Neutralised (Right to) Strike

The European Committee of Social Rights on the Right to Strike in Italy

Angelo Jr Golia

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On 13 March 2026, the European Committee of Social Rights (ECSR), the expert body monitoring the European Social Charter (ESC), has published the decision on the merits in collective complaint no. 208/2022, brought by the trade union USB against Italy. The case concerned the right to strike in essential public services (EPS) under Law no. 146/1990. On the one hand, the decision found that Italy violated Article 6§4 ESC as the notion of EPS adopted by executive bodies and the *Commissione di garanzia* (the Commission) – the administrative agency overseeing the exercise of the right to strike in EPS – is too broad and underspecified. On the other hand, it found no violation of the ESC concerning the (absence of) effective judicial review against the acts of these bodies. However, the problem of the overly broad definition of "essential services" cannot be separated from that of effective judicial protection. From this point of view, the decision overlooks the constitutional and institutional peculiarities of the Italian system and shows a limited understanding of administrative and procedural realities, which effectively neutralise the judicial oversight. In fact, the Commission's expansive interpretation is largely a byproduct of loose legislative provisions and weak judicial oversight, which has enabled administrative discretion to grow unchecked.

An ambivalent decision at a critical juncture

The decision comes at a sensitive moment for the right to strike in Italy, Europe, and beyond. Long considered to be in crisis, this right has been increasingly constrained by legislation, judicial interpretation, and transnational economic governance (see, e.g., Ewing in here and Correa de la Hoz here). In recent years, however, it has re-emerged as a key instrument of collective participation, both economic and political – dimensions that are difficult to separate anyways. From climate strikes to transnational labour mobilisations (see, e.g., here), strikes now function not only as tools of industrial conflict but also as vehicles of contestation and potential constitutionalisation "from below". This renewed role is particularly significant in a context where traditional institutions of representative democracy appear less and less capable of translating democratic demands and social justice goals into concrete policies. Against this backdrop, some scholars have begun advocating for the constitutionalisation of a right to political strike in EU law. Recent mass general strikes in Italy and elsewhere illustrate this development: they have mobilised diverse movements around the contestation of economic policies, including military spending and regressive taxation, the articulation of social justice claims – especially concerning gender, territorial, and migrant inequality – and the attempted enforcement of Italy's international obligations, notably in relation to arm deliveries in the context of international crimes committed in Gaza by the Israeli forces.

Taken together with these developments, the ECSR's decision is both timely and ambivalent. It (re)affirms the systemic importance of the right to strike and condemns excessive restrictions and the expansive notion of "essential services". However, it overlooks key problematic aspects of the current Italian framework. This blogpost therefore critically engages with its reasoning, particularly the assumption that judicial review is effectively available. In reality, not only the formal legal framework but also the concrete functioning of the administrative and judicial infrastructure surrounding the right to strike shapes its effectiveness, often limiting its broader constitutional and transformative potential in subtle ways. In

this sense, analysing the Italian case provides an example useful to other contexts and systems, as it illustrates how procedural, micro-level practices may effectively de-activate strong constitutional entitlements.

The right to strike in Italian constitutional development

In Italian constitutional history, few rights have been as central as the right to strike enshrined in Article 40 of the 1948 Constitution ("the right to strike shall be exercised in compliance with the law"). While politically contested from many points of view, two core elements were widely shared amongst constituent forces. First, there was a clear break with the model based on repressive – criminal and administrative – measures that, in different forms and degrees, had characterised both the liberal (1861-1922) and Fascist (1922-1943) periods. The essential aspects of the right – holders, legitimate aims, limits, etc. – were to be governed by parliamentary legislation. This "reservation to legislation" was intended not only to ensure legal certainty (for example, when strikes affect other fundamental fights) and democratic oversight, but also to enable constitutional review. Second, the constitutional right to strike – that is, the constitutional protection of the strategic withdrawal of expected labour – was conceived not merely as a socio-economic entitlement but as a cornerstone of democratic participation and a tool for rebalancing power in the workplace and society at large.

However, after the Constitution entered into force, no statutory legislation regulating the right to strike and balancing it with other constitutional rights was enacted for over forty years. The only applicable rules remained the anti-strike provisions inherited from the Fascist-corporatist regime, which postwar governments did not repeal. In the late 1940s and early 1950s, the new Republic experienced widespread repression of workers' movements (see, e.g., here) and delays in securing judicial independence. The Constitutional Court became operational only in 1956, while the Supreme Judicial Council – the body ensuring judicial independence – was established in 1958.

Only the interventions of the Constitutional Court rendered this framework compatible with the 1948 Constitution. Faced with prolonged legislative inertia, the Court, from the early 1960s, effectively reshaped Fascist-era legislation through selective declarations of unconstitutionality and evolutive interpretations, progressively expanding both the legal notion and constitutional protection of the strike. This process culminated in 1974, when a landmark judgment recognised "pure" political strikes as protected under Article 40, in parallel with widespread mobilisation by established trade unions as well as student, feminist, workerist and other grassroots movements. In a country still marked by deep social, economic, and territorial inequalities, this dynamic proved crucial for implementing the Constitution's most progressive provisions, including workers' rights, social security, education, and healthcare. The open-textured nature of Article 40 enabled a transformative interaction between collective action, judicial development, and legislative reform, fostering a form of constitutionalisation "from below". This process relied on a judge-made law guided by the Constitutional Court in dialogue with ordinary judges, particularly younger ones influenced by critical legal scholarship advocating an "alternative use of the law". In adjudicating strike-related disputes, the Court aimed not only to resolve individual cases but to orient strike practices in line with the broader constitutional framework.

The political-economic shifts since the 1980s are well known: fragmentation of labour movements due to diversification, tertiarisation, and globalisation; the crisis of trade unions' stabilising role in neo-corporatist settings; and a turn towards "regulatory" models of political and economic governance. More generally, (neo)liberal governance has triggered and/or reinforced those trends, promoting the competitive alignment of fiscal, welfare, and labour systems, weakening workers' solidarity at both national and transnational levels and reducing unions' bargaining power (for examples drawn from European monetary policies, see here and here). While by no means not unique to Italy, these developments interact with its still-strong constitutional protection of the right to strike. Over

time, however, this protection has been significantly neutralised, especially in EPS, where strikes remain relatively effective but are increasingly constrained.

Neutralising the right to strike

The neutralisation of an otherwise strongly protected constitutional right has occurred through the "administrativisation" of the regulatory framework concerning the strike in EPS. Faced with the weakening of the 1970s neo-corporatist compromise and the explosion of micro-conflicts (especially in public services), Law no. 146/1990 originally aimed to promote the (self-)regulation of strikes through collective agreements between workers and employers, with the Commission acting as an expert body tasked with evaluation and follow-up sanctions, subject to review by ordinary courts. The Commission was not intended to exercise general regulatory powers. Its independence from the executive was to be ensured by its composition: members appointed jointly by the Speakers of Parliament from among experts in constitutional law, labour law, and industrial relations, and barred from holding political or representative roles. At the time, parliamentary practice still reflected a more pluralist system, including the convention that one Speaker came from the opposition.

Today, however, this context has changed. Both Speakers are expressions of the governing majority, and the Commission is widely perceived as politically aligned, increasingly exercising its mandate not to balance the right to strike with competing rights, but to minimise its exercise. Subsequent legislative developments (especially Law no. 83/2000) and administrative practice have progressively reinforced the Commission's role.

First, it has made extensive use of anticipatory "moral suasion" in conciliation and cooling-off procedures. In specific disputes, the Commission issues advance "invitations" or "guidance," effectively pre-assessing the parties' conduct and signalling the consequences of non-compliance. Although formally non-binding and not directly challengeable in court, these acts function in practice as the parameters for subsequent sanctions, shaping behaviour *ex ante*. Second, the Commission may adopt "provisional regulations" replacing collective agreements deemed "unsuitable" to guarantee EPS. These "provisional" regulations, subject to review by administrative courts, have been particularly influential in key sectors such as local public transport, where in some instances they have remained in force for over fifteen years. Third, recent years have seen a resurgence of executive return-to-work injunctions, exposing workers to potential criminal liability. Typically issued by the Minister of Internal Affairs shortly before a scheduled strike, these measures can be challenged only before administrative courts under extremely tight deadlines, restrictive standing requirements, and deferential standards of review. The requirement of a "concrete and actual" interest often leads to inadmissibility, as disputes may become moot once collective agreements are renewed or the injunction's effects expire. Preventive interests – such as avoiding future violations – are not recognised as sufficient.

As a result, judicial remedies are effectively limited to urgent proceedings, with all their constraints. Even when courts reach the merits, in assessing the conduct of striking workers they tend to defer to the Commission's prior "invitations" and "guidance", emphasising its independence and expertise, and to apply stricter scrutiny only where the executive acts without such indications. This logic not only weakens effective protection of the right to strike but also prevents courts from engaging with the broader social role of trade unions and collective action.

To sum up, the current framework of strikes in EPS is centred on anticipatory measures. At the macro level, these include assessments of the (in)suitability of collective agreements and the adoption of "provisional regulations". At the micro level, they include "invitations," "guidelines," and "proposals," as well as the procedural interaction between the Commission and executive authorities. Sanctions and injunctions still matter, but they operate as "silent guests," shaping conduct before any action occurs. As a result, collective conflict is managed through administrative tools that keep it below the threshold of social visibility, within a context marked by growing inequalities

and unrest. Unsurprisingly, while the overall number of strikes has declined, there has been an increase in general and "spontaneous" strikes – forms that more easily bypass administrative constraints but also have a greater impact on conflicting rights.

Rights without remedies: the missing link between protection and judicial infrastructure

In its decision, the ECSR rightly found that the lack of clear statutory standards defining "public services" violates Article 6§4 ESC, as it allows administrative bodies to expand the notion of "essential services" excessively. However, in the light of the framework described above, equally or more problematic are issues concerning effective judicial protection. The relocation of disputes over the Commission's acts to administrative courts – combined with restrictive standing rules and deferential standards of review – has significantly weakened such protection. On this point, the ECSR's reasoning is unconvincing, as pointed out by Salcedo Beltrán in her separate dissenting opinion, joined by Olivier De Schutter. The decision merely noted that Commission decisions can be challenged in court and cited a 2023 Council of State judgment annulling a ruling on strike distancing in the transport sector in a 'provisional regulation.' From this single example, it drew general conclusions about the availability of effective remedies, without distinguishing between different measures – such as return-to-work injunctions – or examining how proceedings function in practice. Moreover, in that cited case, the isolated annulment was not based on excessive restriction of the right to strike, but on deficiencies in the preliminary investigation, which undermined the proportionality of the measure.

The problem of the overly broad definition of "essential services" identified by the ECSR cannot be separated from that of effective judicial protection. In fact, the Commission's expansive interpretation is largely a product of weak judicial oversight, which has enabled administrative discretion to grow unchecked, beyond the reach of constitutional and ordinary courts. Judicial review of decisions by "independent" expert bodies is effective only where clear legal standards exist and procedural rules allow meaningful challenges. In Italy, the prominence of administrative courts – combined with limited jurisdiction of ordinary courts and the Constitutional Court – has marginalised constitutional review. These courts are excluded from assessing many of the administrative and regulatory acts that shape the right to strike. Even when prompted, administrative courts do not raise questions of constitutionality concerning key provisions of Law no. 146/1990 conferring broad discretionary powers. This is particularly problematic in a system lacking direct individual access to the Constitutional Court, which cannot review administrative acts. Overall, the current framework is ill-suited to capture the broader social and political role of workers movements and collective conflict and facilitates executive-oriented discretion.

This is not to say that the ECSR decision is meaningless. The decisions of this expert body, while not formally binding *per se*, are recognised as "authoritative" in interpreting binding ESC provisions and might finally push Italian (administrative) courts to raise questions of constitutionality. However, despite its important findings, which might influence domestic developments, the decision misses the deeper link between rights protection and the institutional infrastructure sustaining it. This is even more important as European political skies become increasingly gloomier, and Italy, where the adoption of repressive "law & order", anti-protest legislation has increased, has been recently found to be among the "dismantlers" of the rule of law.

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ABOUT THE AUTHOR

Angelo Jr Golia

Angelo Jr Golia is an Assistant Professor at the LUISS School of Law and a Senior Research Affiliate at the Max Planck Institute for Comparative Public Law and International Law.Angelo Jr Golia is an Assistant Professor at the LUISS School of Law and a Senior Research Affiliate at the Max Planck Institute for Comparative Public Law and International Law.

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