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Contractual Limits to the Right to Strike in the Era of Crisis. The Italian Case with some Comparative Reliefs (France and the U.K.)[*α]

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Abstract

The economic crisis, the outsourcing of production, and globalization have produced significant changes in industrial relations and trade unions. Because of these changes, dissent – which is usually manifested through the exercise of the right to strike and the spontaneous actions – faces certain limitations set by trade union clauses, which have been recently introduced to govern industrial relations (e.g. industrial peace clauses and enforceability ones). In order to deal with the foregoing questions, the present paper provides an analysis of the notion of strike through supranational sources (Introduction, Silvia Donà, Università di Roma La Sapienza), followed by an examination of what is meant by "holding the right to strike" in Italy. The paper goes on to investigate the way this right is exercised (Section 1, Lilli Carollo, Università di Roma La Sapienza) and the clauses which have been devised to narrow down its exercise through the years (Section 2, Anna Rota, Università di Bologna), and concludes with an overview of the consequences arising from the violations of these clauses (Section 3, Marianna Russo, Università di Roma La Sapienza). With a view of better understanding the peculiarities of the Italian rules concerning the right to strike, a comparison will be provided with France and the UK (Marta Filippi, Università di Roma La Sapienza).

Introductory Remarks.

Freedom of association has been carefully considered by International Law through ILO Conventions No. 87 and 98[1] concerning "freedom of association" and "the right to organize and collective bargaining", respectively.

The International Covenant on Economic, Social and Cultural Rights – which was transposed into Italian law through Act No. 881 of 25 October 1977, also argued in favour of the acknowledgment of the right to strike. In a similar vein, Article 11 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (CEDU) – which was ratified and implemented in Italy by means of Act No. 848 of 4 August 1955 – guarantees the right to form trade unions. The freedom to organize is also ensured by the European Social Charter, which also safeguards workers' right to bargain collectively and to protect themselves, including the right to strike.

The international legal sources referred to above place an obligation upon governments to transpose these provisions into national legislation, and a number of monitoring mechanisms are in place that can be enforced by both individual citizens and associations to ensure compliance. Nevertheless, one of the main challenges is the effective implementation of these rights.

EU legislation also recognizes the right to strike as a fundamental one, particularly following the enforcement of the Nice Charter. Moving beyond certain resistance from the previous EU treaties, the Charter of Fundamental Rights of the European Union formally acknowledges the right to strike, even though silence is maintained on "the modalities trade unions should be legitimized at the European level"[2] (Galantino, 2009, 82). Specifically, Article 28 of the Nice Charter, which was given legally binding value following the entry into force of the Lisbon Treaty on 1 December 2009, established that "Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action".

Concerning social fundamental rights, one might note that the European Union draws a distinction between those matters falling within the remit of the Community that are dealt with by means of directives and those which are considered to be outside EU competence, among

[1] These Conventions have been ratified in Italy by means of Act No. 367 of 23 March 1958.

[2] Following the entry into force of the Lisbon Treaty, the EU is under the obligation to adhere to the ECHR, pursuant to par. 2, Article 6 of the Treaty of the European Union.

others: remuneration, the right to organize and, significantly, the right to strike and lockout (Giugni, updated version by Bellardi, Curzio, Leccese, 2014, 260 and ff.). In the latter case, while regarding the right to collective action as a fundamental one, the EU leaves to each Member State the task of regulating these aspects.

The landmark decisions in the Viking[3] and Laval[4] cases are illustrative of this approach and provide an example of the restrictions that can be placed on the right to collective action in order to comply with EU law (Carabelli, 2009, 143).

In this connection, Article 28 of the Nice Charter mentioned above plays a key role in that, because it achieves a balance between the exercise of the right to strike and the fundamental economic freedom ensured by the Treaty on the Functioning of the European Union (TFEU).

This is because the exercise of the right to strike cannot justify violations of EU law, even when they are acknowledged in national legislation. The decisions in the Viking and Laval cases drew criticism from legal opinion (Ballestrero, 2008,371; Sciarra, 2009,27-33), for they appear to significantly limit the right to collective action to prioritise freedom of establishment (as it is in Viking) or freedom to provide services (as in Laval). A further criticism concerns the competence of the European Court of Justice (ECJ) to set such major restrictions on the right to strike (Carabelli, 2009, 143) and the advisability to involve it in matters which are the exclusive responsibility of Member States, as specified in the TFEU.

The analysis of the industrial relations system at an international and community level indicates that many questions exist that are relatively difficult to solve: the balance of competing interests, complex and subtle issues associated with competence and responsibilities and the difficulty arising from the effective implementation of rights, as is the case with the right to strike.

Considering the Italian case, par. 1, Article 39 of the Italian Constitution sets forth that “The organization of trade union is free”, while Article 40 specifies that “The right to strike is exercised within the laws that regulate it”. As early as in the years following the enactment of the Constitution, legal opinion (Calamandrei, 1952, 221) pointed out the need to set conditions and limitations to the right to strike which, in the absence of specific provisions, should be established by case law drawing

[3] Cf. *C. Giust., 11.12.2007, C-438/05, International Transport Workers' Federation, Finnish Seamen's Union c. Viking Line ABP, OÜ Viking Line Eesti.*

[4] See *C. Giust, 18.12.2007, C-345/05,Laval un Partneri Ltd c. SvenskaByggnadsarbetareförbundet, SvenskaByggnadsarbetareförbundetsavd. 1, Byggettan, SvenskaElektrikerförbundet.*

on Article 40 of the Italian Constitution. This assumption is still relevant today, since the regulation of such a delicate matter as the right to strike is closely related to the enforceability of collective agreements, a point which has been made by many authors recently (Maresca, 2015, 112 ss.).

Prior to the enforcement of Act No. 146 of 12 June 1990, lawmakers did not make any attempt to regulate the right to strike, and a number of restrictions were introduced by case law. By way of example, Ruling No. 711/1980 of the Corte di Cassazione (the Italian Supreme Court) provides some guidance on how to distinguish between "external" and "internal" limitations of the right to strike. The external limitations have been established to associate recognition of the right to strike with other rights established by the Constitution in an attempt to achieve a balance between competing interests. As for the internal limitations, they are intended to classify unusual forms of strikes, making use of notions based on pre-determined elements, since not all manifestations of conflict can be seen as legitimate ones.

A part of legal literature considered taking strike action as an individual right that the government should ensure; (so-called diritti soggettivi pubblici) thus, neither national legislation nor the employer can impede its exercise (CALAMANDREI, 1952, 221). In this sense, Article 40 of the Constitution should be seen as related to the principle of "substantive" equality (par. 2 of ex article 3 of the Constitution) in consideration of the societal clash resulting from the competing parties (employers and employees). However, this view seems to diverge from the previous one according to which the right to strike is a worker's "potestative" right (Ghezzi, 1963, 84). In other words, right holders (workers) are given the means to safeguard their interests (e.g. a strike). Legal literature has always considered the question concerning the identification of the right holder and the ways this right can be exercised (Bellocchi, 1994, 169). Many theories developed as to whether a right is granted individually, collectively or even "jointly", with the latter based on the German legal system (NOGLER, 2013, 12). Each of these views has prevailed over the years – depending on the period and the industrial relations system in place – and the debate is still ongoing today. Therefore, it is interesting to refer to research on who the holder of the right to strike is (F. Santoro Passarelli, 1949, 138 ff.; Tosi, 1989, 71 ff; Pino, 2005, 112 ff.; A. Zoppoli, 2006, 1ff.; Carinci, 2009, 424 ff.; Romei, 2012, 336-337; Borgogelli, 2014, 171ff; Lambertucci, 2015, 66 ff). The most widespread approach seems to be the one that considers the right to strike as collective, and more emphasis is given to whether this entitlement is exercised effectively.

1. The Right to Strike: From Holding to Exercising it.

With a view to distinguish between holding and exercising the right to strike, it seems useful to examine the meaning of the terms making up the notion of a "strike" to see how this right is exercised: right/entitlement; proclamation/exercise; abstention/exercise.

The right to strike encloses all these elements and doubtless is "a complex social phenomenon of both an individual and a collective nature" (Rusciano, 2002, 172).

As seen, Article 40 of the Italian Constitution determines that "the right to strike is exercised within the laws that regulate it". Act No. 146 of 1990[5] is a special provision which regulates the way this right should be exercised, limiting the freedom of the parties to ensure that other constitutional rights are safeguarded and to protect all the values that come into play.

Legal literature considered the distinction between the right to strike in essential public services and in other sectors (ROMEI, 1999, 221 ff; PILATI, 2004), although in the context of this paper a general overview of these aspects will be given by only pointing out a few major differences between the two forms of strike action. The puzzling formulation of Article 40 of the Constitution paves the way for new and different interpretations on the holder and of the way this right is exercised, with this latter point being more complex.

"Holding a right" refers to the relationship between a legal and individual status and the holder, who is "the reference entity of this right and its qualifying components which connect through his/her presence"; the word "holder" is used to refer to both someone who exercises a right and benefits from it (ZATTI, 1994. In relation to strike action, see ROMEI, 2012, 334).

Exercising is concerned with the practical implementation of a right. In the event of a strike, it implies the interruption of the employment relationship, while ensuring other workers' rights (e.g. trade union rights and those not related to one's work performance)[6]. The exercise of the right to strike is not legally permitted and does not comply with the conditions established in Article 40 of the Italian Constitution when it is detrimental to business productivity; that is when it hampers an employer's freedom of economic initiative as regulated by Article 41 of the Italian Constitution (Ruling of the Corte di Cassazione No. 711 of 30 January 1980). However, many questions arise concerning the holder of

[5] See Act 12 june 1990, n. 146, «Norme sull'esercizio del diritto di sciopero nei servizi pubblici essenziali» (G.U. 14 june 1990, n. 137).
[6] Cass. sez. lav., 30 october 1995, n. 11352.

this right. This is because in dealing with the right to strike, two legal dimensions must be considered: on the one hand, there are trade unions or any other collective bodies; on the other hand, there is the worker who decides to join the strike, and, therefore, to effectively exercise his/her right not to work (SANTONI, 1999, 19).

The wording "holding a right individually, but exercising it collectively" (SIMI, 1956, 125; MENGONI, 1961, 37; GIUGNI, 2010, 237) means that exercising such a right is "intended to promote no-individual interests"(BELLOCCHI, 1994; ROMEI, 1999, 247).

In this sense, besides the terms making up the wording of the Constitution, it is decisive to take due account of the underlying collective interest which concerns one's professional status[7], (F. SANTORO PASSARELLI, 1949, 12). Specifically: "the right to strike is concerned with collective action" undertaken to claim one's right, better working conditions, and new forms of collective bargaining (BALLESTRERO - DE SIMONE, 2012, 306). Consequently, exercising the right to strike and not going to work is functional to this interest (ROMEI, 2012, 335)[8].

Other authoritative scholars supported the thesis that the right to strike is either a right that individuals hold collectively, but exercise individually (PINO, 2005; ZANGARI,1976, 50) or a collective one (PERA, 1989, 699). Hence, a further distinction is made between the strikes resulting from the right to form trade unions and spontaneous strike action, which is initiated by a body or a group in times of labour conflict (BELLOCCHI, 2013, 326; M.G. GAROFALO-U. ROMAGNOLI, 1988, 581). At any rate, whoever the holder of the right, industrial action must be agreed upon collectively.

Two more competing theories exist which concern the exercise of the right to strike. The proclamation theory argues that an individual exercises his/her right to take industrial action following the decision made collectively (ZANGARI, 1976, 52), whereas the implementation theory supports the view that the decision to take industrial action is a collective one and therefore already complies with the types of strike action legally permitted, irrespective of the fact they are agreed upon by the collective (SIMI, 1956, 112; PERA, 1989, 699).

In reference to the exercise of the right to strike, Italian system makes a distinction between the moment a strike is called – which involves a group of workers, trade unions or organizations at the grass-

[7] See Trib. Firenze 31 october 1989, TLG, 1989, 695.
[8] Corte Cost. 28-12-1962, n. 123, in MGL, 1962, 416; Corte Cost. 14-1-1974, n. 1, in MGL, 1974, 11; Cass. 17-12-2004, n. 23552, in GL, 2005, n. 9, 53.

roots level – and that when workers stop working, which concerns workers exclusively.

Accordingly, while the prevailing view is that going on strike is "an individual right which is exercised collectively" (SIMI, 1956, 125), the fact that workers are the holders of this right is representative of a collective interest (GIUGNI, updated version by BELLARDI, CURZIO, LECCESE 2014, 263). Not going to work and exercising this right is a worker's choice, provided that this choice is agreed upon (or reunié(e) as French judges would say). The fact that it is the individual worker who holds the right to stop working is confirmed by the definition of a strike as one's decision "not to perform work as laid down in the employment contract" (SIMI, 1956, 24). In this sense, joining a strike is a right which can be exercised by workers, irrespective of their affiliation with trade unions or other bodies, thus treating all workers equal (BALLESTRERO, 2012, 380).

According to many, ambiguity arises when exercising the right to industrial action, since strikes are declared and take place in two different moments. Calling a strike does not mean that an agreement has been reached between workers who decide not to go to work. Rather, it can be seen as an invitation to join the strike (GIUGNI, updated version by BELLARDI, CURZIO, LECCESE 2014, 266), as effective agreement to take industrial action is reached only "when workers effectively and collectively stop going to work". The latter represents the exact moment a strike occurs[9].

Therefore, trade unions, or other groups established spontaneously to represent workers, have the task of pinpointing the collective interest and "guiding" individual workers while exercising their rights. However, they are not entitled to this right[10] and no-strike agreements are binding only for the signatories, not for individual workers (See sections 2 and 3). In other words, the announcement is a formal procedure which is not essential to a strike[11]. According to most scholars, exercising the right to strike does not require an announcement on the part of trade unions (BALLESTRERO – DE SIMONE, 2012, 309). Consequently, calling a strike is "a voluntary act that is not subject to any special requirement and through which those concerned decide to disseminate the news of such action to meet certain collective interests" (A. ZOPPOLI, 2006, 153). Calling a strike means to "spread the word concerning industrial action" and "to make people aware of who organized it", although it is frequently the case that "no declaration takes

[9] Cass. Sez. lav., 8 august 1990, n. 8021, Trib. Roma, 2 june 1987.
[10] Trib. Siena 27 october 2008, in RGL, 2009, II, 877.
[11] Cass. 17 december 2004, n. 23552, in DRI, 2005, 506; Trib. Roma 27 november 2007, in LG, 2008, 827.

place, and, when it does, it is not formalized so as to allow the identification of those who called it" (A. ZOPPOLI, 2008, 670; PASCUCCI, 2008, 12). Groups other than trade unions can call a strike and encourage individual workers to exert their right, leaving them free to decide to join the protest or to go to work (ROMEI, 2012, 334). As far as the exercise and the announcement of a strike are concerned, emphasis should be given to the practical implementation of one's right to industrial action.

A distinction should be made between the moment the strike is called collectively – the official announcement, i.e. when information is given about the way this right should be exercised (LUDOVICO, 2014, §6) – and when this right is exercised individually, in compliance with Article 40 of the Constitution and Act No. 146 of 1990. Essential public services have been regulated by means of special provisions. Legal literature has observed that the new procedures to call a strike as amended by Act No. 146/1990 have generated a new interpretation of legislation concerning the right to strike, which now sees it as a collective rather than as an individual entitlement (RUSCIANO, 2002, 2). Both the rights to join and announce a strike and those to exercise it and not to go to work are limited through measures preventing conflict[12].

The same does not happen in other areas where these aspects are usually governed by case law. The collective nature of industrial action emerges when the strike occurs, as collective bodies with a sufficient power of representation voice the interests of a category or a group of workers (SIMI, 1956). Others argue that the collective dimension of a strike already manifests when the latter is announced (F. SANTORO PASSARELLI, 1949), supporting the view that emphasis should be given to the collective interest over the scope for workers to decide not to perform their duties. This aspect can be explained by the fact that the decision of an individual worker not to perform his/her tasks to pursue as collective interest is itself regarded as a form of strike[13]. Yet the reverse is also true: the case of a group of workers who do not go to work to fulfill personal, albeit unrelated, interests falls within the definition of a strike[14].

However, as argued earlier, strikes can also be called by entities other than trade unions. In fact, this right can also be exercised by workers who are not trade union members and even by those whose view is not in line with that of trade unions, like for instance grassroots

[12] See the conciliation procedures implemented before calling a strike, art. 2, Act n. 146/1990.
[13] Pret. Castelnuovo Garfagnana 9 june 1971, GC, 1971, I, 1882.
[14] Cass., sez. lav., 23 july 1991, n. 8234.

organizations (GIUGNI, updated version of the volume by BELLARDI, CURZIO, LECCESE 2014, 263)[15]. Accordingly, calling a strike does not require a formal announcement or notice, save for those cases laid down in self-regulation codes.

Finally, since the right to strike is an individual entitlement aimed at safeguarding a collective interest, exercising this right requires that workers who totally or partially suspend their working activity should made this decision collectively, irrespective of their decision to take part in the strike[16].

To this end, Italian legislation allows for the right to organize meetings (Article 20 of Act No. 300/1970) and referenda (Article 21 of Act No. 300/1970), through which trade unions and other organizations can ensure workers' consensus.

The considerations on holding and exercising the right to strike lead one to reflect on the conventional limits and the sanctions laid down by trade union rules if workers decide not to perform their duties, also when not going to work is a collective decision and takes place spontaneously. This peculiar form of strike action is often referred to as "wild strike".

As seen, any group of workers driven by individual reasons can generate a collective interest and become a legal entity and, as such, a holder of this right. They can spontaneously decide not to perform their duties, with this act that is an uncontrolled, unscheduled and unorganized manifestation of the will of autonomous groups.

Spontaneous strikes still represent a critical issue in Italian system, particularly when assessing their legitimacy at the time of their announcement and considering "hypothetical" sanctions (MAGNANI, 2005, 79; FERRARI, 2006, 86). This is especially true in relation to essential public services, since Act No. 146/1990 has been seen as a form of "collective means to channel conflict" (IORIO, 2005, 176).

The most important amendments on this issue are included in Resolution No 05/518 of 16 October 2008 of the Official Committee on Strikes. This provision states that in the event of a series of spontaneous and collective strikes from which no elements emerge to identify the organisers (MONTUSCHI, 2003 e 2005), an inquiry into the workers involved would not result in the application of the penalties laid down in Act 146/1990 and ff. Rather, this move should be viewed as an invitation to the employer to sanction those held responsible for allegedly illegal strikes.

[15] Cons. Stato, sez. IV, 12 october 2000, n. 5414.
[16] Cass , sez. lav., 08 august 1987, n. 6831.

As pointed out in the case of spontaneous strikes, subjectivity and collective aspects cannot be taken into account and the only question that should be answered is whether trade unions can take steps to regulate the actions of dissenters. Further, a relation should be established between this type of strikes and the legal procedures, the sanctions and the new rules contained in the 2014 Consolidated Text, taking into account the aspects concerning the distinction between the "exercise-announcement" and the "exercise-adhesion" moments (Section 3).

To sum up, while no problems arise in relation to the procedures to call a strike, some questions emerge concerning the sanctioning mechanism and the implications that failing to sanction spontaneous strikes might have on third parties. When the social partners try to regulate and harmonise competing interests – thus limiting one's right to strike – the recourse to spontaneous strikes is likely to increase, precisely because they are neither regulated nor limited through a conflict-management system.

2. From Industrial-peace clauses to the "enforceability" of collective agreements.

The revived interest on who has to be regarded as the holder of the right to strike has been accompanied by a lively debate on collective conflict due to a major review of the national industrial relations system (TREU, 2013, 597; ROMEO, 2011, 464-465; GRAGNOLI, 2013, 658 and ff.) and of the role of trade unions. Besides being involved in law-making on working conditions (ROMAGNOLI, 2013, 7), unions are also tasked with ensuring that collective dynamics do not affect the presence of businesses in the labour market (ROMEO, 2013, 467; CARRIERI, 2011, 25 and ff.; MARESCA, 2014, 564). This function of collective bargaining, which is mainly the result of the new economic context and globalization (Lassandari, 2005, 266 and ff.) can be found in the recent agreements concluded by the social partners (LASSANDARI, 2013, esp. 253 and ff.), which are intended to prioritise the adequate economic planning of production.

Against this changing background, conflict is governed through clauses of industrial peace negotiated at different levels in collective bargaining.

An analysis of the most recent collective agreements might help to become familiar with the main features of a never-ending debate among industrial relations scholars, which particularly concerns the relationship between the enforceability of the contract and the right to strike (Mengoni, 1975, 253 was the first who considered the enforceability of the collective agreement in Italy. A more recent evaluation of this topic is

provided by GHERA, 2012, 243 and ff.; LAMBERTUCCI, 2015b, 72 and ff.).

Before providing a detailed analysis of this issue, it might be useful to draw a distinction among absolute, relative and procedural clauses of industrial peace. Absolute clauses are those through which conflict is prevented. Theses clauses cannot be included in the collective agreement since it unlawfully limits the right to take industrial action. Conversely, relative and procedural clauses are legally permitted. Briefly, relative clauses limit the exercise to the right to strike in definite issues, whereas procedural clauses involve the use of arbitration and conciliation practices to resolve conflict.

It should also be noted that the prevailing view that the right to strike is an individual one have led lawmakers to acknowledge that industrial peace clauses apply to collective entities but not to individual workers (for a summary of the doctrinal debate, after GHEZZI, 1967, 149 and ff., see PASCUCCI, 1990, 493 and ff. and more recently, P. LAMBERTUCCI, 2015b, 72 and ff.) since the latter cannot waive or amend their right to strike. Consequently, industrial peace clauses have been included among the mandatory terms of collective agreements, while the worker's possible misconduct has been considered only in the relationship between trade unions and workers[17].

A different outcome would have allowed to regard one's right to strike as a collective one, since the clauses of industrial peace could have applied to both workers and the signatory trade unions. No changes have been reported in relation to the debate concerning the exercise of the right to strike. It is worth recalling that in a very few cases, scholars have argued that these clauses imply that trade unions and their members waive their right to strike, particularly if one considers union representation (F. SANTORO PASSARELLI, 1971, 375 and ff.; PERA, 1964, 927 and ff.).

Significantly, the current discussion on the role and the definition of industrial peace clauses is also influenced by the thesis put forward by legal literature. The view that the right to strike is collective has been given fresh momentum, encouraging many scholars to question the weakness of the mandatory section of the collective agreement in Italian unionism (TREU 2007, 658; DE LUCA TAMAJO, 2011, 364; CORAZZA, 2012, 126, who discuss the presumed backwardness of these measures if

[17] It must be pointed out that the only pronunciation of Cassation on the point considered the terms of ceasefire binding on workers, valuing the bond of employee representation by the union policyholder and function and conciliatory settlement of the collective agreement. In these terms Cass. 10/2/1971, no. 357. This is a thesis partially taken from LISO-CORAZZA, 2015, 6.

compared with the negotiation practices in place in the UK, Spain and Switzerland).

One might note that industrial peace clauses were in force as early as the 1960s. This aspect was evidenced in collective bargaining, according to which these and so-called postponement clauses are mutually related. Specifically, industrial peace clauses were intended to safeguard the assignment of competences in the collective agreements concluded at a higher level. This was followed by a period of permanent conflict (GIUGNI, 1970, 34 and ff.) where industrial peace clauses lost their relevance and were only seen as standard clauses. Following this period when employment contracts were not viewed as tools to deal with labour conflict, a new scenario emerged where industrial peace clauses were intended to manage conflict in exchange for an obligation on the part of trade unions to provide workers with information concerning their rights (CORAZZA, 2014).

Noting that unregulated collective conflict represents a luxury that many economic systems can still afford (DEL PUNTA, 2012, 50; ICHINO, 2006, 16 and 223), the most recent industrial peace clauses differ greatly from the "commitment schemes" foreseen by the Giugni Protocol, for at least two reasons.

The 1993 Protocol made provision for industrial peace clauses lasting up to the conclusion of the collective agreement, envisaging sanctions for workers, who were no longer paid during the collective shortcoming. Following the Separate Agreement of 22 January 2009 (RICCI, 2009, 367; F. CARINCI, 2009, 177 and ff.; CORAZZA, 2012 amplius), collective agreements prioritized conciliation and arbitration procedures over the power to waive or suspend one's right to industrial action.

Especially since the conclusion of the Interconfederal Agreement of 28 June 2011, the parties agreed to establish and regulate an industrial relations system that favoured competitiveness and productivity to boost production, employment levels and remuneration (TREU, 2011, 616).

The implementation of measures to avoid conflict is illustrated by the common willingness to conclude and make use of industrial peace clause, as a normal and necessary tool to guarantee the stability of collective bargaining binding for the trade unions and the employers' associations which signed the 2011 Interconfederal Agreement, by virtue of which the collective agreements concluded at a company level become enforceable.

Unlike the past, the most recent collective agreements are devoid of a repressive approach towards conflict, since there are no sanctions for

those engaged in conflict-management if failing to fulfil their duties is the result of compliance with the contractual terms (MASTINU, 2013, 381).

An exception to this state of affairs are the collective agreement concluded in the plant of a leading car manufacturer (he last of which was signed in the month of July 2015) where conflict is regulated by assigning more responsibility to trade unions than in the past (ROMEI, 2012, 572; MASTINU, 2013, 382; BAVARO, 2015, 302-303). Besides committing not to use industrial action as a tool to amend collective agreements prior to their expiration, now trade unions also face responsibility (MARIUCCI, 2011, 500; F. CARINCI, 2010, 598; TERZI, 2011, 18) if workers engage in protests which trade unions are unable to stop and which seriously endanger the continuation of the business activity (CHIECO, 2011, 365; S. LIEBMAN, 2011, 1284).

Although its peculiar nature in company level collective bargaining, this clause is lawful, since the effects of the negotiations of industrial peace do not concern the worker's prerogatives, but the powers of trade unions on an exclusive basis (DE LUCA TAMAJO, 2010, 1087).

The last time when collective bargaining considered these clauses was on 10 January 2014, that is when the Consolidated Text on Representation was enacted. It was stated that "The signatory parties of recent collective agreements commit themselves to establish penalties to sanction any act or omission impeding the enforceability of the national collective agreements concluded pursuant to the present provision. This will be done with a view of laying down measures to prevent and sanction actions compromising the negotiation process, as established by Interconfederal Agreements, and the enforceability and effectiveness of the collective agreements concluded in compliance with the principles and the procedures referred to in the above provision".

The wording of the Consolidated Text on Representation confirms the decision to assign liability to the trade unions which sign or adhere to interconfederal agreements, by laying down industrial peace clauses in the collective agreements concluded at the company level and solving the issues of the effectiveness of and compliance with these terms. In other words, industrial peace clauses are not assigned legal value so that workers face no direct liability if they breach a "peace obligation". This aspect points to the need to make the collective agreement enforceable – as indicated by the foregoing company level collective agreements, the Interconfederal Agreement of 28 June 2011 and the Agreement signed on 31 May 2013. It also calls for the need to lay down special sanctions for any violation resulting from non-compliance with the terms of the collective agreement (about some example of penalties for non-compliance should be noted LAMBERTUCCI, 2015, 95-96). The notion of

"enforceability" (about its significance, recently FALSONE, 2015, 123 and ff.) is used to provide protection against strikes and other forms of industrial action that endanger the performance of the contract, therefore safeguarding the interests stemming from the implementation of the latter (MARESCA, 2014, 570).

In conclusion, the most recent experiences show that the renewed purpose of the collective agreement is that of ensuring compliance with contractual duties without affecting its performance. This need for certainty can be seen in the terms regulating the binding industrial peace clauses of the collective agreements concluded at national or a company level, which extend the effectiveness of the latter to all the parties concerned. In company level collective agreements this aspect is evident in clause 6 of the Interconfederal Agreement of 28 June 2011 and in clause 5, part IV of the Consolidated Text of January 2014. As for national collective agreements, one can have a look at clause 5, part II of the Agreement of May 2013 and clauses 2 to 4, part IV of the Consolidated Text.

Unlike the past, the introduction of industrial peace clauses in the collective agreement is not to be intended as a standard clause (CORAZZA, 2012, 55), but as a tool to ensure compliance with the commitments undertaken by the parties to the collective agreement (see DE LUCA TAMAJO, 2010, 798; contra BARBIERI, 2014, 578). In other terms, what emerges in the most recent collective agreements is the willingness to effectively regulate conflict and to help businesses stay in the labour market through a stronger and new commitment of the signatory trade unions. This is even truer if one considers the role they can play to avoid the outsourcing of production (see CORAZZA, 2011, 374).

3. Enforceability and Sanctions.

In order to gain an understanding of the novelties introduced by part IV of the 2014 Consolidated Text (CORAZZA, 2014, 1), it should be highlighted that more relevance is given to the consequences of non-compliance with contractual system than in the previous agreements. Specifically, the 2011 Interconfederal Agreement and the 2013 Memorandum of Understanding devoted only one and two clauses to this aspect, respectively, while five paragraphs covered this issue in the 2014 Consolidated Text. Furthermore, "the need to lay down provisions to prevent and sanction" any violations of contractual rules is highlighted for the first time. A further confirmation of the need to regulate conflict is also evident in linguistic terms, due to the frequency of expressions like "to sanction", "penalties" and "sanctioning mechanisms".

This could be seen as symptomatic of a transformation of the industrial relations system (VALENTE, 2014, 454). Many politic, social and economic factors exist which affect the dynamics of trade unions and encourage social actors to move beyond an adversarial approach: strikes, workers' traditional protection tools, are less widespread than in the past (CORAZZA, 2012, 13; G. SANTORO-PASSARELLI, 2013, 416); trade union density is decreasing among workers and employers (CELLA, 2002, 118 and ff.; LANZALACO, 1998, 147); the fact that collective bargaining is increasingly carried out at the company level, along with the internationalisation of production, have inevitable implications on industrial relations systems; the threat of delocalisation, especially in times of crisis, acts as a deterrent to trade union claims; the recent political instability and the lack of rules on union representation seem to encourage self-regulation among the social partners.

This complex framework includes the commitment of the signatories of the 2014 Consolidated Text to fully implement what has been agreed upon, by resorting to negotiation to deal with conflict. The social partners acknowledge the need to devise tools to prevent and tackle possible conflict while concurrently providing sanctions for those who violate and invalidate the contractual terms (MARESCA, 2015, 111 ff.). In this respect, a break with the past can be seen in that trade unions show their reliability and capability to represent by avoiding conflict, rather than spurring it (CORAZZA, 2012, 13; DEL PUNTA, 2012, 31; LISO, 2013, 837). This calls for the need to ensure compliance with contractual clauses by establishing a sanctioning system in the event of a violation of such clauses.

The generic nature and the enforceability of industrial peace clauses do not allow to provide a clear definition of "a breach of the contract". In the 2014 Consolidated Text, a contractual breach is defined as "any type of action intended to jeopardize the negotiation process". This is a wide definition and includes a number of approaches. Breaching a contract does not only mean to call a strike while the collective agreement is still in force, nor does it necessarily refer to illicit conduct, but to any action which might compromise what has been decided upon in the agreement (MARESCA, 2015, 111 ff.).

It should also be pointed out that the 2014 Consolidated Text makes reference to any act or omission, without making any distinction. Therefore, trade unions not only commit themselves not to call a strike, but also to make sure the collective agreement is complied with, by exerting their influence on member associations at a local level and on workers, be they individuals or organised in collective bodies.

An interesting aspect concerns the identification of those who can be held liable and can be sanctioned in the event of a breach of the collective agreement. Unlike Act 146/90 (and following amendments) concerning essential public services, the 2014 Consolidated Text does not allow sanctions to apply to individual workers. This distinction has reasonable grounds, because it is legislation and not the collective agreement that is taken as a source of regulation. In addition, the peculiar nature of public essential services ensures that users, who are regarded as third parties within the employment contract, enjoy the rights laid down by the Italian Constitution.

The 2014 Consolidated Text keeps silent about the case of groups of workers who call a spontaneous strike. On this score, we agree on the position of the European Committee of Social Rights, which argues that industrial peace clauses "only apply to the members of the signatory trade unions and not to other workers, whether or not unionised" (European Committee of Social Rights, 2005, 40).

As things stand now, and without considering the complexity to identify the members of spontaneous groups, it is difficult to admit the possibility of sanctioning groups of workers who call a strike spontaneously and thus violate industrial peace clauses. This is because the 2014 Consolidated Text chose not to act on the relationship between individuals, but to strengthen the links between trade unions. Such an approach is evident if one looks at the frequency of the wording "the signatory parties" in the text and is realized through the provision of sanctions within the collective agreement itself, which ensures that trade unions fulfil the duties they have undertaken (F. CARINCI, 2014, 67).

For the reasons explained above, it seems more appropriate to talk of "enforceability clauses" than of "industrial peace clauses", as is traditionally the case. Significantly, making enforceability dependent on the relationship between trade unions rather than on legislation (VISCOMI, 2013, 773) entails some serious difficulties in devising effective civil-law remedies in the event of non-compliance with contractual clauses. This is an important aspect and poses the question of finding adequate sanctions.

The 2014 Consolidated Text entrusts collective agreements concluded at national and company level with the task of regulating and detailing the sanctioning mechanism for the "contracting parties", therefore providing "monetary sanctions or other penalties involving the temporary suspension of the trade union rights included in the collective agreement and any other entitlement resulting from the present understanding". However, the new procedures related to collective

bargaining have not been initiated so far, thus it is not possible to provide an assessment of the applicable sanctions.

In any event, the remedies provided by civil law seem to have little effect (e.g. the objection raised regarding non-performance and termination clauses). They can be found in contracts laying down reciprocal duties, where the obligation to maintain peace on the part of trade unions is offset by the allocation of economic or trade union benefits to workers.

Equally ineffective is the request to the Court to terminate the contract due to non-compliance and to award damages to the injured party. This is because the slow pace of the legal system would negatively affect the dynamism of trade unions and it would be complicated to ascertain and assess (GIUGNI, 1973, 24) one's damage (DELL'OLIO, 1990, 671 rules out the causal nexus between the strike called by the unions and the damage caused to the employer resulting from workers' non-performance of duties. Nevertheless, relevant case law admits compensation for different types of damage, also indirectly caused).

The 2014 Consolidated Text refers to pecuniary sanctions and envisages a penalty clause as an alternative to the award of damages. Nevertheless, this move does not serve as a sufficient deterrent, neither for the employer (individual employers or employers' associations) nor for trade unions. In light of the above, providing conciliation procedures and establishing an arbitration board and a permanent inter-union committee seem to be the most effective tools to settle possible disputes.

The failure to implement the 2014 Consolidated Text stirs up the debate about whether legislative action is needed in industrial relations (RUSCIANO, 2003, 266). This might help to protect workers falling outside the scope of application of the 2014 Consolidated Text and to ensure that rules are applied consistently in such a delicate area as the right to strike.

4. Comparative analysis between Italy, Britain and France.

In Britain the absence of a written Constitution, like the one at the base of many legal systems traditionally defined civil law, such as Italy and France, involved the development not so much of the recognition of a real right to strike, but rather the affirmation of a widespread negative freedom to strike.

As is known, in fact, in common law countries, namely based on law pronounced by the courts through the judgments, it is possible to recognize the layer of legality before the parliamentary legislation (CORRAZZA – DI GIOVINE – FERRARI, 2013, 74). For this reason, into

the Anglo-Saxon judicial system, the courts have played in the determination of boundaries and limits to the exercise of the right to strike a crucial role.

During the nineteenth century, the "Master and Servant Act" considered the exercise of the strike like a crime as well as cause of resolution of the employment contract. In addition, the Courts shared the same line of thought. In fact, the latter developed a system of additional penalties. The Trade Disputes Act of 1906 made an important breakthrough because it laid the foundations of the actually negative freedom to strike. However, the unions and the workers did not enjoy even a fundamental right to strike. The law, in fact for this reason, provides for trade unions and workers a system called "immunity", without which the same should answer for the crimes of termination, of incitement to breach of contract, of harassment and damages. Through the system of immunity any act performed during the announcement or promotion of a labor dispute, according to the so-called "golden formula disputes" (Monkam, 2010, 10), is covered by a status of immunity significant both in terms of criminal than civil responsibility. Currently the Trade Union and Labour Relations Act of 1992 regulate the exercise of the freedom to strike. Even in the absence of a legal definition of a strike, it provides that a dispute between workers and employers gives immunity to workers, who would otherwise be liable to sue for damages. This dispute must be significantly related to problems concerning the workplace, in this way ruling out the legality of any form of political strike or solidarity. Richer in this respect appears the Employement Rights Act of 1996. This Act mentions most definitions of strike including "the cessation of work by a body of workers collectively" or "the joint refusal of most workers to continue working for the employer in the presence of a labor dispute "(BARRET - EARL - LYNCH, 2012, 92).

The Trade Union and Labour Relations Act, as later amended, provides for a series of procedural requirements to be respected before the start of the strike because industrial disputes involve high cost and often they are detrimental for companies and workers. In Britain, for this reason, the culture of negotiation is very developed. However, when this is not possible, the Trade Union of '92, as amended by "Employment Relations Acts" of 1999, disciplines a rigid and complex procedure characterized by a preventive "pre -strike ballots", a secret ballot held among workers of the factories affected by the strike.

The violation of the procedure of pre-strike ballots involves for the union the loss of immunity (MAGNANI, 2013, 55). The Government also made a similar proposal in Italy with the presentation in the Senate of the bill n. 1473 of 2009, concerning the reform of the discipline of the

strike in the public services. Regarding instead the conventional limits to the exercise of the right to strike should be noted that, although the British judicial system does not knows a real obligation of industrial peace, some collective and individual agreements can force workers not to strike for a period of time (ARABELLA STEWART & MARK BELL, 2012, 102).

In fact, the TULRCA of 1992 (the Trade Union and Labour Relations (Consolidation), provides that when a collective agreement contain no strike clauses, these will form part of individual's contract of employment only when: 1) the collective agreement is made by an independent trade union and it is in writing; 2) it states that the no strike clause may be incorporated into contracts of employment; 3) it is reasonably accessible during working hours; 4) the worker's own contract expressly or impliedly, incorporates it into his contract. It is no possible for a collective agreement or individual contract of employment to contract out of the above conditions.

In France the recognition of the right to strike and its relevance as a constitutional right, must be considered the result of a long and difficult path. Said path arrived to fruition only with the approval of the preamble of the Constitution of 1946, reclaimed by the next of 1958. This preamble, which also inspired the Italian Constitution, provides in section 7 that "the right to strike is exercised in the context of the laws that regulate it." Based on the reference in the Constitution to the law, during the years, in contrast to what happened in Italy, the legislature intervened several times to regulate the right to strike both in the private labor sector both in the public.

In a fragmented legal framework, the vertices by the Court of Cassation and the State Council have made up for the gaps left by the legislature, both for the scope both for the definition of the limits of the right to strike[18]. In France, the right to strike is defined as "a collective and concerted work stoppage in support of claims professional[19]" From this definition derives that, as in other jurisdictions such as the Italian, the right to strike appears as an individual right to exercise necessarily collective (PELLISSIER, 2008, 1406 - TEYSSIE ', 2012, 893).

In the French system the exercise of the right to strike is limited mainly from legal sources, especially in the public sector (as, indeed, in the Italian system), while for the private sector, the Civil Code identifies some optional procedures for resolving conflicts at the basis of the

[18] Cons. d'Et. 7 july 1950, Dehaene, D. 1950, 538, comment by André Gervais, G.C.P. 1950, II. 5681, conci. Gazier; Civ. sect, soc., 27 jenuary 1956, D. 1956, 481.

[19] Cfr. Cour de Cassation 23 october 2007, in RJS 01/08, n. 65.

exercise of the right to strike, such as conciliation, mediation and arbitration (not present in the Italian if not to establish conventionally).

Regarding the conventional limits to the exercise of the right to strike, for a long time, the General Confederation of Labour, also supported by the Literature (SINAY - Javillier, 1984, 250), defended the thesis of nullity of the no strike clauses. This conclusion is based on the preamble of the French Constitution which poses as the only restriction on the exercise of this right the laws that govern it.

Indeed as early as the 60s' that view it was widely criticized by the Literature and jurisprudence. The idea that the trade unions signed a collective labor agreement are required to not declare the strike for matters governed by the same collective agreement during its validity, (DURAND, 1961.216) according to the more general principle of good faith and fairness in the execution of the obligation, it begins to emerge in this period (DURAND, 1961.216)

The actual labor law Literature believes that conventional clauses limiting the strike, understood as an individual right, it is not always invalid. an important ruling by the French Supreme Court has reinforced this concept[20]. The French Supreme Court, considering a negotiating clause requiring a period of notice in the event of a strike in the private sector, said not so much the illegality of the clause, but the ineffectiveness against individual workers, who, on strike, exercise a constitutional right (Cristau, 2008, 9).

5. Brief Conclusions.

The economic crisis, the outsourcing of production, and globalization have produced significant changes in industrial relations and trade union activity, causing a worsening of conflict and a gradual decrease in unionism rates among employers and employees. Against this background, a change is evident in the way strikes are organized, since workers' traditional non-performance of work gives way to other collective mechanisms of self-protection (CORAZZA, 2012, 13). Consequently, industrial peace clauses have also been amended and become enforceability clauses, as laid down in the 2014 Consolidated Text, even though their legitimacy has been questioned by a part of legal opinion.

The review of the trade union system and the close relationship between different economic dynamics affect industrial peace, placing the need to make collective agreements enforceable high on the agenda of trade unions.

[20] Cass. Soc. 7 june 1995.

Enforceability is the mechanism identified by the social partners to ensure the effectiveness of collective agreements (MARESCA, 2015, 112) which is also supplemented with a set of sanctions put in place to avoid conflict. This way, protest, which in the past was the prerogative of trade unions, now also takes place through spontaneous strikes called by groups of workers, who are motivated by collective interests, irrespective of the union they are affiliated to. These groups cannot be sanctioned, since statutory penalties only apply to the contracting parties and not to individual workers.

In the view of the foregoing considerations, the 2014 Consolidated Text seems to argue in favour of conflict resolution through arbitration and conciliation procedures. The trend to promote the amicable resolution of employment-related disputes is also evident in the other countries surveyed (The UK and France). In the first case, pre-strike ballots are organised, while in the second case a widespread use of conciliation and mediation mechanisms has been reported in both the public and the private sector.

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