IS THE CONFLICT A VALUE? DIFFERENT PERSPECTIVES BETWEEN ITALIAN AND SWEDISH LABOUR LAW

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ABSTRACT

The present paper focuses on the value that the conflict has in the Italian and Swedish systems of industrial relations and employment law. The analysis points out how the respective differences between the two countries play a major role in shaping some of the basic features of the national systems.

The changing constitutional relevance of the phenomenon of the strike, which represents the classic example of conflict within the industrial relations, affects various aspects of the national frameworks. On one hand, it contributes to shape the conflictual or cooperative approach of the trade unions towards the employers, while on the other impacts on the individual litigation of the single employee against the employer.

The principal findings are that while in the Swedish system the conflict is perceived as something negative and to avoid, in the Italian one it almost arises as a value itself. From this basic difference, stem several implications, which lead in the former case to a system with a high degree of cooperation and low conflictuality, while in the latter to an opposite outcome.

Keywords: Conflict, Right to Strike, Mediation, Conciliation, Role of the Social Partners, Role of the Judges, Impact of the Cost of the Procedure.

INTRODUCTION

Every dispute arises from a conflict and, under a certain aspect; it is shaped upon its features. Thus, the understanding of the role that the conflict plays in a specific legal framework is essential to understand the functioning of the system of dispute resolution (Behrens et al., 2020).

Under this aspect, a significant divide separates the Italian and Swedish labor and employment law, especially with regard to the industrial conflict.

The main indicator of such difference is the constitutional regulation of the right to strike. In Sweden, this rights stems from the right to bargain collectively and it is intended as a mean to push the counterpart to accept the requests of the trade union. In other words, it is mainly seen as a leverage to obtain a greater bargaining power (Bruun & Johansson, 2014). Therefore, it should not be used after the signature of the collective agreement (Bruun & Johansson, 2014; Fusco, 2019; Nyström & Erlandsson, 2016). It is important to note that such restraint from the industrial action is not only due by the existence of a legally binding duty of peace, but has a deeper social root. Thus, the social partners usually feel as "*unfair*" also actions that are legally permitted (because they do not fall within the scope of the legally binding duty of peace), but are contrary to the "*spirit*" of the system (Government Offices Ministry of Labor, 2018).

In Italy, on the other hand, the right to strike is conceived as a standalone one. This is because the Constitution protects both the freedom of association (art. 39) and the right to strike (art. 40). Thus, the latter enjoys an autonomous protection, which is not linked to the bargaining process. For this reason, the conclusion of a collective agreement does not hinder the possibility to resort to an industrial action (De-Luca, 2010).

In addition, also the trade union structure plays an important role in defining the value of the dichotomy conflict/peace. In fact, in spite of the act that trade union pluralism is well protected in both countries, the different ways to realize it produce contrasting outcomes.

In the Nordic country, trade unions are not only organized based on the economic activity of the employer, but also on the ground of the category of the worker. Thus, as a general rule for each economic sector (i.e. engineering industry) it exists one union for the blue-collar, one for the white collars and one for the graduated employees, each of them signing its own collective agreement (Westregård & Milton, 2016). This feature is significant because the different unions target their action towards different category of workers, so that for each contractual area there is in general only one union interested in bargaining. Such structure lowers the risk of clashes between different trade unions, thus eliminating an element that, as we will see for the Italian case, can enhance the conflict.

In Italy, on the other hand, most of the trade unions aim to organize all the workers of a specific sector. Thus, the trade union pluralism results in a competition among different unions to attract the same workers. In this scenario some unions that do not sign an agreement can have interest in promote industrial actions also to demonstrate that they do not agree with the choices of the signing unions (for a detailed description of this phenomenon see (Ichino, 2015).

Those brief remarks clearly show the different attitude that the two countries have towards the role of the conflict. In one case (Sweden), it should be avoided as long as possible and it should be functional at the achievement of a period of peace.

In the other case (Italy), the conflict is considered almost a value itself. The industrial action is not ancillary to the bargaining process and the existence of a valid agreement does not impede to call a strike.

In other words, we can say that in Sweden the strike is merely a tool to obtain a better agreement, while in Italy it arises as a goal itself.

The Effects that the Different Value of the Conflict Produces on the Social Partners

Those different approaches have important implications on the mindset of the social partners. In the Nordic country, the idea of the strike as the last resort pushes all the industrial partners to adopt a more cooperative behavior. Thus, when a dispute arises it is normally solved thanks to consultation and mediation procedures. In addition, it is prohibited to strike in relation to the disputes of rights, which, instead, should be solved by the courts (see SFS 1976:580 as amended by SFS 2019:503). In other words, the Swedish trade union are more willing to solve eventual disputes via negotiation and mediation procedures, rather than resorting to the conflict (Malmberg, 2002).

Finally, the existence of a National Mediation Office with the aim to help social partners to find pacific solutions, contributes to foster a culture of cooperation.

In Italy, on the other hand, the extensive protection granted to the right to strike, together with its autonomy from the freedom of association, create a situation in which the conflict is

perceived as something much more "*normal*". Employees and trade unions can strike without the need to differentiate between disputes of interests and of rights, nor they are obliged to respect a peace obligation after the conclusion of an agreement (Sanchez, 2014). The mix of all of those elements pushes the Italian trade unions to be much more conflictual and sometimes the conflict itself arises as an autonomous value. This happens for example when a trade union defends a very intransigent position more to show that it does not deal with the employers, rather than because of the value of the position itself (Ichino, 2015).

For those reasons when a dispute arises it is much easier that it will be addressed in a more conflictual way, resorting to strikes or other types of industrial actions.

In addition, also the case law plays an important role in supporting this conflictual approach. In fact, over the years the social partners have tried several times to limit the industrial action resorting to contractual tools (Corazza, 2012). However, the courts, when dealing with behaviors of the trade union, which were clearly against those contractual peace obligations, have constantly stated that it is not possible to limit the right to strike. Thus, the violation of a peace clause would never be sanctioned (Fusco, 2018). The same solution applies (let apart specific exceptions) to the violation of the consultation and mediation procedures laid down by the collective agreements (D'Onghia, 2019).

This lack of sanctions against eventual violations devoid those provisions of their effectiveness, hindering the resort to alternative systems of dispute resolution (Carinci et al., 2018).

The Effects Produced on the Individual Litigation

In order to fully understand the features of the Italian and Swedish systems it is essential to understand that the effects stemming from the different approach to the phenomenon of the conflict are not confined within the area of the industrial relations, but have a significant impact also on the individual litigation system (under a broader perspective see (Amiq et al., 2019).

In fact, the culture of the conflict on the Italian labor relations generally pushes the workers to reject forms of dispute resolution different from the decision of the court. Particularly significant under this aspect is the fact that the pre trail compulsory conciliation procedure has been abolished in 2010 (see Law n. 183/2010, entered into force on 24 November 2010). In fact, even if it was in place since 1998, (art. 36 of the d.lgs. of March 31 1998, n. 80 transformed the pre-existent conciliation procedure from voluntary to compulsory); it resulted to be very ineffective. Significant was the fact that the parties were filing for the compulsory procedure with the only extent to make it fail, so that they would have been able to file the claim in front of the labour court (Carinci et al., 2005).

This behavior has been fostered by a set of factors. On one end, we should take into account the culture of conflict created by the abovementioned situation of the industrial relations. On top of this, we should also consider a labor processual regulation that was (and still is) very favorable for the worker. In fact, the labor trail is traditionally not only faster than the normal civil one, but also very cheap, being exempted of any fee or tax (this special rule has been smothered over the time, but it still remains quite cheaper in relation to other forms of litigation). In addition, it is a widespread praxis to do not condemn the employee to refund the employer's legal expenses neither if the latter wins the case.

On the other hand, in Sweden the non-conflictual approach adopted by employers' organizations and trade unions shapes also the individual litigation. This is also because the trade union plays an important role in relation to the worker's individual legal claim. In fact, because of the high legal fees it can be very difficult for the worker to sue the employer without the financial support of the trade union. Being the union keen to conciliate with the employer, this result in the extensive resort to ADRs procedures, whose effectiveness is demonstrated by the fact that only a limited number of cases reaches the Labour Court every year. In addition, most of those cases are withdrawn in early stages because the parties reach and amicable agreement.

CONCLUSION

In conclusion, it is possible to affirm that many of the differences between the Italian and Swedish system of dispute resolution in the area of labor and employment law depend from the different constitutional value given to the phenomenon of the conflict.

While in the latter country the entire system is based on a cooperative approach, in the former the autonomous constitutional protection given to the right to strike leads to the opposite outcome.

Those different ways to conceive the conflict shape various aspects of the national reality and, first of all, the respective systems of dispute resolution. Thus, an essential element to consider while studying those systems is the impact that the different significance of the conflict plays on set of rules, which are formally similar.

The failure of the Italian compulsory conciliation procedure and the success of the voluntary Swedish one are clear examples of the importance of the suggested approach.

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