Right to strikes in public interest services (in Italy)

Giovanni Orlandini (University of Siena)

The Italian case is particularly interesting in the European context because it shows how the right to strike can be severely restricted even in a system in which this right is expressly and solidly recognised as a fundamental right in the Constitution. In particular, the Italian case shows very well how through the technique of balancing it with other rights and freedoms protected by the Constitution, the right to strike can be deprived of much of its content and rendered de facto an ineffective weapon.

1. The right to strike in the Italian legal order

The right to strike is recognised by Article 40 of the Italian Constitution, which delegates the ordinary law to regulate its exercise. However, no law in this matter has been adopted until 1990, when a law was approved to regulate strike in the area of public services. Until then, the regulation of the right to strike came about only through case law, thanks to the principles developed by the Constitutional Court and the High Court (*Corte di Cassazione*). The latter in particular has progressively strengthened the status of this right, recognising that its content, not being specified in any way by the Constitution, coincides with '*the common meaning that is attributed to it in the factual industrial relations context*' (*Cassazione* Judgment No. 711/80). Consequently, no limit to the right to strike can be configured by interpreting Article 40 in relation to its mode of exercise and the purposes it pursues. The only legitimate limits permitted by the Italian legal system are those aimed at protecting other constitutional rights (the so-called external limits), as also affirmed by the Constitutional Court (Judgment No.222/76).

According to absolutely settled case law, the right to strike is considered an individual right of workers, albeit to be exercised collectively. The 'individual' nature of the right to strike reflects the extremely pluralist feature of the Italian industrial relation system, in which many different unions coexist. As an individual right, it is out of the availability of the trade unions. There is therefore no peace obligation and the peace clauses included in collective agreements have little effect because they do not legally bind workers.

It is precisely the extreme pluralism of the industrial relation system that explains the origin of Law 146/90 regulating strikes in essential public services. The law was adopted, with the consensus of the main trade union organisations (CGIL, CISL, UIL confederations), with the main objective of limiting the conflictual conduct of the so-called autonomous unions (grassroots unions). In 2000, the law was substantially reformed to strengthen and broaden its scope. These two dates are not random: 1990 is the year of the World Cup in Italy and 2000 is the year of the 'Great' Jubilee called by Pope John Paul II.

2. Law No. 146/90 on the exercise of the right to strike in essential public services

The purpose of Law 146/90 is to balance the right to strike with the rights that (like the right to strike) are based on the Constitution and which are held by the users of public services (for this reason defined as 'essential'). This balancing is concretely carried out, in compliance with the principles laid down by the law, in the various public service sectors by rules determined through a procedure involving the social partners and an administrative authority (the "*Commissione di Garanzia*"), which has the task of assessing the content of collective agreements identifying the minimum services ('*prestazioni indispensabili*') to be guaranteed during strikes and of supervising compliance with the rules laid down by the law and by the agreements themselves.

It is therefore up to the social partners, through collective bargaining, to define the rules applicable to the individual sectors and the concrete content of the "minimum services" in each sector. But this is a fictitious collective autonomy, because the content of the agreements is conditioned by the provisions of the law and the intervention of the *Commissione*, which can also replace the social partners, directly dictating the rules to be observed in the individual sectors.

In fact, the law requires collective agreements to provide for notice (minimun 10 days), cooling-off and conciliation procedures; to indicate the maximum duration of a strike (which normally can never exceeds 24 hours); to establish minimum intervals between one strike and the next that affects the same service (even if called by a different union); to establish percentages of service to be guaranteed during the strike (as a rule, 50% of the normal) and of workers who provide them (as a rule, 1/3 of the total); to establish daily time slots and exemption periods during the year (first of all, Christmas, Easter and Summer holidays) in which it is forbidden to strike (i.e. during which the service must be 100% guaranteed).

To understand the real impact of these rules, one must consider the breadth of their scope, which has increased over the years because the notion of 'public service' is not determined by law in an exhaustive manner (Article 1, Law 146/90). A public service is considered 'essential' if it can be traced back to a constitutional right, but the number of constitutional rights listed by the law is extremely broad and practically any public service can be traced back to them, regardless of the public or private nature of the body providing it. To give just one example: even the opening of museums is considered an essential public service because it guarantees the right to the protection and enjoyment of the country's artistic and cultural heritage.

On the other hand, not only 'strike' actions fall within the scope of the law, but any conduct that affects the service (such as a workers' assembly, or even the simultaneous sick leave of a 'suspected' number of workers).

Lastly, the law gives the public authority (Minister or Prefect) an extraordinary power to adopt back-to-work orders (orders of "*precettazione*"), normally at the request of the *Commissione*, in the event that the strike causes '*a well-founded danger of serious and imminent harm to the rights of the person*' (Article 8 Law 146/90) (obviously, in the opinion

of the Minister and of the *Commissione*). The order can be adopted (in theory) even if the rules on minimum services are complied with. Violation of this order results in very heavy fines for the union calling the strike and for the workers partecipating in it (who, however, cannot be dismissed).

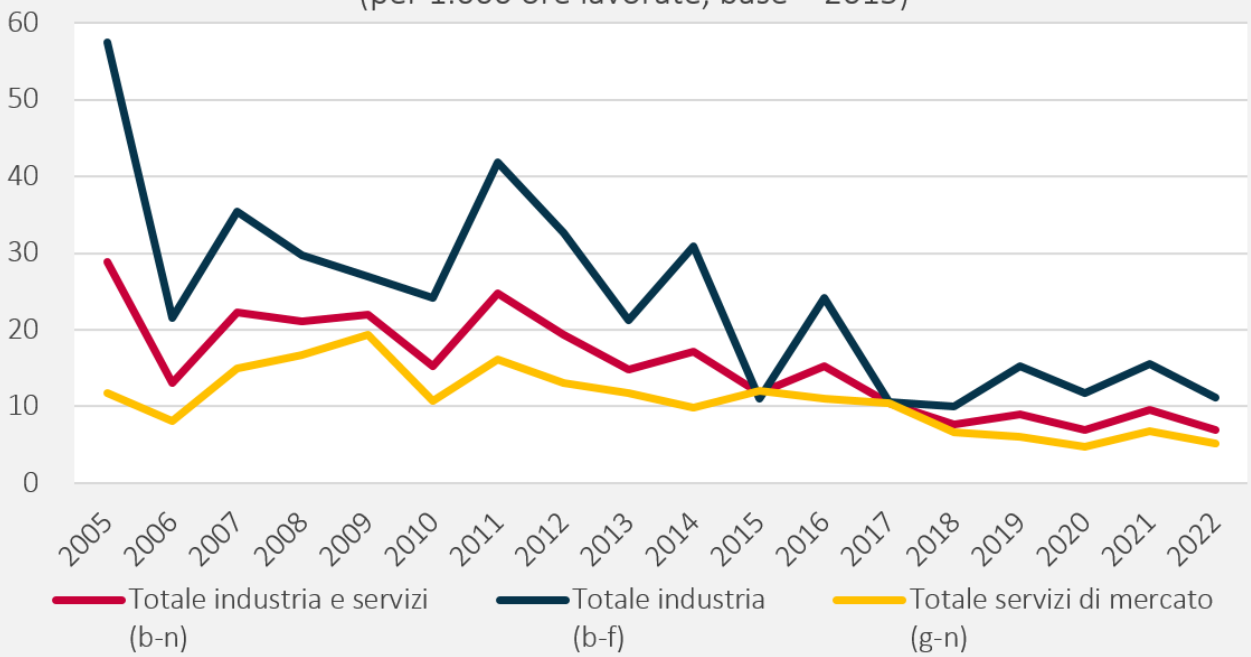
It is a very incisive authoritative power, the use of which varies (of course) as Governments change. The current Minister of Transport has made and is making massive use of it. And this despite the fact that the number of strike hours has not increased at all in recent years.

3. Data on strikes in the public services in Italy

The data on strikes in Italy indicate that the number of strike hours in public services since the law was approved has remained more or less constant, with some fluctuations and in a context of general reduction in conflict (as it happens in almost all European countries).

In this graph, the yellow line refers to strike hours in the service sector since 2005 to 2022.

Fig. 10: Ore di sciopero per settore
(per 1.000 ore lavorate, base = 2015)

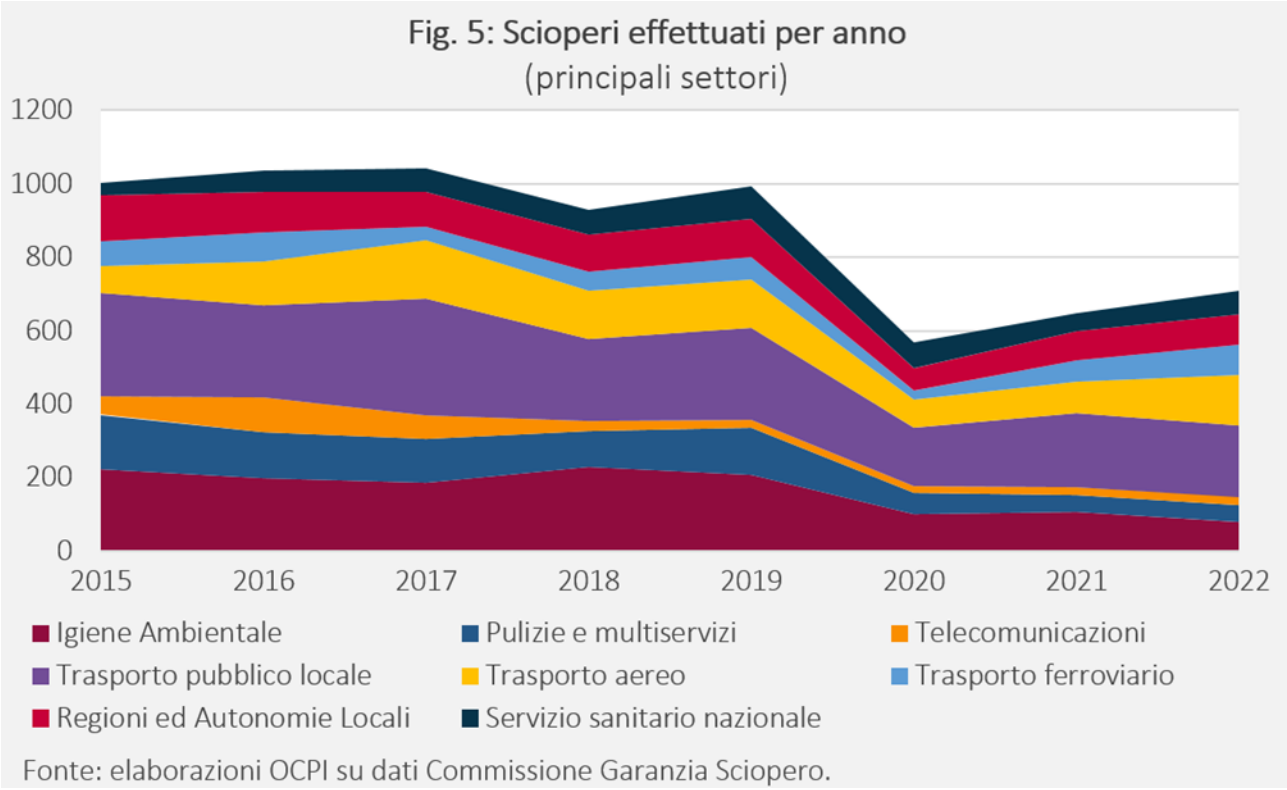


Fonte: elaborazioni OCPI su dati Istat.

It is true, however, that the law has produced a sort of paradoxical effect, at least in some sectors (like transport and cleaning services): since a single strike action is ineffective and and essentially harmless, unions tend to multiply strike actions, exploiting the few spaces

that the law leaves open. In other words, instead of a single strike completely blocking the service, numerous strikes of a few hours are called over several months. With the consequence that the inconvenience and the impression of disorder by users increases, instead of decreasing.

This graph shows the trend in the number of strikes in the different service sectors since 2015.



The reason for this persistent conflict in some public services is mainly to be found in the public budget cuts and wage austerity policies pursued by all Governments since the 1990s. Italy is the European country with the lowest wage growth rates, and this is particularly the case in some service sectors (such as cleaning and transport services), which are provided by private companies operating under concession from the State or local authorities. The harmlessness of strikes, on the other hand, does not allow trade unions to effectively counter these policies nor to adequately support collective bargaining, in a sort of vicious circle fostered precisely by the law on strikes.

4. The legal strategies of trade unions to defend the right to strike

What legal strategies have been adopted by trade unions to defend the right to strike in such a legal framework?

First, the trade unions, both confederations and autonomous, acted at the level of domestic law, challenging Commission acts and public authority orders before the administrative courts.

The actions have been brought before administrative courts, not labour courts, because their purpose is not to challenge employers' conduct but the exercise of administrative power, on which the limits on strike actions depend. This makes action in court more difficult, because administrative judges, on the one hand, are less used to dealing with labour issues, and on the other, tend to respect the discretion of administrative bodies, unless there are obvious violations of the law. Legal disputes are therefore rarely favourable to the union, because Law 146 does not provide for clear and precise limits to administrative power, in particular of the *Commissione* which is granted wide discretionary powers in dictating the rules on strikes.

Moreover, to effectively counter a back-to-work order (adopted a few days before the strike), it is necessary to obtain an immediately enforceable measure (injunction) that 'suspends' the order. But such a measure is rarely granted by administrative courts.

4.1 Recent (partly) union-friendly administrative case law

In the last two years, however, there have been some signs of change in the case law, a prove that both the *Commissione* and the government authority have really gone too far in exercising their powers to restrict the right to strike.

For the first time, in March 2023, the *Consiglio di Stato* (the Supreme Administrative Court) annulled a resolution of the *Commissione*, which had amended the collective agreement on minimum services in local public transport because it provided for an interval of 'only' 10 days between one strike and the next (the so-called "rarefaction rule"): too short for the *Commissione*, which had imposed an interval of 20 days. The increase in the duration of the interval was necessary (in the opinion of the Authority) to counter the excessive frequency of strikes in the sector that had occurred in recent years. According to the administrative tribunal, however, the *Commissione* acted unlawfully because in reality, as the data clearly shows, there had been no increase in strikes in local public transport: therefore the further restriction of the right to strike was to be considered unjustified.

Most of the recent legal actions have concerned the back-to-work orders adopted by the current Minister of Transport to prevent general strikes called (autonomously) by the main confederations (CGIL and UIL) and autonomous unions. These legal actions produced case law that was in some cases positive for the trade unions, and in any case important, because with it the lower administrative tribunals (the *TAR*s, Regional Administrative Court) reduced the authoritative powers of the government authority, subordinating them to those of the *Commissione*.

In particular, the *TAR*s rigorously applied the rule of law 146/90 that conditions the Minister's power to a previous warning by the *Commissione*, except for the existence of particular reasons of '*necessity and urgency*' that the *Commissione* has not consider. For

this reason, the Regional Administrative Court of Lazio in March 2024 annulled an order of the Minister that had reduced to from 24 to 4 hours the duration of a national strike in public transport sector called by the autonomous trade unions (Judgment No 6084/24) and in December suspended a new order adopted against the same trade unions (Decree No 13467/24). But, for the same reason, another order adopted to reduce to 12 hours the duration of a strike called by the CGIL and UIL was instead judged legitimate, having been preceded by a warning from the *Commissione* (Judgment No 5939/24).

These judgments reduce the government authority's power to prohibit or hinder strikes. On the other hand, however, they strengthen the role of the *Commissione*, which, as mentioned, has very broad powers both in dictating the rules on strikes (imposing them on the social partners) and in ensuring compliance with them by workers and trade unions (who are subject to its sanctioning power). These powers are de facto unquestionable on the merit. Even the recent judgment of the *Consiglio di Stato* on 'rarefaction', mentioned above, confirms that judicial review only concerns procedural aspects, such as, in that case, a defect in the motivation of the contested act. In other words, before the administrative judge one cannot challenge the specific rules on strike as such, but only the manner in which they were adopted by the *Commissione*.

It is true that the *Commissione* is supposed to be a neutral and impartial body (as opposed to the Minister), given that it is an authority composed of experts and not politicians. However, it cannot be ignored that these experts are chosen by the Presidents of the two branches of the Parliament, who are members of the Government parties. The *Commissione* is therefore an expression of the current Government and, in fact, its orientation changes as the Governments change.

5. USB's collective complaint before the European Committee of Social Rights

In addition to domestic law, international law was also used by unions to implement legal strategies in defence of the right to strike.

The main autonomous trade union (USB) in 2023 submitted a collective complaint before the European Committee of Social Rights (ECSR), asking for recognition that Law 146/90, read in the light of its application practice, is contrary to Art. 6(4) (concerning the right to strike) and Art. G ('restrictions') of the Revised European Social Charter. As is well known, Art. G allows restrictions and limitations to the rights recognised by the Charter only if '*necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*'.

The object of the complaint is not only the rules and principles provided for by Law 146/90, but the way in which these rules and principles are implemented and specified by collective agreements and the acts of the *Commissione*. In particular, the complaint challenges the breadth of the discretion and powers attributed to the *Commissione* and the public authority in inhibiting or limiting the exercise of the right to strike, such as to render their acts de facto removed from judicial review.

The complaint puts emphasis on particularly stringent sectoral rules and emblematic cases involving the complaining union, that demonstrate the degree of compression of the right to strike produced by Law 146. For example, it is pointed out that both the duration of the mandatory interval between two strikes affecting the same sector and the duration of the conciliation procedure, also taking into account the mandatory notice period, in some sectors is equal to or greater than 30 days; and that the strike, even in these cases, can be further postponed by the *Commissione*.

Also the duration of the periods of the year in which it is forbidden to strike is deemed excessive by the complainant trade union. These limits are particularly strict in the transport sector. Local transport workers are not allowed to strike for a large part of the summer period (continuously, from 28 July to 3 September) nor '*in conjunction with significant events*'. For this reason, for example, the *Commissione* declared a strike during the chocolate festival in Perugia unlawful and the Prefect of Milan prevented a strike because it risked creating troubles for a local marathon.

5.1 ECSR's precedents on strikes in public services

The ETUC submitted its own observations in support of the complaint, even though USB is not one of its members. Both the complaint and the ETUC's observations are based on the principles of international law (ILO stardards, first) and on the previous conclusions of the ECSR, which has repeatedly censured the legislation and case law of several States because it restricts the right to strike in public services in a way not consistent with the Charter (e.g. conclusions concerning Bulgaria, Ukraine, Iceland, Croatia...). These include Italy, which in 2014 was judged not in compliance with Article 6.4 due to the limits on the duration of the strike and the excessive breadth of the power of the Government authority to adopt back to work orders.

The Government's reply is mainly based on a broad interpretation of Article G of the Charter, according to which limitations on the exercise of the right to strike would always be allowed to guarantee the continuity of public services that a State considers "essential".

The risk that ECSR will adhere to the Government's argument has increased after the recent decision on the Netherlands published in July 2024 (complaint No.201/2021), which followed the infamous Humpert case before the ECtHR. In this decision the Committee emphasises the distinction between, on the one hand, the "regulation" of the right to strike, which may be permissible in itself under Article 6§4 of the Charter, and, on the other hand, any further "restriction" which must meet the conditions set out in Article G of the Charter. Such a distinction could legitimise many of the limits provided for in Law 146/90, because the Committee considers the obligation to give notice, the cooling-off period and conciliation procedures to be 'regulation'. Thus, the ECSR might not even consider Article G to justify most of the limitations in the Italian law.

However, as Carmen Salcedo notes in her dissenting opinion, the distinction between regulation and restriction is not at all clear and precise, because the former, if it excessively limits the exercise of the strike, can overlap with the latter. Regulations have in fact been

considered legitimate in the past by the Committee with certain limitations: notice and cooling-off period not too long; conciliation procedures not too onerous; rules not sufficiently precise and foreseeable by law; lack of legal certainty, etc.

On the other hand, prohibitions to strike for long periods during the year and the obligation to guarantee 'minimum services' should fall under 'restrictions'. Here again, however, the recent decision increases the uncertainty of the outcome of the complaint, because the ECSR stated that there is no violation of Article G if the restrictions on the right to strike are not 'systematic'.

In conclusion, the outcome of the complaint will depend on a rather unpredictable (as it is very subjective) assessment of the proportionality of the rules limiting strikes, considering their practical application since Law 146/90 came into force. Certainly the decision concerning the Netherlands does not justify optimism, since the Dutch courts' wide discretion to limit, postpone or prohibit strikes that create inconvenience or damage "*towards the person and the goods of others*" was not found to be contrary to Art. 6.4.

5.2 The Possible Effects of the ECSR Decision in the Italian Legal Order

In case of a decision of non compliance, the problem of its effects in the Italian legal order will arise. It must be considered that in Italy (as in many other States) decisions of the ECSR are not considered binding, i.e. they do not produce direct legal effects in the domestic legal order. However, they should at least be considered by judges (both lower and higher Courts) when interpreting domestic law. The Constitutional Court should also take them into account when assessing the constitutionality of a law. It is anyway extremely unlikely that it could declare Law 146/90 contrary to the Constitution, having declared the opposite in the past.

The main objective of the claimant is therefore to obtain a decision that can indirectly affect the various authorities (judicial and administrative) that, at different levels, concur in interpreting and applying Law 146/90. Above all, the hope is to influence the activity of the *Commissione*, inducing it to greater self restraint in evaluating the content of collective agreements and intervening in trade union disputes.

On the other hand, it is illusory to think of reforming the law in a more favourable direction for workers. At most, a censure by the ECSR could induce the current Government to give up on plans to reform it in order to further restrict the right to strike (for example, by introducing compulsory pre-strike ballots), as already announced by the Minister of Transport.