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From Polarisation to Precarisation of the Italian Labour Market

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Die DFG-Kollegforscher_innengruppe „Landnahme, Beschleunigung, Aktivierung. Dynamik und (De-) Stabilisierung moderner Wachstumsgesellschaften“ – kurz: „Kolleg Postwachstumsgesellschaften“ – setzt an der soziologischen Diagnose multipler gesellschaftlicher Umbruchs- und Krisenphänomene an, die in ihrer Gesamtheit das überkommene Wachstumsregime moderner Gesellschaften in Frage stellen. Die strukturellen Dynamisierungsimperative der kapitalistischen Moderne stehen heute selbst zur Disposition: Die Steigerungslogik fortwährender Landnahmen, Beschleunigungen und Aktivierungen bringt weltweit historisch neuartige Gefährdungen der ökonomischen, ökologischen und sozialen Reproduk-tion hervor. Einen Gegenstand in Veränderung – die moderne Wachstumsgesellschaft – vor Augen, zielt das Kolleg auf die Entwicklung von wissenschaftlichen Arbeitsweisen und auf eine Praxis des kritischen Dialogs, mittels derer der übliche Rahmen hochgradig individualisierter oder aber projektförmig beschränkter Forschung überschritten werden kann. Fellows aus dem In- und Ausland suchen gemeinsam mit der Jenaer Kollegforscher_innengruppe nach einem Verständnis gegenwärtiger Transformationsprozesse, um soziologische Expertise in jene gesellschaftliche Frage einzubringen, die nicht nur die europäische Öffentlichkeit in den nächsten Jahren bewegen wird: Lassen sich moderne Gesellschaften auch anders stabilisieren als über wirtschaftliches Wachstum?

Die Kolleg-ForscherInnengruppe zum Thema
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Antonio Loffredo

From Polarisation to Precarisation of the Italian Labour Market

Zusammenfassung

Das Papier untersucht die „unendliche Reform“ im Feld individueller und kollektiver Arbeitsbeziehungen in den letzten zehn Jahren in Italien. Es versucht dabei die Verbindung zwischen juristischen Interventionen in das Arbeitsrecht, die Fragmentierung von Unternehmen und die Herstellung größerer Ungleichheit zwischen ArbeitnehmerInnen herauszuheben, deren Wichtigkeit in den Jahren der Austeritätspolitik deutlich zu spüren war. Aus dieser Perspektive fokussiert der Autor auf die Art und Weise, auf die der gesetzliche Rahmen die Polarisierung des italienischen Arbeitsmarkts ursprünglich als ein Resultat der EU-Politiken im Bereich Arbeit und Wirtschaft ermöglicht und dann in den letzten Jahren eine allgemeine Prekarisierung der ökonomischen und gesetzlichen Schutzmechanismen für ArbeitnehmerInnen sogar gefördert hat.

Abstract

The essay explores the evolution of the "never ending reform" in the field of individual and collective labour relations in Italy during the past decade, trying to underline the connection between legal interventions in labour law, the fragmentation of businesses and the creation of bigger inequalities among employees, whose importance has been clearly felt in the years of austerity policies. From this perspective, the author focuses on how the legal framework, as a result of the EU occupational and economic governance, has initially allowed a certain polarisation of the Italian labour market and then, in the most recent years, even fostered a generalised precarisation of economic and legal protections provided for workers.

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The Italian labour market shows a clear connection between adjustments to Labour Law, fragmentation of businesses and the creation of greater inequalities among employees, whose importance has been clearly felt in the years of the austerity policies (Palomeque 1984, 134). Moreover, the workforce polarisation, meaning by this the existence of a segmented labour market divided at least into two large segments (on the "social" role of labour market see Solow 1994), one for workers having a particular specialisation required by enterprises and another one for those less skilled, is by now an evident reality, as has been underlined by many OECD reports on Italian employment (since OECD 2004). It is not unreasonable to assume that this trend has received strong support even from the current legal framework and, particularly, from the most relevant Italian Labour Law reforms of the new millennium: the "Biagi Reform" (Legislative Decree 276/2003), the "Collegato lavoro" (Act 183/2010), the "Fornero Reform" (Act 92/2012) and the "Jobs act" (Act 183/2014 and Legislative Decrees n. 22, 23, 80, 81, 148, 149, 150 and 151 of 2015).

The legal framework concerning the Labour Law from 2003 until today has initially allowed and even fostered a certain polarisation of economic and legal protections provided for the different kinds of employees, also based on the professional skills of workers (Loffredo 2012, 111). This polarisation has resulted in significant differences in protections, especially for those workers who were hired in the new millennium, for various reasons, among which it is worth citing for their consequences on the precariousness of the Italian workforce: a) the fragmentation of enterprises and the creation of mono-specialised businesses after the outsourcing reforms of 2003; b) the regulation of some contractual typologies in a more precarious way, acceptable almost exclusively to unskilled workers having low bargaining power or to some social clusters or categories towards which they are traditionally directed; c) the increase of "subjective causes" to conclude some contractual typologies characterised by less legal and wage protections, mostly used by enterprises operating in labour intensive sectors; d) the use of professional training in the employment contract mostly in an occupational key through the reduction of workers protections, which has resulted in the debasement of the professional situation inside an apprenticeship, e) the attack on trade unions rights; and, finally, f) the unfair dismissals reform. So, in a way it is possible to say that the major finding of this paper is that these reforms of the legal framework helped to polarize the labour market and thereby led to its increasing precarisation in different periods, starting in 2003 (coinciding with the so called Biagi Act) and continuing through a deepening in 2010, ultimately finding its conclusion with the government of Matteo Renzi and the reform of dismissals.

1. Outsourcing and the fragmentation of enterprises

Starting from the effects of new rules about outsourcing (Speziale 2010, 5) in the Italian labour market, it is simple to note how this situation is different in comparison to that regarding Labour Law in the past century, in which the cases of decentralised production were rare. Act 1369/1960 was a symbol of that Labour Law, forbidding the employer to contract the execution of mere work performances and punishing this phenomenon with the establishment of an employment relationship with the real employer-user and not with the formal employer. For this purpose, the legislation introduced two principles: the joint liability between the formal and the real employer for credits claimed by workers and the principle of equal treatment between the client's and

contractor's workers (Costa 2016). Article 85 of the Legislative Decree 276/2003 abrogated the latter principle which resulted in the devastating effect of creating two labour markets having different economic and legal conditions. The first one is for clients, with standard employment relationships stable and more protected; the other one is for contractors, which are under the economic authority of clients, often operating in labour intensive sectors and low-skills sectors with. The workers of these sectors are often hired with precarious contracts, the duration of which can coincide with the duration of the contracts between clients and contractors (Scarpelli 1999, 353). In this way the labour market has been polarised resulting in the perverse effect that a commercial contract concluded between two enterprises influences directly the initial duration or the termination of the employment contract between the contractor and the employee, bypassing the dismissal regulation.

This kind of outsourcing manages to guarantee a general decrease in the transaction costs, including the ones connected to the trade unions presence in the enterprise, by sharing them with other businesses through which strong collaborative relations are established; indeed the new formulas of outsourcing allow the contractor to maintain substantial control and to exercise their powers on the decentralised parties (De Simone 1995), although they have autonomy in management and in responsibility, maintaining their own specialisation in a certain activity.

Therefore, if Act 1369/1960 could be considered the symbol of a Labour Law aimed at protecting the workers, Legislative Decree 276/2003, which has completely abrogated Act 1369/1960, is the real paradigm of a law in which the organisational needs of the enterprises have prevailed strongly over the protection of workers. Finally, as we will see later, Act 183/2014, the so called Jobs Act of Renzi's government, is the clearest example of a precarised Labour Law in terms of salaries, stability and the power of employees and of trade unions.

Even the transfer of undertakings reform can be read in the same way. The modification of Article 2112 of the Italian Civil Code, also carried forward by Article 32 of Legislative Decree 276/2003, specified the notion of the "part of undertaking", stating that a functional, independent division is "an organised economic activity, identified by the transferor and the transferee at the moment of the transfer". This part of the regulation results in a serious risk of abuses, allowing the use of this regulatory scheme both to break enterprises into small-sized firms and to cut some non-profitable branches without having to follow the collective dismissals regulation (Gallino 2005).

Finally, the introduction of both temporary agency work and staff leasing in 2003, as well as the Renzi's government reform of 2014 (the first step of the "Jobs Act") that has liberalised temporary agency work, allows enterprises to fragment their productive organisations and their legal status too (Corazza 2004), using whichever scheme they prefer.

The principle of economic dependence between two enterprises could potentially be a useful tool to establish labour relationships formally belonging to contractors with clients and to try to reduce the proliferation of substantial subordinate enterprises, inside of which these second-class workers are mostly employed because of their low skills, even though they have the same dignity and deserve the same respect from the legal system.

2. Atypical contracts and disadvantaged groups in the labour market

The "neverending labour market reform", which began in the '80s and has modified the rationale of Italian Labour Law[1], has had devastating effects mostly on workers who are on its periphery, especially young people, immigrants and women.

Since 2003, the Italian legislator has created an enormous variety of contracts (in a given moment 43 different employment contracts existed simultaneously); however, the Legislative Decree 81/2015 about contractual typologies concerns the whole area of precariousness and tends towards a formal reduction in the number of contracts but, on the other hand, seeks to promote further flexible rules in favour of enterprises in order to accomplish the Troika austerity policies.

Concerning that, it is worth outlining a peculiarity of Italian Labour Law, namely the idea according to which self-employed workers do not need the legislator's balancing activity, because they would not be in a situation of contractual imbalance in a legal and economic sense. Thus, Labour Law has chosen to give direct protection to employees in a prevalent and exclusive way ignoring atypical contractual relations. This approach has certainly fostered the birth of many "bogus self-employed", who have represented for a long period one of the favourite ways for the Italian entrepreneurs to avoid Labour Law rules and protections.

Workers involved in this phenomenon are often the most disadvantaged groups in the labour market, namely those employed with coordinated and continuative collaboration contracts, in many occasions confused with employees (Revelli 1997, 85) because of the broad and distorted use of them by enterprises which have entrusted these "parasubordinate workers" with many functions previously assigned to employees, obtaining benefits concerning wages, social security and legal regulation. When the abuse of this regulation scheme evident, it started a debate concerning which kind of legislative action would be more suitable to contain the phenomenon[2]. Legislative Decree 276/2003 modified the normative situation establishing "project work" (Pallini 2006 and Santoro Passarelli-Pellacani 2009) which, even if it was inserted with the aim of extending some protections provided for employees to parasubordinate workers, has been an ineffective regulation both for the generality of the definition of the "project", which does not prevent simple avoidances, and for the limited extent of protections. Furthermore, the mentioned Legislative Decree of June 2015 about contractual typologies aims to erase these very few protections introduced with the project work, to bring back the whole category of parasubordinate workers to the coordinated and continuative collaborations area (Perulli 2015, 16) and so to enter a more precarious situation in terms of rights.

[1] It is possible to talk of a "permanent" Labour Law reform not only in times of austerity also in other countries of the European Union, (Palomeque 2001, 9).

[2] Italy is second only to Greece in Europe for self-employed workers in 2017, with 21% of the workforce according to Eurostat data.

2.1 Part-time and precarious jobs not just for women

A part-time contract, if chosen voluntarily, can represent an effective instrument of flexibility for all the parties involved, since it allows the employee to have a better conciliation of work and personal life. However, in times of austerity, a part-time contract has also become a precarious contract. From its very first introduction it was mainly used for two categories of workers: young people still living in their parents' household and hence not in need of a full salary, and women, who are often required to work and look after the house and children. In recent years however, the dramatic decrease in full-time job offers and the consequent reduction of the actual employees' power of choice have given rise to a sharp increase in the use of part-time contracts amongst adult men as well.

The most significant aspects of the legal regulation of part-time contracts that have been enforced more and more frequently by the employers are the possibility of extending work hours above the agreed hours — but still below full-time (the so-called supplementary work time) — and changing the distribution of working hours throughout the week. The former has been extensively reformed on many occasions, from 2003 to the aforementioned Legislative Decree 81/2015 (Zoppoli L. 2015, 13), and the changes have been mostly beneficial to enterprises. Legislative Decree 276/2003 has significantly amended the "flexible" and "elastic" clauses: the flexible ones refer to the possibility of changing the temporal allocation of work performance, while the elastic ones concern the possible increase in the maximum duration of work per day. Such clauses, whose permissibility had been banned by the Constitutional Court during the previous regulation, must be agreed by both parties and require the explicit consent of the employee; however, in the absence of collective agreements regulating the subject, employers and employees may also adopt those clauses (De Luca Tamajo, Rusciano, L. Zoppoli 2004, especially the essays by A. Zoppoli, Alessi, Bavaro), whose concrete activation is subject to only two requirements: a notice period from the employer and the worker's right to a defined compensation.

Therefore, the increase of part-time contracts[3], not only amongst women and young people, does not come as a surprise as it allows the employer to have a broad management of part-time workers, who are actually employed for a number of hours that quite frequently are very close to those worked by their full-time colleagues and who thus lose power on the conciliation of work and personal life.

2.2 Professional training as an instrument for occupational policies

During the '80s and '90s, Italy saw a wide spread use of professional training contracts. The key factor of their success can be easily explained by their ability to allow the flexibility of labour costs (L. Zoppoli 1998, 825). Professional training contracts, the use of which were also supported by the government's policy of incentives, were an instrument of labour policy that made the transition from temporary to permanent employment easier, mostly for young people. So, they were used mainly with an occupational function, which also had the effect of demeaning the "professional" function of training, making it an effective tool to undermine some of the workers' rights (Napoli 1998, 51 and Loffredo 2012, 183).

[3] According to the Eurostat data, the increase of part-time workers in Italy is quite surprising, moving from 17.5% in 2006 to 29.6% in 2016, http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00159&plugin=1

Currently, the apprenticeship is the only professional training contract left in the labour market. It underwent various stages of reform: first the radical reform of Legislative Decree 276/2003, it then suffered various "adjustments" firstly in the Refunded Act in 2011, then in new reforms in 2012 and 2014 and, finally, in the complete reform of the labour market included in the mentioned Legislative Decree 81/2015 about precarious contracts.

All Italian governments of the third millennium have focused on the issue of extending the use of apprenticeship and, since the 2003 reform, have developed forms of contracts increasingly more beneficial to the needs of businesses. The Legislative Decree 81/2015 could have been an opportunity not only for a real simplification of the number of existing employment contracts but also to make the function of said contracts clearer, allocating a specific function to each one of them and avoiding unnecessary "competition" between contracts. Unfortunately, the Legislative Decree does not follow this direction and, in regard to the apprenticeship, it formally reiterates the contract's double function: professional training, on one hand, and employment, on the other. Nevertheless, the legislative regulation clarifies that the latter is the most relevant function, as shown by the rules focusing on business incentives rather than on training.

However, after the so-called Jobs Act of Renzi's government, the apprenticeship suffered "competition" from other types of contracts that are much more profitable for businesses[4]. The main advantages of hiring with an apprenticeship contract have always been the exclusion of the apprentice from appearing in the company's number of employees and the free dismissal at the end of the training period. Nonetheless, the reform of Article 18 of *Statuto dei Lavoratori* and the complete liberalisation of fixed term contracts directly through the company or through agencies make both these regulatory incentives less and less attractive for employers. Moreover, the incentives on social security contributions have always been the most attractive point for businesses in hiring apprentices but, due to a supposed lower productivity of a worker who must undergo a training period, businesses can also pay an apprentice up to two levels less than the other workers. This reduced salary is confirmed by the Legislative Decree 81/2015 but becomes absolutely unacceptable because of the complete cancellation of the obligations for employers to pay the apprentices during external (public) training, on the one hand, and for apprentices to pay up to 10% of their wage for the hours of training performed within the company, on the other hand. This provision constitutes a real insult to the dignity of apprentices, who must pay for professional training out of their own pockets, even when the training is inside the enterprise and often "looks like normal work" because it is difficult to control its real execution.

The only possible way to make sense of the apprentice work contract would be through enhancing the training, as it is the only aspect in which there is no "competition" with other labour contracts, which would give a sign of a real change in employment policies towards quality employment and a low-cost workforce.

[4] Actually, in 2015 the percentage of apprentices had decreased by about 8% and their number was about 410,000, 15% of the workers between 15 and 29 years, according to the public institute of professional training, Isfol http://www.isfol.it/comunicati/archivio/14-luglio-2016-lapprendistato-in-italia

3. The breakdown of stability principle in workplaces

The fixed term contract became relevant in the Italian legal system only in 2001; before then, it had been used exclusively in the cases provided by law, which was when the employer needed a worker whose task was not permanently necessary for the enterprise. Therefore, the rate of temporary employment in Italy had rarely exceeded 8%, far below many countries of the European Union.

The 2001 reform (Legislative Decree 368/2001) was the first Act of Berlusconi's government in the area of Labour Law, which clearly demonstrates its determination to break down job stability. The decree, which amended the fixed term contracts and introduced a general clause that would allow a temporary contract whenever there are "technical, productive, organisational or substitutive reasons" (Carinci 2005), caused a remarkable increase in the number of temporary workers, whose dedication to the company is more strongly guaranteed by their hope of obtaining a permanent contract than any legal obligation could. Legislative Decree 368/2001 is undoubtedly a "wrong" transposition of Directive 1999/70 (Zappalà 2001, 633), which was a European collective agreement signed by social parties aimed at preventing the abuse of temporary contracts. Nevertheless, this reform did not completely meet the expectations of the employers since it had some legal problems addressed in court[5] that resulted in punishment for the abuse of the fixed term contracts even in that so flexible regulation (Speziale 2003, 225). Basically for that reason, the government of Matteo Renzi converted the fixed term contracts into a sort of long trial period, which allows free temporary employment for the first three years of the contract, during which period dismissal with no reasons needed is permitted. This clause likely breaks the rules of EU Directive 1999/70 and the principles concerning unfair dismissals.

This new trend in Italian Labour Law, which aims at a complete breakdown of stability within the workplace as a right and as a symbol, was a clear consequence of austerity policies and is moving the Italian labour market from a situation of polarisation to another of extended precarisation (Lassandari 2015, 63)[6]; so, the rules on unfair dismissals could not be left untouched.

The Italian system in this field grants workers protection mainly based on the size of the company[7]: the protection against unfair dismissals may be "real" or compensated by a monetary reparation. The so-called "real" protection applied to large and medium enterprises and it was guaranteed by "well known" Article 18 of Act 300/1970 (commonly known as *Statuto dei Lavoratori*): it determined the reinstatement in the position as if the employment relationship had never been interrupted. The constitutional articles that the Constitutional Court considered as the basis of Article 18 were Articles 4 (the right to work) and 35 (protection of labour in all its forms and applications). In addition to the reinstatement, the worker was entitled to compensation, the cost of which was calculated in the unpaid wages the worker did not receive, beginning from the date of the dismissal until the actual reinstatement, including all social security contributions. In small businesses, protection against unlawful dismissals were less strong, where the employer could choose between "re-hiring" the worker (i.e. the dismissal is effective and should begin a new employment relationship) or a compensation determined in the judgment that may vary between 2.5 and 6 months of salary. In this area, where "real protection" did not apply, it was

[5] The first judgement of the Corte di Cassazione on that regulation was n. 7468, 21/5/2002, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 2003, II, p. 49.

[6] Precarisation is understood as a transformation from guaranteed, permanent employment to less well paid and more insecure jobs.

[7] It applies to enterprises employing more than 15 workers.

common to find a more precarious labour market with fewer protections, where workers were afraid to claim their rights and trade unions faced barriers of entrance. Article 18, beyond its specific applications, had an enormous importance in the political and academic debate as it represented a multiplier of rights: that is, without stable employment the workers do not claim their rights. For this basic reason, the Constitutional Court's judgment 174/1972[8] acknowledged that only when there is a "real" protection against unfair dismissals can workers feel free to exercise their rights and to his end provided two different deadlines for the prescription of rights: during or at the conclusion of the employment relationship.

There have been several attempts to reform the area of "real stability" and the most notable was carried out by the government of Berlusconi in 2002, which aimed to allow a suspension of the application of the rule for a certain period of time and in some areas of the country, especially in the southern regions of Italy where the rate of unemployment is remarkably higher. The trade union response was overwhelming; on March 23, 2002 one single union, the CGIL, organised a strike that brought to the streets of Rome more than 3 million people in defence of Article 18 and of the right of all workers to see their relationship guaranteed by a system that allows them to live as free citizens in the workplace.

Another response to this attack against Article 18 was the referendum in 2003 which aimed to extend the "real" protection to workers employed in companies with less than 15 employees. The referendum did not reach the necessary *quorum* to make it valid but collected more than 10 million votes in favour, a political outcome that seemed to discourage any government from retrying a reform with the same purpose.

Recognising these obstacles, as they had been seen previously, Berlusconi's government sought other ways to achieve the same goal; by signing a certain number of Acts that applied a large scale liberalisation of many employment contracts (fixed term and part-time contracts, apprenticeship, "work project" and more) and that especially facilitated the abuse of contracts and subcontracts, Berlusconi's policy has dramatically reduced the cases in which "real" protection applied, broadening the precarious market and creating a "reserve army" of workers. The choice of using the strength of weak ties[9] has made the system more and more precarious, especially for new contracts, as it directly avoided modifying protections against unfair dismissals whilst reducing their effectiveness.

Once the goal of creating a labour market where only few workers can *effectively use* their rights fully and a vast majority move between unemployment and precarious labour relationships had been achieved, the objective of the austerity policies was the reduction of protection against unlawful dismissal and, specifically, to remove almost completely the real stability. In the political and academic debate, Article 18 has always been considered an example of an anomaly in Italian Labour Law; however, it is rarely stressed that the real Italian anomaly issue on dismissals is the compensation provided to workers unlawfully dismissed in companies with less than 15 employees and, not least, the absence of a general system of economic protection in cases of unemployment. Maybe the Italian problem has never been the "real" protection, in spite of what the employers' associations and

[8] In www.cortecostituzionale.it

[9] Mariucci 2003, 255 states that a precarious employment contract is a strong tie for a worker because he needs to work more and more to get a decent salary.

the guidelines of the European employment policies used to say, but the area where no real stability is applied, since the Italian economy is based on small enterprises.

Recognising the impossibility for Berlusconi's governments to formally amend Article 18, and despite having widely reduced its effectiveness, the European Union "strongly supported" the appointment of Mario Monti, a former Competition Commissioner in the EU, as Prime Minister of Italy in order to accomplish the austerity policies[10]. His government of technocrats made a vast Labour Law reform that, among other things, altered Article 18, reducing the possibility of the "real" protection to very few cases and facilitating the use of the objective dismissal by limiting the intervention of the judiciary.

None of these measures, which had cut down the cases eligible of coactive reinstatement, seemed to be sufficient enough to meet the demands of the EU, and the first law reform contained in the so-called Jobs Act of the Renzi government proceeded to completely eliminate the sanction of reinstatement except for discriminatory dismissals. In all the other cases, it has introduced (Legislative Decree 23/2015) only a very low economic sanction, fixed by law and based on the seniority of the employee unlawfully dismissed (the so-called "increasing safeguard contract", *contratto a tutele crescenti*) (Giubboni-Colavita 2017).

This decision appears to be the final stage of a long journey that began in 2003 and has led the Italian employment system to be one of the most flexible in all of Europe both for hiring and dismissing. It is very important to highlight how this process panned out because, once it recognised the impossibility of making the reforms it required, the European Union itself intervened directly through a replacement of Italian democratic institutions to achieve an objective that European guidelines on employment had been requiring for more than a decade. Thanks to policies that have diminished the area of "real" stability and have pushed the Italian labour market to a new level of precariousness, it is clear that the EU's request to modify the rule that was a symbol of workers' rights in Labour Law had nothing to do with objectives of employment policies but was only driven by the "austerity obsession" to recover the loot of a robbery (Romagnoli 2009, 13): the license to fire freely.

4. Trade unions in a precarised labour market

The increasing expansion of precarious jobs and the polarisation of the Italian labour market determined a severe decline in terms of membership and representativeness of trade unions, even if there is no official data about it; the most representative among them tried to give a (late and not too effective) response to those problems through the creation of *ad hoc* structures for atypical workers, reaching an integration with "standard workers", in order to create a common consciousness. The three major federations for atypical workers are Nidil (Cgil), Felsa (Cisl) and Uiltem.p@ (Uil). "Autonomous" trade unions (Cobas, Usb, Confsal, Cisal and so on) have "naturally" included atypical workers in their actions, with more radical positions, having some positive results; however, the peculiar legal framework of Italian industrial relations makes their lives especially complicated, and even more so under the effects of EU austerity policies.

[10] As it was clearly shown by the "secret" letter sent the 29th of September of 2011 (and published by the Corriere della sera the 5th of October of the same year) by Mario Draghi and Jean Claude Trichet to the President Berlusconi.

The efforts of the unions are likely to be cancelled by any legislator who does not hide his lack of sympathy for them; the crisis of representativeness that trade unions are facing is, certainly, a consequence of the difficult economic period that we are living in and, at the same time, the absence of legislation regulating the exercise of the collective constitutional rights. Specifically, the constitutional model of collective bargaining (described in Article 39) and the exercise of the right to strike (Article 40) have not been developed by Italian legislation. The reasons are multiple but one of them worth pointing out has been trade unions' "fear" of any public intervention in their organizations. However, this fear has a simple explanation: originating in the early fifties, they had just come out of the violent repression of twenty years of fascism.

In the past century, this peculiar situation did not create major problems for trade union activity thanks to their strong representativeness; instead, the breakdown of trade unions' unity over the last decade, promoted by almost all Italian governments of this period, combined with the effects of austerity policies, is now leading to cases of absolute confusion. This new political and social landscape makes it impossible to keep on accepting a system without legal rules to verify the representativeness (D'Antona 1998, 319) of trade unions because the major unions can even loose the right to representation in the company if the employer refuses to sign a collective agreement with them. That is exactly what happened in the conflict in Fiat that began after it acquired control of Chrysler. We should remember that Chrysler came from a troubled past and has been repeatedly on the brink of bankruptcy in recent decades. Being marginalized by the U.S. market, it was not surprising that when Barack Obama decided in 2009, after their bankruptcy, to bail out General Motors and Chrysler, no American business stepped forward to fix and re-launch Chrysler. An attempt was made by Daimler but, after losing several million dollars, it was forced to give up in 2007. When Fiat acquired control of Chrysler, it circulated the illusion that an Italian company had begun a "conquest of America". A few years on, it is clear that the situation should be seen in the opposite sense, because the strategies used by Fiat in Italy are not taken from Italian industrial relations tradition, but, on the contrary, they derive directly from the U.S. The problem is that the importance of this company has spread the conflict to other enterprises and sectors all over the country (Ales 2014).

Fiat, using an authoritarian and undemocratic approach, decided to escape from the structure model of collective bargaining of the Italian industrial relations system regulated by the *Protocollo* of July 1993 and, simultaneously, from the model of union representation in the company. The most significant step of Fiat's business strategy was to exit from the employer's association with which it was affiliated (Federmeccanica/Confindustria). Therefore, as there are no obligations from a legal standpoint for an employer regarding whether and with whom to bargain collectively, Fiat has been released from contractual obligations and started a new era of collective agreements stipulated with only a few of the most representative unions, creating major conflict within the trade unions as well as sparking significant academic debate.

A paradoxical consequence of existing Italian legislation involves FIOM members. Despite the fact that it is the most representative trade union both in the company and in the metal sector, the members of this union have lost the right to have representation unless FIOM signs the deal, because Article 19 of *Statuto dei lavoratori* guarantees this right only to trade unions that have signed a collective agreement applied within the company at any level (Ghera 2013, 155). Nevertheless, after the ruling of the Constitutional Court 231/2013, according to Article 19 of *Statuto dei lavoratori*, the most representative trade unions have the right to participate in the

negotiations for the conclusion of collective agreements and the right to have the peculiar prerogatives provided for in Title III of the *Statuto dei lavoratori* (A.Zoppoli 2011).

4.1 Precarious jobs and atypical strikes

This complicated social, political and legal situation was made even more difficult by austerity policies, as workers rights were further attacked, including the right to strike.

The only statutory regulation about striking in Italy, until 1990 when Act 146 on conflict in essential services was approved, had been Article 40 of the Constitution, which states merely that "the right to strike has to be exercised according to the laws that regulate it". The succinct formulation of Article 40, which asked for the intervention of the law combined with the silence of Italian legislative bodies on the matter, resulted in their being replaced by social partners, case law and scholars. So, we could say that the theory of the right to strike has been shaped through the dialogue between doctrine and case law, while collective agreements have focused on setting procedural requirements like no-strike clauses (A.Zoppoli 2006) and cooling-off periods.

Thanks to this cooperation between scholars, judges and social parties, since the sixties the right to strike has been interpreted as an absolute, fundamental right of the worker to be exercised in a collective way for contractual or non-contractual reasons, including in the case of political and solidarity strikes. Specifically, "economic-political" strikes, which are economic in their content and political in their subject matter, fall within the exclusive competence of political power and have been regarded as a right by the Constitutional Court.

There is a clear connection between Article 39 (freedom of association) and Article 40 (right to strike) of the Constitution, as Article 40 provides an important tool to make the freedom of association effective; nevertheless, the right to strike has no connection with the presence of a trade union in the company because the right to participate in a strike is an individual right regardless of membership in the union that has claimed the right (Loffredo 2008). At the same time, it is obvious that the absence of a trade union inside a company, as it happened to FIOM in the Fiat conflict, makes it much more difficult for them to organize collective actions (Liso 2013, 166).

Looking at the case law of the Constitutional Court, it can be said that in Italy, in the private sector, there are no legally binding procedural restrictions on collective action, and there are no real limitations on the objectives and content of the strike. The exercise of the right to strike has the sole effect on the employment relationship of a proportionate loss of pay; any other employer's action against workers on strike is explicitly prohibited, including dismissals, which must be considered unfair, even if they are a consequence of an illegal strike in essential services. Article 28 of *Statuto dei lavoratori* provides these rules, stating that in the case of an action of the employer against strikers, trade unions may ask the labour judge for a summary injunction against the employer (according to Art. 28 of *Statuto dei lavoratori*).

As we can see, lacking any statutory definition of rules on striking, judicial control has played a crucial role in defining the current regulatory framework of the right to strike; but, for the same reason, and perhaps under the influence of the European Court of Justice, in the future we might see changes of direction in jurisprudence in our definition and exercise of rules on striking.

The different approaches of Italian judges and the European Court of Justice on this point are clearly shown in the regulation of the conflict between the right to strike and market freedoms. A historical decision of the *Corte di Cassazione* of 1980, regarding the legality of "atypical" strikes (which are collective actions like intermittent strikes or strikes by groups, and so on), stated that in the constitutional framework there does not exist a notion of "typical" strike and that the notion of strikes has to be found in what is understood as such in practice in the common meaning in society. The first consequence of this decision was that "atypical" strikes fell within the scope of Article 40 of the Constitution and could not be declared illegal.

The second consequence, which is particularly interesting when compared with the judgments of the European Court of Justice on strikes, was that any damage that the strike may cause to the enterprise's production had to be considered legal. This judgment does not mean that in Italy the employer's economic freedom is not protected against industrial action, because the *Corte di Cassazione* specified that the exercise of the right to strike should not infringe upon the right of the employers to resume productive activities once the strike is over (business productivity protected by Article 41 of the Constitution). The difference between the restriction inferred by Italian courts on the basis of Article 41 of the Constitution and the one inferred by European judges, for example in *Laval* and *Viking* cases, which in a way we can say opened the austerity era in Europe, is that the former concerns a pathological stage of a company's life cycle, protecting its survival and its ability to remain on the market once the industrial dispute is over, whereas the latter concerns the physiological condition of a company's life cycle, pertaining to the protection of its business and its freedom to operate in the market. According to the European Court, this interest may not be restricted either by a collective agreement, whose function is precisely to limit the exercise of the economic freedom of the employer, or by a strike.

A paradigmatic example of what could happen to the right to strike in this new legal and political landscape is, once again, the Fiat conflict. In fact, the so-called "liability clause" of some collective agreements signed by Fiat with only two of the three most representative unions seems to have the intention of denying the right to strike to workers. Point 1 of the clause states that the breach of a single part of the collective agreement by trade unions releases the company from all the obligations contained in that agreement and in national collective bargaining. Point 2 states that even individual actions that violate the collective agreement, in whole or in part, have the same effect as point 1.

This clause, in Fiat's intentions, should have had the function of limiting the conflicts in the plant because it expressly individualizes sanctions for breaching part of the agreement; in these cases, according to Fiat's interpretation of the clause, the company can consider itself released from its obligation to comply with every other clause of the collective agreement at the plant and national levels. The purpose of this clause is to avoid strikes on subjects regulated in the agreement, because the company knows that many workers and the most representative unions disagree with its contents (Santoro Passarelli 2017, 81).

In my opinion, both clauses cannot reach the objective because, from the collective perspective (point 1), the clause should be considered as a simple "no strike clause" with the only difference being that it has a predetermined sanction; if we use this interpretation, it would create little problem, as the collective parties can freely choose the type of sanction to apply in the case of the breach of a collective agreement that will bind only the signatory parties. On the other hand, in its individual aspect (point 2), it should be considered superfluous,

because it is obvious that the contents of the collective agreement form part of the individual contract. If, however, it is intended to prevent the exercise of the right to strike of workers as individuals, we are facing a clear violation of Article 40 of the Constitution, which recognizes a fundamental right for workers that cannot be denied by the legislator and, even less so, by a collective agreement or an individual contract.

5. A new paradigm: the labour market law

The difficult situation that we are facing would suggest the approval of a "promotional" legislation in order to facilitate the relationship between trade unions and the different categories of workers in the enterprises; furthermore, there is an urgent need for a legislative intervention with the purpose of defining at least rules on how to measure the representativeness of trade unions, developing Article 39 of the Constitution. Both objectives seem to be absent from the political agenda of the Italian governments of the last decade, who have preferred to take advantage of this situation of crisis of representativeness of trade unions and have even strengthened the breakdown of trade unions' unity which has made the workforce feel even more precarious.

In the austerity era, starting in 2007 with the global financial crisis, Italian Labour Law seems to have resolved the tension between the principles of a system focused mostly on "employment" purposes and one aimed to protect the weaker parties of a contract by favouring the former. This view seems to switch the Labour Law into a "Labour market law", based on a supposed influence of the law on occupational dynamics, and has generated social and generational tensions by widening the already existing gap between workers (Romagnoli 2013, 589): "strong" and "weak" employees, men and women, adults and the young. Italian legislation on Labour Law made the choice to create a multitude of contractual types functional to business interests and produced a multitude of social figures, which ultimately affected their individual behaviour, life expectancy and social perception.

Since 2003 the Italian Labour Law has facilitated this phenomenon with the increasing use of "subjective causes", especially for disadvantaged groups of workers in the labour market. The use of this legal technique is instrumental in creating various types of employment contracts whose aim is to create an increasing percentage of workers with fewer rights and lower salaries. Moreover, increasing the "subjective causes" designed for weaker groups can sometimes be considered a form of indirect discrimination (Santos Fernandez 2008, 689).

Job insecurity is widespread among young people[11] and the same lack of stability has "infected" their own lives, as highlighted by the increasingly low birth rates; couples often have children only after obtaining stability in their employment, a milestone that is achieved much later, and with less protections, in comparison to their parents' generation.

The social and employment condition of young people in Italy worsens further when other variables such as geography and gender are taken into account; in fact, employment rates find great differences between the northern and southern regions of the country and between men and women. In cases of young women, or people living in Southern Italy, the effects of the "strength of weak ties" are extremely visible, with employers opting for

[11] http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsi_emp_a&lang=en

precarious contracts with reduced rights rather than a standard contract which allow the termination of the employment without being subject to the (few remaining) rules for unfair dismissals. With the reform of dismissals, Renzi's government completed this project of the precarisation of the Italian labour market (Romagnoli 2015, 3), because the effectiveness of labour rights is strictly related to the stability principle; moreover, his government achieved the objectives of EU austerity policies and seemed to send a clear message to employers: they no longer have excuses for not hiring but, at the same time, they have all the excuses that they can desire to dismiss an employee.

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