

Wage-setting in Italy: The Central Role Played by Case Law

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Abstract

In Italian law wage-setting is dealt with by all levels of the labour law sources. Some amount of interference comes from the supranational level: not so much from the ILO, which most relevant Convention on the matter has not been ratified by Italy, but rather from the European Union. Even though the Union has no competence in the area of pay, it has not been prevented from acting within the existing framework of European economic governance to issue recommendations aimed at influencing somehow wage-setting. As for the domestic sources, a major role in wage-setting is played by the Constitution, especially by article 36 setting out the right to a fair wage. Labour Courts, combining this constitutional provision with wage provisions included in sectoral collective agreements, have given rise to the 'Italian way' to the minimum wage. Its effectiveness is currently under discussion, alongside some proposals for introducing a statutory minimum wage, which has been lacking so far in Italy.

Keywords: Wage-setting; Sources of Law; European Economic Governance; Pay Equality; Fair Wage; Statutory Minimum Wage.

1. Introduction.

The consideration of wage-setting in Italian law, as well as in most of the countries, goes beyond the mere exchange of obligations between the parties of the employment contract¹.

On the 'individual' level, the wage is the source of livelihood for most of the workers and their families. For this reason, labour law tends to alter the market value of work

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¹ Roma G., *Le funzioni della retribuzione*, Cacucci, Bari, 1997; Zoppoli L., *La corresponsività nel contratto di lavoro*, ESI, Napoli, 1991; Gragnoli E., Corti M., *La retribuzione*, in Marazza M. (ed.), *Contratto di lavoro e organizzazione*, *Trattato di diritto del lavoro* (Carinci F., Persiani M. eds.), Cedam, Padova, 2013, 1375.

performances by the imposition of minimum wages. Still because of the ‘social’ function of the wage, a balance between the work actually performed and the employee’s pay might be totally missing every time the employer is, for example, obliged to remunerate a sick or pregnant employee. So, there is not always a strict correspondence between the wage and the employer’s consideration for the work received.

Wage-setting presents also relevant ‘collective’ aspects. It plays an important role in Governments social and macro-economic policies dealing with redistribution, inflation and unemployment.

It is therefore not surprising that, given the underlined socio-economic and political relevance, wage-setting is dealt with by all levels of Italian labour law sources (§ 3). Even international and supranational organizations have often been trying to interfere with national wage policies. In particular, the European Union (EU), despite the formal exclusion of its institutions from exercising competence in the area of pay, in accordance with article 153 (5) of the Treaty on the Functioning of the EU (TFEU), has not been prevented from acting within the existing framework of economic governance to issue recommendations aimed at influencing national policies (§ 2). This has not only been the case of Italy, but it has involved many other EU countries. The peculiarity of Italy concerns, instead, the unusual way the minimum wage is established, which is currently under discussion (§ 4).

2. The Impact of the EU Economic Governance on Wage-setting.

As anticipated, under Article 153 (5) of the Treaty on the Functioning of the European Union (TFEU), the EU has no competence in matter of pay. This exclusion rests on two main arguments. First, wage policy is a sensitive area: it may unduly undermine the autonomy of Member States, since it represents an important tool for domestic economic policy and for the functioning of the national labour market². Second, the exclusion of EU intervention is aimed at preserving collective bargaining autonomy at the national level³.

Nonetheless, the exclusion of EU competence on pay has been considered inappropriate, since it precludes a common wage policy despite the monetary union⁴. This paradox has become even more evident when in the broad context of EU economic coordination, the EU institutions have decided to deal with national wage policies, despite the lack of competence.

We have, in particular, witnessed two main channels of EU intervention.

The first, and more dramatic, concerned those countries that received financial assistance under the so-called bailout plans. The assistance came alternatively from the so-called Troika (the European Commission acting in liaison with the European Central Bank and the

² See on this Ryan B., *Pay, Trade Union Rights and European Community Law*, *International Journal of Comparative Labour Law and Industrial Relations*, 1997, 13(4), 305–325.

³ See the conclusion that Advocate General Kokott delivered in Case C-268/06, *Impact* [2008], ECR I-02483173, pointing out that the protection of collective bargaining autonomy is ‘evidenced not least by the close association between pay and the other matters excluded from the Community’s powers: the right of association, the right to strike and the right to impose lock-outs, which are particularly important in relation to fixing pay and, accordingly, are referred to ‘in the same breath’ as pay in Article 137(5) EC’.

⁴ Ryan B., (2).

International Monetary Fund (IMF)), bilateral loans, but mostly from the European Financial Stabilization Mechanism and its successor, the European Stability Mechanism⁵.

The second and 'ordinary' channel of intervention is that referring to the new version of the European Economic Governance (EEG), widely reformed in response to the financial and economic crisis of 2008. It is currently based on a single process⁶, the so-called European Semester, merging together the surveillance over budgetary positions, coordination of economic policies, prevention of excessive macroeconomic imbalances and integrated guidelines for growth and employment coming from the Europe 2020 strategy. Despite its name, the European Semester basically consists in a yearly cycle where each Member State receives Country-Specific Recommendations (CSRs) drawn up by the Commission on the basis of a detailed analysis of national budgetary and structural policies and macroeconomic imbalances. Once endorsed by the heads of state and governments within the European Council and formally adopted by the Council of the EU, these recommendations are to be transformed into national 'reform programmes' whose effectiveness will again be assessed by the Commission.

Quite often, the recommendations addressing wage-setting mechanisms have been generated by the procedure for macroeconomic surveillance. This starts with the alert mechanism report, through which the Commission analyses the economic situation of every country using a scoreboard with ten indicators covering the major sources of macroeconomic imbalance. The current scoreboard includes the unemployment rate and the variation of the unit labour cost (ULC). If on the basis of the in-depth review the situation cannot be considered dramatic, it will be dealt with under the preventive arm of the procedure, leading to recommendations requiring countries to take actions to correct the identified imbalances, which become part of the CSRs. Otherwise, when macroeconomic imbalances are deemed excessive and in need of corrective actions, the Commission may ask the Council to place the country in question under the corrective arm (the excessive imbalance procedure). Here the Council issues a set of policy recommendations to be followed within a deadline. Non-compliant Eurozone Member States will face financial sanctions designed with a high level of automatism.

The ULC has played a central role in the topic we are dealing with. As the European Commission has repeatedly stressed, the increase in nominal ULC corresponds to a rise in labour costs exceeding the increase in labour productivity, which might erode competitiveness⁷. This has become a problem of major concern after the creation of the monetary union. The increasing differences in competitiveness between EU countries (between so-called surplus and deficit countries) are mainly owed to the divergent trends in wages and ULCs. Many countries in the past, Italy first, have been able to circumvent this problem by devaluating their national currencies, but this is obviously no longer possible under the single currency. Nowadays, according to the EU institutions, the same result can

⁵The European Stability Mechanism was designed to become the main and stable way for managing Eurozone Member States financial crisis. Unlike its predecessor, it works outside the EU institutional context, bases on an Intergovernmental Organisation created by the Eurozone countries, similarly to the IMF.

⁶ Provided by Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011, amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

⁷ See European Commission, *Scoreboard for the Surveillance on Macroeconomic Imbalances*, in *European Economy Occasional Papers* 92, 2012, 14.

be achieved by policies of ‘internal devaluation’, meaning a reduction of labour costs able to increase the competitiveness of deficit countries⁸.

When the EU institutions decided in 2011 to step in and influence the way Italy was addressing the crisis, they started with a non-ritual intervention of the European Central Bank, which told in a ‘secret’ letter sent to the Italian Government on 5 August 2011 that, among other things, the system of industrial relations had to be reformed, in order to ‘allow enterprise-level agreements to cut wages and working conditions to the specific needs of companies and make these agreements more relevant than other negotiating levels’⁹. The purchase of hundred millions of Italian Government bond was at stake. Therefore, not surprisingly, the Government reacted very quickly, approving in August 2011 a law decree (no. 138) entitled ‘support for proximity collective bargaining’. By this act, company or territorial-level agreements can derogate, not only from industry-level agreements, but also from statutory law, outside of any principle of favour, on most of the employment matters. It is still under dispute whether derogation can include minimum wages provided by industry-level agreements. Social partners, in their turn, tried to raise the value of second level bargaining by the Interconfederal Agreements signed on 28 June 2011 and 16 November 2012, entrusting to it the provision of additional variable wages aimed at increasing work productivity (see *infra*), without allowing diminutions of the minimum wages established at the industry-level¹⁰.

Because of the lack of a statutory intervention on the minimum wage, differently from other EU countries equipped with it (i.e. France), the EU institutions could not address recommendation directly targeted at cutting/freezing/moderating it. They had to deal with it though the promotion of collective bargaining decentralisation. In this regard, the European Semester tried to push Italy further in the direction of wage bargaining decentralisation, since its inception. In 2012, and again in 2013, the Council addressed to Italy the recommendation of reinforcing ‘the new wage setting framework [that established by the mentioned Interconfederal Agreements] in order to contribute to the alignment of wage growth and productivity at sector and company level’¹¹. This implicitly included the request for more decentralisation of collective bargaining, as it turned out in the subsequent 2013 country report: ‘The dominant level of collective bargaining in Italy remains the national level ... This hampers a better alignment of wages to firms or local economic and competitiveness conditions’¹².

The 2014 Commission Country Report on Italy complained about the fact that company-level agreements still covered a minority of workers and firms¹³. The 2015 Council CSRs

⁸ Armingeon K., Baccaro L., *Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation*, in *Industrial Law Journal*, 2012, 41, 254-256.

⁹ Recchia G.A., *The Future of Collective Bargaining in Italy Between Legislative Reforms and Social Partners’ Responses*, in *Transfer: European Review of Labour and Research*, 2017, 23, 459.

¹⁰ See Delfino M., *Salario legale contrattazione collettiva e concorrenza*, Editoriale Scientifica, Napoli, 2019, 89-106.

¹¹ Council Recommendation on the National Reform Programme 2013 of Italy and delivering a Council opinion on the Stability Programme of Italy 2012-2017 (2013/C 217/11), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:217:0042:0046:EN:PDF> (accessed 22 October 2019).

¹² European Commission, *Assessment of the 2013 national reform programme and stability programme for ITALY 10*, https://ec.europa.eu/info/sites/info/files/file_import/swd2013_italy_en_0.pdf (accessed 23 April 2019).

¹³ European Commission, *Assessment of the 2014 national reform programme and stability programme for ITALY 20*, https://ec.europa.eu/info/sites/info/files/file_import/swd2014_italy_en_0.pdf (accessed 22 October 2019).

required explicitly to Italy to ‘promote, in consultation with the social partners and in accordance with national practices, an effective framework for second-level contractual bargaining’¹⁴. Again the 2016¹⁵ and 2017¹⁶ CSRs reported the insufficient use of second-level bargaining. This situation, in the opinion of the Council, made it difficult to develop in Italy innovative solutions at firm level that could improve productivity and foster the response of wages to labour market conditions.

Apart from the mentioned legislative intervention of 2011, aimed at enhancing ‘proximity’ collective agreements, the Italian legislator has not done very much to boost second-level collective bargaining and, in particular, company-level wage bargaining. The traditional legislator reluctance to intervene in the sphere of industrial relations has so far prevented a heteronomous intervention of the internal set-up of collective bargaining. It has just tried from 2008 on, by rather patchy legislative provisions, to incentivize form of additional wages related to productivity gain, to be achieved via company-level agreements (see *infra*). However, the macroeconomic target of matching wage growth with productivity is far from being achieved because of the still limited coverage of company level-agreements¹⁷.

Similar conclusions were reached by the Council of the EU in 2018 CSRs¹⁸, noting that “bargaining at firm or territorial level remains limited”, a situation which might “prevent wages from adapting swiftly to local economic conditions”. It noted also that “tax rebates on productivity-related wage increases set by second-level agreements were strengthened in 2017”, concluding with a shade of scepticism, that “their effectiveness is difficult to evaluate”.

3. The Role Played by the Various Sources of Law.

3.1. International and Supranational Sources.

The acts issued by other, different from the EU, international and supranational organizations, dealing with the right to a fair wage have always had little impact on wage-setting in Italy. Leaving aside the solemn but rather symbolic provisions included in the Universal declaration of Human Rights (article 23.3) and in the European Social Charter

¹⁴ Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Italy and delivering a Council opinion on the 2015 Stability Programme of Italy, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015H0818%2817%29> (accessed 22 October 2019).

¹⁵ Council Recommendation of 12 July 2016 on the 2016 National Reform Programme of Italy and delivering a Council opinion on the 2016 Stability Programme of Italy, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2016.299.01.0001.01.ENG&toc=OJ%3AC%3A2016%3A299%3ATOC (accessed 22 October 2019).

¹⁶ Council Recommendation on the 2017 National Reform Programme of Italy and delivering a Council opinion on the 2017 Stability Programme of Italy (2017/C 261/11), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A32017H0809%2811%29> (accessed 22 October 2019).

¹⁷ This is the conclusion provided by a comprehensive research on this topic undertaken by Resce M., Sestili E., *First qualitative evidence from the monitoring on tax rebates on productivity-related pay increases*, 2018, available at <https://oa.inapp.org/handle/123456789/373> (accessed 7 November 2019).

¹⁸ Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Italy and delivering a Council opinion on the 2018 Stability Programme of Italy, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1538474984830&uri=CELEX%3A32018H0910%2811%29> (accessed 7 November 2019).

(part II, article 4), the most relevant ILO Convention on the matter, no. 131 of 1970, providing that “minimum wages shall have the force of law” – meaning that they should be established by statutory law or universally applicable collective agreements – has not been ratified by Italy. Indeed, as we are going to see *infra*, Italian law does not generally provide minimum wages neither by legislative acts nor by collective agreements provided with *erga omnes* effect.

3.2. The Constitution

As for national law sources, some relevant provisions are included in the Constitution, at the top of the hierarchy of labour law sources. Article 37 lays down the right to equal pay for equal work value with regard to possible sex and age discriminations. It has been debated for a long time whether a general principle of pay equality exists in Italian law¹⁹. Some scholars have tried to infer it from article 3 of the Constitution – establishing that “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions” – and/or from other general principles, like that of good faith and fair dealing²⁰. However, the Supreme Court has always rejected these arguments²¹.

Some disorientation has been created for a while by a famous 1989 sentence of the Constitutional Court²², by which the Court apparently acknowledged the principle of equal pay for equal work, basing it on some statutory anti-discrimination provisions (article 15 and 16 of the Workers Statute), on article 37 of the Constitution and on the ILO Convention no. 117 of 1962 (ratified by Italy); admitting however at that same time that “differentiated and unequal treatments are tolerable as long as they are justified and reasonable”²³. Following on this sentence, a few early ‘90s Supreme Court decisions argued that the employer should always provide an objective justification for differentiating wage treatments and that a judicial check on the reasonableness of the employer’s choice is admitted²⁴. The Supreme Court has soon moved away from these decisions and reassembled its jurisprudence, confirming that an employee’s subjective right to equal pay for equal work cannot be inferred from Italian law²⁵, with the exception of the public sector²⁶. Provided that there is no discrimination, the employer is therefore free to grant higher wages or bonuses only to selected workers, without

¹⁹ On pay equality, as well as on the broad role of the principle of equality in Italian labour law see Angiello L., *La parità di trattamento nei rapporti di lavoro*, Giuffrè, Milano, 1979; Santucci R., *Parità di trattamento, contratto di lavoro e razionalità organizzative*, Giappichelli, Torino, 1997. More recently, Del Punta R., *What has Equality got to do with Labour Law? An Italian Perspective*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2002, 18(2), 197.

²⁰ See the reconstruction of the debate provided by Novella M., *La parità di trattamento a fini retributivi*, in Gragnoli E., Palladini S. (eds.), *La retribuzione*, Utet, Torino, 2012, 280.

²¹ Corte di Cassazione, S.U., 17 May 1996, no. 4570; Corte di Cassazione, S.U., 29 May 1993, no. 6031.

²² Corte Costituzionale, 9 March 1989, no. 103.

²³ On the interpretation of the decision see Barbera M., *L’eguaglianza come scudo e l’eguaglianza come spada*, in *Rivista Giuridica del Lavoro*, 2002, I, 808.

²⁴ Corte di Cassazione, 9 February 1990, no. 947; Corte di Cassazione, 9 March 1990, no. 1888.

²⁵ See, among the many, Corte di Cassazione, 17 May 1998, no. 4570; Corte di Cassazione, 18 August 2003, no. 12076.

²⁶ Article 45, para 2, of the legislative decree no. 165 of 2001 imposes to the public administrations the obligation to “grant equal contractual treatments” to their employees.

breaching any principle of equality, just like collective bargaining is free to decide different pays for similar jobs²⁷. A different conclusion would enable an unacceptable restriction of the autonomy of the contracting parties, individual and collective.

Within the meaning of another constitutional provision, article 36, “Workers are entitled to remuneration commensurate with the quantity and quality of their work, and in any case sufficient to ensure to them and their families a free and honourable existence”. A wage can therefore be considered as fair only if it couples, at the same time, with: the principle of *proportionality*, taking into account the time spent at work (‘quantity’), complexity and responsibility of the job, professionalism and competence involved with it (‘quality’); the principle of *sufficiency*, which implies that every worker should be granted a ‘living’ wage, socially acceptable²⁸. As for the reference to “families” included in article 36, it has been referred by judiciaries to the intervention of specific welfare programs, hence excluding it from the constitutional functions of pay²⁹.

According to the constitutional framework, as also it emerges from the preparatory work of the Constituent Assembly, the implementation of the principles established by article 36 is entrusted to the so-called Authorities for Salaries, namely statutory law and collective bargaining³⁰. More in particular, a preference for sectoral agreements provided with universal application, within the rules and the meaning of the second part of Article 39³¹, can be implicitly derived from the Constitution³². However, collective agreements applicable *erga omnes* have never seen the lights because article 39 has never been implemented. Collective agreements do not formally belong therefore to the sources of law and are governed by the ‘ordinary’ law of contracts³³. Nonetheless, the Constitutional Court has confirmed the shared responsibility of the legislator and collective bargaining for the guarantee of fair wages, pointing out that:

- Collective bargaining has a central role in setting wages, notwithstanding the failure to implement article 39. Social Partners are undoubtedly the best expert of labour market, able to give the right value to work, considering sectors and professional groups³⁴.

- The legislator cannot normally cancel or overturn the choices made by collective agreements, which should act free in the determination of wage levels³⁵; however, the legislator shall make sure that employees and their families are granted a wage sufficient to give them the chance to conduct a free and decent existence; it shall also safeguard social, political and economic public interests (even constraining collectively bargaining choices)³⁶.

²⁷ Corte di Cassazione 11 March 2003, no. 7752.

²⁸ Treu T., *Art. 36*, in Branca G. (ed.), *Commentario alla Costituzione. Rapporti Economici*, Zanichelli, Bologna-Roma, 1979, I, 76.

²⁹ The Supreme Court has been rather clear on this: Cass. S.U., 29 maggio 1993, n. 6030, in *Rivista Italiana di Diritto del Lavoro*, 1993, II, 653.

³⁰ Menegatti E., *Il salario minimo legale. Aspettative e prospettive*, Giappichelli, Torino, 2017, 61-64.

³¹ The last paragraph of article 39 states that “Registered trade unions are legal persons. They may, through a unified representation that is proportional to their membership, enter into collective labour agreements that have a mandatory effect for all persons belonging to the categories referred to in the agreement”.

³² Treu T., (27) 75.

³³ Magnani M., *The Role of Collective Bargaining in Italian Labour Law*, in *Labour Studies*, 2018, 7, 3.

³⁴ Corte Costituzionale 11 December 1962, no. 106; Corte Costituzionale, 28 June 1963, no. 120; Corte Costituzionale 16 July 1968, no. 101; Corte Costituzionale 16 June 1970, no. 99; Corte Costituzionale 30 July 1980, no. 141.

³⁵ Corte Costituzionale, 7 February 1984, no. 34.

³⁶ Corte Costituzionale 15 November 1962, no. 106.

At the end of the day, the implementation of the principle of proportionality is especially devolved to collective bargaining, which should set wages taking into proper consideration the ‘quality’ of work, whereas the legislator should address the social functions inherent the sufficiency of wages, in case, interfering with the choices of collective bargaining³⁷.

3.3. Legislation.

Despite its prominent role in wage-setting accorded by the Constitution, the legislator has been traditionally scarcely involved with it. The only relevant interference dates back to the period between 1975 and 1992, where a “sliding wage scale” system was in force in Italy, aimed at safeguarding workers’ purchasing power, by keeping the wage increases in line with inflation growth. In recent years, the legislative intervention on wage-setting is confined to the support of social partners in the attempt of boosting, via company-level agreements, form of additional wages related to productivity gain. To this end, from 2008, but in a more stable and organic way, only from 2016, the legislator provided tax deductions and incentives to promote forms of variable salary (additional to flat pay rates – see *infra*), connected to productivity.

The other, traditional, task of statutory law is that of regulating the different pay systems. The civil code deals with them in a number of articles (2099-2101, 2349, 2441, 2358)³⁸. The most common and relevant is pay at time rates. It grants to workers a flat salary rate, capable of taking the business changing fortune out of the contractual exchange, thus ensuring that the wage level will be only related to the quality and quantity of work, as requested by article 36 of the Constitution. The constitutional function played by the pay calculated on working hours makes it the privileged form of pay, the only which can work as exclusive component of the wage³⁹. On the contrary, the other systems of remuneration shall be always combined with a flat component.

That is the case of another traditional way of calculating the wage, namely the “piecework pay” connected to a predetermined piecework rate. Apart from homeworking, it can only work as an additional pay to that quantified at time rates. It used to be quite common until the 80s. Nowadays it has given way to other forms of variable salary connected to productivity. Other kind of variable salary, provided by the civil code as well, are fees and commissions of agents or brokers (working as employees); employees’ participation in company products, revenues, profits sharing, company stocks or share capital. These forms of wages, entailing a financial and, to some extent, even managerial participation of workers, have never been very common in Italy, except for managers.

³⁷ On this division of the roles between the sources see Zoppoli L., (2) 207; Treu T., (27) 75.

³⁸ For an overview of the different wage forms considered by Italian law see Topo A., *Le forme della retribuzione*, in Gragnoli E., Palladini S., (19) 71-111; Biasi M., *Pay*, in Carinci F., Menegatti E. (eds.), *Italian labour law and Industrial Relations*, Ipsoa, Milano, 2015, 143.

³⁹ Angiello L., (18) 140.

3.4. Collective Bargaining and Case Law.

Collective bargaining has constantly been the most important wage-setting player, across the fascist period and the current republican legal order. In this regard, the most representative employer association and trade unions (Confindustria, CGIL, CISL, UIL) have determined, via intersectoral agreements (*accordi interconfederali*), the general framework for collective wage bargaining. In the latest version of it, outlined by the Intersectoral Agreement signed on 9 March 2018, a prominent role has been entrusted to sectoral collective agreements, in continuity with the recent history of industrial relations in Italy. Accordingly, they should establish the “overall emoluments”, including “minimum wages”, so granting “uniform economic and normative working conditions throughout the whole sector, wherever employed across the country”⁴⁰. In practical terms, sectoral collective agreements quantify the wages in relation to the different qualifications and jobs, determining the various wage items, such as the basic flat salary rate, 13th month pay and other extra month pay, special allowances, indemnities, productivity-related extra income.

However, because of the already highlighted missing implementation of article 39 of the Constitution, collective agreements have formally a scope of application narrowed to those who are members of the signatory parties. It is precisely against this background that a creative operation undertaken by judiciaries came in. In order to remedy the very poor wage conditions widespread in the ‘50s, when collective agreements had a very limited coverage, labour courts managed to extend minimum wages provided by industry-level collective agreements to all employees, irrespective of whether the employer was bound by the agreement. That has given rise to the so-called Italian way to the minimum wage.

4. The Italian Way to the Minimum Wage and its Shortcomings.

More precisely, labour courts have moved from the consideration that the right to a fair wage provided for by Article 36 of the Constitution is directly effective within the context of the employment relationship⁴¹. Hence, whenever the wage level looks unfair, one employee can claim his/her constitutional right to a fair wage before the labour Court, which will normally refer it to the minimum wages provided by the relevant sectoral collective agreement, as a reliable parameter of fairness, consistent with Article 36⁴². If the wage is lower than that of the collective agreement, the Court will replace the pay provided by the employment contract with that enshrined in the collective agreement. Once this jurisprudence has become consistent, employers have generally granted the application of wages provided by the pertinent sectoral agreement, very often along with the application of the whole agreement⁴³.

⁴⁰ On the possible implications of this Agreement on wage-setting see Pascucci P., *Giusta retribuzione e contratti di lavoro. Verso un salario minimo legale?*, Franco Angeli, Milano, 2018, 121-122; Lassandari A., *Retribuzione e contrattazione collettiva*, in *Rivista Giuridica del Lavoro*, 2019, 2, 210.

⁴¹ This case-law dates back to Corte di Cassazione, 12 May 1951, n. 1184; Cassazione, 15 November 2001, no. 14211; Cassazione, 14 May 1997, no. 4224; Cassazione, 9 August 1996, no. 7383.

⁴² Among the many decisions see Cassazione, Sezioni Unite (United Sections), 29 January 2001, no. 38.

⁴³ The impact of the mentioned case law, plus other factors, like statutory benefits related to the application of collective agreements, explain the high coverage of collective bargaining in Italy, estimated by the OECD,

The judicial elaboration on article 36 of the Constitution showed immediately certain limits, motivated by labour courts self-restraint. First of all, minimum wages established by collective agreements were considered just as a ‘guidance’. Accordingly, judges have validated, under certain circumstances (i.e. company crisis or precarious financial conditions)⁴⁴, wages which were lower than those provided by the relevant collective agreement.

Moreover, labour courts have not referred the ‘constitutional’ parameter of the fair wage to the whole ‘pay package’ provided by sectoral agreements. It has been otherwise connected only to the ‘basic’ flat pay rate and the 13th monthly pay, so excluding all the other allowances, bonuses, seniority-linked payments, etc⁴⁵. This has made one employee’s actual remuneration less likely to be considered unfair by the Court.

Finally, the judges have almost always refused to extend the scope of the constitutional right to a fair wage beyond the employment contract⁴⁶, even though there are many good reasons for extending the right to those who are in a condition of operational and probably even economic dependence from one main client⁴⁷.

More recently, the effectiveness of the labour courts case law has been also jeopardized by an ‘external’ factor: the increasing number of the so-called pirate agreements; that is to say, sectoral agreements, signed by scarcely representative organizations, aiming at making available to companies wages that are lower than those provided by ‘mainstream’ collective agreements⁴⁸. They have been spreading in certain sectors, usually low-wage sectors, taking advantage of the combination of two features of the Italian system of industrial relations: the guarantee of trade union pluralism (any genuine trade union is worthy of protection under Italian law) and the absence of a mechanism for selecting the collective bargaining parties. An authentic trade union, albeit scarcely representative, may therefore sign collective agreements having the same legal value as the collective agreements signed by the most representative ones. Labour courts have no possibility to interfere with the application of these agreements, even if they entail poor wage conditions.

Collective Bargaining Coverage Statistics (available at <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>), around 80% (but probably even higher).

⁴⁴ Some examples are Cassazione, 14 December 2005, no. 27591; Cassazione, 15 November 2001, no. 14211; Cassazione, 14 May 1997, no. 4224; Cassazione, 9 August 1996, no. 7383.

⁴⁵ Cassazione, 8 August 2000, no. 10465; Cassazione, 9 August 1996, no. 7379; Cassazione, 16 July 1987, no. 6273.

⁴⁶ See lastly, Cassazione, 7 December 2017, no. 29437. This jurisprudence finds a support in an old sentence of the Constitutional Court, 7 July 1964, no. 75.

⁴⁷ Menegatti E., *A Fair Wage for Workers On-Demand via App*, in Ales E., Curzi Y., Fabbri T., Rymkevich O., Senatori I., Solinas G. (eds.), *Working in Digital and Smart Organization*, Palgrave Macmillan, Cham, 2018, 67-92.

⁴⁸ The number of pirate agreements is still on the rise. According to the Italian National Council for Economics and Labour (Comitato Nazionale dell’Economia e del Lavoro), *Seventh report on industry-level collective agreements*, 2018, <https://www.cnel.it/Comunicazione-e-Stampa/Eventi/ArtMID/703/ArticleID/197/Contratti-collettivi-nazionali-232-disponibile-il-7176-Report-periodico>, in March 2018 there were 868 national level collective agreements filed in its repository, whereas in 2013 there were 561 and 396 in 2008. The phenomenon has been noticed by the Council of the EU, that in the Recommendation of 13 July 2018 on the 2018 National Reform Programme of Italy and delivering a Council opinion on the 2018 Stability Programme of Italy (2018/C 320/11), <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1538474984830&curi=CELEX%3A32018H0910%2811%29>, noted that “while the total number of collective agreements is on the rise, only a small share of them is signed by the main trade unions and employers’ association”.

Given the size and negative impact of the phenomenon, the legislator has tried to provide some fragmented solutions⁴⁹, which have not been so far able to prevent those agreements from spreading.

Last but not least, ‘mainstream’ collective bargaining has not been able, over the last decade or so, to support wage developments. In-work poverty has sharply increased, especially after the great recession, becoming Italy one of the EU countries with the highest number of working poor⁵⁰.

4.1. The Current Debate on the Minimum Wage.

The highlighted issues have made the prospect of a statutory intervention aimed at setting minimum wages very appealing for some. The debate on the introduction of a statutory minimum wage has recently restarted, after having been silent for 30 years or more⁵¹.

There are essentially three main solutions on the table, which are also included in some bills pending in the Parliament.

One is represented by the “classic” universal statutory minimum wage. It would fit well within the highlighted framework set out by the Italian Constitution. Considering the division of competences between statutory law and collective bargaining, the latter would be entrusted with the determination of a fair return for work, taking into account the quantity and quality of the work performed, whereas the former would be responsible for granting a sufficient wage, so fulfilling the social and economic objectives related to wages policies. The statutory minimum wage would work as a floor, supporting collective wage bargaining and fees of dependent contractors too.

However, this possibility has attracted a big deal of criticism, mainly from Trade Unions. According to a traditional and deep-rooted argument, shared by Unions in countries where a statutory minimum wage does not exist⁵², wage-setting should remain the responsibility of the bargaining partners. A statutory minimum is liable to jeopardize the coverage of collective agreements and eventually the action of trade unions. In the opinion of some commentators, if the legislator provided a minimum wage, this would automatically become the new reference of the ‘constitutional’ fair wage, instead of the presumably higher wages provided by sectoral collective agreements⁵³. Collective agreements would therefore be suddenly

⁴⁹ E.g. Social security contributions should be calculated on the wages provided by the agreements signed by the comparatively most representatives trade unions. The grant of tax rebates and other benefits for companies are as well conditional on the application of Collective Agreements signed by comparatively most representative trade unions.

⁵⁰ According to Eurostat, database “*In-work at-risk-of-poverty rate*”, available at <https://ec.europa.eu/eurostat/web/products-datasets/product?code=tespm070> (accessed on 12 November 2019), in-work poverty rate in Italy is close to 12%. Worse than Italy are Romania (Close to 20), Greece, Spain, Luxemburg, while the EU average is 9.6%.

⁵¹ The policy was discussed in particular by Roccella M., *Il salario minimo legale*, in *Politica del Diritto*, 1983, 243; Grandi M., *Prospettive in Italia per una legislazione sui minimi*, in *Politica Sindacale*, 1962, 102; and then more recently by Pascucci P., (39); Magnani M., *Il salario minimo legale*, in *Rivista Italiana di Diritto del Lavoro*, 2010, I, 769; Bavaro V., *Il salario minimo legale fra Jobs Act e dottrina dell'austerità*, in *Quaderni di rassegna sindacale*, 2014, 4, 61; Ballestrero M.V., *Retribuzione sufficiente e salario minimo legale*, in *Rivista Giuridica del Lavoro*, 2019, 2, 235. Delfino M., (10); Menegatti E., (29).

⁵² Eldring L., Alsos K., *European Minimum Wage: A Nordic Outlook – an update*, Norway, 2014.

⁵³ Bavaro V., (50) 68.

deprived of their ‘constitutional’ function, granted so far by the highlighted labour courts’ elaboration⁵⁴. Companies just needed to grant the statutory minimum wage to be protected from complaints regarding the fairness of the wage. This would remove the main reason that has so far led to a widespread application of collective agreements by Italian employers.

We believe that the negative impact that might come from the introduction of a statutory minimum wage is overestimated. The mentioned arguments do not take into account the fact that a statutory minimum wage would only satisfy the constitutional principle of sufficiency, leaving out that of proportionality, which would remain under the responsibility of collective bargaining. In other terms, the application of the statutory minimum wage alone would not make the pay constitutionally fair, if the quality of the work performed required a higher wage in accordance to sectoral agreements. Employers would then still adapt the wages to collective agreements, otherwise labour court can be asked to intervene and increase the wages themselves.

A less intrusive solution into the domain of collective bargaining is that put forward by the broad labour law reform known as Jobs Act⁵⁵. It provided for the introduction of a statutory minimum wage for the sectors “not regulated by a collective agreement signed by the comparatively most representative trade unions” (article 1, para 7, law no. 183 of 2014). The statutory wage could not here interfere with collective wage bargaining. It had just to fill the gaps left by collective agreements signed by the main trade unions. This policy was eventually abandoned by the Government. Anyway, the solution was deemed to have very little impact in practice, since it is difficult to think to any sector “not regulated” by collective agreements.

A third, more effective, option can consist in the generalisation of the norm provided for cooperative companies by Article 7, para 4, law decree no. 248 of 2007, establishing that “in case a plurality of collective agreements are present within the same category, cooperative companies [...] shall apply to their working associates [...] an overall economic treatments not lower than that that provided by the relevant industry level agreement signed by the comparatively most representative, at the national level and within the category, trade unions and employers’ associations”. The aim of the provision is that of tackling wage dumping, given the relevant incidence of pirate agreements in the sectors where service cooperative companies operate.

The exportation of this obligation to all the other sectors would certainly provide effective wage protection, introducing an appropriate minimum, linked to the whole ‘pay package’ provided by collective agreements for all level of qualifications⁵⁶. However, it also represents some limits. First of all, as the implementation of the provision for cooperative companies has shown, it is not always easy to identify the agreement signed by the comparatively most representative trade unions. Moreover, this solution alone is not capable, unlike a minimum wage provided by statutes, of including workers who are not employees, and supporting wage developments beyond the contractual power of trade unions.

⁵⁴ Bavaro V., (50) 70.

⁵⁵ It includes several legislative decrees enacted in 2015 on the basis of a delegation approved by the Parliament in 2014 (law no. 183).

⁵⁶ This idea has been supported by Delfino M., (50) 64; Pascucci P., (39) 105.

In the light of the above, the best solution could probably come from a combination of the obligation to grant a remuneration not lower than that provided by the relevant industry level collective agreements signed by the most important trade unions, backed with the provision of a statutory minimum wage⁵⁷, applicable beyond the employment contracts towards dependent contractors.

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⁵⁷ This is roughly the idea on which is based the bill no. 658/2018, currently pending before the Parliament, (proposed by the Senator Catalfo et al. - available at <http://www.senato.it/leg/18/BGT/Schede/Ddliter/50199.htm>). A similar solution is proposed by the bill no. 1132/2019 (presented by senator Nannicini et al. - available at <http://www.senato.it/service/PDF/PDFServer/BGT/01107487.pdf>) even though the scope of the statutory minimum wage is here narrowed to the sector not covered by collective agreements signed by the comparatively most representative trade unions. A third bill, no. 310/2018 (presented by senator Laus et al. - available at <https://www.senato.it/service/PDF/PDFServer/DF/340692.pdf>) proposes the introduction of a statutory minimum wage only, automatically revalued at the beginning of each calendar year.

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