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Luisa Ficari[1]. Collective bargaining vs. individual agreements in Italy's latest reforms : a "Tale of Two Cities"?

Summary: -1. Collective regulation in economic conditions of austerity: a transformation of* ends *of bargaining? Negotiation and participation, purposes of at odds. -2. Freedom of collective bargaining and protection of employees: the enforcement enacted in domestic constitutional principles and in European Union principles. -3. Collective regulation at plant level in case of crisis of the undertaking or company's bankruptcy: protecting employees, or saving the company? -4. Wages and other claims, a possible overlapping; a legislator's choice, the enforcement of a less favorable regulation despite of a more favorable one. -5. Concluding remarks. Tools and Actors: is the scenario complete ? Not a "Tale", not just "Two". -6. Bibliography (selected). -7. References (selected).

1. Collective regulation in economic conditions of austerity: a transformation of ends *of bargaining? Negotiation and participation, purposes of at odds.*

This paper[2] intends to discuss issues as summarized above, focusing on national conditions concerning collective bargaining and labour law enforced in Italy, a contry member of the European Union. In regard of special regulations provided for in Italy's labour law in the matter of collective agreements negotiated in the public sector[3], analysis will consider mainly the private sector, with the exception of brief remarks dedicated to recent developments in the national context regarding the public sector, among which a sentence recently[4] adopted by the Constitutional court concerning collective agreements. The issues which will be focused may offer matter of interest for other national contexts, especially, and possibly not only, those which provide the same conditions as those provided for in Italy's context in the matter of collective bargaining regulation and collective agreements procedure.

First question: *do* economic conditions of austerity imply transformation of the ends of collective regulation? The question implies, obviously, a statement about what are nature and contents of collective regulation's *ends*. Second question: is it possible, and is it correct on legal grounds, to look at the "ends" of collective bargaining in such a way as to compare them with the "ends" of the legislator? Such a question seem justifiable in reason of the fact that collective bargaining, together with the right to strike, is expression of trade unions *freedom,* which is guaranteed, at the highest level, in all national contexts[5] and, more, is enforced in international

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2 Draft, 31.07.2015 *[not to be quoted]*.

3 References in Carinci, F., "Il settore pubblico privatizzato - Contrattazione e contratto collettivo", pp.981-1030, in *Trattato di diritto del lavoro* directed by Mattia Persiani and Franco Carinci, vol. 2, "Organizzazione sindacale e contrattazione collettiva", Proia, G., ed. , ISBN 978-88-12-309-19-0, spec. pp. 1026-1031.

4 In 2015.

5 Regard to Italian context, see, for ample discussion of this theme on general terms, Persiani, M., "Il contratto collettivo di diritto comune nel sistema delle fonti del diritto del lavoro", in *Argomenti di diritto del lavoro*, 2004, p.19.

treaties and embodied in European Union's principles. Therefore, the *purposes* of collective bargaining should not be considered in perspectives which might imply a *limitation* of the role of trade unions6; more, the State cannot impose, in respect of trade unions activity, neither rules in matter of organization, nor *ends*7,

Another relevant perspective might be recalled at this same point: industrial relations are the field on which so many authors[8] have described the fundamental characteristics of trade unions: autonomy; self-government and independence from the State; freedom of collective bargaining. The perspective obliges to recognize that, on legal grounds, all ends of collective bargaining, as well as any single purpose that might be considered necessary or useful for meeting an end, are chosen and pursued in total freedom and autonomy for what concerns trade unions.

Defense of employment in respect of firms competition in an international market and in respect of companies' decentralization has been the ground on which collective agreements have played the most relevant role, while making use, until recent past, of a somehow *traditional* pattern of collective negotiation and bargaining between employers and workforce[9]. As all national contexts have, in time, provided and provide different patterns of agreements according to national legislation, differences between one and another national context, although apparent[10] and mostly interesting for *comparison*, have not, on the whole, allowed to describe the same bargaining pattern be used in, or adapted to, different national contexts. A different approach might now be suggested, as economic conditions of austerity have deeply changed, not certainly unions' autonomy and independence, albeit their role in negotiating.

In such perspective, it must be noted how collective bargaining has been representing, since a number of years, in the national context considered in this paper[11], a path for introducing more

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6 For an example of what I suggest might be seen as implying a limitation: referring to a national context, Botha, M.M., "Employee Participation and Governance: A South African Perspective", in *Rethinking Corporate Governance: From Shareholder Value to Stakeholder Value,* Roger Blanpain - William Bromwich - Olga Rymkevich & Iacopo Senatori (eds.), 141-162, 2011, Kluwer Law International, BV, The Netherlands (ISBN 978-90-411-3450-9), summarizes the purposes of collective bargaining (p.145, quoting Blanpain) and describes the collective bargaining process , stressing that "collective bargaining mainly focuses on setting terms and conditions of employment, and other matters of mutual interest between employers and employees" (pp.148-149, quoting, in footnote 46, Salamon's *Industrial Relations: Theory and Practice*). In other words, I suggest, referring to a "mutual" interest of the matters, might already be looked upon as a sort of limitation.

7 Quoting Bellocchi, P., "La libertà sindacale", pp.3-94, in *Trattato di diritto del lavoro* directed by Mattia Persiani and Franco Carinci, vol.2 "Organizzazione sindacale e contrattazione collettiva", Proia, G., ed. , ISBN 978-88-12-309-19-0, p.68.

8 A review in Pessi. R. "Ordinamento statuale e ordinamento intersindacale: promozione o regolazione?", in *Rivista italiana di diritto del lavoro*, 2014.

9 Scarponi, S., "Gli accordi transnazionali a livello di impresa: uno strumento per contrastare il dumping sociale?", in *Lavoro e diritto*, 2011.

10 Different national contexts have been observed by Sciarra. S., "L'evoluzione della contrattazione collettiva. Appunti per una comparazione nei paesi dell'Unione Europea", in *Rivista italiana di diritto del lavoro*, 2006.

11 Collective agreements have been mostly allowed to provide *deregulation* since labour reforms enacted in 2003 (quoted in references) and a number of experiences previous to labour reforms of 2003, is also to be registered in the matters of regulation of temporary, fixed-time, part-time work (in references) .

flexibility in the workplace[12] and making it easier, if not less costly, for the employer to employ *temporary* or *part-time* or *fixed-term* workers or to change tasks and assignments to employees. Nevertheless, as it is generally stated, the level which employees' protection has reached to, through collective bargaining and subsequent collective agreements, should not - *in principle* - lessen or decrease in consequence of any sort of transformation in bargaining ends or in bargaining procedure.

But how can employees' *protection* be guaranteed in case of crisis of the undertaking or in case of possible jobs reduction? This paper's perspective considers how collective agreements are related to individual ones at plant level and tries to explain on what grounds (and by what means, or legal tools) it may be considered *legitimate,* in a national context, for collective bargaining to meet the purpose of employment defense without renouncing to fulfill the end of employees' protection, *even when* negotiation and agreements bring to decrease wages or to reduce jobs in the plant. The perspective, in other words, is the following: is the *traditional* role of collective bargaining somehow put aside when, in conditions of austerity, it comes to the point of pursuing, and negotiating for workers concerned, specific working conditions *in pejus* and at a lower level than those which have been attained in individual employment contracts as enforced by *jus cogens* or as a result of a previous, more favorable, agreement?

2. Freedom of collective bargaining and protection of employees: the enforcement enacted in domestic constitutional principles and in European Union principles.

How does *transformation* take place in a context, which is *submitted* to domestic constitutional principles such as employees protection and freedom of collective bargaining and to European Union directives? National contexts should be therefore analyzed seeking which is the *specific place* assigned to the principle of freedom of collective bargaining and at which level and through which provisions or rulings, the principle is enacted and enforced.

It is therefore relevant to note that a *constitutional principle* as the one embodied in article 39[13] of Italy's Constitution (enacted in 1948) assigns the highest place to "freedom of organization" in the matter concerned. In the same article, Italy's Constitution embodies another principle, related to the previous one, which offers collective bargaining the chance to obtain, following a definite procedure, the result of a binding coverage for all workers included in the area of the collective agreements negotiated following the procedure. But such a procedure, to be enforceable in the legal context, needed and still needs a law regulation, which at present is still lacking[14]. Collective bargaining coverage and effects in respect of employers and employees are consequently, in general

12 Pizzoferrato, A., "L'autonomia collettiva nel nuovo diritto del lavoro", Paper presented at the National Congress of the Italian Association for Labour and Social Security Law, Crisi economica, vincoli europei e diritti fondamentali dei lavoratori nell'ordinamento multilivello, Foggia, 28-30 maggio 2015, in www.aidlass.it.

13 Quoted in references.

14 It is lacking, for reasons it would be too long and complicate to explain in this paper; actually, provisions containing tentative regulations of the matter and implying regulation of the binding coverage for collective agreements, are been discussed both at government and at trade unions level: the legal context is, perhaps, not far from substantial changes.

and in principle[15] , strictly limited to those workers and those companies who have taken part, represented by their union's delegates, in the negotiation of the agreement with employers[16].

Such was, and is at present, the context into which recent labour law developments have set specific regulations, bringing into the picture new issues, by means of laws and ruling of Courts and, also, by means of collective agreements[17] which appear to be crucial, in the perspective of new transformations affecting collective bargaining in the fore said context. Two issues, in particular, should be focused: in first place, the binding effects of those agreements which are negotiated, according to the new rules, under specific circumstances[18], cover the whole of workers in the plant in which the agreement has taken place; in second place, the same agreements bear, as a rule, provisions *in pejus*, worsening employment conditions for all the fore mentioned workers engaged in the plant.

Collective bargaining, as a result of trade unions freedom to act and choose legal tools in a national specific context, might imply – in a context of larger scale as the European Union – the use of the instruments of consultation and, previously, of information from the employer's side: such instruments have been provided for by directives[19], implemented by EU member States in national legislation. Information and consultation, although *linked* to an agreement and directed, in principle, to negotiating, should all the same be considered apart, as they are not strictly related to the theme of bargaining. It may be noted, at this point, how some authors are inclined to relate negotiation itself, and bargaining itself, to participation and to define *bargaining* as "one of the ways in which employees can participate in decision-making in management"[20]. On the contrary, it seems nevertheless advisable to have each or the fore said instruments, through which trade unions act and carry on their activities in full autonomy, stand on its own ground.

The national context founded on the constitutional principles mentioned above (Italy's Constitution, article 39) embodies one other principle strongly related to the issue of wages and of pay claims arising from individual employment relationship: such principle (Constitution, article 36) decrees that wage must be proportionate to "quantity" and to "quality" of the work carried out by the worker. In this context, it has to be stressed, no law regulation but, on the contrary, only collective bargaining has provided regulation for (so called) minimum wages in private sector[21]; the same principle is applied in public sector but, in this case, following specific rules. In other words, it is *not legislator's ruling* which provides regulation for wages, on the contrary, it is collective bargaining which is entitled to provide in the matter, following the principles enforced in article 36

15 Santoro Passarelli, G., "Verso l'istituzionalizzazione del contratto collettivo di diritto comune?" in *Diritto lavori mercati*, 2009, n.1, pp. 99-110.

16 Santoro Passarelli, G., quoted.

17 Quoted in references .

18 Regulation of such agreements is provided for in article 8 of Law n.148 enacted in 2011 (quoted in references).

19 Quoted in references .

20 Botha, M.M., "Employee Participation and Governance: A South African Perspective", in *Rethinking Corporate Governance: From Shareholder Value to Stakeholder Value,* Roger Blanpain-William Bromwich-Olga Rymkevich&Iacopo Senatori (eds), 141-162, 2011, Kluwer Law International, BV, The Netherlands (ISBN 978-90-411-3450-9), p.145 (quoting Blanpain).

21 Gragnoli, E. - Corti, M., La retribuzione, in *Trattato di diritto del lavoro*, directed by da Mattia Persiani and Franco Carinci, Padova, 2012, vol. IV.

[22]. In such context, consequently, the role of collective bargaining in defining the level of salaries and wages is apparent, although collective bargaining is not only "*wages"*.

The national context pictured above is enriched and enlarged through the implementation of European Union directives, so the question is, do EU provisions touch the issue of collective bargaining, and, in case, which way? All specific provisions concerning employment conditions, embodied in national regulations and coming from EU directives, constitute a general frame, referring to which collective agreements may improve, or on the contrary may worsen, if allowed to, employees' conditions as resulting from individual employment contract.

3. Collective regulation at plant level in case of crisis of the undertaking or company's bankruptcy: protecting employees or saving the company?

What in case collective regulation has to cope with the crisis of undertaking or company's bankruptcy at *plant level*?

In national labour law contexts related to EU regulations and directives, as is Italy's context, employees protection in case of company's bankruptcy and insolvency is guaranteed, in first place, by means of trade unions information and consultation leading to an agreement meant to avoid, if possible, collective dismissals or to reduce the number of employees losing their job; the matter, as well as the matters of redundancies and collective dismissals and of employees protection in case of transfer of undertaking, is fully considered, under all aspects, by national provisions implementing a number of EU directives[23].

This paper's perspective intends to highlight only one relevant aspect, specific to the national framework, as follows: in case of transfer of the undertaking, or of a part of the undertaking, if the company is either in a condition of bankruptcy or of insolvency or in a condition of economic crisis to which bankruptcy or insolvency might follow, an agreement can be negotiated with the transferee in order to rescue the enterprise as a source of employment, but with loss or scaling back of many of the workers' rights under the the employment contract or collective agreement at sector or plant level. Such an agreement has binding effects for the entire workforce[24] and, consequently, no grievance or legal action against transferor or transferee could be proposed by employees who suffer dismissal or loss of rights: e.g., a reduction in severance pay due from the old employer. .

4. Wages and other claims, a possible overlapping; a legislator's choice, the enforcement of a less favorable regulation despite of a more favorable one.

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22 Specific aspects of the constitutional principle as related to collective bargaining are often analyzed in rulings of the courts: see Corte di Cassazione, ruling n.896 of 2011, in *Il diritto del mercato del lavoro,* 2011, n.1-2, pp.301-316, with note by Brizzi, S., "Determinazione giudiziale della retribuzione sufficiente e condizioni territoriali".

23 For a review of national legal framework, Venditti, L., "Licenziamento collettivo e tecniche di tutela" , Esi, Napoli, 2012 (ISBN 9788849525540); referring to employees' protection in case of bankruptcy, may I add Ficari, L., "I lavoratori nella grande impresa insolvente", 2003, Giappichelli, Torino (ISBN 88-348-2513-6), spec. pp-245-312.

24 May I quote Ficari, L., "Workers' Voice and Involvement in the Restructuring of Undertakings", p.97, in *Rethinking Corporate Governance: From Shareholder Value to Stakeholder Value,* Roger Blanpain, William Bromwich, Olga Rymkevich & Iacopo Senatori (eds.), pp.91-104, 141-162, 2011 Kluwer Law International,BV, The Netherlands, ISBN 978-90-411-3450-9.

Does *transformation* affect other aspects of collective bargaining? Pay *claims* arising out of employment relationships and minimum wages provided for by collective agreements is a ground on which one might be see a sort of *overlapping,* if a special agreement between employer and employee were allowed, as it is in Italy's labour law upon special conditions[25], to settle any question through *individual waivers* or through *transactions,*

Furthermore, collective agreements at different levels can be related to employment relationship at individual level in different ways, such as, for example, in case collective agreements at plant level providing a different level of wages compared to a national context. Overlapping in an international context might also be considered, in case collective agreements at plant level were overlapping national level through decentralization.

From another point of view, employment relationship at individual level might not be strictly related to national collective agreements. Such is the perspective related to the binding effects of collective agreements in respect to the stakeholders concerned: the question is, in other words, on which grounds is the right guaranteed for employees, and the obligation enforced for employers, to be included in the area of binding collective agreements. A further question, starting from *comparison* between collective regulation and individual employment relationship and concerning the enforcement of *more* favorable regulation provided for by collective agreements, would bring to legitimate, or, on the other hand, to exclude, a sort of free shopping-choice between collective regulation and individual employment agreements: à recerche of the most favorable regulation for employees.

Italy's recent context offers an interesting example, which has been said to be "unique in the European landscape"26; more, considering it brings to labour law *deregulation* at plant level, it has been said to open a path to social dumping at plant level27 . Indeed, law provisions (article 8, law n. 148 of enacted in 2011) have enforced a special *pattern* of collective agreements at plant level, which, strictly, plays the "role" of worsening the protection for all workers concerned in the plant and area of agreement, with the "end" of avoiding restructuring with loss of jobs, in a perspective of general interest 28

5. Concluding remarks. Tools and Actors: is the scenario complete ? Not a "Tale", not just "Two".

The analysis of recent national trends of transformation of collective bargaining was meant to underline how, for various reasons and different purposes and in different moments of labour law legislation, trade unions have been empowered to draft and negotiate binding agreements including *in pejus* regulation at plant level as well as, often, at sector level. Do any national contexts offer

25 Civil code, article 2113.

26 By Perulli, A., "La contrattazione collettiva di prossimità: Teoria, comparazione e prassi", in *Rivista italiana di diritto del lavoro*, 2013, n.1, pp.919-960, p. 922.

27 Perulli, A., quoted, p. 923, p.926, while a totally different opinion is expressed by Vallebona, A., "L'efficacia derogatoria dei contratti aziendali territoriali: si sgretola l'idolo dell'uniformità oppressiva", in *Massimario di giurisprudenza del lavoro*, 2012. It must be noted how most authors are discussing various issues of the provision, enacted in 2011, concerning the so called "proximity" collective agreements, and its consequences resulting on the role of collecting bargaining and are expressing strongly different views on the matter.

28 Perulli, A., quoted, p. 929 (footnote 30, quoting Veneziani, B.).

valuable experience? *Is* it possible to *understand* which *way* the transformation of collective bargaining points to and where it leads to? Would it be possible, and *correct,* to alter (in which way? And which legal tools to use?) any direction that recent developments of collective bargaining are pointing to?

The crucial question concerning *transformation* of *ends* of collective bargaining can be afforded, on a legal ground, only if joined to another question, the following one: by which legal tools (national law; free collective agreements; individual employment agreements; rulings of the Courts) and by action of whom (law; trade unions; companies and workers representatives at plant level) does such a transformation take place? In other words, the choice of one or another specific tool is the condition upon which one can understand, and in a certain way explain, *transformation* as it takes place in one or another context. In fact, collective agreements are related in a different way to all and to each one of the fore mentioned tools, depending upon the national context: consequently, the effects of collective agreements towards one or another tool are quite different, whether it is law and legislator, on one side, or individual agreement, on the other side.

The paper has intended to discuss the theme "Collective bargaining – and beyond?" cutting across the theme "Labour law and development" and pointing to specific questions referring to a national context which, in recent times, has undergone substantial changes. Such questions are, without doubt, rather specific: all the same, they seem to offer a possible common perspective for a general view of the core problem of the theme. Also, the solutions which have been found on legal grounds, notwithstanding the fact that the legal tools which have been described belong to a national context which is specific and, one might say, particular, seem to offer possible useful solutions.

As it has been said, the paper was meant to refer to a period of time of special importance for national labour law, the one going from year 2003, when a fundamental general reform of Italy's labour law was enacted29, passing through a number of other relevant regulations30 up to the reforms enacted in the last years 2014-201531 with Mr. Renzi's government providing a new, general, reform concerning almost all the issues of domestic labour law. In particular, attention has been drawn to a recent regulation, enacted in article 8 of Law n.148 of 201132, providing a new form of collective agreement which is characterized by its being "close" (the *most* close), or "near", to the employees of the plant: so-called, *"proximity"* collective agreements. It has been stressed how such agreements allow (and are meant to allow), on one side, workers' representatives to worsen, in negotiating with the employer, the protection elsewhere guaranteed by labour regulations and how, on the other side, they allow the employer to apply such *in pejus* collective regulations with binding effects for the whole of workers at plant level.

The question is whether collective agreements are entitled, under specific circumstances, to renounce to their traditional role of improving and negotiating better working conditions and whether, consequently, such collective agreements might be looked at, or should not be looked at as if they were opposed, or opponent33, in respect of the more favorable individual agreements

29 Quoted in references.

30 Quoted in references.

31 Quoted in references.

32 Quoted in references.

33 As might be suggested by Dicken's novel quotation in this paper's title.

existing at plant level. On the contrary, the tentative conclusion which has been here proposed, as resulting from the analysis of a national context, suggests the use of a legal track to meet and fulfill the end of employees' protection. Defining such a track brings to a further aspect of the question: both collective agreements and individual ones need, at plant level as well as on larger scale, the support of law regulation and of rulings of the courts in order to establish the frame, inside which autonomy of bargaining and freedom of choice for employees and employees can act and proceed. Is the making of European labour law, also to be considered? The answer is yes, of course: on one hand, EU directives would come into the picture by means of implementation in national context, while, on the other hand, EU regulations and rulings of the Court of Justice would necessarily have to to be considered. At the same time, as collective bargaining stands on a ground of freedom and autonomy, its role in the private sector34 is not, and it could not be, by any means reduced in consequence of rulings or regulations related to general economic crisis.

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34 The conclusion might be different referring, as previously noted, to Italy's context in the public sector, especially after the ruling of Constitutional Court in 2015.

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