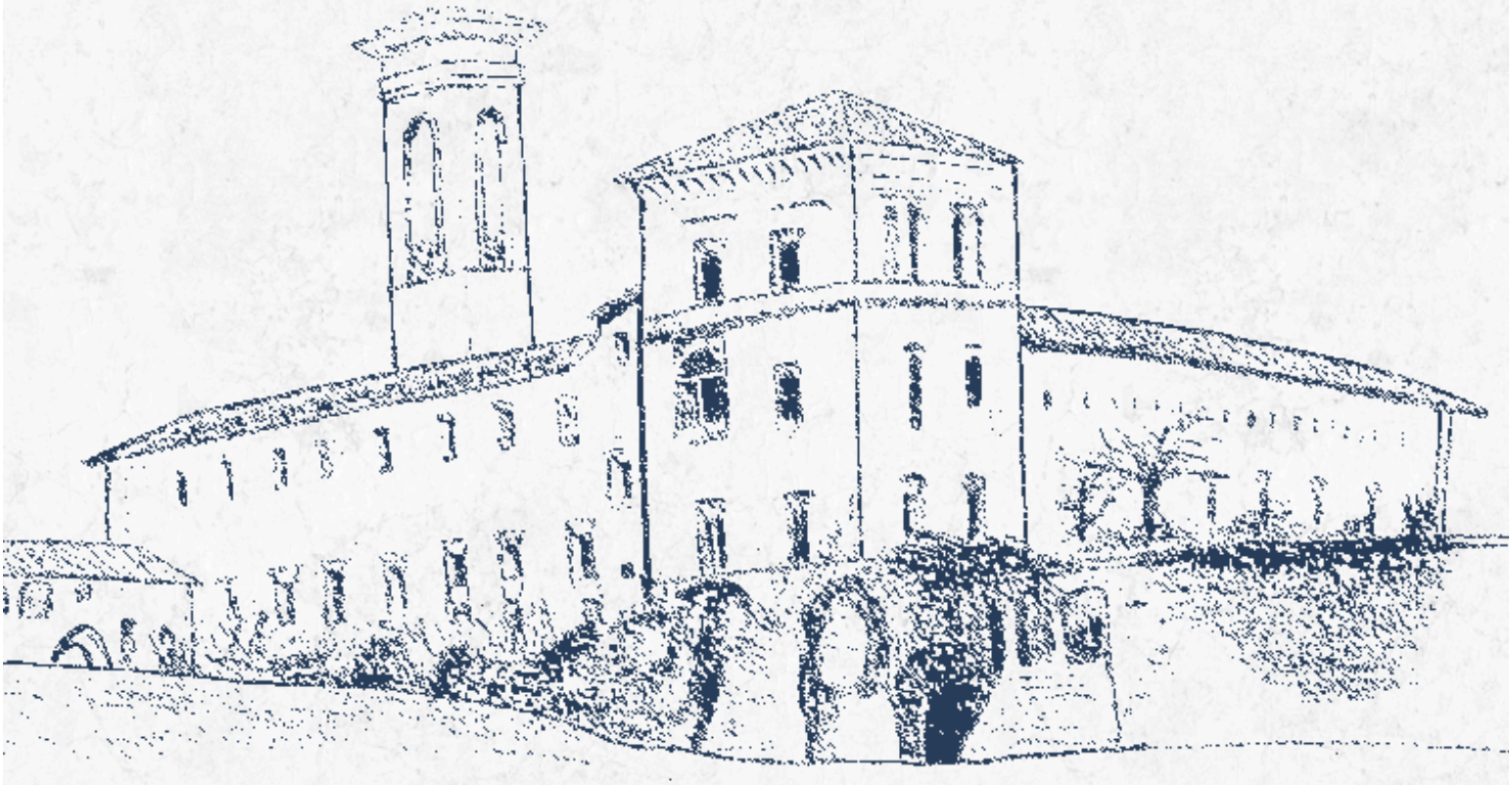
OPEN ACCESS
ISSN 2280-4056

E-Journal of International and Comparative

LABOUR STUDIES

Volume 9, No.3, September-October 2020



ADAPT
www.adapt.it
UNIVERSITY PRESS

E-Journal of International and Comparative **LABOUR STUDIES**

ADAPT *International School of Higher Education in Labour and Industrial Relations*

E-Journal of International and Comparative

LABOUR STUDIES

Volume 9, No. 3, September-October 2020

ADAPT
www.adapt.it
UNIVERSITY PRESS

Online Publication of the ADAPT Series
Registration No. 1609, 11 November 2001, Court of Modena
www.adaptbulletin.eu

The COVID-19 Emergency from an 'Industrial Relations Law' Perspective. Some Critical Notes on the Italian Case

Michele Tiraboschi [1]

Abstract
This paper disregards the legal and social dilemmas about work – which have emerged in the context of risk society – as these are aspects decision-makers, scholars and legal experts will soon be faced with. Rather, this paper will examine a more specific – though just as important – methodological issue, which considers how legal rationality is conceived in new modernity when used to deal with work-related issues, irrespective of the framework adopted for analysis.

Keywords – *Industrial Relations; Italy; Pandemic; Legal Rationality; Economic Rationality.*

1. Framing the Issue

'Nothing will ever be the same again'. This is the mantra that has been repeated in the public debate regarding the aftermath of the emergency caused by COVID-19. This watchword condenses the views of the scientific and the academic community[2] – both on the national and international level – discussing the consequences the pandemic will produce on the labor market and its rules.
It remains to be seen whether the confidence behind this statement – which seems to brook no argument, although being rather vague when it comes to results and practical implications[3] – will wane in the following months, once concerns over the pandemic will give way to daily

[1] Michele Tiraboschi is Full Professor of Labor Law and Industrial Relations at the University of Modena and Reggio Emilia (Italy). Email address: tiraboschi@unimore.it

preoccupations. It can also be the case that this state of affairs will pave the way for what has been termed 'the new normal'[4], which hopefully will be better than the pre-crisis period for our economies and societies[5].

Scholars investigating labor-related changes are under the impression that the COVID-19 emergency has done nothing but accelerate some labor market trends – which are commonly associated to the Fourth Industrial Revolution – raising awareness among decision-makers and in public opinion.

Moving away from the Marxist interpretation of the economic processes that has been marking labor law and industrial relations research until recently, it can be argued that these trends were not the result of unavoidable technological changes[6]. Rather, they originated from social transformations – especially demographic and environmental ones – that have altered the labor market and that characterize new modernity and 'risk society'[7], whereby pandemics and other natural disasters are not exceptional or unpredictable phenomenon[8].

There are two elements confirming that the analytical framework characterizing Beck's risk society is suitable to analyzing the labor law and employment issues that emerged during COVID-19. The first one is a marked "top-down approach when dealing with the pandemic, with the government enjoying more latitude in emergency situations"[9]. This

[2] See G. Lichfield, *We're not going back to normal,* in *MIT Technology Review,* March 17, 2020.

[3] An exception is the increasing recourse to remote working. On this way of organising work and its links with 'the new normal', see A. Pennington, J. Stanford, *Working from Home: Opportunities and Risks,* the Australia Institute, Centre for Future Work, 2020, p. 2.

[4] See A. Winston, *Is the COVID-19 Outbreak a Black Swan or the New Normal?,* in *MIT Sloan Management Review,* March 16, 2020 and *A. Levenson, A Long Time Until the Economic New Normal,* in *MIT Sloan Management Review,* April 10, 2020.

[5] A. Grant is more optimistic about this phenomenon. See *This is how COVID-19 could change the world of work for good,* World Economic Forum, 16 April 2020.

[6] Giugni's *Il Ragionevole Capitalismo di John R. Commons,* in *il Mulino,* n. 12/1952, especially p. 680, is still relevant today. The author points out that "by adhering to Unwin's theory", Commons "described the Industrial Revolution as resulting from changes to markets and not from technology transformation, thus running counter to Marxist theories".

[7] See U. Beck, *Risk Society: Towards a New Modernity,* 1992, London: SAGE Publications.

[8] Research has been paying attention to possible pandemics and the entailing tensions between healthcare and the economy for a decade now. For the Italian case, see M. Giovannone, M. Tiraboschi (eds.), *Pandemia influenzale e valutazione dei rischi nei luoghi di lavoro,* Bollettino speciale ADAPT n. 11/2009. More in general see M. Tiraboschi, *Labour Law and Welfare Systems in an Era of Demographic, Technological, and Environmental Changes,* Cambridge Scholars, 2019, pp. 72-101.

[9] See: U. Beck, *Risk Society: Towards a New Modernity,* p. 103.

approach has affected the system making up the sources of law and the traditional mechanisms balancing constitutional values and principles, e.g. people's right and duty to work and their freedom to conduct business. In this respect, the successive decrees issued by Italy's President of the Council of Ministers and the ordinances enforced by regional and local authorities are paradigmatic. Describing this approach, overseas scholars have talked of a suspension of constitutional government, also in relation to key issues, e.g. the employer's powers of control, employee data processing, and staff health monitoring[10]. The second aspect that is worth stressing is the increased fragility of the scientific rationality in terms of risk assessment and management – i.e. the pandemic and the entailing healthcare emergency in our case – which leads those in charge to escape decision-making.

Together with the relentless search for alibies and scapegoats, this situation has wreaked havoc on communication between politics and the media, frustrating the attempt of public opinion to form an idea about events. In turn, the feelings voiced by the public at large through surveys have also conditioned the massive law-making process during the emergency. It is perhaps for this reason that emergency legislation proves contradictory and illogical, also because of the poor technical quality of the provisions put in place. In considering work-related and employment issues, the decision- and law-making process has short-circuited, as two forms of rationality clashed in communication with the public at large and trade unions. Specifically, medical and scientific rationality – which advocated for the closure of businesses – opposed to economic rationality, which argued in favor of restarting operations. It was as though economic rationality was driven by the entrepreneur's mere interest to generate profit and not by more complex social coexistence – which is mediated by legal rationality when it comes to interests and power conflicts – the aim of which is to create value, wealth, employment opportunities and means of subsistence for all.

Based on the foregoing reasoning, this paper does not want to deal with an issue that will be key in labor law and industrial relations for the next ten years. We are referring to the social and economic sustainability of those risks that will have an impact on production and individual performance, and fall outside the entrepreneur's responsibility and

[10] See K.D. Ewing, *Covid-19: Government by Decree,* in *King's Law Journal,* 2020, pp. 1-24, which is particularly effective on this point.

control[11]. If one considers employee protection, these risks make the distinction between salaried and self-employment irrelevant, so it is necessary to move away from it[12]. Drawing on the marked geographical differences in which COVID-19 spread, the causal nexus between the most devastating effects of the pandemic (e.g. the number of infectious and fatalities), industrialization rates and particle pollution[13] is yet to be demonstrated from a scientific point of view.

However, it seems clear that the pandemic has put a strain on an entire development model which has long been characterized by inequalities and unbalanced wealth distribution,[14] and to use Beck's words[15], has to come to terms with 'the economic unilateralism of scientific rationality'.

If analyzed from the point of view of legal rationality, this state of affairs produces two consequences. On the one hand, work is merely regarded as an economic phenomenon, which is assessed in relation to its exchange and market value[16]. On the other hand, the risks linked to or caused by production processes are deemed to be socially bearable for the sake of progress. This latter aspect emerges in the sterile debate taking place on the scientific and political level over 'the threshold values' when applying the precaution principle.

---

[11] Recently, the World Bank has discussed this topic in a report, which examines the main disruption factors in the world of work and their impact in terms of risk, considering the economic and social protection tools in traditional employment relationships. See *World Bank, Protecting All Risk Sharing for a Diverse and Diversifying World of Work*, 2019, particularly p. 40, which contains a table summarising risks in relation to labour demand and supply, and the labour market, more generally.

[12] On the limited scope of application of traditional labour law as opposed to the risks generated by the pandemic, see N. Countouris, V. De Stefano, K. Ewing, M. Freedland, *Covid-19 crisis makes clear a new concept of 'worker' is overdue,* in *Social Europe,* April 2020.

[13] A considerable amount of research is moving in this direction, e.g. L. Becchetti, G. Conzo, P. Conzo, F. Salustri, *Understanding the Heterogeneity of Adverse COVID-19 Outcomes: the Role of Poor Quality of Air and Lockdown Decisions,* 2020 (which can be found on the Social Science Research Network website) and X. Wu, R.C. Nethery, B.M. Sabath, D. Braun, F. Dominici, *Exposure to air pollution and COVID-19 mortality in the United States*, in *MedRxiv,* 2020 (available on the website of the Department of Biostatistics of Harvard University).

[14] Inequalities have intensified during the pandemic. See A. Adams-Prassl, T. Boneva, M. Golin, C. Rauh, *Inequality in the Impact of the Coronavirus Shock: Evidence from Real Time Surveys,* 2020 (available on *Research Gate).*

[15] Cfr. U. Beck, *Risk Society: Towards a New Modernity,* p. 79.

[16] See L. Herzog, *What does the corona crisis teach us about the value of work?,* in *NewStatesman* of 1 April 2020, discussing the revival of the social and relational value of work, also when engaging in menial jobs.

In consideration of the issues examined above, this paper adopts a narrower perspective. It deliberately disregards the legal and social dilemmas about work – which have emerged in the context of risk society – as these are aspects decision-makers, scholars and legal experts will soon be faced with. In this sense, the pandemic has just been a triggering factor, particularly when considering the cultural lags and resistance characterizing the handling of environmental risks and their links with the world of work. Rather, this paper will examine a more specific – though just as important – methodological issue, which considers how legal rationality is conceived in new modernity when used to deal with work-related issues, irrespective of the framework adopted for analysis (e.g. the new normal, risk society, the Fourth Industrial Revolution). This might be a key aspect when dealing with the factors discussed above in practical rather than ideological terms.

The starting point of this investigation will be once again Beck's insights into risk society. The author attributes the current crisis of techno-scientific rationality not to the failure of individual scientists or disciplines, but to the systematically grounded approach that sciences have to risk, both from an institutional and methodological standpoint. "The way they are constituted - with their overspecialized divisions of labor, their concentration on methodology and theory, their externally determined abstinence from practice - sciences are entirely incapable of reacting adequately to civilizational risks, since they are prominently involved in the origin and growth of those very risks"[17].

Rather than dwelling on topics that have been researched extensively by labor law scholars – e.g. government involvement in economic regulation – another aspect should be considered. Specifically, it seems sensible to investigate how the contraposition between primary goods and values – e.g. health, enterprise, and work – has been depicted once again through the lens of a unilateral form of economic rationality. When seeking legal solutions, this approach does not allow for understanding the extent of the issues and the legal and institutional dimension that results from the interaction between groups having competing interests. Industrial relations scholars have been facing this issue frequently.

Against this background, this paper will consider the measures laid down to limit people's freedom of doing business and accessing work in order to contain COVID-19 spread in Italy. Based on an abstract and nineteenth-century conception of economic, professional and production

[17] Cfr. U. Beck, *Risk Society: Towards a New Modernity,* p. 78.

activities, these provisions do not consider the institutional – or 'investigative' to use Commons' words – dimension of the economy[18]. As a result, while dealing with the labor law and employment issues linked to the healthcare emergency, those in charge seem to disregard the solutions provided by industrial relations actors, which also concern law-making. Arguments will be put forward in this paper showing that these solutions have predicted, supplemented, and further clarified the abstract and ill-defined provisions enforced by the government during the pandemic, or established in general legislation to seek reasonable, and thus socially sustainable, economic solutions.

As labor law scholars, one lesson we should learn from the current healthcare emergency concerns methodology. In other words, what bears relevance is that examining the law originating from industrial relations systems might pave the way for implementing more adaptable legal and institutional frameworks, and welfare systems consistent with the current economic geography. The latter can be fully appreciated, also in terms of legal rationality, only going through the dynamics featuring global value chains and their production and distribution channels, and coming to terms with transitional labor markets.

This lesson also brings to the fore the importance of developing a unitary conception when approaching social sciences. Labor law is not a mere strategy which is implemented unilaterally to protect the weakest contracting party, but an overall 'legal order' laid down to oversee work-related, economic and social processes.

On close inspection, the most significant shortcoming of the measures put in place in Italy and other countries to tackle the pandemic is precisely the failure on behalf of the government to provide a joint response to solve the labor-related problems brought about by COVID-19.

2. Legal and Economic Rationality: Provisions Regulating the Suspension of Non-essential Businesses and Public and Private Services

By means of a decision of the Council of Ministers dated 31 January 2020, the government declared a state of emergency, implementing a patchwork of measures to contain the spread of the virus (examples include the decrees of the President of the Council of Ministers and other local ordinances). Together with healthcare provisions, important initiatives

[18] Again, G. Giugni, *Il "Ragionevole Capitalismo" di John R. Commons,* cit., p. 677.

concerned travel bans imposed on people, and the temporary closure of non-essential businesses and private and public services.

In order to evaluate the efficacy of these measures, the way work-related travel has been regulated would deserve a separate analysis. Initially, commuting was said to be possible only 'for *urgent* matters'. However, the final text of the provision contained the less stringent wording 'for *certified* working reasons', so people were allowed to travel for work if the reasons for doing so were documented and not urgent.

This paper will only focus on the emergency legislation which – due to public health reasons – limits the operations of industrial plants, businesses, retailers, educational providers (when teaching does not take place remotely) or any other activity which is not deemed to be essential.

In considering these aspects, it seems of no use to detail the legal provisions that followed and amended previous legislation. Yet we might say that as a response to workers' unorganized strikes and a lively debate involving businesses and trade unions, Italian lawmakers issued a list of businesses whose operations had to be suspended, which was progressively extended according to the seriousness of the pandemic. Gyms, sports centers, swimming pools, wellness and leisure centers, ski resorts, bars and restaurants had to stay closed between 6pm and 6am, while medium and large-sized stores and businesses operating in commercial centers and markets could not open on public holidays and on the days preceding them. In order to avoid pedantic descriptions, and in terms of legal rationality, it is sufficient to refer to the criteria adopted by Italian decision-makers in the midst of the pandemic to select those businesses which could stay open. Arguably, this choice was made on poor law basis and might be questioned in relation to the legal sources referred to.

The relevant provision is Decree of the President of the Council of Ministers (henceforth: DPCM) of 22 March 2020, which features a linear and straightforward framework. This piece of legislation sets forth that remote work applied to public servants and had to be considered as the ordinary way of working until the end of the emergency period. Remote work had to be preferred also in the private sector, when possible in organizational terms and depending on workers' tasks. This was also in consideration of the amendments made to legislation in order to facilitate the implementation of this working arrangement, particularly in businesses which otherwise had to close. Companies providing 'public utility services' and 'essential services' and 'any business which might help to deal with the pandemic' could stay open. Likewise, the production, shipping, sale and delivery of drugs, healthcare technology and medical

devices, as well as food and agricultural products were also permitted. Businesses featuring continuous production, which could not be halted without affecting overall operations or causing risk, could stay open and so could those having national relevance – e.g. the aerospace and defense industry – so long as the Prefect's office was made aware of it. All other businesses were shut down, with the exception of those included in an appendix to the DPCM – which was later on amended by means of a decree of the Ministry of Economic Development. This list consisted of companies included in a number of productive sectors singled out through ATECO codes, which corresponds to the classification of economic and production activities laid down by the European Union (NACE codes), which in turn refers to International Standard Industrial Classification (ISIC).

While seemingly irrelevant, the list of businesses not required to close provides some useful insights, also when limiting our analysis to the better integration between legal and economic rationality when dealing with the employment and occupational issues resulting from the healthcare emergency.

It falls outside our expertise to assess the real impact of the DPCM in terms of economic value (i.e. GDP and loss of revenue) and unworked hours as compared to the need to save lives, provided that an analysis of costs and benefits of this kind is possible[19], especially because it might be challenged in ethical[20] and also empirical terms.[21] In the same vein, the

[19] See for example, C.A. Favero, A. Ichino, A. Rustichini, *Restarting the Economy While Saving Lives Under COVID-19,* 2000 (available on the Social Science Research Network website), which provides a well-balanced model of contagion based on careful policies and the gradual return to work. This model is based on a combination of criteria used to select those workers authorised to resume work according to age and the level of risk in the sector they operate. In the USA, the Wharton School of the University of Pennsylvania developed a model concerning the national lockdown *(Coronavirus Policy Response Simulator: Health and Economic Effects of State Reopenings,* 1° May 2020). According to this piece of research, the implementation of restrictive measures caused some 116,523 deaths due to COVID-19 from 1 May to 31 June 2020, and some 18.6 million jobs were lost. In the same period, resuming work on a partial basis would have produced 161,664 deaths and the loss of 11 million jobs. If all US States had had reopened all businesses, the number of people dying would have been around 349,812, with only 500,000 jobs lost.

[20] This situation has given rise to a sterile discussion concerning 'the right price' of human life, which in Europe was fuelled by a gloomy article published in *the Economist (Covid-19 presents stark choices between life, death and the economy, The Economist* del 2 April 2020*),* on the advisability of an analysis purely based on the costs and benefits of health value as compared to the economic aspects and the financial harm caused by business closures.

increasing attention[22], especially of public opinion, devoted to essential tasks rather than general sectors – the latter being the government's focus – can be ascribed to the emotionality caused by the healthcare emergency. This is an aspect that should be dealt with considering the legal ways of assessing the 'social value' of work, which goes beyond its economic dimension. Considerable research has been carried out on the foregoing topic suggesting that decision-makers could have pursued more articulated legal solutions in order to consider the degree of riskiness associated to each job and thus their relevance and essentiality in relation to people's and society's primary needs during the pandemic[23].

The combination of sectorial analysis with the assessment of each occupation also indicates that – when considering the gradual re-opening of businesses and the consequent provisions aimed at containing the spread of the virus – the activities that resumed at a later stage mostly employed "vulnerable groups, e.g. women (who made up 56% of workers who stopped working since 4 May), temporary workers (48%), part-time workers (56%), young people (44%), non-nationals (20%), and those engaged in small-sized companies (46%)"[24].

---

[21] On this topic, and for the US case, see Z. Lin, C.M. Meissner, *Health vs. Wealth? Public Health Policies and the Economy During Covid-19,* NBER Working Paper No. 27099, 2020, spec. p. 9), arguing that: «policy has been theoretically predicted to matter for the economy. A high intensity and duration of (non-pharmaceutical policy interventions) NPIs is predicted to lower cumulative mortality and peak mortality, but this comes (theoretically) at a greater cost to the economy than had NPIs not been imposed. We find no evidence of this. (…) There is no evidence that stay-at-home policies led to stronger rises in jobless claims».

[22] See T.A. Kochan, B. Dyer, *What we owe essential workers,* in *The Hill* of 1 May 2020, where it is argued that «if you call them heroes, pay them as such». In a similar vein, but related to individuals engaged in undeclared work who largely contribute to essential sectors (e.g. agriculture and domestic work) see A. Corchado, *If They're 'Essential,' They Can't Be 'Illegal',* in *The New York Times* of 6 May 2020.

[23] In this sense, see the assessment provided in the INAPP research*, Lavoratori a rischio di contagio da covid-19 e misure di contenimento dell'epidemia,* INAPP Policy Brief, n. 16/2020. Discussing the jobs in the sectors concerned and the tasks carried out by workers, this research tries to define the index measuring the likelihood of being exposed to infections/diseases, the index of physical closeness when working with other people and the index measuring the possibility of working remotely. A different classification related to the vulnerability of each job during an healthcare emergency in the French context can be found in J. Flamand, C. Jolly, M. Rey, *Les métiers au temps du corona,* France Stratégie, Note d'analyse, n. 88/2020.

[24] See the statement made by both INPS and INAPP*, I settori economici essenziali nella fase 2: impatto sui lavoratori e rischio di contagio,* May 2020, which draws on the data elaborated by Uniemens Inps (p. 2).

A further aspect emerges when considering the issues pointed out in Paragraph no. 1, especially when investigating the reasons underlying the heated reaction of industrial relations actors (i.e. representatives from the economic, business and employment arena) to using ATECO codes, which can be seen as a move prompted by legal rationality. Little is known about the 'subterranean' and informal negotiation process taking place between the government, employers' associations and trade unions operating at national level. Yet companies met the list containing the ATECO codes with dissatisfaction, as they would have preferred stringent safety protocols than formal bans on openings. Trade unions were also unhappy with them, as the list approved on 22 March 2020 was a rather loose one, up to a point that they felt they were not considered during negotiations with decision-makers and companies. It was for this reason that, following strike-threats, a reviewed version of the list containing the ATECO codes was released[25]. This latter list was shorter, though the number of those required to work was higher than before.

3. The ATECO Codes used to Classify Economic and Production Activities and the New Geography of Work

The government's choice to use ATECO Codes constituted a simplistic solution in terms of legal rationality. While this move facilitated the handling of administrative procedures and the monitoring of compliance, it backfired on decision-makers when considering today's businesses and work.

The ATECO classification – which has been in force in Italy since 2008[26] – is used for statistical purposes, as well as for taxation and for identifying occupations and trades, also thanks to a 'Job Atlas'[27]. The ATECO codes provide a rather abstract and unreliable picture of Italian economic and production activities. One reason for this is that these codes draw on an

[25] Decree of the Minister of Economic Development of 25 March 2020, *Modifica dell'elenco dei codici di cui all'allegato 1 del decreto del Presidente del Consiglio dei ministri 22 marzo 2020*.

[26] Here reference is made to the 2007 ATECO classification. It constitutes the Italian version of the classification of economic activities in the European Community (NACE REV. 2) which was approved by means of Regulation (EC) No. 1893/2006 and draws on the classification defined by ONU (ISIC REV.4).

[27] It is a database used for classification and information purposes, which aims at detailing work processes and activities in 24 economic and occupational sectors. The sectors were calculated considering the classification codes laid down by Italy's National Institute for Statistics (ISTAT) concerning economic activities (ATECO 2007) and occupations (the 2011 Classification of professions).

old-fashioned 'geography of work' which still considers the distinction between primary, secondary, and tertiary sectors (i.e. agriculture and fishing; manufacturing and building; trade and services, respectively)[28].
Employers' harsh reaction to this classification reflects what most research in both economic and non-economic areas has proved in relation to what has been aptly termed 'the new geography of work'[29].
This new geography of work goes beyond national borders and the hard-and-fast distinction provided by the ATECO codes. This model no longer considers the rigid parameters based on sectors and goods, but local, work-related ecosystems called agglomerations, to use economic terminology[30]. Agglomerations bring together a number of companies having reticular and cooperative character[31], which are closely intertwined with complex chains of production operating locally and globally, so the idea of a closed and self-sufficient company is now set aside[32].
It is through chains of global, value-creating, providers and sub-providers that COVID-19 is thought to have spread at a surprising pace if compared to previous pandemics[33]. In these production and business settings, 'connectivity' is the watchword[34], and there exists an economic dimension that escapes the ATECO classification, because it develops

[28] See P. Bianchi, S. Labory, *Industrial Policy for the Manufacturing Revolution Perspectives on Digital Globalisation,* Edward Elgar, Cheltenham, UK - Northampton, MA, USA, 2018, p. 3, where it is argued that «in the past, industry studies and industrial economics have tended to confine industry to the manufacturing sector, following the famous division introduced by Fisher in 1935 into the three sectors. However, economic, social and technological developments have made this distinction increasingly outdated, especially in the last few decades where the three sectors have become progressively intertwined».
[29] See E. Moretti, *La nuova geografia del lavoro,* Mondadori, Milano, 2012.
[30] See the detailed report by the World Bank, *World Development Report 2009. Reshaping Economic Geography,* 2009, especially p. 126 and ff. In the literature, see S.S. Rosenthal, W.C. Strange, *The Determinants of Agglomeration,* in *Journal of Urban Economics,* 2001, pp. 191-229 and R. Hausmann, C.A. Hidalgo, S. Bustos, M. Coscia, S.Chung, J. Jimenez, A. Simoes, M.A. Yıldırım, *The Atlas of Economic Complexity - Mapping Paths to Prosperity,* Harvard's Centre for International Development (CID), Harvard Kennedy School, MIT Media Lab, 2011, especially p. 200, where reference is made to 'a complexity index' applying to economic and production processes in Italy.
[31] See R.J. Gilson, C.F. Sabel, R.E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration,* in *Columbia Law Review,* 2009, pp. 431-502.
[32] See P. Bianchi, S. Labory, *Industrial Policy for the Manufacturing Revolution Perspectives on Digital Globalisation,* cit., especially Chapter 3.
[33] On this point, see R. Baldwin, R. Freeman, *Supply chain contagion waves: Thinking ahead on manufacturing 'contagion and reinfection' from the COVID concussion,* Vox, 1 April 2020.
[34] See, P. Khanna, *Connectography. Mapping the Future of the Global Civilization,* Random House, 2016.

illegally, though constituting an important component of this 'modern' economic system. An example of this state of affairs is the growing work-related issues affecting agricultural work, to which we have been turning a blind eye.

Moving away from Marx's views[35], we have learned since the days of Sombart[36] that 'the economy is not our destiny'. Yet we did not need a pandemic and the drastic measures that followed to become aware that the ATECO codes – but the same can be said of other international systems used to classify economic activities – are no longer suitable because they still refer to schemes and processes in place in the nineteenth century. More dynamic economic processes have ousted them, and so has the push towards integration and complementarity imposed by new production.

Nevertheless, the recourse to ATECO codes allows for the implementation of public processes and activities which go far beyond the attempt to provide a picture of national economic activity used for statistical purposes and for impacting the taxation and welfare system. Rather, these codes affect some processes concerning legal rationality which govern work-related issues, such as: the codification of jobs and trades also for skills certification; the identification of the degree of risk associated to each economic activity; and, importantly, the definition of a framework featuring risk classes and social aggregation which might help to fine-tune the measures put in place to limit contagion in the workplace.

One attempt to create better links between legal and economic rationality has been seen in the collective regulation of the employment relationship in Italy. This was done by Italy's National Council of the Economy and Work (CNEL), a body having constitutional relevance and run by a well-known labour law professor like Tiziano Treu, when updating, re-classifying and digitalizing the national archive of collective agreements, set up pursuant to par. 1, Article 17 of Act no. 936 of 30 December 1986.

The association of the codes used for classifying national collective agreements in the private sector aims at creating a unified database containing collective agreements concluded at a national level. However, this database cannot serve as an objective parameter to determine the

[35] See W. Sombart, *L'avvenire del capitalismo*, cit., p. 27, footnote 1, where he rejects "Marx's popular formula which summarises the essence of modernity: the economy is our destiny (*die Wirtschaft ist unseres Schicksal*)".

[36] W. Sombart, *Die Zukunft des Kapitalismus,* Berlin, Buchholz & Weißwange, 1932. In this paper, reference is made to the Italian translation of this work, which can be found in R. Iannone (ed.), *L'avvenire del capitalismo*, Mimesis Edizioni, Milano-Udine 2015, p. 27.

representation power of the signatories to each collective agreement, neither in relation to each sectorial code nor to the scope of application of these contracts (i.e. the so-called 'reference category' or 'productive sector').

In reality, the aim was precisely that of providing a solid legal and institutional basis to the attempt to limit the improper proliferation of collective agreements and 'pirate contracts'[37]. This was done to better reflect social and economic processes and to make adequate use of public resources and rules governing collective bargaining. It is CNEL itself which specifies that this work "provides a valid indication of the number of agreements concluded, helping one to identify the situations in which contractual dumping and unfair practices might take place (…) by laying down parameters which consider the content of national agreements, thus making available a quality-based interpretation framework"[38].

A recent draft bill submitted by CNEL to the parliament[39] is intended to introduce in national legislation a unified code that identifies national collective agreements attributing an alphanumerical sequence to each of them. In the CNEL proposal, this unified code (e.g. 'the CCNL code') would help determine the remuneration level when calculating social security contributions[40]. However, it cannot be denied that – as confirmed by a further draft bill[41] – this simple move used for contract classification and identification might constitute a sound legal and institutional basis to introduce a law on trade union representation and the guaranteed minimum wage, in line with Articles 39 and 36 of the Italian Constitution.

---

[37] 'Pirate contracts' are not new and date back to the 1980s. See *Note sui contratti collettivi «pirata»,* in *Scritti di Giuseppe Pera,* II *Diritto sindacale*, 2007 (but 1997), pp. 1667-1683. More recently, see G. Centamore, *Contrattazione collettiva e pluralità di categorie,* Bononia University Press, 2020, especially pp. 65-71.

[38] CNEL, *Rapporto mercato del lavoro e contrattazione collettiva 2019,* Roma, 2020, p. 30.

[39] Italian Senate, Draft Bill no. 1232 on the initiative of CNEL, *Codice unico dei contratti collettivi nazionali di lavoro,* submitted to the Italian President on 5 April 2019.

([40]) Cfr. Par. 1, Article 1 of Decree-Law no. 338 of 9 October 1989, *Disposizioni urgenti in materia di evasione contributiva, di fiscalizzazione degli oneri sociali, di sgravi contributivi nel Mezzogiorno e di finanziamento dei patronati,* converted with amendments by Law no. 389 of 7 December 1989.

[41] In this respect, and by implementing the proposal made by CNEL, see Italian Senate, Draft Bill no. 1132 tabled by Senators Nannicini, Patriarca and others, *Norme in materia di giusta retribuzione, salario minimo e rappresentanza sindacale,* submitted to the Italian President on 11 March 2019.

Discussing the complexities of a possible provision on union representation[42] and the criteria employed to single out those carrying out industrial relations, falls outside the scope of this paper. However, it seems clear that this long-standing issue affecting Italy's politics and industrial relations has significant implications in what – referring to Commons – Giugni would define 'the long-awaited bridge between law and the economy'[43]. The proposal put forward by CNEL is worthy of consideration because it does more than assessing the advisability of enforcing a trade union law. CNEL has revived an aspect that has emerged forcefully during the pandemic and will be discussed by both policy-makers and industrial relations actors: the need to integrate legal and economic rationality into the industrial relations arena.

Nevertheless, the factual assumptions and theoretical implications related to law-making and law resulting from the CNEL proposal are perplexing. In practical terms, the whole reasoning is based on the ATECO codes which, as pointed out in this paper and demonstrated by the controversy generated by the lockdown, reflect an outdated geography of work, thus harnessing the dynamics of industrial relations based on concepts pertaining to the past. This aspect holds true if one considers that the new codification of collective agreements – which brings together economic rationality (the dynamics of labor market sectors) and legal rationality (the constraints and conditions for using the labor factor in companies) – took place matching the ATECO codes to each collective agreement. This procedure was carried out by CNEL considering their scope of application as defined by the agreements themselves, and later on validated by the signatories. In reality, the matching of the 800 national / sectorial collective agreements and the 1,224 ATECO codes considers the scope of application of each agreement if reference is made to the ATECO sectors, which is usually the case for collective agreements concluded by trade unions and employers' associations represented at CNEL).

What is most perplexing are the conceptual and theoretical implications of this proposal and the way it can be used in terms of law policy and law-making. This approach helps to better identify those areas where social

[42] See the collection of papers edited by Carinci (ed.), *Legge o contrattazione? Una risposta sulla rappresentanza sindacale a Corte costituzionale n. 231/2013,* ADAPT University Press, 2014.

[43] This is how G. Giugni, *Introduzione,* in G. Giugni, *Lavoro, legge, contratti,* il Mulino, Bologna., 1989, p. 13, discussed the institutionalism of the Wisconsin School, which aimed to integrate economic and law theory.

dumping is more widespread (i.e. the use of 'pirate contracts') and the degree of overlapping between different collective agreements having the same scope of application, i.e. within the same production categories. This approach also produces significant red tape when defining the sectors where collective bargaining should take place and those who must legally represent each category. This aspect might not be compatible with the principle of freedom of association governed by Article 39 of the Italian Constitution. In considering the link between legal and economic rationality, this principle can be interpreted as giving priority to private law governing collective agreements over political and administrative procedures affecting the dynamic nature of industrial relations.

The procedure just outlined and the provisions enforced to ratify the deliberations adopted by CNEL take place after identifying those conducting negotiations, an aspect which conditions future developments by creating a sort of institutional oligopoly of representation. Furthermore, and like what happened during Fascism[44], an approach of this kind would end up consolidating a system of professional categories that only considers the national dimension and is governed by a collective agreement whose scope of application is decided upon through administrative procedures.

A further problem of this procedure is the marginalization of some emerging forms of negotiation – e.g. involving different production units or those operating at local level – which might give rise to a paradigm shift in the industrial relations system, in line with the dynamics emerged in the context of the Fourth Industrial Revolution (i.e. employee representation voicing the needs of workers operating in different areas).

From this point of view, and in consideration of the integration of legal and economic rationality, the controversy made against the ATECO codes might be reversed. In other words, what needs reviewing is not the criteria used by economists to provide a statistical representation of production activities and services, but the steps made by those engaged in industrial relations – who still adopt an approach to the economy (i.e. the labor market) and to the institutions regulating it (the collective agreements concluded at the industry level) – which used to be relevant in the last century. They do so while global value chains, providers and sub-providers govern today's economy. The collective agreements classified

[44] See Article 2061 of the Italian Civil Code pursuant to which "the system of professional categories is determined by the government's laws, regulations and provisions and by the statutes enforced by professional associations". See F. Pergolesi, *Istituzioni di diritto corporativo,* UTET. Torino, 1935 (2nd edition), pp. 217-292.

according to each product sector and sectorial-level representation constitute the legal transposition of the same dynamics used to represent the economic processes reflected by the ATECO codes. This transposition takes place in statutes concluded at a company level and in the context of industry-level collective bargaining.

4. Investigating 'Industrial Relations Law'

The considerations provided above might give rise to novel cultural insights. Furthermore, moving beyond the occupational and employment issues produced by the current healthcare emergency, these reflections can help revive the analysis framework referred to as 'industrial relations law' in Italy and elsewhere. In other words, this means examining in a systematic way the law produced by collective bargaining system, prioritizing the 'look and see' approach. By employing this research perspective, it was Commons who first tried to integrate legal and economic rationality, by examining the foundations of the modern system of production (i.e. the different types of industrial government), the first collective agreements, health and safety legislation, and the ways the government dealt with work-related issues and economic activities.
The systematic analysis of the many collective agreements concluded at national, local and company level[45] to tackle pandemics in the workplace might prove useful also to overcome the ongoing healthcare emergency and the ensuing work-related issues. One reason for this is that this approach is once again[46] illustrative of the way the economy is not a set of unchanged rules or a context in which employers only work for their own interest. Rather, the economy can be seen as a field where will and choices emerge[47]. These choices are all but easy and might give rise to social disruption, as was the case when the government opted for the closure of certain businesses. Yet these choices can be better defined if an agreement-based approach is taken, rather than imposing rules top-down.

[45] As ADAPT, we have been monitoring and classifying this documentation in the ADAPT annual report on collective bargaining, using a database of some 4,000 collective agreements concluded at company and local level and collected using the CNEL dataset. See *VI Rapporto ADAPT sulla contrattazione collettiva in Italia,* ADAPT University Press, 2020.
[46] See G. Giugni, *Introduzione,* a S. Perlman, *Ideologia e pratica dell'azione sindacale,* La Nuova Italia, 1956, p. XII.
[47] See G. Giugni, *Il "Ragionevole Capitalismo" di John R. Commons,* cit., esp. p. 675, where the author stresses that from a modern point of view, the economy is regarded as "the science of choices".

Furthermore, derogations – Italy's peculiarities – should be avoided because they make laws less effective and easier to circumvent. An example of this is the tacit approval of Italy's government bodies operating at provincial level in relation to those businesses that were formally suspended during the healthcare emergency.

Here, reference shall be made again to Sombart's insights, especially when he argues that the economy is not our destiny (see Paragraph no. 3). In other words, "the economy is not a natural process, and it will be designed by the mankind's cultural institution. Accordingly, the future of the economy or a particular economic system is at the discretion of these men. While fulfilling their objectives, they are bound by needs imposed by the nature and the spirit. In its essence, the future organization of the economy is not a problem of science, but of will. As such, it does not concern the scientist, who must only establish what that is, without saying how that should be done"[48]. This statement certainly makes sense for sociologists or economists in relation to a certain way of engaging in economic issues, yet things are different for those applying a legal method. If the economy and the market are the result of people's free will, labor lawyers are called on to recognize and promote this will which - as Giugni taught us[49] - emerges in legal terms not only when referring to national legislation but also to the rules of work – which are the result of national and local systems of industrial relations – as a reflection of legal rationality far closer to those aspects that needs regulating.

This aspect was also recognized by Italian lawmakers when implementing the much-debated ATECO codes to select essential businesses. Soon afterwards, they had to refer to industrial relations law, namely the protocols regulating the measures to tackle COVID-19 spread in the workplace. This was done to ensure the safety of workers who carried on working, imposing that "essential businesses must comply with the protocols laid down to contain and tackle the spread of COVID-19 concluded on 24 April 2020 between the government and the industrial relations actors, and also with those agreements implementing them at local and company level. Furthermore, these businesses also adhere to the protocols applying to building sites concluded on 24 April 2020 between the Minister of Infrastructure and Transportation, the Minister of Labor and Social Policies and the industrial relations actors (…) as well as the protocol of 20 March 2020 applying to the transport sector and logistics

[48] W. Sombart, *L'avvenire del capitalismo*, cit., p. 27.

[49] G. Giugni, *Introduzione allo studio della autonomia collettiva,* Giuffrè, Milano, 1977 (but 1960).

(…). Failing to enforce them and to ensure proper safety levels will lead to business closure until the safety levels are restored"[50].

[50] Par. 2, Article 2 of the DPMC of 26 April 2020. See also par. 3, Article 1 of the DPMC of 22 March 2020.

ADAPT International Network

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at *www.adapt.it*.

For more information about the E-journal and to submit a paper, please send a mail to *LS@adapt.it*.

DEAL Centre for International and Comparative Studies Law Economics Environment Work
THE MARCO BIAGI DEPARTMENT OF ECONOMICS
UNIVERSITY OF MODENA AND REGGIO EMILIA

ADAPT International.it
Building the Future of Work