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# Strike in the Essential Services: Italy

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## **Strike in the Essential Services: Italy<sup>α</sup>**

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<sup>α</sup> The paper will be published in Mironi Moti and Schlachter Monika (eds.), *Regulating Strikes in Essential Services – a Comparative Law in Action Perspective*, Kluwer (forthcoming).

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## **I. General Background – Country Profile**

### **1. The Legal Framework of Labour.**

#### **a) Constitutional Background.**

The Constitution enacted in 1948 after a long dictatorship under Benito Mussolini, the Prime Minister who came to power in 1922<sup>1</sup>, is the foundation of the Italian legal system. The Constitution supports a republican form of government, in compliance with the rejection of the monarchic regime after a referendum held in 1948. The Constitution confers the sovereignty to Parliament. The President of the Republic has powers aimed at guaranteeing the balance between the constitutional bodies. Notably, the Italian Constitution does not only regulate civic and political liberties and political institutions but also economic and social rights. Labour is at the core of the constitutional chart<sup>2</sup>. Labour is mentioned in the opening of the Constitution, where Art. 1 states that 'Italy is a democratic republic founded on labour'<sup>3</sup>. Art. 4 recognises the right to work for all citizens. Interrelated with the right to work is the duty for citizens to cooperate to the material and moral progress of the society<sup>4</sup>. The right to work has therefore a fundamental value in the constitutional political project, which supports strategies aimed at protecting employees and workers whether under a subordinate or independent contract. The Titolo III of the Constitution details the basic protection for labour in few Articles. Courts have applied these Articles without the mediation of specific statutes in many occasions. One can find a very important example of the straight application by Courts of constitutional labour principles in the matter of remuneration. On the basis of Art. 36 of the Constitution, the remuneration ought to be proportional to the quantity and also to the quality of the work performed<sup>5</sup>. It is worth noting that Italy has not yet adopted a statute that details what is the minimum wage in every sector. As a consequence it had seemed problematic for an employee to sue an employer in Court in order to challenge a contractual agreement setting a wage apparently unfair. Civil Courts have nevertheless overcome the absence of legislation on

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<sup>1</sup> Lyttelton Adrian, *The Seizure of Power: Fascism in Italy 1919-1929*, 2004.

<sup>2</sup> Mengoni Luigi, *Fondata sul lavoro: la Repubblica tra diritti inviolabili dell'uomo e doveri inderogabili di solidarietà*, in Napoli Mario (ed.), *Costituzione, lavoro, pluralismo sociale*, 1998.

<sup>3</sup> Scognamiglio Renato, *La Costituzione repubblicana*, in Persiani Mattia (ed.), *Le fonti del diritto del lavoro, Trattato di diritto del lavoro*, vol. I, 2010, p. 113..

<sup>4</sup> Mancini Giuseppe Federico, *Commento all'articolo 4 della Costituzione*, in Branca Giuseppe (ed.), *Commentario alla Costituzione*, 1975, p. 199.

<sup>5</sup> Gragnoli Enrico – Corti Matteo, *La retribuzione*, in Marazza Marco (ed.), *Contratto di lavoro e organizzazione, Trattato di diritto del lavoro*, vol. IV, part 2, 2012, p. 1375.

minimum wage retrieving Art. 2099 of the Civil Code adopted in 1942 and clearly inspired by the fascist ideology on labour<sup>6</sup>.

### **aa) Remnant of Corporative Regulation**

#### **(1) Impact on Individual Cases**

Article 2099 of the Civil Code allows Courts to settle an individual claim on the right to a fair pay simply by applying the sectorial national collective agreement. In order to understand the mechanics of the trial, it should be remembered that under the fascist regime every industrial conflict had to be settled through a collective agreement to be applied to the whole sector workforce or through a Court of Appeal's binding decision, if parts could not agree on the economic matter. The judge could then easily decide on a labourer's claim for a fair wage, because the solution of the case was in the necessary application of the existing, in the circumstances, collective agreement or the application of the Court of Appeal's award setting the dispute on interests. This regulation enabling Courts to decide on industrial disputes does not operate any more. Courts nevertheless still apply Article 2099 of the Civil Code in claims about pay, even if the employer and the employee are not, in the circumstances, unionized and subject to a collective agreement. The Italian regime based on the economic individual freedom to negotiate (Art. 41 Constitution) does not allow Courts to settle individual or collective disputes on interests. Notwithstanding these limits, Courts argue that the necessary application of the constitutional right to a sufficient and proportionate remuneration obliges judges to decide on what is, in the circumstances, a fair wage. How do judges decide what is fair? Courts actually take inspiration from tariffs provided for by collective agreements applied in the same sector or in similar sector, and this is exactly what Art. 2099 c.c. provides for in these cases<sup>7</sup>. Art. 2099, enacted in a totally different context, is fundamental in order to guarantee the right to a fair wage. The example on the fair pay is useful to understand the method of interpretation applied by Italian Courts to the industrial relations after the fall of the fascist regime. With the support of scholars, Courts have adapted, wherever possible, the corporative regulation of labour to the new constitutional principles.

#### **(2) Impact on Collective Cases**

The contextualization of rules enacted during the corporative period has happened also in the matter of strike. As this essay will discuss in the following chapters, for a long time after the enactment of the new

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<sup>6</sup> Santoro Passarelli Francesco, *Nozioni di diritto del lavoro*, 9<sup>th</sup> ed., 1957; Martone Michel, *La fase corporativa*, in Persiani Mattia (ed.), *Le fonti del diritto del lavoro*, Trattato di diritto del lavoro, vol. I, 2010, p. 63.

<sup>7</sup> Cass., 11 January 2012, no. 153, *DL Rivista Critica di Diritto del Lavoro*, 2012, p. 200.

republican constitution, and notably since 1990, the regulation of strike was based on laws that had been adopted in 1930 and therefore clearly in a different political climate. This fact seems a paradox if one considers that strike was at that time a criminal offence. The Italian Criminal Code enacted in 1930, and still generally in effect, provided for with rules that punished strike and lock out as crimes against the national economy<sup>8</sup>. The Criminal Code punished strike and lock out distinguishing different situations on the basis of the strikers' typical aims. The list of crimes is not just historically interesting. In the legal jargon, operators still qualify an industrial action using the legal categories provided for by the Criminal Code. Courts specifically qualify a strike and lock out in respect of the aims of the agents on the basis of the criteria adopted by the Criminal Code. There are economic actions, solidarity actions, political strikes, The Constitutional Court from 1960 has produced a string of decisions assessing to what extent a strike aimed at a specific purpose is protected by the Constitution that guarantees the right to strike under Art. 40<sup>9</sup>. The clash between a perspective that considers industrial action as an individual fundamental right<sup>10</sup> and a perspective that qualifies a strike as a criminal offence is evident. The Constitutional Court had nonetheless to interpret criminal norms on strike in order to draw the limits of the right to strike<sup>11</sup>, which the Constitution does not regulate. The Criminal Code also punished the 'desertion' of a public service or a service of public necessity on the basis of a provision that was interpreted as applicable to industrial actions<sup>12</sup>. In 1990, the provision relating to the desertion of a public service was abolished by statute when Parliament enacted the first regulation in the matter of strike in the public services with Legge no. 146/1990. This is the only criminal norm applicable on strike that has been abolished by statute. It is worth noting that the Parliament has adopted a statute only on the matter of strike in the essential services. The regulation of a normal strike is still based on the string of principles of law produced by the Corte constitutional in the assessment of the coherence between the Constitution and the rules prohibiting strike.

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<sup>8</sup> Santoni Francesco, *La libertà e il diritto di sciopero*, in Lunardon Fiorella (ed.), *Conflitto concertazione e partecipazione*, Trattato di diritto del lavoro, vol. III, 2011, p. 3.

<sup>9</sup> Suppiej Giuseppe, *Trent'anni di giurisprudenza costituzionale sullo sciopero e sulla serrata*, *Rivista Italiana di Diritto del Lavoro*, 1989, no. 1, part I, p. 25.

<sup>10</sup> Santoni Francesco, *La libertà e il diritto di sciopero*, quoted nt. 4.

<sup>11</sup> Topo Adriana, *Tutela e rappresentanza degli interessi collettivi nel lavoro autonomo*, *Lavoro e Diritto*, no. 2, 1997, 203.

<sup>12</sup> Artt. 330 and 333, Criminal Code.



## II. Collective Labour Relations

### 1. Freedom of Association and Collective Bargaining: the Italian Paradox.

One may find that many Italian statutes make reference to collective agreements as a way for regulating specific profiles of the employment relationship, in situations where by contrast the individual negotiation is forbidden<sup>13</sup>. Italy nonetheless still lacks a general regulation by statute on collective bargaining. In Italy does not exist a legal regulation of the industrial relations in the private sector, nor a definition of collective agreement. As this essay pointed out above, the freedom of association and the freedom of collective bargaining, which is theoretically associated with the freedom of association, are nevertheless fundamental principles of the Italian regulation on labour, because the Constitution provides for the freedom of association under Art. 39<sup>14</sup>. First paragraph of Art. 39, bestows freedom of unionization to individuals and collective agents. The second, third, and fourth paragraphs, of Art. 39, all regulate a procedure meant to extend the application of a national collective agreement on to a pool of employees when certain conditions are satisfied. These Paragraphs are referred to as the 'second part' of Art. 39, and secondary legislation would be necessary to make them applicable. The Second part of Art. 39 is nevertheless effective by not allowing the Parliament to regulate collective bargaining on the basis of principles other than the ones compliant with Art. 39 of the Constitution. There are few reasons explaining why Art. 39 of the Constitution was not regulated by secondary legislation. The second part of Art. 39 was not detailed by secondary legislation, on the one side, because of the opposition of the most prominent national unions. These unions have opposed a detailed regulation of the process of collective bargaining, arguing that the constitutional process would have imposed an assessment of unions' membership in order to weight unions' right to participate in the process. Only recently CGIL (Confederazione Generale Italiana del Lavoro) has changed its opinion on this issue. Union representation has to be weighed only in the public sector since collective bargaining has been introduced as the necessary method for regulating

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<sup>13</sup> A good example is the "Testo Unico sulla Rappresentanza Confindustriale- CGIL, CISL, UIL" dated 10 January 2014, <https://www.cisl.it/grandi-temi/rappresentanza/769-testo-unico-rappresentanza.html> last visited on 24 March 2014.

<sup>14</sup> Giugni Gino, Commento all'Art. 30, in Branca Giorgio (ed.) Commentario della Costituzione, Rapporti economici (Artt. 35-40), 1979, p. 257.; Bellocchi Paola, La libertà sindacale, in Proia Giampiero (ed.), Organizzazione sindacale e contrattazione collettiva, Trattato di diritto del lavoro, vol. II, 2014, p. 3.

working conditions<sup>15</sup>. A theoretical argument was nevertheless also opposed to the enactment of the second part of Art. 39<sup>16</sup>. The second part imposes unions with duties that were similarly adopted by the fascist legislation, such as the unions' registration in a special register, the necessary assessment on the association's statute by the administrative authority in order to check the fairness of internal rules. Scholars<sup>17</sup> have therefore argued against the implementation of the registration rule on the basis of the incompatibility between this rule and the principle of freedom of unionization, which would not permit any interference with internal statutes and decisions adopted by trade unions.

#### **a) The Regulation of Collective Bargaining.**

In the absence of a legal regulation, the discipline of collective bargaining can be found on the one side, in framework agreements negotiated by the most representative unions and employers' associations. These framework agreements regulate the very process of collective bargaining and industrial relations. Courts' decision on claims concerning the application of a collective agreement in specific circumstances set, on the other side, the precedents by the judiciary bodies that integrate the framework. The matter is eventually regulated by the combination of the regulation adopted by unions and employers' associations with the Courts' set of decisions on the same topic. However, one should point out that interestingly the regulation of few fundamental aspects of collective bargaining is still based on Civil Code's norms. The Code specifically regulates the corporative collective agreements. These agreements were substantially statutes. The application of corporative rules on collective bargaining is nevertheless still admitted by Courts today, whenever these rules can be interpreted in compliance with the principle of freedom of association, bestowed by the republican constitution<sup>18</sup>, as explained above.

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<sup>15</sup> See [www.cgil.it/news/Default.aspx?ID=21954](http://www.cgil.it/news/Default.aspx?ID=21954), last visited on 1<sup>st</sup> December 2017. Proia Giampiero- Gambacciani Marco, Il contratto collettivo di diritto comune, in Proia Giampiero (ed.), *Organizzazione sindacale e contrattazione collettiva*, Trattato di diritto del lavoro, vol. II, 2014, p. 595, at p. 608.

<sup>16</sup> Ghezzi Giorgio, *La responsabilità contrattuale delle associazioni sindacali*, 1963, p. 191.

<sup>17</sup> Bellocchi Paola, *Organizzazione sindacale e contrattazione collettiva*, in Proia Giampiero (ed.), *Organizzazione sindacale e contrattazione collettiva*, Trattato di diritto del lavoro, vol. II, 2014, p. 95.

<sup>18</sup> Proia Giampiero - Gambacciani Marco, *Il contratto collettivo di diritto comune*, quoted at nt. 8.

### **aa) Collective Bargaining and Collective Agreements.**

Collective relations are common practice at national level but also at local (regional or provincial) and plant level. As pointed out above the shared wide interpretation of the freedom of association means that industrial agents are free to decide at what level or levels to regulate labour so that the regulation of the level or levels of negotiation is a typical content of framework agreements between employers' associations and unions. These are typical agreements involving more unions on the one side and more employers' associations on the other side. Normally these framework agreements regulating industrial relations apply to a wide range of businesses<sup>19</sup>. Besides, Italy has a long tradition, starting before the republican constitution, of national collective bargaining for most of the productive sectors. Lately since the start of the new millennium the law has provided incentives in order to enhance collective bargaining also at industrial level so that firms would possibly adapt the regulation of work to specific production models and strategies, for example on the matter of working time<sup>20</sup>. As we already pointed out above, the hierarchy, between local or plant negotiations and national negotiation, is not regulated by statute. The link between agreements operating at different levels in practice is nonetheless the subject of the framework agreements, described in the paragraph above. There may be sectors where a plant agreement is the only agreement applied to the workforce. This situation is not frequent but there is an important example, which is the car manufacturer FIAT's collective agreement. Fiat, one of the most renowned Italian automobile manufacturer, withdrew from Confindustria (one of the main employers' associations of manufacturers) in 2009 and has therefore started a process of collective bargaining with unions on its own. The collective agreement that has been reached, but not with Fiom-CGIL (the metalworkers' trade union linked to CGIL), is now applied to all of Fiat's workers in Italy and is considered by scholars both a plant agreement but also, as a national agreement given the presence of Fiat factories on different areas of the Italian territory<sup>21</sup>. The lacking of a general regulation by statute for collective bargaining and collective agreements means that collective agreements are interpreted as contracts not different from the

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<sup>19</sup> Maio Valerio, *Struttura ed articolazione della contrattazione collettiva*, in Proia Giampiero (ed.), *Organizzazione sindacale e contrattazione collettiva*, Trattato di diritto del lavoro, vol. II, 2014, p. 446.

<sup>20</sup> Lassandari Andrea, *Il contratto collettivo aziendale*, in Proia Giampiero (ed.), *Organizzazione sindacale e contrattazione collettiva*, Trattato di diritto del lavoro, vol. II, 2014, p. 717.

<sup>21</sup> De Luca Tamajo Raffaele, *Accordo di Pomigliano e criticità del sistema di relazioni industriali italiane*, *Rivista Italiana di Diritto del Lavoro*, no. 4, part. I, 2010, p. 797.

commercial ones. Courts treat collective agreements as commercial contracts. Few specific norms on collective bargaining have been enacted and regulate very peculiar situations. One finds a good example of a peculiar regulation in Art. 8, Law no. 148 of 2011. This norm regulates the effectiveness of plant level agreements. The specific norm makes these agreements binding for all plant's employees once the plant agreement was submitted to a workforce referendum gaining the majority of votes in the poll<sup>22</sup>. This regulation that applies only to agreements regulating specific matters confirms nevertheless the prevailing political approach to industrial relations based on the principle of no-interference and no-regulation by statute. An important exception to the principle of the limited efficacy of collective agreements is the collective agreement that sets the essential services to be performed by the workforce in case of strike. These agreements are in fact binding for all the work force on the basis of their incorporation into the code of practice adopted by the employer in order to regulate organization of work in the undertaking<sup>23</sup>.

As the author pointed out above, Courts apply to collective bargaining also the rule on corporative collective agreements embedded in the Civil Code, if Courts interpret these norms as coherent with the Constitution principles on labour. A good example to understand this perspective is Art. 2066. This Article provides for a fundamental rule in the perspective of safeguarding the effectiveness of collective bargaining. The Article says that individual contracts are not allowed to derogate terms set by collective agreements applicable to the workforce, unless the specific individual agreements are more favourable to employees. Courts have applied this Article to collective agreements even if this Article was adopted under the corporative regime that compared collective agreements to statutes and therefore regulated their legal efficacy<sup>24</sup>. Courts' decisions have also been fundamental in order to safeguard the effectiveness of a collective agreement to the whole workforce at least on the matter of remuneration<sup>25</sup>. This is in fact an issue that the lack of regulation of the collective agreement by statute has left to Courts to decide, and that has been approached through the interpretation of the Code civil and notably

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<sup>22</sup> See Lassandari Andrea, *Il contratto collettivo aziendale*, quoted at nt. 13.

<sup>23</sup> This point was made clear in 1996 by Corte costituzionale, 18 October 1996, no. 344, in <http://www.giurcost.org/decisioni/1996/0344s-96.html>, last visited on 26 March 2018.

<sup>24</sup> Proia Giampiero - Gambacciani Marco, *Il contratto collettivo di diritto comune*, quoted at nt. 8, at. p. 612.

<sup>25</sup> Proia Giampiero - Gambacciani Marco, *Il contratto collettivo di diritto comune*, quoted at nt. 8, at. p. 619.

of Art. 2099 of the Civil Code on the matter of pay in connection with Art. 36 of the Constitution<sup>26</sup> as pointed out above.

## **2. Collective Bargaining in the Public Sector.**

### **a) Scope of Collective Bargaining: Public Servants.**

Besides the private sector, collective bargaining is a typical instrument for the regulation of labour relationships in the public sector. Not all public employees are subject to regulation by collective agreement. Members of the military force, police officers of the national body, members of the diplomatic body, members of the judiciary, university professors and researchers, home office officers such as 'prefects' are not subject to collective bargaining. The fact that these categories do not have the right to collective bargaining does not mean, on the one side, that job terms and conditions of work are not regulated on the basis of a negotiation between the public authority (the Government) and representatives of the bodies' members. In the circumstances terms of employment are incorporated into secondary legislation that, differently to collective bargaining, applies to all member of the bodies and not just the ones represented by the negotiator. Eventually it is worth noting that only a few categories, notably members of the military force and police officers, are expressly not allowed to strike, and only member of the armed forces are not allowed to join unions on the basis of Art. 1475 of Legislative Decree no. 66/2010. Considering the recent decisions by the ECtHR on Art. 11 of the ECHR<sup>27</sup>, in French cases, it seemed nevertheless unlawful the limit to join unions provided for by the law for the Italian armed forces, and in fact the Italian Constitutional Court has removed the unlawful limit on the 11<sup>th</sup> April 2018<sup>28</sup>.

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<sup>26</sup> See above in this essay sub Chapter 1. aa) (1).

<sup>27</sup> Laulom Sylvaine, *Strike in Essential Services in France*, in this book, observes that in ECtHR, *Matelly c. France* (Req. n° 10609/10) 2 October 2014 and ECtHR, *Adefdromil c. France* (Req. n° 32131/09), 2 October 2014, related to the members of the armed forces freedom of association, "The Court (ECtHR) concluded that, while the exercise by military personnel of freedom of association can be subject to legitimate restrictions, a blanket ban on forming or joining a trade union encroached on the very essence of this freedom, and was as such prohibited by the Convention (ECHR). The Court's judgment holds that an absolute prohibition may not be imposed on trade unions in the armed forces. However, it specifies that restrictions (even significant ones) may be placed on the exercise of freedom of association by military personnel, since the specific nature of the armed forces' mission requires that trade union activity be adapted in consequence. Nonetheless, those restrictions must not deprive service personnel of the general right of association".

<sup>28</sup> [https://www.cortecostituzionale.it/documenti/comunicatistampa/CC\\_CS\\_20180411184944.pdf](https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20180411184944.pdf), last visited on 25 April 2018.

**b) Public Employees.**

The largest components of public employees do not belong to the list of officers named above: for example the staff of governmental departments, the staff of local public authorities, teachers and administrative staff in state schools and state universities, doctors, nurses and administrative staff in the health service, fall under a special legislation. This legislation enacted in 1993 and modified many times<sup>29</sup> regulates on the basis of employment contractual rules and on the basis of collective bargaining the relationship between employers and employees. The most striking difference between the private and the public sector is the fact that the law regulates the process of collective bargaining and the efficacy of the collective agreement for the public sector. All employees are submitted to regulation by collective agreement. The application of the collective bargaining process into the public sector has been achieved as an important success by unions gradually starting in the late '60 of the last century, and has become the general rule in 1993<sup>30</sup>. Before the implementation of the contractual principle, secondary legislation was the legal instrument meant to regulate public employees' condition of work. Trade unions promoted industrial actions in order to negotiate first pay and subsequently other terms of work. It is worth remembering that one of the reasons behind the decision of the Government of the time to allow collective bargaining in the public sector, as a general rule for negotiating wages, was the issue of strikes<sup>31</sup>. The statute that initially regulated collective bargaining in the public sector excluded from the negotiation unions that had not yet adopted internal binding rules on strikes in the essential services<sup>32</sup>. The pressure on Government to contain the impact of strikes in the essentials service was then a reason for overcoming the long time indifference by Government to adopt a regulation on strike in application of Art. 40, of the Constitution. Art. 40 states in fact that the right to strike ought to be performed in compliance with the norms regulating it. The Government, instead of adopting a statute with detailed rules on strikes in the essential services, decided to adopt a legal incentive

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<sup>29</sup> Decree Legislative, 30 March 2001, no. 165 regulates today the employment relationship and collective bargaining in the public sector for all employees with the exception of public servants as defined below.

<sup>30</sup> Carinci Franco, *Contrattazione e contratto collettivo*, in Proia Giampiero (ed.), *Organizzazione sindacale e contrattazione collettiva*, Trattato di diritto del lavoro, vol. II, 2014, p. 981.

<sup>31</sup> See Law 29 March 1983, no. 93, sub Art. 11.

<sup>32</sup> Treu Tiziano, Brancasi Antonio, Rusciano Mario, *La legge quadro sul pubblico impiego*, commentario della legge 29 marzo 1983, n. 93, 1985.

for unions, so that unions had to take measures to regulate strikes through codes of conduct in order to participate in the collective bargaining process.

### **III. The Right to Strike**

#### **1. The Right to Strike in General.**

##### **a) The Definition of Strike and the Right to Substitute Employees on Strike.**

The Italian constitution bestows the right to strike on the basis of Art. 40. The wording of the Italian norm is similar to the French Constitutional norm on strike<sup>33</sup>. Art. 40 of the Constitution is concise. It states that the right to strike shall be exercised in conformity with the legislation that governs that right. The Constitutional regulation of strikes does not define what is strike nor dictates principles, as instead the second part of Art. 39 of the Constitution does, to address the legislation to be adopted by the Parliament in order to detail how and in what circumstance one is allowed to strike<sup>34</sup>. The word strike was not new to the Italian legal language because strike and lock out were considered criminal offences during the fascist age. The definition of a strike under the republican constitution was therefore influenced by the previous interpretation of strike. Courts agree that a strike is the act of abandoning work during working time in order to protect professional interests<sup>35</sup>. A strike itself is an individual action. Nevertheless it is performed in order to protect interests that are shared by a group of workers. A large or a small group of workers can lawfully strike. It is not necessary that all of the group's members take on an action in order to qualify the abandoning of work as a strike. Under the Courts' interpretation not all industrial actions are strikes and the freedom to strike just refers to the abandoning of work by employees with the aim of protecting workers' interests. This interpretation was adopted by the Constitutional Court since 1962<sup>36</sup> and confirmed later in 1969<sup>37</sup> and again in 1974<sup>38</sup>. Also the Law no. 146 of 1990<sup>39</sup> regulating strikes in the essential services gives the definition of a strike as the 'suspending of the act of performing'<sup>40</sup>. The employee does not have the right to partially suspend

<sup>33</sup> Constitution of the French Republic, 27 October 1946, Preamble Par. 7.

<sup>34</sup> This situation is similar to the French situation regarding the regulation of strike. See Laulom Sylvaine, *Strike in Essential Services in France*, quoted nt. 26.

<sup>35</sup> Santini Fabrizia, *Le forme di sciopero*, in Lunardon Fiorella (ed.), *Conflitto concertazione e partecipazione*, Trattato di diritto del lavoro, vol. III, 2011, p. 83..

<sup>36</sup> Corte costituzionale, 28 December 1962, no. 123, *Foro italiano*, 1963, I, c.1.

<sup>37</sup> Corte costituzionale, 17 March 1969, no. 31, *Foro italiano*, 1969, I, c. 795.

<sup>38</sup> Corte costituzionale, 14 January 1974, no. 1, *Foro italiano*, 1974, I, c. 299.

<sup>39</sup> Law 15 June 1990, no. 146.

<sup>40</sup> Art. 2 bis, par. 1 and Art. 8, par. 1, Law no. 146 of 1990.

his work in order to perform only some tasks, because this behaviour would be an interference with the managing power of the employer, so that not performing certain tasks with the aim of protesting would be a breach of contract. Instead the employee has the right to strike for long or short periods of time and also only on overtime. Employees on piece-work can relent production but not below the minimum standard<sup>41</sup>. A strike can be performed in various ways. Unions and workers are not required to give notice of the industrial action. Notice is a duty for unions only in the essential services, as this essay will analyse in the forthcoming chapters. As such, sudden strikes are lawful<sup>42</sup>. Hiccup strikes and chessboard strikes are also lawful. The only limitation for a strike action is the effective damage suffered by people and by factory machineries, situation which happens, for example, when the suspension of production make machineries and working tools no longer useable after the strike<sup>43</sup>. It's nevertheless worth noting that the employer might use employees that are not taking part in the industrial action in order to limit damages to the business activity during the suspension of work by a part of the workforce<sup>44</sup>. In the essential services, the Constitutional Court<sup>45</sup> has therefore declared as compliant with the right to strike the specific rules<sup>46</sup> permitting the public administration to substitute courts' clerks and registrars on strike because the substitution prevents damages caused by the industrial actions. What is not permitted to the employers is the hiring of new staff in order to simply substitute employees on strike when the contract that the employer would apply is a short term contract, a temporary contract through agency, or an 'intermittente' contract, which is a sort of zero hours contract regulated by Legislative Decree no. 81 of 2015.

### **b) Classification of Strikes.**

For the absence of a statute on strike, the Constitutional Court has classified strikes according to the aim pursued in the circumstances by employees through the industrial action and on the basis of the definition adopted by the Criminal Code<sup>47</sup>. The most typical aim pursued through the

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<sup>41</sup> Santini Fabrizia, *Le forme di sciopero*, quoted at nt. 24, at p. 130

<sup>42</sup> Corte costituzionale, 28 December 1962, no. 124, *Massimario di giurisprudenza del lavoro*, 1962, p. 416.

<sup>43</sup> Corte costituzionale, 28 December 1962, no. 124, quoted at nt. 31. Lately, Cass.17 December 2004, no. 23552, *Foro italiano*, 2005, I, c. 2774. Santini Fabrizia, *Le forme di sciopero*, quoted at nt. 24, at p. 119.

<sup>44</sup> Cass., 13 March 1986, no. 1701, *Massimario di giurisprudenza del lavoro*, 1986, p. 336.

<sup>45</sup> Corte costituzionale, 23 July 1980, no. 125, *Foro italiano*, 1980, I, c. 355.

<sup>46</sup> Art. 34 D.P.R. 15 December 1959 no. 1229, and Art. 74, Law 23 October 1960, no. 1196.

<sup>47</sup> Santoni Francesco, *La libertà e il diritto di sciopero*, quoted at nt.4, at p. 52.



strike is the obtaining of better working conditions. This type of strike and the lock out meant to resist this claim were regulated as a crime by Art. 502 of the Criminal Code. The Constitutional Court declared since the early '60 of the last century that Art. 502 is inconsistent with the Constitutional system and the Court of Cassazione<sup>48</sup> had already taken the same solution. A strike is legitimate also when it pursues aims such as applying pressure on public powers for the satisfaction of employees' economic interests embedded in the principles of the part I, chapter III of the Constitution<sup>49</sup>. This is a political economic strike whereby the employer does not have the power to bargain with unions on the matter at stake, but public institutions, such as the Parliament, have the power to regulate the matter. A good example is a strike with the aim of ameliorating public pensions or increasing health and safety cover or public housing policies as well fiscal policies and the reduction of taxes. If a case like this occurs in the essential public services unions have nevertheless the duty to give notice to the employer<sup>50</sup> of the strike as they have regardless the purpose of the action. The Constitutional Court has not declared Art. 505 of the Criminal Code, concerning strike in support of other categories of workers (sympathy strike), as contrary to the constitution and has referred the power to lower Courts to decide if in a given circumstance there is a significant link between the categories taking industrial actions, so that support by one category has a meaningful purpose<sup>51</sup>. Besides, the Criminal Code regulates also the purely political strike framed as a crime by Art. 503 of the Criminal Code. The aim of a purely political strike is contesting the policy taken in given circumstances by the Government or other political institution, such the case when workers criticize foreign politics or the participation in a military action. Courts consider purely political strike as a situation differing from an economic-political strike, which happens when employees aim at promoting political reforms that impact on their economic or professional interests<sup>52</sup>. The Constitutional Court, reversing its original approach, has eventually declared that Art. 503 of the Criminal Code, which punishes the political strike, is unconstitutional<sup>53</sup> because of the contrast with the freedom to take part in a national debate. For the Courts political strike

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<sup>48</sup> Cass., 7 June 1952, no. 1628, *Foro italiano*, 1953, I, c. 355.

<sup>49</sup> Corte costituzionale, 14 January 1974, no. 1, quoted nt. 27.

<sup>50</sup> Corte costituzionale, 10 June 1993, no. 276, *Foro italiano*, 1993, I, c. 2401.

<sup>51</sup> Corte costituzionale, 28 December 1962, no. 123, *Foro italiano*, 1963, I, c. 1.

<sup>52</sup> Corte costituzionale 14 January 1974, no. 1, *Massimario di giurisprudenza del lavoro*, 1974, p.11.

<sup>53</sup> Corte costituzionale, 27 December 1974, no. 290, *Massimario di giurisprudenza del lavoro*, 1975, p. 1.

gives in fact "voice" to citizens<sup>54</sup>. The freedom to strike for political reasons cannot be subject to interferences by the Government. It is nevertheless unclear on the basis of the constitutional rules if an employee taking part in a political strike has also a 'right' to strike in respect to the employer. Theoretically, it is in fact possible to distinguish between the freedom to strike and the right to strike, which is the immunity in respect to the possible reaction by the employer when an employee does not work in order to strike. Italian Courts treat strike as a fundamental right through which workers convey their "voice", in the Hirschman sense, on all the matters that they collectively consider as relevant. The wide application of the freedom to strike, which allows worker and employees to suspend work in order to express their opinion on professional and political issues, free from any interference from public powers, does not mean that strike has no impact on the employment contract. Could then an employer lawfully dismiss an employee for taking part in a merely political strike? For sure a political strike still falls under the Criminal Code, if employees take industrial action in order to subvert the existing legitimate constitutional order<sup>51</sup>. It is nevertheless worth noting that a strike in the essential services without previous notice is lawful if the strike is meant to oppose a revolution against the existing constitutional order<sup>55</sup>. Revolutionary strike is anyway a special situation subjected to exceptional rules. Even if the Constitutional Court's arguments on strike could support the conclusion that the right to strike does not cover all industrial actions, it is nevertheless also undisputable that more recently the Court of Cassazione has adopted a perspective on the basis of which, independently from the strikers' aims in the circumstances, whatever their alleged purposes, workers have the freedom to strike and also the right not to be dismissed for their participation in industrial action<sup>56</sup>, adopting the widest perspective on the freedom to strike. The Italian regulation therefore differs sensibly, for example, from the English regulation of strike where, "at common law, the employer has entirely free discretion to dismiss an employee who has

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<sup>54</sup> Meny Ives, *La crisi politica*, *Rivista Trimestrale di Diritto Pubblico*, no. 3, 2016, p. 621 links strike to the "voice" function. On the voice function: Hirschman Albert, *Exit, Voice and Loyalty*, 1970.

<sup>51</sup> Corte costituzionale 27 December 1974, no. 290 quoted nt. 49.

<sup>55</sup> Art. 2, par. 7, Law no. 146/1990. On the issue: Santoro Passarelli Giuseppe, *Questioni aperte dello sciopero nei servizi pubblici essenziali: Sciopero politico-economico, sciopero politico, sciopero generale e preavviso*, *Diritto delle Relazioni Industriali*, no.1, 2008.

<sup>56</sup> Cass., 21 August 2004, no. 16515, [www.iusexplorer.com](http://www.iusexplorer.com), last visited on 24 March 2018. Sciarra Silvana, *I diritti sociali e i dilemmi della giurisprudenza costituzionale*, *Rivista Italiana di Diritto del Lavoro*, no. 3, 2017, p. 347; Giugni Gino, *Diritto sindacale*, 1968, p. 220. For a comparative perspective on strike that enlightens this difference: Lord Wedderburn, *Employment Rights in Britain and Europe*, *Selected Papers in Labour Law*, 1991, p. 74 seq.

taken industrial action by reason of breach of a fundamental term of the contract of employment; although an employer may elect not to do so. Employees in England are therefore dependent on statutory intervention to provide for protection from dismissal (TULRCA 1992, ss 237, 238 and 238A)<sup>57</sup>.

### **c) Balancing the Right to Strike with Other Fundamental Rights.**

As this essay has pointed out, the Constitutional Court has integrated with a body of decisions the basic regulation of strike adopted by the Constitution. Some of these decisions are based on the argument that the freedom to strike cannot overcome other freedoms and fundamental rights such as, for example, the right to be healthy and alive. Strikes that compromise other fundamental rights embedded in the Constitution are not lawful. Among the competing different interests Courts have acknowledged also the employer's freedom to continue the economic activity after the end of the industrial conflict, which means that a strike that compromise the economic resilience of the undertaking is unlawful<sup>58</sup>. As a consequence, in some circumstances or for some categories of workers, strike is forbidden or limited. The right to take action has to surrender before the duty of solidarity, recalled by Article 2 of the Constitution<sup>59</sup>, and therefore has to be balanced with other right of similar rank.

### **2. Actions Different from Strike.**

Types of industrial actions different from strike are not covered by the Constitutional protection. Behaviours meant at not collaborating with the employer and his/her staff, obstructionism, and behaviours meant to relent the business throughout the captious application of rules and procedures are not considered as a strike<sup>60</sup>. Sabotage is not protected as an industrial action and the rule that punishes it as crime<sup>61</sup>, Art. 508, par. 2, of the Criminal Code, is still applicable. Also the occupation of the plant by employees during the strike is a crime falling under Art. 8, par. 1, Criminal Code. The Constitutional Court has made it clear that for the purpose of

<sup>57</sup> Novitz Tonia, The English National Report, in this book, p. 3.

<sup>58</sup> Among the recent decisions see: Cass., 3 December 2015, no. 24653, [www.iusexplorer.com](http://www.iusexplorer.com) last visited on 24 March 2018.

<sup>59</sup> Corte costituzionale, 3 August 1976, no. 222, Foro italiano, 1976, I, c. 2297; Corte costituzionale, 12 January 1977 no. 4, Giurisprudenza costituzionale, 1977, I, p. 20; Corte costituzionale, 8 July 1992, no. 317, Foro italiano, 1992, I, c. 2904.

<sup>60</sup> Luciani Vincenzo, Le forme di conflitto diverse dallo sciopero, in Lunardon Fiorella (eds.), Conflitto concertazione e partecipazione, Trattato di diritto del lavoro, vol. III, 2011, p. 187

<sup>61</sup> Art. 508, par. 2, Criminal code. Corte costituzionale, 17 July 1975, no. 220, Massimario di giurisprudenza del lavoro, 1975, p. 282.

striking employees do not have to necessarily occupy the work place<sup>62</sup>. If they remain in the workplace during the strike, employees are not punished<sup>63</sup> if their aim is not interfering with the production activity. In the latter circumstance, where employees occupy the plant without the aim of interfering with production, they may be nevertheless punished for trespass to land on the basis of Art. 633 Criminal Code, except if their staying is very short. The right to strike does not cover the violent picketing<sup>64</sup> that happens when strikers embrace each other in a human chain with the purpose of stopping people from going to work, so that other employees have to break the chain to enter the workplace, or when strikers threaten with the menace of a violence other employees that do not want to strike. The blocking of goods from entering and exiting the plant is also a crime falling under Art. 610 Criminal Code, and is not covered by the right to strike. Other behaviours not covered by the right to strike are the boycotting of good produced by an employer with the intention of convincing other not to purchase them or persuading others not to accept job offers from the employer (Art. 507 Criminal Code). Blocking roads in order to protest and making excessive noise in a public space with the aim of protesting is not lawful. The employer and the public may react to these behaviours by calling police officers and asking the Court for an injunction to stop them depending of the size and length of the protest.

#### **a) Assembly as Industrial Action.**

It's worth noting that employees have nevertheless the right to assembly<sup>65</sup> in the work place whenever the workforce occupied in the factory is more than fifteen employees (or more than five employees in an agricultural business) and the purpose of the meeting is to debate labour issues. In practice employees' representatives typically call an assembly during strikes so as to 'occupy' part of the factory without incurring in a potential crime. These assemblies may continue after working time or be held during the strike and in this case the employer cannot report any unlawful occupation of the property. Furthermore the employer has a duty to make the room available and fit for meeting in during the assembly, providing for the utilities that may be required for the purpose.

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<sup>62</sup> Corte costituzionale, 17 July 1975, no. 220, quoted nt. 48.

<sup>63</sup> On the basis of Art. 508 Criminal Code.

<sup>64</sup> Luciani Vincenzo, *Le forme di conflitto diverse dallo sciopero*, in Lunardon Fiorella (ed.), *Conflitto concertazione e partecipazione*, quoted at nt. 49, p. 190.

<sup>65</sup> Law 15 May 1970 no. 300, Art. 20. Corso Fulvio, *I diritti sindacali*, in Proia Giampiero (ed.), *Organizzazione sindacale e contrattazione collettiva*, *Trattato di diritto del lavoro*, vol. II, 2014, p. 341 at p. 366.

### **3. The Right to Strike in the Essential Services.**

The difference between the regime of strike in general and the regulation of strikes in the essential services is remarkable. Courts have developed rules on strike over a long time through a set of judgments, whereas the right to strike in the essential services is regulated by a statute enacted in 1990 (Law 15 Jun 1990, no. 146/), when the practice of self-regulation by unions had already failed to produce a satisfactory protection for users of such services<sup>66</sup>. On the basis of the interpretation that qualifies a strike as a fundamental right<sup>67</sup>, strike is not permitted only in few exceptional situations that this essay will analyse below. Therefore strikes are also permitted in the essential services. Law no.146/1990 lists the constitutional rights that ought to be balanced with the right to strike. The fundamental rights enlisted in the statute are the right to life, the right to health and to personal freedom and security, the freedom to travel, the right to assistance and to social security, the right to education and the freedom to communication<sup>68</sup>. Subsequently the statute make a list of the essential services submitted to the application of special rules. These services are: the health service, the service of waste collection and disposal, the supplying of energy and primary goods, the service of justice, protection of the environment and surveillance on museums, transports, payment by banks of pensions and wages, education, the postal service, telecommunication services and public information on radio and television. The list is open to any other service that may be instrumental for the protection of the fundamental rights listed in Art. 1, par.1. Essential services may be provided for by enterprises or public agencies. Law no. 146/1990 regulates the industrial action regardless of the nature, public or private, of the employer. Law no. 146/1990 applies also to public agencies or private enterprises supplying goods or services to the employer that provides for essential services (Art. 13, lett. e).

#### **a) The Legal Rules in the Case of Strike in the Essential Services.**

##### **aa) Rules on cooling off and arbitration procedures.**

A very important profile of the regulation of strike in the essential service is the unions' duty to negotiate in order to prevent industrial

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<sup>66</sup> Pascucci Paolo, *Dalla giurisprudenza costituzionale alla legge sullo sciopero*, Lunardon Fiorella (ed.), *Conflitto concertazione e partecipazione*, Trattato di diritto del lavoro, vol. III, 2011, p. 217; Gaeta Lorenzo, *Una storia giuridica dello sciopero nei servizi pubblici dall'Unità alla Costituzione*, Pino Giovanni (ed.), *Diritti fondamentali e regole del conflitto collettivo. Esperienze e prospettive*, 2015, p. 161.

<sup>67</sup> Santoni Francesco, *La libertà e il diritto di sciopero*, quoted nt. 4, p. 17

<sup>68</sup> Law no. 146/1990, Art. 1, par.1.

conflicts. In order to prevent a strike the statute imposes a duty on employers and unions to regulate, in collective agreements, cooling off procedures and arbitration bodies meant to settle industrial conflicts<sup>69</sup>. Unions and employers ought to negotiate arbitration procedures on the basis of Art. 2, par. 2. If parts do not regulate arbitration procedures on the basis of collective agreements, the Commission that oversees industrial actions in the essential services<sup>70</sup>, now and thereafter the CGSSE, adopts a temporary regulation imposing the arbitration process. Employers and unions have a duty to activate and participate in the procedures before calling an industrial action. If they do not obey this rule they are submitted to sanctions by the CGSSE on the basis of Art. 4, par. 2. The arbitration process is not necessary when the strike is a political economic strike aimed at persuading the Government at adopting specific policies.

### **aaa) The Duty to Give Notice and the Duty of Communication to the Consumers about the Industrial Action.**

Generally speaking unions do not have any duty to give notice of a strike<sup>71</sup>. The duty to give notice is on the contrary one of the basic rules about strike in the essential services. The written notice must be given at least ten days before the action and the communication must explain the reasons for the strike and its length of time and also its operating methods (Art. 2, par 2). The duty falls on unions but workers do not lawfully strike if they take action in the absence of notice and information to the employer (Art. 4, par.1). Unions have to send the communication with the notice to the employer and to the public authority that has the power of issuing an injunction (*precettazione*) in case of strike. The public authority transmits the information to the CGSSE that starts monitoring the situation. The notice and the communication of the modalities of the industrial action is necessary for the employer in order to manage the situation and in order to organise the service during the industrial action. The employer also has the duty to alert and inform the public through the media at least five days before the action regarding the strike and the services that will be performed during the action. The workforce nevertheless does not have the duty to inform the employer whether or not they will take the action.

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<sup>69</sup> Topo Adriana, Raffreddamento e composizione del conflitto industriale nel settore dei servizi pubblici essenziali, in *Rivista Italiana di Diritto del Lavoro*, 2004, no. 3, p. 351. Pilati Andrea, Il campo di applicazione della legge e i requisiti di legittimità delle astensioni collettive, Lunardon Fiorella (ed.), *Conflitto concertazione e partecipazione*, Trattato di diritto del lavoro, vol. III, 2011, p. 277.

<sup>70</sup> Ferrari Paola, Struttura e attività, in Lunardon Fiorella (ed.), *Conflitto concertazione e partecipazione*, Trattato di diritto del lavoro, vol. III, 2011, p. 419.

<sup>71</sup> Pilati Andrea, Il campo di applicazione della legge e i requisiti di legittimità delle astensioni collettive, quoted at nt. 57.

The duty to give notice has an exception when the strike aims at protecting constitutional bodies or when the action is a reaction against situations of relevant damage to the security and health protection of workers. In these cases workers have to perform the essential services but they are not asked to give notice of the action (Art. 2, par. 7). Unions have also to communicate the length of time during which the action will take place so that there cannot be notice of strike without a deadline. Also unions cannot give notice of more than one action in a single moment because there must be an interval between the first strike and the second strike called by the same union.

(1) Cancellation of a Strike in the Essential Services

The legislation enacted in 1990 was amended in 2000 and one of the aspects that the new legislation modified relates to the situation where a union, after having called a strike, cancel it. It is considered unfair practice to call a strike and then to cancel it without a reason (Art. 2, par. 6). The restriction to the right of calling an action is necessary in order to prevent strategies meant only for disrupting services with no consequences for the workforce that will continue to receive a wage for continuing to work. The cancellation of the action is fair when is communicated before the employer has already informed the public, and is always fair when, after the calling a strike, unions and employers find an agreement that settles the dispute or the CGSSE or the authority with the power to issue an injunction invites the parties to suspend the strike (Art. 2, par. 6).

**b) The Definition by Collective Agreement of the Services that Have to be Performed during a Strike in the Essential Services.**

The wording "essential services" do not only describe the rights that ought to be protected during an industrial conflict. Essential services also indicates that during an industrial action employees should be required to perform only what is strictly necessary in order not to jeopardize users' rights. Before the regulation by statute, the essential services were regulated in detail by an act of self-regulation adopted by trade unions or by collective agreements. Under the legislation adopted in 1990, the collective agreement between unions and employers is the most important legal instrument for the definition of the services that have to be performed during an industrial action (Art. 1, par. 2; Art. 2, parr. 1 and 2). These collective agreements are the agreements between the public agencies or the enterprises (or their associations) and trade unions (Art. 2, par. 2) at a national level but also at a local level so that typically the national level agreements require from local agreements and factory agreements an even more specific regulation of the modality of actions in order to prevent

very specific needs. The CGSSE evaluates if these agreements are adequate for the protection of fundamental rights listed by statute no. 146/1990 and in the case that they are not the CGSSE delivers a decision that details the activities that ought to be performed by employees and workers during the industrial action (Art. 13, lett. a). One might wonder if the regulation satisfies the constitutional principle embedded in Art. 40, of the Costituzione, that entrusts primary legislation the duty to limit the right to strike. The Constitutional Court has nevertheless argued that the legal scheme is legitimate because regulation of strike on the basis of collective agreements fulfils the necessity of a very specific and detailed regulation for every specific sector<sup>72</sup>. Employers on the basis of the agreement may request employees to perform their job during a strike. Employers have to communicate to trade unions the name of employees required to work<sup>73</sup>.

**bb) The Necessary Content of the Collective Agreements on Essential Services.**

Law no. 146/1990 nevertheless also specifies rules of behaviour that unions and employers have necessarily to agree on in order to negotiate a valid agreement on industrial actions, which means that the agreements must regulate some specific terms compliant with the legislation. One among the binding rules that relates to the agreements' content is the rule on the basis of which the work force on duty during a strike should be on average no more than a third of the normal workforce. The service performed during a strike should be about the fifty per cent of a normal service. These rules aim at protecting the right to strike but they are nevertheless not strictly binding and set only a theoretical balance because in many circumstances the situation may require a larger workforce and an almost complete service for not jeopardizing the safety of users of services (Art. 13, lett. a). Regarding the transport service to islands, for example, Law no. 146/1990 rules that transport of people and shipping of goods necessary for the people located on islands and all services instrumental to the latter have to be provided for during a strike (Art. 3), which means that the rule on the percentage of staff on duty cannot necessarily be a strict limit for the provider of services if the strict application of the percentage rule does not accommodate the population' needs. The legitimacy of the agreement is also conditional on the fact that parties accept that there must be an interval<sup>74</sup> between a strike and the call for the subsequent strike by the same union or even by a different

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<sup>72</sup> Corte costituzionale, 18 October 1996, no. 344, *Foro italiano*, 1997, I, c. 381.

<sup>73</sup> Cass., 23 June 2011, no. 13789, *Giustizia civile*, no. 11-12, 2012, 2698.

<sup>74</sup> This is the 'rarefication' rule. See Art. 2, par. 2, Law no. 146/1990.



union. It is not acceptable that a given essential service does not operate for a long time because of subsequent strikes, unless there is a valid alternative service for the users (Art. 13, lett. a). It is also evident that the call to strike by one union always limits another union's right to call a strike in the same sector for a given length of time. This rule seems to incentivise unions to compete through unfair practices meant at anticipating calls for strike that prevent other unions to promote an industrial actions. The Law no. 146/1990 forbids unions to give notice of a strike and then to cancel it after the employer has communicated the information to the public (Art. 2, par. 6) so that a specious use of the right to call an industrial action should be avoided.

### **c) The Supervision on Strike by the CGSSE.**

The CGSSE takes into consideration all relevant aspects in order to assess the lawfulness of the agreement on the essential services. Once an agreement has been negotiated, parties have to submit it to the CGSSE that assesses it through a complex process initially involving the relevant consumers' associations on whether the regulation is adequate to meet the needs of consumers. If the CGSSE approves the agreement, public administrations and private providers of essential services have the duty to apply the agreement to all of the workforce independently of the fact that all employees are members of the unions that have agreed upon the regulation (Art. 2, par. 3). The general application of the agreement to unionised and non unionised workers is the consequence of the participation of the CGSSE in the process meant at regulating strikes<sup>75</sup> so that the regulation of collective bargaining on strikes in the essential services does not violate the freedom of association. The statute also regulates the matter when parties do not reach an agreement. In this situation the CGSSE can promote a consultation in the work place in order to assess the opinion of the workforce on contentious terms. If parties do not reach an agreement or the CGSSE does not approve the possible agreement, the CGSSE indicates an alternative regulation and submits it to the unions and to the employer where both will have to decide whether to accept it within fifteen days (Art. 13, lett. A). If parties again do not accept the terms drawn up by the CGSSE, the latter enforces a temporary regulation, which is binding until parties do find an agreement on the regulation of strike (Art. 2, par. 2). Public administrations and private providers of services have the duty to affix the regulation in the workplace and the CGSSE can promote the publication of the regulation on the media. It is worth noting that the CGSSE' deliberations are also published on the

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<sup>75</sup> Corte costituzionale, 18 October 1996, no. 344, quoted at nt. 58.

Italian legal official journal, the '*Gazzetta Ufficiale*' (Art. 13, let. l). Agreements and temporary regulations by the CGSSE can be modified and integrated if it is evident that it is reasonable to do it. The CGSSE also has the power to interpret its regulation and collective agreements when parties ask for it. The CGSSE is the body ruling in the field of strikes in the essential services through the exercise of its powers. The CGSSE has nine members selected by Parliament among experts in labour and constitutional law and industrial relations. Among CGSS's powers that have been described above, we find also other prerogatives. If the CGSS's opinion is that the industrial conflict could possibly be settled, the CGSSE, even after conciliation has been already been tried, is allowed to deliberate an adjournment of the strike in order to promote a new mediation between parties (Art. 13, lett. c). When conciliation fails, in the period of time between the communication of the strike and the suspension of work, the CGSSE assesses if cooling procedures have been applied by unions and employers and if not invites parties to postpone the strike in order to perform their duties relating to communication and arbitration. The CGSSE can also ask employer and public administrations providing directly for services to stop unlawful behaviours that are the motive for the industrial action (Art. 13, let. h). Finally the CGSSE has the power to communicate to the Prefect, who is the authority responsible for the '*precettazione*' (administrative injunction), that it is necessary to issue an injunction and detailing the injunction terms (Art. 13, let. h). The CGSSE monitors the industrial action and on the impulse of local authorities, or on the impulse of the users of services, or on its own, evaluates how unions, employers and workers, behave during the strike and if necessary, after a hearing with all parties involved, deliberate on sanctions to be applied in the circumstances (Art. 13, let. g, and Art. 4).

**d) The Fallback Option in case of Strike in the Essential Services: the Administrative Authority Injunction.**

The protection of fundamental rights during a strike in the essential services is not just in the hands of the CGSSE. The ultimate safety net is the administrative injunction (*precettazione*), which is the order by the administrative authority to stop the industrial action<sup>76</sup>. Due to the lack of dedicated regulation on strikes, the Constitutional Court had to assess if the regulation enacted during the fascist period and meant to regulate situations very different from contemporary strikes could be lawfully applied to strikes in the essential services in order to balance the industrial

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<sup>76</sup> Canavesi Guido, La *precettazione*, in Lunardon Fiorella (ed.), *Conflitto concertazione e partecipazione*, Trattato di diritto del lavoro, vol. III, 2011, p. 542.

action with the competing public interest<sup>77</sup>. The '*precettazione*' was the order by a public authority, such as the prefect and the city mayor, to order citizens to take action without delay in order to protect health and safety and public order and security, whenever these goods and services are at risk in matters relating to housing, local security, and hygiene. The Court also said that the contingent of people that is allowed to strike in an essential service depends on how many people are necessary in that service in order to guarantee not the full service but the service which is necessary in order to protect fundamental rights. Thereafter authorities have used the '*precettazione*' as the legal tool meant at stopping actions that are exceeding the bearable distress for consumers of services in such circumstances. Law no. 146/1990 has then regulated a special '*precettazione*', which applies only in the case of a strike in the essential services.

The authorities with the power to issue these administrative injunctions in case of national conflicts are the Prime Minister (*Presidente del Consiglio dei Ministri*) and Ministers, and in case of local conflict the authority is the Prefect (Central Government Agent at County level) (Art. 8, par 1). Whenever the interruption or the reduction of an essential service risks immediate damage to the fundamental rights enlisted in Art. 1, the authority has the duty to issue an injunction ordering what is necessary in order to avoid any damage to constitutional rights. The injunction can be addressed to employees, the self-employed, owners of small businesses and to unions and employers. The process through which the authority issues the injunction is complex. The CGSSE takes the initiative to promote the issuing of the order but the authority is allowed to act independently in serious circumstances when there is an imminent risk of damage to users. In the latter situation the authority nevertheless has the duty to inform the CGSSE (Art. 8, par. 1). The authority has to invite parties to a hearing and has the duty to promote conciliation between them before the issuing of the order. Civil Courts have been very inflexible in interpreting these legal duties as all to be performed necessarily before the issuing of the injunction<sup>78</sup> so that the authority can issue the order only if the conciliation fails. The injunction dictates the activities that ought to be performed by staff and employers during the strike but can also suspend the strike or shorten the protest. The order is made public by the employer in the workplace through billposting and is also transmitted and published by media such as radio and television. The injunction is immediately self-

<sup>77</sup> Corte costituzionale, 12 January 1977, no. 4, in Massimario di giurisprudenza del lavoro, 1977, no. 1, p. 1, on Art. 20, Real Decree, 3 March 1934, no. 383.

<sup>78</sup> Cass., 12 June 1999, no. 5797, *Rivista Giuridica del Lavoro*, 2000, part II, p. 147.

executing but recipients can file a claim against it within seven days. The administrative tribunal suspend the injunction only if the claim is based upon reasonable arguments in order to allow the industrial action to continue. The tribunal can also limit the suspension to the part of the injunction that exceeds what is necessary to protect fundamental rights (Art. 10, par. 2).

#### **e) Sanctions for Unlawful Strike in the Essential Services.**

The application of sanctions in the case of an unlawful strike in the essential services is complex because the Law no. 146/1990 provides for different sanctions in relation to the specific agent accountable for the unlawful action. In short, the regulation provides for different sanctions to be applied to employees, self-employed, managers and unions involved in the unlawful strike<sup>79</sup>. The violation of the authority's injunction (*precettazione*) is also sanctioned through a specific process. Finally a subject who has suffered damages because of the strike has the right to sue the party that caused it in front of the Civil Court. The Criminal Court may also be involved if a crime, for example manslaughter, has been committed in the circumstances, but it is important to point out that generally a strike is not itself a criminal behaviour. The specific sanctions linked to the violation of Law no. 146/1990 are disciplinary sanction for employees (Art. 4, par.1). It's worth noting that the employer cannot terminate the employment relationship as a disciplinary sanction in the case of the violation of the rules on strikes in the essential services. The sanctions for unions are civil and administrative sanctions (Art. 4, par. 2 and par. 4 bis). The law provides for economic administrative sanctions against private and public managers (Art. 4, par. 4), and economic administrative sanctions for self-employed, and associations of self-employed (Art. 4, par. 4). Noncompliance with an administrative injunction is punished with administrative economic sanctions when the agent is an employee, or a self-employed or a trade union (Art. 9, par. 2). If the agent is a manager the sanction is the suspension from the job (Art. 9, par. 2). The economic sanctions are doubled when agents did not followed the request sent by the CGSSE to postpone the industrial action or the request to apply the specific strike regulation deliberated by the Commission itself. (Art. 4, par. 4 ter). The CGSSE is the key player in the process of applying sanctions, with an exception for the case of violations of the administrative injunction (*precettazione*). In the latter case the administrative authority itself applies directly the sanctions without hearing parties (Art. 9, parr. 1

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<sup>79</sup> Pallini Massimo, Le sanzioni nel sistema della legge n. 146/1990, Lunardon Fiorella (ed.), Conflitto concertazione e partecipazione, Trattato di diritto del lavoro, vol. III, 2011, p. 355.

and 4)<sup>80</sup>. Recalling sanctions for employees, it is worth remembering that on one the hand the employer has the duty to apply the sanction whenever employees violate legal and contractual rules, while, on the other hand, the CGSSE only has the duty to require the employer to apply disciplinary sanctions. This exception aside, the CGSSE decides on sanctions directly and takes its deliberation on sanctions after a hearing with the subjects involved, which have the right to present written and oral defences. After the hearing, the CGSSE deliberates on sanctions that the local employment authority (*Direzione provinciale del lavoro – sezione ispezione*) applies issuing an injunction of payment. Employers have the duty to communicate to the CGSSE the application of disciplinary sanctions to employees and the local employment authority has a duty to communicate the execution of the injunction to the CGSSE. The CGSSE has a duty to sanction employers that have not submitted employees to disciplinary sanctions. In the case of the latter the sanction for the employer must be multiplied for every day of delay in the application of the disciplinary sanction (Art. 4, par. 4 sexies). The CGSSE also has the power to deliberate on sanctions for unions after assessing if unions have not behaved lawfully in the circumstances. The sanctions for unions applied by the employer are the suspension of trade union officials' right to working leaves for the performing of their functions in the workplace, the forfeiture of fees paid by employees through the deduction of salary, and finally a ban from collective bargaining for two months after the completion of the strike. The last sanction is however not effective if the union is powerful and the industrial action continues notwithstanding the banning from collective bargaining, because the sanction does not incentivise negotiation with the employer and does not support the reaching of an agreement. The sanction for unions' whose representatives do not have the right to working leaves and autonomously collecting union fees, without the support of employers, is the duty to pay a sum of money (Art. 4, par. 2). The CGSSE deliberates on the amount of the economic sanction and on the amount of the penalty incurred if unions do not pay the sanction<sup>81</sup> on time. Public and private managers may also be subjected to sanctions if they omit the conciliation or information to the public and if essential services are not performed and they are responsible for the failure. The sanction for self-employed and for their unions is the payment of a sum of money as deliberated by the CGSSE. The CGSSE set the amount within a range regulated by Law no. 146/1990. Against the order of payment issued by the CGSSE all subjects

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<sup>80</sup> Cass., S.U., 30 March 2000, no. 11632, *Foro italiano*, 2000, part I, c. 1792.

<sup>81</sup> Corte costituzionale, 24 February 1995, no. 57, *Italiana di Diritto del Lavoro*, II part, 1995, p. 738.

have the right to claim before the Rome Tribunal (Labour Section). Employees have the right to sue their employer for the application of disciplinary sanctions and unions have also the right to sue the employer for the application of civil sanctions such as the forfeiture of fees. The employer cannot retain fees but must instead deposit them into an account regulated by the collective agreement. If the collective agreement do not regulate the fund, the employer has to deposit the fees into an account managed by the public body in charge of managing social security for employees and self-employed (INPS)<sup>82</sup>. The Administrative Tribunal has jurisdiction on claims against the administrative injunction (*precettazione*), which orders employers, employees, self-employed, to suspend the strike in order to perform specific duties during an industrial action.

#### **IV. Strike in the Essential Services and Law in Action**

##### **1. The Earliest Approach to Strikes in the Essential Services.**

Industrial actions occur in many essential services as the normal consequence of the widely guaranteed freedom to strike. It is worth remembering that since 1960 public employees, especially in the health service, started taking industrial actions in order to obtain the right to collective bargaining. In order to limit the inconvenience for consumers, the law set a duty for the public administration to collective bargaining only with unions that had adopted the code of self-regulation on strikes<sup>83</sup>. Self-regulation is therefore one of the earliest strategies adopted by unions, contrary to a regulation by statute of the right to strike. The marginal regulation of strikes by statute in limited sectors<sup>84</sup> confirmed the support by all the political forces of the decision not to intervene in the matter. The Government itself supported as a political guarantor an agreement meant to limit the recourse to disruptive strikes by unions impacting labourers, especially in the transport sector (*Accordo "Scotti"*<sup>85</sup> 1983). Self-regulation has nevertheless not been effective enough in order to limit the distress and damages to users cause by collective actions, mainly because unions have not sanctioned members that had disregarded the code of self-conduct. Furthermore, when self regulations was supported by the Government as the best strategy to limit strikes, some of the most radical members of unions founded new associations rejecting the self-regulating

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<sup>82</sup> INPS is the public body that manages pensions and social security treatments.

<sup>83</sup> Pascucci Paolo, *Dalla giurisprudenza costituzionale alla legge sullo sciopero*, quoted nt. 54, at p. 247.

<sup>84</sup> See below under Chapter V in this essay.

<sup>85</sup> Pascucci Paolo, *Dalla giurisprudenza costituzionale alla legge sullo sciopero*, quoted nt. 54 at p. 251.

approach that they considered as a weakening option. These new agents started adopting the most disrupting industrial action in order to be admitted to the bargaining table. As pointed out earlier in this paper, the strategy adopted by public powers in order to protect consumers' interests was to apply to the most disruptive situations the legislation enacted during the fascist period that gives to public authority, such as the prefect (the representative of the Government in counties) and the city mayor, the power to dictate emergency rules in order to contain disruption. Obviously these powers were not regulated by the statute for the purpose of limiting industrial action because strikes and lock outs were crimes under the fascist government. These rules were therefore extended to strikes under the new constitutional regime in order to limit risks in few services such as the health service, garbage collection and storage, or transport, in order to guarantee public order and safety jeopardised by industrial actions. It may be interesting to underline that the authority's order to stop the industrial action could and now can be addressed to a group of recipients selected by way of indicating a professional category, or to individuals, and the order could and can also reach the destination through billposting. Contravening to the order was considered as a crime and now is instead fined with the payment of an administrative fee.

## **2. The Experience of Strike in the Essential Services under Law no. 146/1990**

Eventually, in 1990, Law 146/1990, which was amended in 2000, was enacted with the aim of regulating strikes in the essential services<sup>86</sup>. The statute does not totally abandon the strategy of self-regulation and incentivises the limitation of strikes by collective agreements so that collective agreements and not detailed laws are the instrument for regulating the balance between industrial conflicts and consumers' rights. Also the public authorities' power to intervene in the last instance, whenever consumers' rights are at risk, is confirmed and supported by a special regulation. The Law has also created an independent agency of experts the CGSSE with the duty to assess the compliance of collective agreement's terms which regulate strikes in respect to the statutes' principles. As this essay has pointed out above, the CGSSE intervenes when an industrial action, taken on the basis of an agreement that was assessed as an appropriate one, derails becoming problematic for consumers. The CGSSE dictates rules whenever parties do not find an agreement, addresses managers on the application of sanctions to employees, and deliberates on sanctions for unions that do not comply with

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<sup>86</sup> Law 11 April 2000, no. 83.

the rules on strikes set by the law or by the CGSSE. It reports to the Parliament on the evolution of industrial actions and strikes every year. Of most importance is the CGSSE's power to advise<sup>87</sup> unions observing full compliance to the regulations of an announced strike, so that unions may change the programme of the industrial action. The aim of the regulation is to prevent the damages resulting from collective actions. The active presence and work of the CGSSE has made the judiciary's intervening a rare occurrence for the regulation of strikes. Intervention from the judiciary is also prevented by the power of public authorities to adopt an emergency order to perform work. The presence of an active board, which oversees the dynamics of strikes and operates to limit damages and disruptions does not exclude, on the one side, the direct regulation of some typical situations by the law, as for example the duty of unions to give notice in case of strike in the essential services. Besides, the power of institutions such as the CGSSE to reduce the impact of strikes in many situations is not totally decisive. Analysing the report that the CGSSE delivers every year on the state of industrial conflict in essential services provides a good perspective to understand critical situations relating to essential services that may affect the regulation of strikes. In order to proceed, this essay points again out that the qualification of a service as essential is provided by Law no. 146/1990. The statute lists constitutional rights that ought to be balanced with the freedom to strike. The list includes typical rights such as right to health and safety, the right to freely move and so on<sup>88</sup>. Essential services are then detailed in a longer list under Article 1, par. 2, that for example makes clear that the essential service of education means that the opening of nurseries should be guaranteed to users whereas universities should largely guarantee the activity performed by teachers of rating students at the end of a course and at the final end of studies, and not necessarily lecturing.

#### **a) The Issue of Defining as Essential a Service that impacts on the Essential Service.**

Over the year the problem as to whether the list can be extensively interpreted has been faced many times, so that CGSSE has developed many decisions on this issue. One of the problems faced by interpreters relates to strikes in sectors that are not essential but that impact on

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<sup>87</sup> Art. 13, lett. d) Law no. 146/1990.

<sup>88</sup> Law no. 146/1990, Art. 1 "For the purposes of regulation essential services are services meant to protect the right to life, health and safety, freedom and security, freedom of circulation, the right to social security, education and the freedom to communication. The rights have to be guaranteed by any type of worker, and also in the case the services contracted out by contract or licence" (statute translated by the author of this paper).



essential services. This problem has become more important since public administrations have reduced internal operations relating to the services they have to provide. Cause for strikes is the fact local public authorities, in the perspective of reducing public expenditure, have over the years contracted public services, or elements of public services, out to private contractors. On the one side it means that local authorities lose control of employees that cooperate in the supply of services. Contractors are awarded contracts mainly because of their competitive prices so that when the contractor delays wages, as frequently happens due to narrow economic profit, employees start an industrial action and therefore do not collaborate with the body that provides essential services<sup>89</sup>. This has been the case for the catering services in state nurseries and schools which is not itself an essential service under Law no. 146/1990, but that has been qualified as an essential service for being instrumental in the function of schools. The CGSSE has pointed out that all the activities that are instrumental to the delivering of essential services fall under Law no. 146/1990<sup>90</sup>. The consequence is that if the contractor has not agreed with unions on the activities that necessarily have to be performed during strikes, consumers should not pay the consequences of the defiance. In the situation relating to school catering, the CGSSE has therefore ordered the application of a collective agreement between unions of public sector teachers and the representatives of local public authorities regulating strikes in the essential services. What is worth noting is that the agreement was an agreement between totally different subjects from the ones involved in the catering service, given that catering was provided for by private contractors. Another consequence is that in order to assess the accountability of the public bodies providing for essential services to consumers, as in the schools case, it is necessary to ascertain if public administrations, when contracting out, made clear in written contracts that contractors and subcontractors are required to respect the legislation on strikes in the essential services and related collective agreements<sup>91</sup>.

### **aa) Art and Cultural Activities as Essential Services.**

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<sup>89</sup> This is the issue at stake also in the private health sector, where contractors of services delay payment of wages due to the delays by public local administration to compensate contractors. See CGSSE, Annual Report on 2016, [http://www.cgsse.it/web/guest/visualizza-pdf?set=relazione-alle-camere&url=scioperi/relazioni/Relazione\\_annuale\\_2017.pdf](http://www.cgsse.it/web/guest/visualizza-pdf?set=relazione-alle-camere&url=scioperi/relazioni/Relazione_annuale_2017.pdf), p. 53, last visited on 30 November 2017.

<sup>90</sup> A good example is the refuelling of airplanes. See CGSSE, Annual Report on 2016, quoted at nt. 74, p. 79.

<sup>91</sup> CGSSE, Annual Report on 2016, quoted nt. 74, p. 50.

In relation to a different situation more recently the Parliament has added a new service into the list of the essential services amending Law no. 146/1990. This is the case of museums and places of cultural interests. Many such places are present in Italy and the possibility of visiting museums and sites of cultural and artistic interest is an incentive for tourists to travel the country. In 2015 the Parliament therefore added to the list of essential services embedded in Law no. 146/1990<sup>92</sup> artistic attractions such as museums and public art galleries. People working in (and for) museums and cultural and artistic sites are subject to the regulation of strikes in the essential services. The submission of museum's staff to essential services regulation is nevertheless controversial because museums and cultural sites do not provide for services necessary in order to protect the fundamental rights protected by Law no. 146/1990. In any case, collective agreements in the sector ought to guarantee not only accessibility for the public but also surveillance and security for art galleries, providing that during a strike museums ought to be accessible for at least for half the normal day opening, and that, during some periods over the year, strikes are not allowed at all. The enlarged definition of what is an essential service now also covers the digital centralized services for enrolling into courses provided to state universities by a private subject 'Cineca' and the system of registration for appointments in the health and service units<sup>93</sup>. It seems nevertheless at least dubious that these rules enlarging the scope of the legislation on strike in essential services are compatible with the ILO definition of essential service as interpreted by the Committee of Experts on Freedom of Association. The Committee in fact clearly said that "As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population"<sup>94</sup>.

## **b) The Fragmentation in Union Representation and its Impact on Strikes in the Essential Services.**

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<sup>92</sup> Law 12 November 2015, no. 182.

<sup>93</sup> CGSSE, Annual Report on 2016, quoted at nt. 74, p. 54 seq.

<sup>94</sup> ILO, "Reports of the Committee on Freedom of Association", in *Official Bulletin* (Geneva), Vol. LXVII, Series B, No. 1, 233rd Report, Case No. 1255. para. 669. On the matter of strike under the ILO regulation on Freedom of Association, see: Gernigon Bernard, Odero Alberto and Guido Horacio, *ILO Principles concerning the Right to Strike*, ILO, 2<sup>nd</sup> ed., 2000.

An issue that is relevant in the education sector is the fragmentation of trade unions that are allowed to call a strike. As a matter of principle, under Italian law all trade unions have the right to call a strike regardless of the number of members, in general or in a specific sector. More precisely a temporary coalition of workers is also allowed to call a strike for the protection of professional interests. In the essential services, unions (or coalitions) nevertheless have the duty to give notice of the incoming actions and to give detailed information about the modality of strike to the provider of services, so that the provider can inform users. When representation is fragmented, strikes by different unions are frequently called, so that the public is on practically permanent alert of a probable reduced service and therefore looks for possible alternatives. Typically not so many employees join each industrial action but the percentage of workforce participation is not clear before the strike. The situation described above is recurrent in the education sector and especially in state schools, where strikes frequently do not involve more than the 1% of the staff possibly interested in the specific industrial conflict<sup>95</sup>. Notwithstanding a foreseen low participation, headmasters have to give notice of the strike as soon as called by unions and have to suspend the service if they believe that the strike will compromise it. The frequent calling of strikes is lawful if and when at least one week runs between the first strike and the subsequent one (Law no. 146/1990, Art. 2, par. 2). Headmasters cannot make inquiries in advance in order to know if members of staff will effectively go on strike. The inquiry could be considered violation of Art. 8 Law no. 300/1970, that prohibits investigation by the employer on sensitive information. Employees are also free to decide at the very last moment if to go on strike. The consequence is the uncertainty about the full functioning of the service until the very strike should start. The problem has been discussed in front of the CGSSE that has invited parties to reach an agreement in order to overcome these issues, in consideration of the fact that it has been impossible until now the reaching of an agreement between Minister for Education (MIUR) and teachers unions aimed at defining what is the minimum service that would be provided during strikes. The fragmentation of work representatives is also one of the most relevant problems in the transport sector, which is one of the most afflicted by strikes<sup>96</sup> especially at a local level where unions compete with other unions by calling strikes in order to demonstrate which union is representative of the workforce. Sometimes, on the contrary, unions do

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<sup>95</sup> CGSSE, Annual Report on 2016, quoted at nt. 74. See figures at p. 58 and 59.

<sup>96</sup> In 2016, Italian trade unions called 258 strikes in the local transport sector. See CGGE, Annual Report on 2016, quoted at nt. 74, p. 91 and p. 109.

not compete against each other through strikes but join strikes called by different unions. This is a case that has happened in the train transport system when recently an action called by unions, that the CGSSE had declared unlawful before the action was to start. The unions withdrew the call and invited workers on Facebook and other social media to join the strike called by a different union. The CGSSE decided that this invitation was a new call by the first group of unions and declared the invitation unlawful for breaking the duty of notice in the circumstances<sup>97</sup>. These examples therefore demonstrate the disruptive impact that the absence of regulation about the entitlement to strike can cause in the essential services. Instead of making of strike a virtuous support for democracy, the subjective unlimited freedom to strike may transform industrial action into an "unorganized social power"<sup>98</sup> that disrupts the rights and interests of the economically weakest part of the population that has not always resources to exercise the "exit" function, having limited access to the private market of services.

### **c) The Fragmentation of Business in Essential Services.**

On the other side, the fragmentation of business is a problem. This is the case in the rail transport sector. The rail service, once a monopoly, is now open to more competitors. A general agreement on strikes, which at once binds all providers and unions operating in the sector, does not yet exist. The CGSSE has therefore suggested with no result, to all parties to discuss the possibility of negotiating a general framework for strike regulation to be applied by all the suppliers of transport services<sup>99</sup>.

### **d) The Contracting out of Services by Public Agencies and its Consequences on Strikes in Essential Services.**

Economic strikes aim increasing working condition, or at the safeguard of the workplace in occasion of redundancies. Strikes sometimes are called to claim wages from employers that have typically contracted with public administrations and receive late payments for the contracted service. Late payments by contractor also cause wildcat strikes that are unlawful in the essential services. The CGSSE has nevertheless decreed that a wildcat strike aimed at reacting to the employers' breach of contract in a case

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<sup>97</sup> CGSSE, Annual Report on 2016, quoted at nt. 74, p. 98.

<sup>98</sup> Zoppoli Antonello, Relazioni industriali e risorse umane, Diritto di sciopero e rappresentatività sindacale: il paradosso dei servizi essenziali tra sistema "di fatto", istanze di moderna democrazia e bilanciamento dei diritti, Diritto delle relazioni industriali, no. 4, 2017, 1145.

<sup>99</sup> CGSSE, Annual Report on 2016, quoted at nt. 74, p. 93.

where the employer was ten months late in payment of wages was lawful<sup>100</sup>.

**e) The Duty to Bargain Fairly during the Cooling off Period.**

The CGSSE has the duty to assess acts of proclamation in order to prevent the possibility of unlawful strikes. Assessing the lawfulness of a strike has been one of the most important and effective CGSSE activities as confirmed by recent experience<sup>101</sup>. CGSSE preventive control is meant to ascertain if the strike has been called after unions have attempted to find an agreement with employers in order avoid the strike. The law regulates two cooling off procedures: the first one just between unions and employers and the second one in front of the administrative authority. The air transport sector is another area of essential services where unions frequently call strikes: there were about 200 in 2016<sup>102</sup>. The causes of strikes are reorganization and redundancy processes, late payment of wages by contractors, the expiration of subcontracts and largely the violation of cooling off periods and arbitration procedures. The CGSSE has made it clear that arbitration procedures are compulsory and have to take place before the strike. Parties have to behave fairly, providing information and answering in due course to the other parties' request for a meeting<sup>103</sup> and give evidence to the CGSSE of an attentive approach to the duty to bargain fairly. Employers have a duty to inform the public on incoming strikes at least five days before the action takes place but the CGSSE has stated that employers have to repeat the information before the date of the strike if the first communication has been performed long before the date of the strike<sup>104</sup>. During a strike in the essential services companies and public agencies do not have to provide a full service to the public. The principle is that during strikes employers have to provide for a minimum service if the reduced service does not compromise constitutional rights. This rule has been applied since before the enactment of Law no. 146/1990 on the basis of a decision taken by the Constitutional Court<sup>105</sup>. The principle that only a contingent of workers has the duty to abandon the strike has been again stressed by the CGSSE reporting on the air transport sector where companies have organized excess services to be performed during industrial actions so as to limit the right to strike beyond what was unavoidable. Companies therefore have to be transparent and declare in

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<sup>100</sup> CGSSE, Annual Report on 2016, quoted at nt. 74, p. 113.

<sup>101</sup> CGSSE, Annual Report on 2016, quoted at nt. 74, p. 111.

<sup>102</sup> CGSSE, Annual Report on 2016, quoted at nt. 74, Tab. 2.

<sup>103</sup> CGSSE, Annual Report on 2016, quoted at nt. 74, p. 78.

<sup>104</sup> CGSSE, Annual Report on 2016, quoted at nt. 74, p. 81.

<sup>105</sup> Corte costituzionale, 27 May, 1961, no. 26, Foro italiano, 1961, part I, c. 888.

advance which flights and connections will operate during the industrial conflict, so that workers may understand if the workforce that will have to be in service is proportionate to the load of work<sup>106</sup>.

**f) Strategies Meant at Overcoming the Limits for Strikes in the Essential Services.**

Sometimes employees try to overcome the limits for strikes in the essential services with strategies meant to mask the nature of their action. This was the case whereby local policemen on New Year's Eve 2014/2015 were absent en mass from services for illness and other lawful causes. The CGSSE had to operate a complex inquest and discovered that the actions had been organised by a trade union that was therefore condemned. The union claimed, during the Tribunal, that the decision by the CGSSE was unfair because the decision not to work due to illness was a decision taken by every single police officer<sup>107</sup>.

**g) Spontaneous Protests as Opposed to Strikes Called by Unions.**

In 2017 one of the sectors mostly affected by industrial actions has been transport by taxi in conjunctions with new entrepreneurial initiatives aimed at competing with unlicensed taxi in the same sector. From the 15<sup>th</sup> and the 21<sup>st</sup> of February 2017 taxis stopped operating on all national territory causing great inconvenience to users of the service. The CGSSE had invited<sup>108</sup> taxi drivers' unions to suspend the strike, which was unlawful under many profiles. Unions had in fact not given the notice required, unions had not communicated the length of the strike, unions had not communicated the list of services that taxis were anyway required to perform during the industrial action. Taxi drivers' unions had nevertheless replied that they were not responsible for the actions that had to be considered spontaneous protests and had replied also that unions' representatives had already invited drivers to stop the strike. The CGSSE had therefore asked Prefects to send to the CGSSE any information useful in order to identify agents accountable for the interruption of the transport service by taxi. Only a few Prefects sent information and it soon came to light that the strike had been organised on social networks and chats on line. Eventually the Government had opened a conference with drivers' unions in order to discuss issues at stake, eventually promising to enact a new regulation of transport by taxi in order to limit the competition by non licensed drivers.

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<sup>106</sup> CGSSE, Annual Report on 2016, quoted at nt. 74, p. 82.

<sup>107</sup> CGSSE, Annual Report on 2016, quoted at nt. 74, p. 125.

<sup>108</sup> See Deliberation no. 17/148 of 11 May 2017, on [www.cgsse.it/web/guest;jsessionid=Jeu-+JeBiXjKyWMrEQuHGw...sgc8-prd-liferay](http://www.cgsse.it/web/guest;jsessionid=Jeu-+JeBiXjKyWMrEQuHGw...sgc8-prd-liferay), last visited on 20 November 2017.

### **h) Lack of Collaboration by Elected Public Authorities.**

The CGSSE has the duty to sanction independent worker that take unlawful action. The CGSSE then deliberated to ask the mayors of the towns where the industrial actions took place to communicate the names of the taxi drivers that had been on strike. Notwithstanding the request was sent at the beginning of 2017, few city mayors have since replied and no one has yet identified any participant in the unlawful strike. The CGSSE claims that the circumstances make evident a lack of collaboration between local authorities and the CGSSE, as city mayors supervise the organization of the taxi service in their municipality. This situation highlights areas of weak protection in the case of strikes in the essential services, especially when there is not an employer as in the case of taxi drivers, which in Italy are self-employed. As with any self-employed individual, taxi drivers are not subjected to an employer and therefore under the statute they are subjected to the power of CGSSE that cannot directly access the administrative documentation held by local authorities. Local authorities, such as Mayors, are elected by residents, so they may have not a sufficient incentive to disclose the identity of protesters when protesters have the support of the electorate. In Autumn 2017 there was also an industrial action promoted for economic reasons by university professors and university researchers. Academic members of staff do not negotiate wages through collective bargaining nor are academic staff's strikes regulated by and agreement. Statutes and secondary legislations regulate academic staff working conditions. Academic staff does not practice any sort of wage negotiation with Universities. Nevertheless Law no. 146/1990 lists the right to education among fundamental rights and contemplates final examinations as essential services to be performed. The action taken by academic staff during 2017 resulted in the reduction of examination sessions to only one session from the 28<sup>th</sup> August to the 31<sup>st</sup> October. Here, regardless, academic staff guaranteed students the possibility of completing their studies through the discussion of the written final essay. The CGSSE notwithstanding the lacking of specific regulation declared the modality of action taken by the academic staff compliant with Law no. 146/1990<sup>109</sup>. It seems nevertheless evident that this mild industrial action has not produced any impact on to the Government that has not yet agreed on academic staff's requests.

## **V. Restriction of the Right to Strike in Essential Services**

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<sup>109</sup> See CGSS notice on [http://www.cgsse.it/web/guest;jsessionid=Jeu+JeBiXjKyWMrEQuHGw\\_\\_sgc8-prd-liferay](http://www.cgsse.it/web/guest;jsessionid=Jeu+JeBiXjKyWMrEQuHGw__sgc8-prd-liferay), last visited on 20 November 2017.

## **1. Limits to Strikes as Exceptions to Freedom.**

Limits to strike in the essential services are based on the complex system of rules aimed at setting a balance between the freedom to strike and other constitutional rights. Very few categories of employees are not allowed to strike. The Constitutional Court distinguishes between the freedom to strike and the right to strike. All workers (subordinated and independent) are entitled to the fundamental freedom to strike and therefore a limitation to this freedom by public powers must be an exception provided for by law exclusively where prevailing interests compete with labour's interests. It is therefore not surprising that members of judiciary bodies such as Courts' judges have the right to strike. In case of strike, as it happens also in situations where barristers take the industrial action, hearings are suspended<sup>110</sup> and postponed, unless the length of the trial may possibly impact on to the personal freedom of the defendant. Trials in matter of dismissal or redundancies or actions for interim injunctions cannot as well be suspended. In order to regulate the strikes, one among the associations of the members of the judiciary has adopted a regulation that has been submitted to and approved by the CGSSE<sup>111</sup>.

### **a) Seamen.**

A situation where there is a limitation to strike is the maritime business. Seamen do not have the right to strike during navigation and an industrial action on the sea would be a criminal offence on the basis of Art. 1105 of the Navigation Code<sup>112</sup>. Other categories of worker that do not have the right to strike are staff in nuclear plants to the extent to which they are necessary to maintain the safe functioning of the nuclear plant<sup>113</sup>.

### **b) Members of the Military and Members of the State Corp of Police.**

Members of the military<sup>114</sup> and police constables and officers of the national corps of police do not have the right to strike<sup>115</sup>. The limitation is based on the special status of subordination to the government<sup>116</sup> of the

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<sup>110</sup> See Cass., 24 May 2016 no. 10715, [www.iusexplorer.it](http://www.iusexplorer.it), last visited on 27 November 2017.

<sup>111</sup> The regulation is available on [http://www.cgsse.it/regolamentazioni/regolament\\_settore/magistrati%20ANM.pdf](http://www.cgsse.it/regolamentazioni/regolament_settore/magistrati%20ANM.pdf), last visited on 27 November 2017.

<sup>112</sup> Corte costituzionale, 28 December 1962, no. 124, quoted at nt. 31.

<sup>113</sup> Art. 49, D.P.R. 13 February 1964, no. 185.

<sup>114</sup> Art. 8 Law 27 July 1978, no. 382.

<sup>115</sup> Art. 84 Law 1 April 1981, no. 121.

<sup>116</sup> A. Tursi, L'ambito di applicazione della riforma: categorie e amministrazioni escluse dalla privatizzazione del rapporto di lavoro, in Carinci Franco- Zoppoli Lorenzo (eds.), *Il lavoro alle dipendenze delle pubbliche amministrazioni*, 2004, p. 31, at p. 38.



members of these corps, which may be ordered to act for protecting fundamental rights and public institutions in extreme situations. The conditions of work for members of these forces are regulated by secondary legislation. The content of the secondary legislation is nevertheless aligned to agreements negotiated by representatives of the police and the military corps and ministers since 1978, when a body representative of the interests of the members of the military was regulated in order to allow the process of negotiation to operate<sup>117</sup>. The limit for these categories should not cause any relevant issues. Recently, nevertheless, the limitation for members of the military has come to be problematic when the Italian State Forestry Corps, that was not considered a military body, was merged and incorporated into military corps, the 'Carabinieri', and subsequently appeared to lose the right to strike. Unions of the Italian State Forestry Corps made an inquiry in 2016 to the CGSSE regarding whether they still could lawfully strike, but the CGSSE said that it is not up to the CGSSE to decide which bodies have the right to strike and instead it is in the power of Parliament to decide on the issue.

### **c) Difference between Local Police Officers and Members of the State Corp of Police.**

Local police officers fall under a different and less restrictive regulation, having the right to strike and the right to representation by trade unions so that they fully participate in the collective bargaining process. The difference between the situation of national police officers and local police officers is that collective agreements regulate immediately local police officers' condition of work, whereas negotiation for national police officers is only a part of the legislative process meant at regulating working conditions.

## **VI. Alternative to Strike**

### **1. Alternative Methods of Protest in the Essential Services.**

Under the strict interpretation of the right to strike adopted by the Constitutional Court and the Court of Cassazione, only the suspension of work by employees and workers for the purpose of protesting is compliant with the law. Different behaviours that may typically take place during an industrial action do not therefore fall under any special protection and can be interpreted as a breach of contract, for example when an employee do not perform specific tasks during working hours<sup>118</sup>, or a crime as in the

<sup>117</sup> Law no. 382 of 1978 quoted at nt. 97.

<sup>118</sup> Corte costituzionale, 28 December 1962, no. 123, quoted nt. 25; Cass., 25 November 2003, no. 17995, *Rivista Italiana di Diritto del Lavoro*, 2004, II, p. 525.

case of squatting<sup>119</sup> for a relevant length of time in an employer's plant. Among these behaviours one may include 'stonewalling', which is the practice of not performing preparatory activities in respect to the activity that has been agreed upon. Another recurrent case of industrial action is overtime strike, which occurs when employees do not work overtime. The CGSSE has deliberated that in the case of overtime strikes in the essential services the industrial action falls under Law no. 146/1990<sup>120</sup>. It is nevertheless worth noting that overtime strikes are considered as lawful strike by Courts and not as an alternative action<sup>121</sup>. An alternative means of industrial action on which the CGSSE has taken a position is the use of the right to assembly in the workplace as a strategy for disrupting the service to clients of the essential services. The CGSSE has deliberated on the issue of assembly in the workplace as a way for overcoming limits to strikes in the essential services concluding that if the assembly is run in compliance with the legal regulation on the right to assembly and in compliance with the collective agreement applied by the employer the assembly does not fall under Law no. 146/1990. Whenever the assembly is run in a way that is not compliant with collective regulation, the assembly falls under Law no. 146/1990, so that unions have to apply the regulation on strikes in the essential services before the assembly. The CGSSE has nevertheless made it clear that unions and employers have to perform essential services, so that the exercise of the right to assembly does not justify the suspension of essential services<sup>122</sup>, which a limited group of employees have to perform during the assembly.

## 2. The Virtual Strike.

Among alternative forms of industrial action one might also include the virtual strike, which is the continuation of the activity by employees who nonetheless forfeit the right to pay, either completely or for half of their wage, in favour of a special fund. The employer has to pay into the fund a sum equivalent to forfeited wages<sup>123</sup>. The virtual strike is normally regulated by collective agreements because the imposition of the obligation

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<sup>119</sup> Corte costituzionale, 17 July 1975, no. 220, quoted nt. 48.

<sup>120</sup> CGSSE Deliberation 11 September 2003, no. 03/130, [http://www.cgsse.it/static/discipline/Regolamentazioni/Trasporto\\_pubblico\\_locale.pdf](http://www.cgsse.it/static/discipline/Regolamentazioni/Trasporto_pubblico_locale.pdf), p. 22, last visited 30 November 2017.

<sup>121</sup> 25 November 2003, no. 17995, *Rivista Italiana di Diritto del Lavoro*, 2004, II, p. 525.

<sup>122</sup> CGSSE, Deliberation no. 04/212, 1 April 2004, as mentioned in [http://www.cgsse.it/static/discipline/Regolamentazioni/Trasporto\\_aereo.pdf](http://www.cgsse.it/static/discipline/Regolamentazioni/Trasporto_aereo.pdf), p. 683 sub nt. 3, last visited on 28 November 2017.

<sup>123</sup> Topo Adriana, *Raffreddamento e composizione del conflitto industriale nel settore dei servizi pubblici essenziali*, quoted at nt. 57. Santini Fabrizia, *Le forme di sciopero*, quoted at nt. 24, p. 150.

to pay a fee without a legal basis is controversial. The CGSSE has regulated the virtual strike in an interim code to be applied in the helicopter emergency medical service<sup>124</sup>. However, during a recent Parliament hearing on strikes in the essential services, the former President of the CGSSE has clearly pointed out that the practice of virtual strikes cannot be imposed and that the decision on whether to regulate it should be left only to collective bargaining<sup>125</sup>.

## VII. Conclusions

Strikes in the essential services are typically regulated through collective bargaining and self-regulation by the self-employed under the legal framework set by Law no. 146/1990. The CGSSE, which is the administrative authority in charge of monitoring strikes in the essential services, nevertheless plays an essential role as strikes regulator. The CGSSE gives advice to unions and employers on how to regulate the industrial action, regulates the modality of strikes when parties do not find any agreement on strikes, supervise industrial actions in order to prevent disruptions and damages to consumers. The CGSSE applies sanctions and monitors employers that have a duty to apply disciplinary sanctions on employees whenever employees violate a legal or contractual rule during a strike in the essential services. The intervention of the judiciary is therefore less relevant in the perspective of preventing disruptive actions whereas prevention is the key word for interpreting the Italian legal framework in the matter of strikes in the essential services. The Government through the prefects' power to issue orders to perform is also an important agent in the prevention of disruption caused by strikes in the essential services. The Government authority, at local level or at national level, has in fact the power of injunction and can impose a specific duty to work on workers and employees during a strike. The Government authority has also the power to issue and injunction against private and public managers in case of violation of collective agreements and legal rules on strikes, if the violations impact on the necessary performing of services. Notwithstanding the active role of many institutions that work with the aim of preventing wild strikes and interruptions of essential services, the CGSSE still points out emerging issues. Among the most relevant problems one may find there is the contracting out of services by public administrations whose budget has shrunk over the last few years of

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<sup>124</sup> CGSSE, Deliberation no. 5 November 2012, no.12/461, [http://www.cgsse.it/scioperi/relazioni/CgS\\_Rel\\_Annuale\\_2014.pdf](http://www.cgsse.it/scioperi/relazioni/CgS_Rel_Annuale_2014.pdf), p. 23, last visited 30 November 2017.

<sup>125</sup> <http://www.cgsse.it/scioperi/avvisi/RelazioneAudizioneAlesse.pdf>, last visited on 29 November 2017.

recession. Local institutions have contracted out essential services or part of them to private contractors that do not pay or delay payments to employees, causing industrial actions in fundamental services such as waste disposal and local transport. The former president<sup>126</sup> of the CGSSE has pointed out that issues caused by the reduction of public expenditure and reorganization of local public administrations exceed the competence of the CGSSE, which has not powers on the matter. A second relevant issue is the fragmentation of workers' representation. The problem arises from the right of every single union to call a strike independently from the consistency of its membership. This fact produces the consequence that in some sectors few employees on strike interrupt the service for all the users, as it occurs in the education sector. In order to overcome the latter problem the regulation of a necessary ballot to be held before the strike could be a possible solution. On the basis of the report presented in 2015, it seems that it would be appropriate in the circumstances also the consolidation of the CGSSE's powers to arbitrate labour conflicts, which are the reason of the industrial conflict. It's worth remembering that the proposal could nevertheless be in contrast with the principle of freedom of organisation guaranteed to unions by Art. 39, par. 1 of the Constitution, allowing unions also to freely regulate arbitration procedures through collective bargaining. The regulation of sanctions seems to be another issue for the good functioning of essential services. The report points out how inadequate the economic sanctions for private and public managers are in respect to the impact of their actions on the delivery of essential services, and also the inadequacy of the sanctions against self-employed that strike in the context of an unofficial strike promoted on social media without the support of a trade union. The conclusion is that notwithstanding Law no. 146/1990 balances the right to strike with fundamental rights, having contributed to reduce the percentage of industrial actions in many sectors over the years<sup>127</sup>, it would be still necessary to reform the Law under different profiles. It would be also necessary to support Law no. 146/1990 efficacy with the regulation of employees' representatives for the purpose of collective bargaining, in order to reduce the fragmentation of the industrial conflict. As the comparative experience demonstrates, it could nevertheless be problematic to extend only to the most representative unions the legitimation to strike, given strike acknowledged nature of

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<sup>126</sup> Audizione del Presidente della Commissione di garanzia dell'attuazione della legge sullo sciopero nei servizi pubblici essenziali, Roberto Alesse, presso le Commissioni Affari Costituzionali e Lavoro riunite del Senato della Repubblica (15 ottobre 2015), in [www.cgsse.it/scioperi/avvisi/RelazioneAudizioneAlesse.pdf](http://www.cgsse.it/scioperi/avvisi/RelazioneAudizioneAlesse.pdf), last visited 30 November 2017.

<sup>127</sup> See Appendix no. 1.

fundamental right by the Italian Constitution<sup>128</sup>: a right through which the work force not only protests against the employer but publicly give voice to its economic and political instances, as the higher Courts have observed over the years.

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<sup>128</sup> For the French situation, Laulome Sylvaine, quoted nt. 31 points out that “the European Committee of Social Rights concluded that the regulation of the right to strike in France fell outside the provisions of European Social Charter. The Committee maintained that limiting the right to initiate a strike in the public sector to the most representative national trade unions restricts the right to strike and violates Article 6 of the ESC (*European Social Chart*) 1961”.

## Appendix 1\*

Anno	Numero Proclamazioni	Interventi Preventivi	Efficacia Interventi Preventivi
2007	2017	620	66%
2008	2195	567	70%
2009	1899	528	74%
2010	2093	632	81%
2011	2229	653	90%
2012	2330	514	87%
2013	2338	368	92%
2014	2084	379	88%
2015	2261	324	99%
2016	2352	466	99%

Source: CGSSE, Annual Report on 2016, quoted at nt. 74. The table in Appendix shows from left to right: year, total number of calls to strike in the essential services, case of CGSSE's preventive intervention, efficacy of the intervention by the CGSSE.

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