, MASSIMO D´ANTONA, "Il Quarto Comma dell'Art. 39 della Costituzione, Oggi", cit., § 2, also noting that "the practice of social dialogue has assumed the existence of a system of social representation of crucial importance for balancing the economy and for the effectiveness of public policy" (§ 8).

[37] BRUNO VENEZIANI, "Collective Bargaining in Italy", cit., p. 164, clarifying that trade unions and employers' associations, which are de facto associations, unrecognised and lacking legal personality, fall under Articles 36 to 38 of *Codice Civile*, establishing that they are governed by the terms agreed between their members.

[38] LUCA TAMAJO, "Incertezze e Contraddizioni del Diritto Sindacale Italiano: è Tempo di Regolamentazione Legislativa", cit., § 1.

[39] *Confederazione Generale Italiana del Lavoro* (Italian General Confederation of Labour).

[40] *Confederazione Italiana Sindacati Lavoratori* (Italian Confederation of Trade Unions).

[41] *Unione Italiana del Lavoro* (Italian Labour Union).

[42] FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., p. 371, referring to trade union law.

[43] We refer, for example, to *sentenza della Corte Costituzionale n.º 231 del 23 luglio 2013*, which calls on the legislator to intervene, asserting, after mentioning several abstractly possible criteria, for filling out Article 19.1 b), of the *Statuto dei Lavoratori*, that "it falls to the legislator to choose between these or other

Given the stabilization of the general regime of the collective contract under ordinary law[44] - whose foundation is found in the theory of union representation[45] - and given the omission of a specific and substantive regulation of constitutional rules[46], it should be noted, as a first remark, that we are here in the ordinary domain of private contractual autonomy[47], looking at an atypical contract

solutions" (section 9). See also LUCA TAMAJO, "Incertezze e Contraddizioni del Diritto Sindacale Italiano: è Tempo di Regolamentazione Legislativa", cit., § 1: "In short, there is a need for legislative regulation able to bring at least a little order to an area where the actors no longer appear capable of self-government and of accepting mutual recognition; regulation which can stabilise and guarantee a system".

[44] The debate on how to characterise collective agreements under ordinary law as a source of law remains of interest today, in view of their limited effects, cfr. VITTORIA BALLESTRERO, *Diritto Sindacale*, 6th edition, Giappichelli, Turin, 2018, pp. 319 et seq.; FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., p. 17; ANTONIO VALLEBONA, *Istituzione di Diritto del Lavoro, I, Il Diritto Sindacale*, cit., p. 35, also rejecting this characterisation.

[45] VITTORIA BALLESTRERO, *Diritto Sindacale*, cit., p. 228.

[46] As asked by EDOARDO GHERA, "L´Articolo 39 della Costituzione e il Contratto Collettivo", various authors, *El Derecho a la Negociación Colectiva. Liber Amicorum Profesor Antonio Ojeda Avilés*, «Monografias de Temas Laborales», 53, Coord. JUAN GORELLI HERNÁNDEZ, Consejo Andaluz de Relaciones Laborales, Seville, 2014, p. 179, "what should be done with Article 39 of the Constitution? The question, or rather the answer, might appear obvious. After sixty-five years of non-fulfilment of the second part of the constitutional norm – paragraphs 2, 3 and 4, which envisage a sets of rules on unions and collective agreements of 'mandatory effect for all persons belonging to the categories referred to in the agreement' (paragraph 4) - the historical reasons for this omission by the legislator are no longer in question"; adding: "What is left of the constitutional norm, in all its force, is the principle of freedom of association (paragraph 1: trade unions may be freely established), within the framework of which a system of actors and unions relations has grown up and established itself, and shown itself able to evolve over time and to regulate itself on an exclusively voluntary basis The legislator has intervened, but outside the scope of the constitutional provision, to support trade unions: in particular to ensurte their acceptance in undertakings with the workers' statute, in the first place; and then, to regulate strikes in public services".

[47] GINO GIUGNI, *Diritto Sindacale*, cit., p. 139; PIETRO ICHINO, "Primi due Decenni del Diritto del Lavoro Repubblicano. I. Dalla Metà degli Anni '50 alla Legge sui Licenziamenti Individuali", *Rivista Italiana di Diritto del Lavoro*, 2007, no. 3, pp. 279-280, distinguishes this type of collective contract from that resulting from "reenvio legislativo, como elemento de una fattispecie normativa complessa", which has "a function (although not a nature) belonging essentially to public law", applying to a company or to an entire sector; ORONZO MAZZOTTA, *Diritto Sindacale*, 4th edition, G. Giappichelli, Turin, 2017, p. 119.

entered into by trade unions, insofar as it does not contain specific legal regulations[48] (Articles 1321 et seq. of the *Codice Civile*), and so the general rules on contracts apply to this instrument that governs the relationships between the parties and the employment contracts of their members; the collective agreement, which in essence governs employment situations[49] is therefore regulated by the *Codice Civile*.

In the absence of legal provisions on who can participate in collective bargaining, it has been argued that, on the workers' side, this applies to groups of workers (permanent or non-permanent), (traditional) trade unions, associations, and enterprise committees, while on the employer side, entrepreneurs can participate individually or in a group or association[50,51].

[48] FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., p. 237; ANTONIO VALLEBONA, *Istituzione di Diritto del Lavoro, I, Il Diritto Sindacale*, cit., p. 35; speaking of conformity to type, VITTORIA BALLESTRERO, *Diritto Sindacale*, cit., p. 229.

[49] There are however exceptions, such as home working (Article 2128 of the *Codice Civile* and Article 8 of Legge 18 dicembre 1973, n. 877 (*Nuove norme per la tutela del lavoro a domicilio*), www.gazzettaufficiale.it.

[50] ANTONIO VALLEBONA, *Istituzione di Diritto del Lavoro, I, Il Diritto Sindacale*, cit., p. 163; BRUNO VENEZIANI, "Collective Bargaining in Italy", cit., pp. 163 and 173-174.

[51] It should be recalled that, for example, in the 1970s, *Il Patto Federativo CGIL-CISL-UIL*, of 3 July 1972 - https://elearning.unito.it – made provisions for a "*Consiglio dei delegati*", grassroots union bodies, partly elected, unitary and with collective bargaining powers within the company; in many cases, these bodies continued to exist for many years, "remaining 'frozen' by agreement between the confederated organisations; in other cases, one or more organisations seceded, raising delicate issues concerning the division of rights of organisation and negotiation, which not a few collective agreements entrust to these councils", MASSIMO D´ANTONA, "Diritti Sindacali e Diritti del Sindacato: Il Titolo III delle Statuto dei Lavoratori Revisitato", *Lavoro e Diritto*, 1990, no. 2, p. 89.

Following negotiations[52] and the conclusion of a collective bargaining agreement[53], there has been discussion as to whether this agreement must be in writing. Case law holds that the absence of the written form does not affect the validity of the source, since there is no law or other source that requires it, so this is subject to the general rule of the *Codice Civile*, which establishes the freedom of form, *ie*. does not fall under the exception of article 1350, which is a formality *ad substantiam*[54]; the collective agreement must then be filed with the *Consiglio Nazionale dell' Economia e del Lavoro*, CNEL, article 17 of *Legge 30 dicembre* 1986, no. 936[55], which, as we have seen, is not a prerequisite for its validity or effectiveness, since the 1986 law requires the filing of the document within 30 days of its conclusion.

[52] These being negotiations between private parties, there is no intervention by public bodies, except for the possible intervention by the Ministry of Labour, on the basis of its institutional functions, including settlement of disputes (individual and collective), cfr. MARIELLA MAGNANI, "The Role of Collective Bargaining in Italian Labour Law", *E-Journal of International and Comparative Labour Studies,* Volume 7, 2018 no. 2, www.ejcls.adapt.it, p. 8.

[53] Unions have commonly made use of referenda to consult workers prior to finalising a collective agreement, cfr. ANDREA LASSANDARI, *La Contrattazione e il Contratto Collettivo*, "Il Diritto del Lavoro", Ediesse, Roma, 2003, pp. 27-28.

[54] For example, also including acts of termination, *Cassazione*, 23 October 2018, case no. 30264, www.italgiure.giustizia.it, § 14; *Cassazione*, 8 November 2017, case no. 8379, www.italgiure.giustizia.it, § 3.1.; In doctrine, see, for example, the observations of FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., p. 284; ORONZO MAZZOTTA, *Diritto Sindacale*, cit., pp. 128-129.

[55] *Legge 30 dicembre 1986, n.º 936* (*Norme sul Consiglio nazionale dell'economia e del lavoro*), www.normattiva.it. This requires CNEL to set up a National Archive of Collective Labour Contracts and Agreements, where authentic copies of renewal agreements and new contracts are deposited, within 30 days of their conclusion (Article 17.1), the Archive being entrusted with their conservation and allowing public consultation (Article 17.3).

3. The right to strike and lock-out

In Italy, the Fundamental Law (of 1948) provides that "the "right to strike shall be exercised in accordance with the law" (Article 40).

This is a "compromise and oblique" provision that was imported from the preamble of the 1946 French Constitution[56], although it has been accepted, not without debate, that this serves as a recognition of a directly applicable fundamental right[57], which must be exercised in accordance with the legal framework[58].

In accordance with a certain tradition in the Italian legal system (we recall the inaction regarding Article 39), the issue of the strike remained untouched by (general) legislation for almost forty years, although it should be emphasised that, unlike the phenomenon of collective bargaining, the absence of regulation allowed legal theory and jurisprudence to fill the gap and recognise that it was a directly

[56] FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., p. 335.

[57] PIERO CALAMANDREI, "Significato Costituzionale del Diritto di Sciopero", 1952, *Opere Giuridiche,* volume III, *Diritto e Processo Costituzionale*, La Memoria del Diritto, Roma Tre-Press, 2019, pp. 453 et seq., analysing the relevance of its being enshrined in the constitution.

[58] PIERO CALAMANDREI, "Significato Costituzionale del Diritto di Sciopero", cit., p. 444, explaining that, during the preparatory proceedings of the Constituent Assembly, it was proposed that the right to strike be "formulated simply and categorically", proclaiming it directly and unconditionally: "All workers are assured the right to strike"; or: "All workers have the right to strike". However, this proclamation was softened and "almost disguised", in the formulation that later became Article 40, "in which the tonic, which in the original formulation was placed on the affirmation of the right to strike, was shifted and concentrated in the provision for the laws which will govern its exercise. However, this is not to say that, albeit in this indirect and almost circumspect way, the Article does not actually recognise the right to strike, insofar as it features as an assumption".

applicable right[59]. On the other hand, one cannot ignore the *Statuto del Lavoratori* (1970), which does not directly regulate the right to strike, but does protect it (e.g., discriminatory acts, Article 15(b); anti-union conduct, Article 28, paragraph 1)[60].

Corte Costituzionale was eventually called on to pronounce on the various provisions of the *Codice Penale* (*Regio Decreto 19 ottobre 1930*, n. 1398), which, since it had not been expressly repealed, raised doubts as to the provisions punishing labour disputes (articles 502 to 508), which were classified as crimes against the national economy; these included strikes and lockouts with or without a contractual purpose, political strikes, sympathy strikes, boycotts, factory sit-ins and sabotage). This clarification process naturally made it possible to define the rules governing strikes and lockouts[61].

The debate over the scope of the right to strike divided legal scholars, with some advocating a contractual model (strike is an instrument of contractual self-defence), while others argued that strikes are a mechanism to enforce freedom of union organisation

[59] FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., p. 337.

[60] UMBERTO ROMAGNOLI, "Art. 40", various authors, *Commentario della Costituzione*, *Rapporti Economici*, Tomo I, Art. 35-40, Coord. GIUSEPPE BRANCA, Zanichelli e Roma Società Editrice del Foro Italiano, Bologna, 1979, pp. 302 et seq.. For a general analysis of the *Statuto del Lavoratori*, cfr. FRANCO CARINCI, "Lo Statuto del Lavoratori Compie Cinquanta Anni (1970-2020)", *Revista Internacional de Direito do Trabalho*, 2021, no. 1, pp. 453-512.

[61] For example, FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., especially, pp. 339 et seq.; LIBERAL FERNANDES, "O Direito de Greve nos Ordenamentos Francês, Alemão e Italiano", various authors, *Estudos em Homenagem ao Prof. Doutor Eduardo Correia*, volume II, Coimbra, 1984, especially, pp. 377 et seq.; GINO GIUGNI, *Diritto Sindacale*, cit., pp. 258 and 273 et seq..

and activity. *Corte Costituzionale* took the position that there is no separation between the trade union and political spheres, which should be the prevailing opinion in the legal system. In this sense, it has stated that "in general, we may observe that it appears difficult, if not impossible, to distinguish between a strike with economic aims and a strike with political aims, given that close connection between the two forms, so that even a strike that results essentially in pressure and should be regarded as an economic strike, amounts to a political strike for the political authorities insofar as it encourages them to accept certain demands of a particular class, such as improved legislation on safety at work, more appropriate welfare measures for workers and their families, at work, etc." [62].

The path was therefore clear to a broad concept of strike, which the ordinary case law confirmed, by deciding that strike, in the social context, which could not be ignored by the authors of the Constitution and ordinary legislation, "means nothing more than a collective refusal to work, organised by a plurality of workers, in order to achieve a common objective"[63].

[62] *Sentenza della Corte Costituzionale n.º 290/1974*, of 27 December, www.giurcost.org, § 3, which ruled that Article 503 of the Criminal Code - deeming political strikes to be a crime - was unconstitutional, also adding: "at the current historical moment in Italian society, the concept of strike should have a meaning and reach much broader than a mere refusal to work", concluding that, "as well as including Articles 35, 38, 45 and 46 of the Constitution, the protection conferred by Article 40 appears also to extend to Article 3. What is more, this article would seem indeed to represent the starting point for interpretation of Article 40 and all the other rules mentioned in the title in which it is included". See also FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., pp. 351-352.

[63] *Corte di Cassazione,* 30 January 1980, case no. 711, *Il Foro Italiano*, volume 103, 1980, no. 1, columns 28 et seq. (30), adding: "on the other hand, the actual reality of the facts had already done the work of setting aside the theory of 'unfair damage', or of 'equal sacrifices', because in any undertakings with continuous operations, any type of

In contrast, on the basis of Article 39, paragraph 1 of the Constitution, the lockout has been characterised as a mere freedom that does not have the nature of a right, as in the case of a strike (Article 40); in other words, "The position that was then determined with regard to strike and lock-out, in the context of the system of freedom envisaged in Articles 39 and 40 of the Constitution, is therefore this: strike is recognised by the Constitution as a right, but one, in accordance with the precise requirement of Article 40, destined to be regulated by law, while lock-out, although not enjoying that recognition, is also no longer classified in criminal law terms as it was at the time by company law, is currently an act not prohibited by criminal law or, as commonly said, a criminally lawful act"[64].

It has been shown that various consequences flow from the rule's constitutional status. Firstly, it has been understood that strike constitutes the exercise of a (fundamental) workers' right[65] ,and does not entail breach of contract. Also, since there are no general strike regulations, the limits result from the socio-historical justification of the constitutional requirement and the unassailability of other constitutionally guaranteed rights and interests.

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strike, even those falling within the parameters considered 'normal', nonetheless bring losses greater than the mere loss of production during the period in which labour is withdrawn, due to the unavoidable waste of raw materials and the particular technical requirements of restarting operations" (30).

[64] *Sentenza della Corte Costituzionale no. 29/1960*, of 4 May, https://www.giurcost.org/, § 4, which examined whether criminalising lock-outs was compatible with the Constitution. See also ORONZO MAZZOTTA, *Diritto Sindacale*, cit., pp. 183-184.

[65] For an analysis of this issue, PIERO CALAMANDREI, "Significato Costituzionale del Diritto di Sciopero", cit., pp. 449 et seq., presenting arguments that remain valid today.

Strike presupposes a work stoppage decided and carried out collectively in order to protect collective interests - including those not related to pay, and those of a general political nature, if and insofar as labour relations are concerned. The objective assessment that may be made of the strike's validity and reasonableness, and of the importance of the related demands, as well as of the failure to formally proclaim the strike and notify the employer and the fact that the strike is damaging to the employer, halting or reducing the company's output, "is a natural consequence of the strike's mandatory function of self-protection"[66]. During such exercise, the contract is suspended, the worker being released from his duty to work, and the employer from its corresponding obligations.

On the contrary, lock-out is a mere freedom, and does not enjoy the same constitutional protection as strike. This means that it amounts to a breach of contract, the employer being obliged to compensate the workers for any damages caused, as well as potentially constituting anti-union behaviour (Article 28 *Statuto dei Lavoratori*)[67].

[66] *Corte di Cassazione*, 17 December 2004, case no. 23552, *Il Foro Italiano*, volume 108, 2005, no. 10, columns 2774 et seq. (2777).

[67] PIERO CALAMANDREI, "Significato Costituzionale del Diritto di Sciopero", cit., especially, pp. 464 et seq.; FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., pp. 353 et seq., especially, pp. 367 (effects of strike); GINO GIUGNI, *Diritto Sindacale*, cit., pp. 261 et seq.; ORONZO MAZZOTTA, *Diritto Sindacale*, cit., pp. 183-184 and 188 et seq. and 212 et seq.; ANTONIO PILEGGI, "La Serrata", various authors, *Trattato di Diritto del Lavoro*, coord. MATTIA PERSIANI and FRANCO CARINCI, volume 3, *Conflitto, Concertazione e Partecipazione*, ed. FIORELLA LUNARDON, Cedam, Padua, 2011, pp. 605 et seq.; RICCARDO DEL PUNTA, *Diritto del Lavoro*, cit., pp. 283 et seq.. In the case law, admitting the use of management resources seeking to limit the damages caused by a strike, *Corte di Cassazione Civile*, of 28 March 2019, case no. 8670, https://sentenze.laleggepertutti.it.

In addition to the *Corte Costituzionale*, trade unions were to have (and still have) an important role in regulating strikes (unilateral/self- or agreed regulation)[68].

It was four decades before publication of *Legge* n.º 146/1990, 12 giugno (*Norme sull'esercizio del diritto di sciopero nei servizi pubblici essenziali e sulla salvaguardia dei diritti della persona costituzionalmente tutelati. Istituzione della Commissione di garanzia dell'attuazione della legge*, with amendments), regulating strikes in essential public services.

This law, which came in the wake of several decisions of the *Corte Costituzionale* concerning the *Codice Penale* (1930), on the matter of public services (e.g. Articles 330, 333 and 340)[69], was naturally influenced by those decisions; in addition, this legislation was drawn up with the full participation of union federations, and so also paid heed to the existing self-regulatory frameworks[70].

Regardless of the legal nature of the employment relationship, the law regulates essential public services, especially those intended to ensure the enjoyment of personal rights protected by the Constitution, namely the right to life, health, liberty and security, freedom of movement, welfare and social security, education and freedom of communication (Article 1). From this starting point, it establishes a number of rules, in particular those which protect the situation of employers and the community, namely, establishing the obligation

[68] FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., pp. 344 et seq..

[69] For example, *Sentenza della Corte Costituzionale* no. 123, of 28 December 1962; *Sentenza della Corte Costituzionale* no. 31, of 17 March 1969; *Sentenza della Corte Costituzionale* no. 125, of 23 July 1980, available at https://www.cortecostituzionale.it.

[70] FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI e TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., p. 398.

to give notice, among other things, of the reasons for the strike, to the employer and to the relevant authorities (Article 2.1); this notification must be given (at least) 10 days in advance (Article 2.5); both workers and employers are required to provide indispensable services (Article 2.3); a significant feature of the legal framework is the broad scope offered for collective bargaining (e.g. Article 2.2, which provides for contractually agreed resolution procedures) and for the *Comissione di Garanzia della Attuazione della Legge* (independent administrative authority[71]), responsible for guaranteeing application of the law, in order to assess the adequacy of the measures designed to ensure a balance between exercise of the right to strike and enjoyment of the personal rights protected by the Constitution (Article 12.1), with powers to assess the adequacy of indispensable services and, if they are not deemed adequate, to set provisional rules on essential services, conciliation procedures, to pronounce on self-regulation agreements and to inform the parties about breaches of the law, as well as the relevant authority of situation where strike may result in an imminent danger of undermining constitutionally protected rights (Article 13, subparagraphs a) b), d) and f), respectively)[72].

[71] The Commission comprises nine members, chosen, on the basis of nominations from the Presidents of the Chamber of Deputies and the Senate, from among specialists in constitutional law labour law and industrial relations, and appointed by decree of the President of the Republic, for a non-renewable six-year term of office (Article 12, paras. 2 and 3).

[72] For a detailed analysis, inter alia, FRANCO CARINCI, LUCA TAMAJO, PAOLO TOSI and TIZIANO TREU, *Diritto del Lavoro, 1. Il Diritto Sindacale*, cit., pp. 395 et seq.; PAOLA FERRARI, "La Comissione di Garanzia – Struttura e Attività", various authors, *Trattato di Diritto del Lavoro*, coord. MATTIA PERSIANI and FRANCO CARINCI, volume 3, *Conflitto, Concertazione e Partecipazione*, ed. FIORELLA LUNARDON, Cedam, Padua, 2011, pp. 419 et seq.; GINO GIUGNI, *Diritto Sindacale*, cit., pp. 287 et seq.; ORONZO

4. Conclusion

1) The Italian Constitution, which belongs to the modern constitutional movement, ushered in a new era of labour law, and refers to work and labour in several of its provisions.

2) Regarding collective labour rights, Article 39 of the Italian Constitution regulates freedom of association and collective autonomy, states that "trade unions may be freely established" (paragraph 1), and that "no obligations may be imposed on trade unions other than registration at local or central offices, according to the provisions of the law". It also states that registered trade unions have legal personality and provide for unified representation in relation to their members, enabling them to conclude collective agreements that are effective *erga omnes* (paragraph 4).

3) However, the constitutional model proved to be unworkable, as trade unions refused to register with the authorities and continued to conclude collective agreements outside the constitutional provisions.

4) As a consequence, four types of collective agreements are usually identified: corporative agreements, collective agreements which formed the subject matter of Law no. 741, of 14 July 1959 (similar

MAZZOTTA, *Diritto Sindacale*, cit., pp. 197 et seq.; RICCARDO DEL PUNTA, *Diritto del Lavoro*, cit., pp. 301 et seq..

do extension orders), collective agreements provided for in Article 39 of the Constitution, and, finally, collective agreements existing under ordinary law, the only one of the four types still operational.

5) Therefore, collective bargaining developed essentially based on the rules of general contract law and the contractual practises established by the various inter-confederal agreements, consolidated over time with the help of legal theory and jurisprudence. This has impact on legal requirements as to these agreements, e.g., regarding the absence of a requirement of written form, which does not affect the validity of the instrument.

6) The right to strike is granted by Article 40 of the Italian Constitution, which provides for its exercise "in compliance with the laws regulating it", serving as a recognition of a directly applicable fundamental right. *Statuto del Lavoratori* (1970) does not directly regulate the right to strike, but protects it (e.g., discriminatory acts, Article 15(b); anti-union conduct, Article 28, paragraph 1).

7) Strike presupposes a work stoppage decided and carried out collectively to protect collective interests, including those of a general political nature, if and insofar as labour relations are concerned. During strike, the employment contract is suspended, the worker being released from his duty to work, and the employer from its corresponding obligations.

8) In contrast, based on Article 39, paragraph 1 of the Constitution, lockout has been characterised as a mere freedom that does not have the nature of a right, amounting instead to a breach of contract. This leads to the employer being obliged to compensate the workers for any damages caused, as well as potentially constituting anti-union behaviour (Article 28 *Statuto dei Lavoratori*).

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