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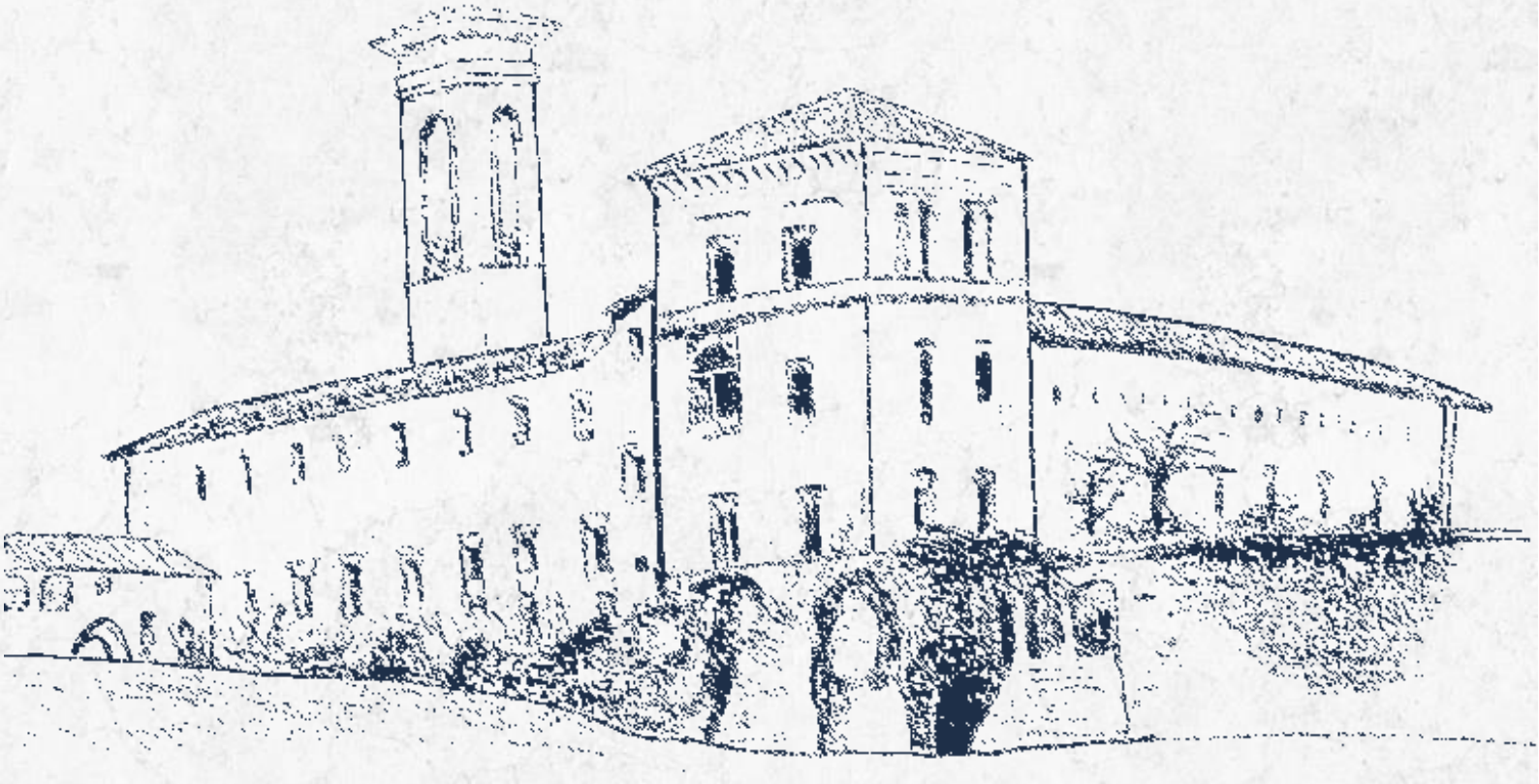

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'Working Anytime, Anywhere' and Working Time Provisions. Insights from the Italian Regulation of Smart Working and the Right to Disconnect

Emanuele Dagnino [1]

Abstract

The right to disconnect has been welcomed by those who regarded it as a "new generation right", though many consider it as a mere repetition of the right to rest. Through the analysis of the Italian regulation of *lavoro agile*, and with specific reference to working and non-working time, this paper frames the right to disconnect in the context of the legal system and the transformation of work. In so doing, it identifies different interpretations of the right to disconnect which call for a review of the notion of time in the employment relationship, also in consideration occupational health and safety and privacy.

Keywords – *Right to disconnect; lavoro agile; Right to rest; Private life; Working time.*

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1. Introduction

Thanks to portable technologies (i.e. laptops, tablets, smartphones), the ubiquity of Internet usage and new organizational models, most work can now be performed outside the employer's premises.

An increasing number of workers other than those operating in the service sector can thus work anytime, anywhere. On the one hand, they enjoy more flexibility as they work outside the office and do not have to comply with rigid working time schedules. This state of affairs helps one to better manage working time and the time devoted to other tasks (caring duties, rest periods and leisure activities). On the other hand, they also face the drawbacks of being 'always on', i.e. overworking, stress, blurred boundaries between work and other activities. Consequently, 'working anytime, anywhere' could easily turn into 'working every time, everywhere' ([2]) ([3]). The contradictions of remote work have emerged during the pandemic, when telework was the principal means to tackle COVID-19 at work. Remote work ensured continuity of work in safe conditions in many sectors, giving parents the opportunity to look after children while schools were closed. Yet working from home has increased the risks referred to before, both in terms of scope and intensity, due to the lack of skills among workers and managers and poor organisation. Against this complex background, what is clear is that working time is changing and that spillover effects and time porosity ([4]) have made it increasingly difficult to separate work and personal life. These changes have had an impact on the labour laws governing working time. These regulations have traditionally played a central role in defining the employment relationship and providing workers with adequate protection.

([2]) The expression refers to the title of a paper by Jean-Emmanuel Ray (see Jean-Emmanuel Ray, *Actualité des TIC. Tout connectés, partout, tout le temps?*, (2015) Droit Social, Issue, 6, p. 516. Its English translation could be "*Is everyone connected, everywhere and in every moment?*". On this topic, see also Rudiger Krause, *"Always-on": The Collapse of the Work–Life Separation in Recent Developments, Deficits and Counter-Strategies*, in Edoardo Ales et Al. (eds.), *Working in Digital and Smart Organizations. Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, (2018), Springer, pp. 223-248.

([3]) A complete analysis of promises and perils of *working anytime, anywhere* is contained in Eurofound and the International Labour Office, *Working anytime, anywhere: The effects on the world of work*, (2017) Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva. See also Jan Popma, *The Janus face of the 'New Ways of Work': Rise, risks and regulation of nomadic work*, (2013) Working Paper ETUI.

([4]) Émilie Genin, *Proposal for a Theoretical Framework for the Analysis of Time Porosity*, (2016) 32 International Journal of Comparative Labour Law and Industrial Relations, Issue 3, pp. 280–300.

These changes are generating tension between current regulations and the new world of work, as evidenced by some recent rulings handed down by the Court of Justice of the European Union (CJEU), specifically Case C-55/18 of 14th May 2019 concerning the calculation of daily working time ([5]). Legislators and scholars worldwide are trying to deal with the transformation of work and its impact on working time ([6]). In the EU context, following some unsuccessful attempts to revise the EU Working Time Directive ([7])([8]), attention is being paid to the right to disconnect on the national ([9]) and supranational level. Though with some differences in its scope of application, this right has been introduced in France ([10]), in Italy, in Spain ([11]) and, at least in principle, in Belgium ([12]), and

([5]) CJEU, Judgment in Case C-55/18, Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank, 14 May 2019 establishing that "*in order to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured*" (§ 60).

([6]) For an overview of the challenges raised by digitalization with a special reference to working time regulation, see Manfred Weiss, *Digitalisation: challenges and perspectives for labour law*, in in Lourdes Mella Méndez, Pilar Nuñez-Cortés Contreras (eds.), *Nuevas tecnologías y nuevas maneras de trabajar: estudios desde el derecho español y comparado*, (2017) Dykinson, pp. 22-31 and Wolfgang Däubler, Challenges to Labour Law, (2016) Pravo. Zhurnal Vysshey shkoly ekonomik, Issue 1, pp. 189-203.

([7]) Reference is made to Directive 2003/88/EC that, notwithstanding the opt-out mechanisms, represents a fundamental document for EU Member States as regards working time regulation. See, inter *alios*, Alan Bogg, *The regulation of working time in Europe*, in Alan Bogg, Cathryn Costello and Anne C.L. Davies (eds.), *Research Handbook on EU Labour Law, Edward Elgar*, 2016, pp. 267. It is noteworthy that European regulation concerning working time is adopted by the European Union according to article 153 of the Treaty on the Functioning of the European Union because of the competence regarding "*the improvement in particular of the working environment to protect workers' health and safety*".

([8]) See Tobias Nowak, *The turbulent life of the Working Time Directive*, (2018) 25 Maastricht Journal of European and Comparative Law, Issue 1, pp- 118-129.

([9]) Notably, the right to disconnect entered the academic debate thanks to Jean-Emmanuel Ray in 2002 (see Jean-Emmanuel Ray, *Naissance et avis de décès du droit à la déconnexion: le droit a la vie privée du XXI siècle*, Droit Social, Issue 11, pp. 939-944) and only in recent years been recognized by collective agreements and laws.

([10]) In France, the right to disconnect has been introduced by article 55 of *Loi Travail* of 2016 (*LOI n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*)

([11]) In Spain, the right to disconnect has been introduced by article 88 of LOPD (*Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales).* Moreover, specific provisions concerning the right to disconnect have also been introduced in the context of the *Real Decreto-ley 28/2020, de 22 de septiembre, de trabajo a distancia*.

([12]) In Belgium, the disconnection and the regulation of the use of technological working tools have been introduced following negotiations in the context of the Health and Safety Committee by articles 15-17 of the *Loi relative au renforcement de la croissance économique et de la cohésion sociale* in 2018.

other countries are also considering its implementation ([13]). Recently, the European Parliament has promoted the diffusion of the right to disconnect by approving a Resolution on 21 January 2021, recommending the introduction of a European Directive on the matter ([14]). The actions taken at the national level seem to be the most effective ones, even if they are not supported by a clear definition of 'time' in the working relationship, since limited attention is paid to the notion of 'working time' itself ([15]). This reasoning also applies for the European Resolution that, while promoting the right to disconnect as a fundamental right (Recital h), expressly confirmed the notion of working time established in the Directive 2003/88/CE. In Italy, the right to disconnect is set forth in Law n. 81/2017 governing "*lavoro agile*" ([16]), a form of salaried employment characterized by flexibility as regards working time and place and the use of technological devices. In this context, the right to disconnect is understood as a peculiar way of regulating working time. Although some inconsistencies exist, this provision offers some interesting insights which can be used as a starting point for reviewing the notion of working time. Drawing on the analysis of the regulation of *lavoro agile*, and with special reference to the provisions on working time, this paper will deal with the challenges posed by the *working anytime, anywhere* approach and with the shortcomings of traditional regulations adopted to addressing these challenges. The paper will be structured as follows: Section I will briefly present the regulation of *lavoro agile*, while Section II will provide some reflections in relation to traditional working

([13]) See, Eurofound, *Regulations to address work–life balance in digital flexible working arrangements*, Research Report, passim.

([14]) See *European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL))*.

([15]) An exception was contained in the above-mentioned *Loi Travail* of 2016 which not only introduced the right to disconnect, but also required the government to produce a report to be delivered to the Parliament regarding the adaptation of the legal framework concerning the notions of 'workplace', 'workload' and 'time' in the context of technological transformation (art. 57).

([16]) While the notion of *lavoro agile* is often translated into English as *smart working*, in this paper a different choice has been made in order to distinguish smart working from what is internationally known with this expression, i.e. "*an approach to organising work that aims to drive greater efficiency and effectiveness in achieving job outcomes through a combination of flexibility, autonomy and collaboration, in parallel with optimising tools and working environments for employees*" (CIPD, *HR: Getting smart about agile working*, (2014) Research report CIPD, pp. 3-4), from the form of work introduced in Italy to support this managerial philosophy (*lavoro agile*). Regarding the distinction between *smart working* and *lavoro agile* see also Carla Spinelli, *Tecnologie digitali e lavoro agile*, (2018) Cacucci, pp. 17 and ff. A comprehensive analysis of *smart working* in managerial terms is provided by Teresina Torre and Daria Sarti, *Into Smart Work Practices: Which Challenges for the HR Department*, in Edoardo Ales et Al. (eds.), *supra* note 1, pp. 249-275.

time regulations. Finally, some conclusions will be drawn regarding the need to rethink working time regulation in the context of digitalization.

Section I – Working Time and the Regulation of *Lavoro Agile*

Provisions regulating *lavoro agile* were introduced by Law n. 81/2017 (Section II) with the aim of improving work-life balance, fostering the competitiveness of companies through time and space flexibility ([17]) and regulating salaried employment to tackle the challenges of the Fourth Industrial Revolution ([18]).
According to article 18, *lavoro agile* is "*a peculiar way of performing work*". Therefore, it is not a type of employment contract, in that this way of working is agreed upon in a separate agreement which integrates the contract of employment stipulated by the parties ([19]). This form of work is characterized by:
- the fact that work is carried out both inside and outside the business premises. *Lavoro agile* is usually organized on a day-per-week basis, though it could also be arranged in different ways (week per months; the duration of a specific project; some hours of the working day);
- the fact that it could "*also be organized into phases, working cycles and objectives and without specific requirements regarding working time and the workplace*", yet complying with "*(only) the maximum limits of daily and weekly working hours*", as established by law and collective agreements;
- the (possible) use of technological devices.

As such, *lavoro agile* could be regarded as an evolved version of telework as defined by the 2002 European Framework Agreement on Telework ([20]) and by

([17]) See article 18 paragraph 1 of the Law n. 81/2017. In the academic debate, see, *inter alios*, Rosa Casillo, *Competitività e conciliazione nel lavoro agile*, (2016) 69 Rivista giuridica del lavoro e della previdenza sociale, Issue 1, pp. 115-126 and Francesca Malzani, *Il lavoro agile tra opportunità e nuovi rischi per il lavoratore*, (2018) Diritti lavori mercati, Issue 1, pp. 17-36.
([18]) Maurizio Del Conte, *Premesse e prospettive del "Jobs Act"*, (2015) 25 Diritto delle relazioni industriali, Issue 4, pp. 939-960. See also Gaetano Zilio Grandi and Marco Biasi, *Introduzione: la "coda" del Jobs Act o la "testa" del nuovo diritto del lavoro?*, in Gaetano Zilio Grandi and Marco Biasi (eds.), *Commentario breve allo Statuto del lavoro autonomo e del lavoro agile*, (2018) Cedam, pp. 3 and ff. and Michel Martone, *Lo smart working nell'ordinamento italiano*, (2018) Diritti lavori mercati, Issue 2, p. 294.
([19]) According to article 19 paragraph 2 of the Law n. 81/2017 the agreement of *lavoro agile* could be conducted temporarily or permanently, irrespective of the duration of the employment contract which integrates. This agreement could potentially be applied to any kind of employment contract and employment relationship: open ended and fixed term contracts; full time and part-time contract; apprenticeships and, even, job on call and agency-work.
([20]) See Framework Agreement on Telework signed by UNICE/UEAPME, CEEP and ETUC, 16 July 2002.

the relevant regulations provided by Member States and by collective agreements at national level ([21]). In this context, *lavoro agile* can be regarded as a form of remote working that must be alternate and occasional in nature. The first feature is coherent with the definition provided by the European Framework Agreement, but it is more limited in scope ([22]). The second feature goes beyond the traditional definition of telework, since the latter expressly requires that "*work, which could also be performed at the employers' premises, and is carried out away from those premises on a regular basis*" ([23]).

While there was a need for a regulation responding to the peculiarities of third-generation teleworking ([24]), where remote working can be occasional and performed in any place, the decision to provide specific rules in addition to the one governing teleworking raises some doubts regarding lawmakers' intentions. Compared to the regulation of teleworking, the one governing *lavoro agile* provides fewer obligations and economic costs for employers. Since some degree of overlapping exists between *lavoro agile* and teleworking, the former is being used more frequently than the latter. Arguably, promoting remote working without reviewing telework was one of the tacit aims of the new regulation ([25]). At any rate, the regulation of this flexible form of work highlights the increasing gap between the new world of work and working time regulation. This aspect emerges from the definition contained in Article 18 and from the other provision regarding working time, i.e., par. 1 of Article 19,

([21]) See the Comparative Labor Law Dossier, titled Teleworking and Labor Conditions, (2017) Ius Labor, Issue 2 available at https://www.upf.edu/documents/3885005/58976718/CLLD/7cd690f2-1def-373e-7ff5-477db437f464. It is to be noted that very important developments have interested the regulation of telework as a consequence of the pandemic crisis. While in some cases the regulations introduced specifically addressed the use of remote working during the *Coronavirus* emergency (see, for example, the *Convention collective de travail concernant le télétravail recommandé ou obligatoire en raison de la crise du coronavirus*, stipulated in Belgium by the social partners in date 26 January 2021), in other cases, the reform regarded the whole regulation of remote working (as it has been, for instance, in the case of Spain, with the introduction of the RD-Ley 28/2020 mentioned above).

([22]) According to the definition of telework provided by article 2 of the European Framework Agreement, telework can be either full time or alternating.

([23]) Id. Emphasis added.

([24]) See Jon Messenger and Lutz Gschwind, (2016) *Three generations of telework: New ICT and the (r)evolution from home office to virtual office*, 31 New Technology, Work and Employment, Issue 3, pp. 195–208.

([25]) Michele Tiraboschi, *Tradition and Innovation in Labour Law: The Ambiguous Case of "Agile Working" in Italy,* in Frank Hendrickx and Valerio De Stefano (eds)., *Game Changers in Labour Law. Shaping the Future of Work*, (2018) 100 Bulletin of Comparative Labour Relations, Wolters Kluwer, § 2.

which regulates individual agreement establishing rest periods and ensuring disconnection.

A. Working Time Regulation and the Definition of Lavoro Agile

Analysing Article 18, it could seem contradictory that it provides for the scope of organizing work without requirements in terms of working time as well as the obligation to comply with maximum daily and weekly working hours. This concern is even more valid if one considers that telework in Italy features high levels of derogation ([26]). In this sense, these regulations implemented according to Directive 2003/88/EC – do not apply when it comes to normal working hours ([27]), maximum weekly working hours ([28]), overwork ([29]), daily rest ([30]), breaks ([31]) and night work ([32]). According to the derogations allowed Directive 2003/88/EC, it regards workers whose working time "*is not measured and/or predetermined or can be determined by the workers themselves*" ([33]).
In the case of *lavoro agile*, this derogation does not seem applicable, since it is the law itself through the obligation to respect maximum daily and weekly working time that imposes compliance with the regulation regarding daily rest periods and breaks. In Italy, no specific provision exists concerning maximum daily working time ([34]). Consequently, this notion is defined by subtracting

([26]) See article 17 paragraph 5 letter d) of Legislative Decree n. 66/2003.
([27]) Article 3 of Legislative Decree n. 66/2003 states that the normal weekly working time is 40 hours and that the exceptions laid down in collective agreements can take place only to improve current working conditions.
([28]) According to article 4 of Legislative Decree n. 66/2003 the maximum weekly working time is established by collective agreements but, in any case, the average duration of the weekly working time cannot exceed 48 hours calculated on a maximum time-period of 4 months (with possible derogations).
([29]) According to article 5 of Legislative Decree n. 66/2003 overwork shall be used within the limits provided by collective agreements or, absent collective regulation, within the maximum limit of 250 hours per year.
([30]) Minimum daily rest is defined, coherently with the Directive, in 11 consecutive hours per 24-hour period (article 7 of the Legislative Decree n. 66/2003).
([31]) Employees are entitled to a minimum break of 10 minutes if their working time exceeds 6 hours (article 8 of the Legislative Decree n. 66/2003).
([32]) According to article 13 of the Legislative Decree n. 66/2003, and to article 8 of the Directive 2003/88/EC, the average duration of night work cannot exceed 8 hours in a 24-hour period.
([33]) See article 17, paragraph 1 of the Directive 2003/88/EC.
([34]) Despite the Italian Constitution expressly states that the maximum daily the law should regulate working time, the Italian legal system lacks a provision introducing this limitation and, as a consequence, it could be calculated only referring to the minimum rest periods and the minimum breaks.

minimum daily rest periods and minimum daily breaks from 24 hours ([35]). This circumstance, therefore, implies time measurement ([36]). Consequently, working without specific working time should normally be intended as a way for the employee to distribute their working hours agreed in the employment contract in their working day. A different perspective – called "maximalist", which opposes the previous one, known as previous "minimalist"([37]) – interprets the provision as a derogation to normal working hours and overwork. This should be intended as contrary to European regulation, since the rationale required by the Directive seems to be missing in *lavoro agile* when implemented by companies. An additional interpretation has also been supported, according to which the derogation to working time regulations only applies when work is organized in order to ensure workers' full autonomy in the management of working time. Conversely, this derogation cannot apply when autonomy is limited or non-existent at all ([38]). While the first situation might take place rarely, the second one occurs frequently when work is carried out in the context of *lavoro agile*. In this sense, and as already outlined by some authors, the contradiction is only apparent ([39]). Lawmakers – even if with some systematic incoherencies in terms of the legislative technique – decided to reaffirm the importance of those limitations in order to ensure employees' health and safety. Notwithstanding the fact that the employee herself enjoys some degree of autonomy regarding the distribution of working time ([40]), some limitations on the duration of working time are needed in order to prevent exploitation and self-exploitation.

([35]) The maximum daily working time is thus 12 hours and 40 minutes.

([36]) See, inter alia, Marco Peruzzi, *Sicurezza e agilità: quale tutela per lo smart worker?*, (2017) 3 Diritto della Sicurezza sul Lavoro, Issue 1, pp. 15-17; Gabriella Leone, *La tutela della salute e della sicurezza dei lavoratori agili*, in Domenico Garofalo (eds.), (2018) *La nuova frontiera del lavoro: autonomo – agile – occasionale*, ADAPT University Press, pp. 479-480 and Carla Spinelli, *Tempo di lavoro e di non lavoro: quali tutele per il lavoratore agile?*, (2018) Giustizia civile, 31 August 2018, § 2.

([37]) Anna Donini, *I confini della prestazione agile: tra diritto alla disconnessione e obblighi di risultato*, in Matteo Verzaro (eds.), *Il lavoro agile nella disciplina legale collettiva ed individuale. Stato dell'arte e proposte interpretative di un gruppo di giovani studiosi*, (2018) Jovene, pp. 114 ff.

([38]) Vito Leccese, *Lavoro agile e misurazione della durata dell'orario per finalità di tutela della salute*, Rivista Giuridica del Lavoro e della Previdenza Sociale, 2020, 3, 441.

([39]) Anna Fenoglio, *Il tempo di lavoro nella "New Automation Age": un quadro in trasformazione*, (2018) 37 Rivista italiana di diritto del lavoro, Issue 4, p. 646.

([40]) Certain limitations to this autonomy are usually included in the agreement not only in compliance with the requirements of Article 19 in terms of rest periods and disconnection, but also for employers' interests, since in many cases work is needed for organizational reasons only in certain periods of the day (for example, when team work is required).

B. Rest Periods and the Right to Disconnect

The regulation of working time for *lavoro agile* laid down in Article 18 is complemented by further provisions contained in Article 19 which, along with Article 21([41]), defines the mandatory terms of the individual agreement of *lavoro agile*. According to par. 1 of Article 19, the agreement must contain the regulation regarding how work should be performed outside employers' premises also with reference to the exercise of the directive power and the use of ICTs as working tools. In addition, par. 1 expressly states that "*the agreement also indicates the employee's rest periods and the technical and organizational measures needed to guarantee the disconnection of the employee from technological working tools*" ([42]).
As such, the 'agile' worker is not only entitled to the safeguards regarding working time as regulated by Legislative Decree n. 66/2003, but the law provides necessary tools to ensure compliance with those rights.
The reference to rest periods in the individual agreement is intended to prevent an overlap between work and family time. It also ensures that parties are aware of the time the employee is on standby, so that rests be provided. In line with Directive 2003/88/EC, rest periods in Italian legislation are defined as "any period not referred to as working time" ([43]). In the case of *lavoro agile* the difference is that the distribution of working time – intended as "any period in which the worker remains available to the employer and carries out his/her duties"([44]) – could be partly (or totally) decided upon by the employee. Therefore, rest hours cannot be determined in a precise way. Yet the employer and the employee shall determine at least certain rest periods, in order to comply with some minimum requirements, e.g. minimum consecutive hours of rest. In this sense, company-level collective agreements providing a common regulation for *lavoro agile* ([45]) often include a provision specifying that work could be distributed over a limited time frame (for example, between 8 a.m. and 8 p.m.) in order to ensure the minimum consecutive hours of rest without performing night work. The timeframe is, in turn, detailed in the individual

([41]) Article 21 of Law n. 81/2017 requires that the agreement of *lavoro agile* includes specific provision regulating how the employer can exercise the power of monitoring work carried out outside of the employer's premises and which are the violations that can be sanctioned by the employer in the exercise of the disciplinary power.
([42]) Article 19 paragraph 1 period 2 of Law n. 81/2017.
([43]) See article 1 paragraph 2 letter b) of Legislative Decree n. 66/2003.
([44]) See article 1 paragraph 2 letter a) of Legislative Decree n. 66/2003.
([45]) While the regulation of *lavoro agile* contained in the Law n. 81/2017 does not expressly provide a specific role for collective agreements, it is quite common that, before stipulating individual agreements of *lavoro agile* with their employees, companies stipulate a collective agreement with workers' representatives in the company in order to establish a common reference for the stipulation of individual agreements.

agreement. Obviously, limitations regarding this timeframe to perform work ì cannot always be included – e.g. this is the case when tasks require one to connect with different areas – and even when the provision is applied, it cannot alone protect employees from the health-related risks resulting from connectivity and over-working. This is one of the reasons why emphasis is provided on both individual and collective agreements to a statement reasserting that *lavoro agile* does not involve any change regarding the number of hours agreed between the parties. Clearly, a statement cannot provide effective protection: not only do remote workers tend to work more hours than their peers onsite ([46]), but it is also difficult to draw a distinction between work and family life.

Against this backdrop, it is possible to understand the right to disconnect and why it was introduced in legislation regulating *lavoro agile* ([47]). It should be noted that – as well as in France and Spain and in keeping with the goals outlined by its first proponent and the European Resolution – the right to disconnect is aimed at protecting employee health and safety by ensuring compliance with rest periods and preserving their work-life balance and private life ([48]). While these purposes are expressly established in the law ([49]) in France and Spain, a similar interpretation of this right is provided in the legal framework of Italy's *lavoro agile*. On the one hand, this way of working is intended to improve employees' work-life balance. On the other hand, the regulation of the right to disconnect is contained in the same provision requiring one to indicate rest periods in the individual agreement.

This regulation neither provides for a definition of the right to disconnect nor includes specific measures to fulfil these purposes. It only requires the parties to specify the technical ([50]) and organizational ([51]) measures that will be applied.

([46]) See Eurofound and the International Labour Office, *supra* note 2, p. 25.

([47]) It should be noticed that, while most Italian scholars regard disconnection as a right of the employee, some commentators, drawing on a literal interpretation, express doubts about the nature of the disconnection in terms of a subjective right of the employee (see Andrea Allamprese and Federico Pascucci, *La tutela della salute e della sicurezza del lavoratore agile*, (2017) 68 Rivista giuridica del lavoro e della previdenza sociale, Issue 2, pp. 314-315. Against this position, *inter alios*, M. Lai, *Innovazione tecnologica e riposo minimo giornaliero*, Diritto delle relazioni industriali, 2020, 3, 678.

([48]) As early as in 2002, Jean-Emmanuel Ray understood the right as a measure needed to address the risks posed by *tele-disponibilité* (availability via ICTs) to the health and safety of workers (with regard to the effective enjoyment of one's right to rest) and to work-life balance (because of the overlap between work and personal life moments) (see Ray, *supra* note 8, p. 941). The Resolution states that «

([49]) See article L2242-17 of the French Labour Code and article 88, paragraph 1 of the LOPD.

([50]) Examples of technical measures include the adoption of pop-up windows, out-of-office messages and the server deactivation in certain periods of the day.

The implementation of the right to disconnect could vary significantly and at times might prove inefficient ([52]), as the rationale of this legislative technique should consider work organization in companies and sectors. Given that the right to disconnect should be applied in different contexts and to many employment relationships, a common standard could have been inefficient, and the decision regarding the measures to be put in place for the implementation of this right could be better taken by those who better know the company and the specific employment relationship.
Without a clear definition and due to the flexibility needed in terms of disconnection from technological working tools in the new world of work, it is thus fundamental to put forward a possible interpretation of this right in working time regulation in *lavoro agile*.

C. A Possible Interpretation of the Right to Disconnect when performing Lavoro Agile

When regulating *lavoro agile,* the right to disconnect is mostly concerned with rest periods and the protection of work-life balance. The first aspect led some commentators to consider the right to disconnect only as a revival of the right to rest established by working time regulation and, accordingly, as something superfluous ([53]).
Contrariwise, when considering the notion of working time, rest periods and the time concerning the disconnection from technological working tools do not fully coincide. On the one hand, an employee could be connected with technological working tools but not working, because she is not technically at the employer's disposal or she is not carrying out her working activities or duties. This is the reason why, usually, the time of connection outside working hours is not considered as overtime. Moreover, it is often time spent voluntarily by the employees in order to move forward with work, while they

([51]) Organizational measures relate to mechanisms put in place in order to avoid that the employee is required to work during certain times, such as policy on the use of ICTs, guidelines regarding who to call when the employee is not available, etc. However, they can also refer to awareness-raising campaigns and training.
([52]) See, for example, Anna Fenoglio, *Il diritto alla disconnessione del lavoratore agile*, in Gaetano Zilio Grandi and Marco Biasi (eds.), *supra* note 14, p. 561.
([53]) The doubts regarding the overlap of the right to disconnect and the right to rest are analyzed, *inter alios*, by Maria Rosa Vallecillo Gamez, *El derecho a la desconexiòn ¿"Novedad digital" o esnobismo del "viejo" derecho al descanso?*, (2017) Revista de trabajo y seguridad social, Issue 408, pp. 167-178, Valeria Zeppilli, Disconnessione: un'occasione mancata per il legislatore?, Rivista giuridca del lavoro e della previdenza sociale, 2020, 2, 314-315 and M. Russo, *Esiste il diritto alla disconnessione? Qualche spunto di riflessione alla ricerca di un equilibrio tra tecnologia, lavoro e vita privata*, Diritto delle relazioni industriali, 2020, 3, 688-690.

are doing other activities. On the other hand, even when not connected, it is still possible to carry out job-related activities.

Since there is no full equivalence between disconnection and rests, it is important to understand the interrelations between the different notions provided in working time regulation (including, of course, working time). Taking into account the notion of 'minimum consecutive rest periods', the right to disconnect increases employee protection since, without the connection with working tools and the "virtual office" ([54]), it is more difficult for the employee to remain at the employer's disposal and to carry out working activities. A disconnection between 8 p.m. and 7 a.m. would be enough to guarantee that no interruption is made to enjoy 11 hours of rest. When possible, it would be better to understand the right to disconnect as also a duty to disconnect ([55]).

However, the right to disconnect could also be used to avoid overtime, if strictly implemented outside normal working time. This would imply a limitation to flexibility which could damage both parties. While it could be applied in a traditional time pattern, it seems not to be consistent with *lavoro agile* and other forms of smart working.

Since the time spent 'connected' outside working hours could be valuable for both parties to the contract ([56]), it could be reasonable to leave a certain degree of autonomy regarding the time one can connect outside the agreed working hours. Using the 'occupied' or 'absent' status available in many platforms (e.g., Skype) could help define when the employee is available for working. Since the time one is connected cannot be considered working time, the traditional limitation provided by working time regulation may not apply, unless some work is performed (if so, it should also be paid and comply with relevant legislation). The limitation should be put in place in order to avoid being connected for too much time. To this purpose, the 11 hours of disconnection

([54]) A comprehensive description of the "virtual office" is provided by Messenger and Gschwind, *supra* note pp. 199–201.

([55]) A duty to disconnect was already advocated by the *Rapport Transformation numerique et vie au travail* (known as Rapport Mettling) an independent report regarding the new world of work requested by the Labour Minister to a group of researchers led by Mettling in 2015, while preparing the above-mentioned reform of the Labour Code. In the scholarly debate see, inter alios, Chantal Mathieu, *Pas de droit à la déconnexion (du salarié) sans devoir de déconnexion (de l'employeur)*, (2016) Revue de Droit du Travail, 2016, Issue 10, pp. 592-595; Allamprese and Pascucci, *supra* note 42, p. 314 and Giovanni Calvellini and Marco Tufo, *Lavoro e vita privata nel lavoro digitale: il tempo come elemento distintivo*, (2018) Rivista Labor, p. 412.

([56]) Many authors outline that millennials have a different understanding of work and the relationship with their devices, which highly impacts on the willingness to disconnect from them. See, *ex multis*, Ray, *supra* note 1, p. 520.

would not be enough. While the promises of a *connexion choisie* ([57]) should be taken into account, limitations to the autonomy given to employees could be a reasonable measure to address its issues.

This interpretation seems to be consistent with the second aim of the right to disconnect, since it permits only a partial overlap between working and leisure time. While it primarily reaffirms the importance of a distinction between work and private life in terms of work-life balance, it may also pave the way to a regulated form of work-life blending promoted by management theorists ([58]). However, while management theorists refer to blending as a way to overcome the traditional distinction between working and non-working time, the dynamics can be contextualized in a world of work that still requires that distinction: it could be regarded as a controlled and employee-managed form of time porosity.

Therefore, this interpretation allows one to enjoy the flexibility of the right to disconnect, which can be put in place in terms of a mandatory disconnection – that guarantees, at least, the consecutive rest periods and the needed time free from any connection to work – and in terms of flexible disconnection – when the employee retains stays connected after normal working hours ([59]).

Before further examining the interpretation in the context of the separation between working time and non-working time, it is worth noting that another function of the right to disconnect has been individuated. While still related to employees' health and safety, there is a use of the right to disconnect that does not consider working time. In some cases, the right to disconnect is also implemented as a means to contrast *infobesity* and hyper-connection during working time, since it is detrimental to the employee that is, consequently, less productive and more stressed ([60]). While this interpretation of the right to

([57]) Grégoire Loiseau, *La déconnexion. Observations sur la régulation du travail dans le nouvel espace-temps des entreprises connectées*, (2017) Droit Social, Issue 5, pp. 469-470.

([58]) For an overview of the theory regarding work-life blending in the context of labour law studies see Tatsiana Ushakova, *Del work-life balance al work-career blend: apuntes para el debate*, in Mella Méndez and Nuñez-Cortés Contreras (eds.), *supra* note 5, pp. 245 and ff. and Mariagrazia Militello, *Il work-life blending nell'era della on-demand economy*, (2019) 70 Rivista giuridica del lavoro e della previdenza sociale, Issue 1, pp. 52-58).

([59]) Again, it is worth noticing that in France few collective agreements provide two different times for disconnection: *haute deconnéxion* (high disconnection) and *basse deconnéxion* (low disconnection). While the distinction is based on the possibility to contact the employee under certain exceptional conditions, which are limited to low disconnection periods, these examples demonstrate that a distinction between periods of mandatory and flexible disconnection (or, better, employee-managed connection) is possible. See, again, Dagnino, *supra* note 49.

([60]) This happens in France where the most innovative collective agreements regarding the right to disconnect integrate the right to disconnect outside working hours (*droit à la déconnexion en dehors de temps de travail effectif*), with a right to disconnect during working hours (*droit à la déconnexion pendant les temps de travail*). See Emanuele Dagnino, *The Right to Disconnect viewed through*

disconnect is interesting and promising, the next section will focus on the one described above.

Section II – The Interpretation of the Right to Disconnect in consideration of Working and Non-working Time

Since the rationale for the promotion of the right to disconnect is not limited to *lavoro agile* and seems to be pervasive also in traditional working patterns affected by the digitalization of work ([61]) – i.e. France, Spain, and Belgium ([62]) have provided a broader scope of application to the right and that Italian scholars advocate for its extension ([63]) – the interpretation put forward should be tested with reference to the overall system of working time regulation in order to understand how it fits with the new reality of work.

In this broader context, mandatory disconnection and flexible disconnection/employee-managed connection could prove to be an interesting way to address the problems related to the always-on culture for traditional employees as well. Even outside a traditional 9-to-5 working schedule employees and employers could have an interest in connectivity and employees may suffer from strict limitations on their possibility of being connected to technological working tools. Simultaneously, they are also interested in adequate protection concerning a full disconnection during certain times in order to guarantee rest periods and to better manage work-life balance.

If this is true, it is necessary to identify specific connection time in the context of a regulation traditionally based on a binary distinction between working time and rest periods.

In this context, the interpretation put forward concerning the right to disconnect can establish a period of rest preserved by the risk of spillovers. In addition, and even more relevant in systematic terms, the interpretation can

the Prism of Work-life Balance. The Role of Collective Bargaining: A Comparison between Italy and France, (2018) in Giuseppe Casale, Tiziano Treu (eds.), *Transformations of work: challenges for the national systems of labour law and social security*, (2018) Giappichelli, p. 441.

([61]) For a thorough analysis, see Eurofound and ILO, *supra* note 2, passim.

([62]) In France, the right to disconnect is regulated both with reference to a peculiar form of work – *forfait en jours sur l'année* – which presents a features of time flexibility comparable to those of *lavoro agile* and with reference to all the workers employed by companies where one or more trade union sections are established: generally, companies employing more than 50 employees (see articles L2242-17 and L2121-64 of the Labour Code). In Spain, according to article 88 of the LOPD, the right to disconnect is applied to all the employees (including public employees). Finally, in Belgium the negotiation regarding disconnection is promoted in the context of companies of a certain size (the ones that has to set up an Health and Safety Committee, thus normally those with more than 50 employees).

([63]) See, inter alios, Gisella De Simone, *Lavoro digitale e subordinazione. Prime riflessioni*, (2019) 70 Rivista giuridica del lavoro e della previdenza sociale, Issue 1, p. 16

serve to bring out the productive nature of some periods that do not fall within the concept of working time, though generating some gains for the employer ([64]). Examples include the time spent by the employee with co-workers and managers of the company and, more generally, engaged in work outside working hours. This time – which somehow recalls an on-call time – is regulated in Italy by collective agreements ([65]) – and has economic value for the employer, since it enhances work organization.

This broader notion of "productive time" ("*tempo-lavoro*" in Bavaro's terms) and, as a consequence, a stricter notion of rests (non-working time, i.e., "*tempo del non-lavoro*") can lead, thanks to the implementation of the right to disconnect, to re-establish rest periods as "personal time free from the ties of production/subordination" ([66]) in accordance with the new reality of work characterized by the "*laisse electronique*" (electronic leash) ([67]). In the meantime, it could serve to recognize the economic value of the time one is potentially up for work. It cannot be treated as working time or rest periods, so there should be room to determine the value of this time in terms of a percentage of a working hour and according to the economic assessment recognized in a given sector.

Obviously, this interpretation of the right to disconnect and of its role in new working time regulation should be promoted by adequate legislative reform in order to be enforced. While this room for innovation can already be envisioned, it cannot be left to the parties (even if collective parties through collective agreements) to determine such an important revision about how time should be considered in the context of the employment relationship. As said, individual and collective parties should implement an updated legal framework, since they better know the specific features and characteristics of the sector or employment relationship.

([64]) According to Vincenzo Bavaro "*the time needed for production, the time that satisfies the creditor's organizational interest, that is, the time that produces economic value and economic utility ("tempo-lavoro"), is not only the actual working time ("tempo-orario")*". (see Vincenzo Bavaro, *Tesi sullo statuto giuridico del tempo nel rapporto di lavoro subordinato*, in Bruno Veneziani and Vincenzo Bavaro (eds.), *Le dimensioni giuridiche dei tempi del lavoro*, (2009) Cacucci, pp. 22-23). Own translation.

([65]) Notably, on-call time has been one of the most recurring issues in the CJEU case law and one of the most disputed aspects by Member States. See recently CJEU, Judgment in Case C-518/15, Ville de Nivelles v. Rudy Matzak, 21 February 2018, containing references to legal precedents. For an overview of case law concerning on-call see also Nowak, *supra* note 7.

([66]) Bavaro, *supra* note 59.

([67]) Already in 2002, Christophe Radé identified the constant connectivity to work due to ICTs as one of the "*nouvelle forms de subordination*" (new forms of subordination) (see Christophe Radé, *Nouvelle technologies de l'information et de la communication et nouvelles forms de subordination*, (2002) Droit Social, Issue 1, p. 29.

Moreover, this kind of revision cannot be efficient if it does not consider the role that should be recognized to the notion of a workload. This is especially valid in the context of *working anytime, anywhere* and with reference to work organized into phases, cycles and objectives, where the measurement of working hours proves difficult. Compliance with working time limitations and rest periods cannot be effective, even when the right to disconnect is applied to the employment relationship, if the workload is not consistent with working hours agreed in the contract of employment ([68]). In this case, no disconnection from work is possible even if a connection with co-workers and managers is not in place ([69]). For this reason, effective mechanisms to determine, monitor and revise the workload according to the working hours agreed should be put in place and they should be regarded as one of the preconditions for the implementation of the right to rest and the right to disconnect ([70]).

Conclusions

This paper considered the new features of working time in the Fourth Industrial Revolution, starting from the analysis of working time regulation in *lavoro agile*. It was possible to question how regulation can address the drawbacks of hyper-connectivity and how it can promote autonomy in the employee's time management. In so doing, it was acknowledged that a distinction between working and non-working time is still needed. Even inconsistently, the choice of the Italian legislator to apply to *lavoro agile* the limitations to working hours and the duty to respect rest periods and breaks as regulated for the standard employees should be welcomed. While it can seem to be an outdated model if compared to the derogations granted by law in the case of teleworking (*supra* section I, A), this regulation could be made compatible with the flexibility required by the new world of work and preserve from the perverse effects of the always-on culture. To this end, the Italian legislator, following the French example, decided to introduce the right to disconnect, a right that should be intended as linked to different, though intertwined purposes: the protection of employees' health and safety and the safeguard of their private life (*supra* section I, B).

([68]) See Mathieu, *supra* note 51 and Laetitia Morel, *Le droit à la déconnexion en droit français. La question de l'effectivité du droit au repos à l'ère du numérique*, (2017) 3 Labour & Law Issues, Issue 2, pp. 12-16.
([69]) Jean-Emmanuele Ray, *Grande accélération et droit à la déconnexion*, (2016) Droit Social, Issue 11, pp. 916-917.
([70]) Morel, *supra* note 63. As already said *supra* note 11, the same law introducing the right to disconnect in France also pays specific attention to a reconceptualization of the notion of a workload.

Against this backdrop, building on the traditional notions relevant for working time regulation, it has been possible to demonstrate that the right to disconnect is neither a duplication of the traditional right to rest and nor only a prohibition to contact the employee outside agreed working hours. While it is intended to strengthen the enjoyment of the right to rest and the respect of the employee's private sphere, it does so by providing a right that should be concretely implemented by measures that better address the conditions of the sector and of the employment relationship. Not contacting the employee outside working hours would not be enough if she were bond to the project assigned because of the workload.

The analysis of how disconnection can help one to reach the mentioned purposes led to put forward a distinction between mandatory disconnection and flexible disconnection/employee-managed connection. This distinction seems to be useful in order to establish some periods where clear boundaries exist, allowing for 'chosen' connection (*connèxion choisie*) (section I, C).

This interpretation of the right to disconnect has been tested in relation to working time regulation also outside remote work. By doing this, some interesting effects were highlighted, which helped to better understand the nature of time in the new world of work. Framing the time one should be connected when working could serve to assess this time both for the protection of employees' health and safety and for the economic value it produces (section II).

Notwithstanding these possible positive outcomes, it has to be said that in employment and industrial relations, the problems of this pattern of evolution of working time can be difficult to see, except for few agreements stipulated in France, which is the country where the right to disconnect was established. While a thorough reform of working time regulation has proved to be particularly difficult both at the European and national level, this interpretation of working time can be promoted by an adaptation of existing rules, since it requires a revision without neglecting the distinction between the time used for production purposes and devoted to personal life.

Addendum

After this contribution had been submitted for publication, Italian lawmakers decided to further regulate the right to disconnection in agile work. Art. 2, paragraph 1-ter, of Legislative Decree no. 30/2021 converted into law through Law no. 61 of 2021, stated that: "the right to disconnect from technological instruments and computer platforms is recognised to agile workers, in compliance with any agreements signed by the parties and without prejudice to any periods of availability agreed upon. The exercise of the right to

disconnection, which is necessary to protect the worker's rest time and health, cannot have implications on the employment relationship or on remuneration". This provision resolves once and for all the doubts on disconnection as a right. Yet, it does not clarify the role of disconnection with reference to working and non-working time. In this sense, two interpretations are possible. If these periods are within the agreed limits of possible daily working hours, nothing can be objected. We refer to agreements in which a flexible management of working hours is provided (e.g. between 7 am and 7 pm). This is also considering a timeframe within which workers need to be on call (e.g. between 10 am and 12 am), which limits the freedom of choice of working time, yet without implications in economic or regulatory terms. The second hypothesis concerns the definition of periods of availability other than the timeframe referred to above. While not affecting compliance with the EU rules on daily rest (11 hours every 24), except for the request for work that as such will be treated, these periods can only be compensated according to the collective agreement in force. And this in compliance with the principle of equal treatment, already enshrined in art. 20 co. 1 of Law no. 81/2017 and reiterated by the comment. In addition, there are two additional problems. First, the legislator speaks of any agreements between the parties, forgetting that – except for interventions on the law. n. 81/2017 – the agreement between the parties is a necessary step for adopting this way of working. Secondly, although it correctly recalls the importance of the right to disconnection for health and safety and for the protection of the right to rest, the function of protection of privacy and distinction between living and working time is not taken into account. In conclusion, the most likely effect of this intervention on the right to disconnect will be the need for further clarification and expansion of the law.

The Effects of COVID-19 on Ukraine's Regulation of Employment Relations

Yana Simutina, Sergii Venediktov [1]

Abstract
This article aims to study the changes in the legal regulation of employment relations in Ukraine following the outbreak of COVID-19. The pandemic has increased law-making activity. However, the obsolescence of Ukraine's Labour Code has produced questionable outcomes. For this reason, the disadvantages caused by the rules governing employment relations in Ukraine should be dealt with, while seeking higher involvement of the social partners, scholars and relevant international organizations.

Keywords – *COVID-19; Quarantine; Remote work; Flexible working hours; Downtime; Unpaid leave; Non-standard work.*

1. Introductory Remarks

Labour law is one of the most consolidated branches of law. This is mainly due to its legal character and its commitment to ensuring the highest socioeconomic safety of those involved in the labour process. While positive, this aspect can sometimes backfire on the parties to the employment relationship, and the lack of flexibility of labour law does not always allow responding to unexpected situations affecting employment. The COVID-19 outbreak is illustrative of this state of affairs. National governments have resorted to different measures to contain virus spread and the collapse of the

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healthcare system. The economic and social impact of these measures is already being felt, and the situation might worsen in the months to come, particularly for workers and employers.

In some cases, workers lost their jobs; in others, reduced working time was implemented; in some others, remote work was adopted. Some employees have been granted sickness or unemployment benefits, while others have been left without any protection. Yet most of them are still facing uncertainty, particularly those operating in the informal economy, migrant and platform workers[2]. Starting from the latter half of March 2020, Ukraine's Cabinet of Ministers implemented a nationwide quarantine due to the increase in the number of people affected by COVID-19. This decision has had a serious impact on all the spheres of life. In Ukraine, only employees working in essential businesses – i.e. food stores, pharmacies, state institutions, hospitals – were allowed to use public transport while the underground service was temporarily discontinued, together with intercity carriage performed by bus, railway and air transport. Entertainment events were also suspended, and shopping centers were closed. Education provision underwent significant changes, i.e. online teaching was implemented where possible, with kindergartens that were shut down temporarily.

Undoubtedly, this situation has a negative impact on the employment relationship, too. Because of the quarantine, a significant number of enterprises had to reconsider, close or reduce their business activities. According to a survey conducted by the Union of Ukrainian Entrepreneurs, almost 60% of the business owners surveyed continue to operate under restrictions, i.e. mainly large and medium-sized businesses; 29 % of them stopped working (mostly micro-businesses; 51% of them can only last a further month[3]. Furthermore, many Ukrainian nationals previously working abroad are flooding into the country's labour market. In considering March alone, more than 270,000 seasonal workers returned to the country. In order to prevent mass unemployment, the Cabinet of Ministers of Ukraine planned to create 500,000 jobs in May[4]. The Parliament of Ukraine adopted Law No. 530-IX, of

[2] The importance of the effective respect and implementation of ILO's International Labour Standards in the context of the outbreak of COVID, 2 May 2020. https://www.ilo.org/actrav/info/pubs/WCMS_743402/lang--en/index.htm (Accessed 31 May 2020).

[3] *51% підприємств в умовах карантину зможуть протриматися місяць – опитування*, ZN,UA, 3 квітня 2020. [51% of enterprises under quarantine can last a month – interview, ZN,UA, 3 April 2020]. https://dt.ua/ECONOMICS/51-pidpriyemstv-v-umovah-karantinu-zmozhut-protrimatisya-misyac-opituvannya-343491.html (Accessed 20 April 2020).

[4] Datskevych, N. *Amid pandemic, Ukraine's unemployed grow by 36,000 people in one week*, 13 April, 2020: https://www.kyivpost.com/business/amid-pandemic-ukraines-unemployed-grow-by-36000-people-in-one-week.html (Accessed 20 April 2020).

17.03.2020 and Law No. 540-IX, of 30.03.2020, which amended labour legislation, primarily the Labour Code (hereinafter: the LC). These amendments are aimed at extending unpaid leave, detailing the use of flexible working hours and remote work, clarifying the procedures for remuneration during downtime. Besides the changes put in place by the government, further measures exist to support both workers and employers during the quarantine period. One of those is simplifying the procedures for obtaining unemployment status, creating new employment and ensuring financial support to employers who are facing economic hardship because of COVID-19. While it is true that the pandemic has produced negative effects worldwide, it has also true that in some countries – e.g. Ukraine – it has highlighted some major shortcomings in relation to the regulation of flexible forms of employment. Against this backdrop, this paper intends to examine the recent changes in Ukrainian labour legislation, in order to assess its effectiveness and how labour relations must adapt to meet the new needs originating from information society and the gig economy.

2. Discussion

2.1. Changes in the Regulation of Employment Relationships

The amendments made to the LC in March 2020 aimed to update some old provisions of the Code, which failed to keep up with current times. The LC was adopted in 1971 and has undergone a number of changes for nearly 50 years now, yet retaining its socialist foundations. In this respect, the LC does not regulate non-standard employment, remote work and the use of modern electronic communications, and refers to outdated time management mechanisms, providing ineffective grounds for dismissal, to name a few. This is so because the LC is a reflection of the last 50 years of the twentieth century. Due to increased information access, many changes have taken place in relation to professional qualifications, the educational structure and the nature of work. These transformations also involve an employee's roles and functions, as intellectual and creative work displaces the work of an individual directly involved in the production process. In the last 25 years, a number of innovations have characterized the way employment is regulated[5]. In most branches of Ukrainian law, we currently have modern codified provisions, and

[5] Vyshnovetska, S., Vyshnovetskyi, V. *Labour law under the conditions of the information society development*. Jurisprudence in the modern information space. Collective monograph. Edited by prof. Irina Sopilko. Hamilton: Accent Graphics Communications and Publishing, 2019. P. 87. https://er.nau.edu.ua/bitstream/NAU/41335/1/collective%20monographLitvinova.pdf. (Accessed 31 May 2020).

in some spheres, these legal acts have already been updated on a regular basis. Yet the modernization of labour relations since the adoption of the new LC has remained unclear for long time. Political, economic, and legal discussions are ongoing with regard to the possible ways of reforming labour legislation[6]. The issue of adopting a new LC has arisen in Ukraine many times since its independence. For example, drafts of the new LC were registered in the Ukrainian Parliament in 2003, 2009, 2011, 2015 and even in 2019. In turn, the new Code was not adopted, mainly due to a lack of agreement with the social partners – the government, employers and workers. Previous codifications of labour legislation in Ukraine took different paths, the result of a different sociopolitical situation. At each stage of the process intended to codify labour legislation (1918, 1922, 1971), its essence is determined by the needs of society at a certain time. Currently, drafters of this act are faced with new qualitatively problems. The Code must meet the new socio-economic and legal needs, e.g. the conditions for creating a market economy; the processes of globalization and integration into the global (primarily European) space; a significant increase in labour migration; the need to implement a decent work program and its standards. One needs to take into account such trends in the development of labour law, as well as a decrease in the role of centralized (legislative) regulation and the growing importance of contractual regulation of social and employment relations, the convergence of civil and labour laws which are legally regulated, the impact of innovative processes on the development of labour law, etc. One should also consider the new functions of labour law, caused by the current health emergency, which might last for a long time[7]. Due to the lack of a modern codified act in the field of labour, the adoption of the March amendments has been hailed positively. However, these amendments, which were designed to modernize employment relations, have given rise to some controversy. First of all, the changes to the LC were aimed at governing employment relationships during periods of possible economic instability, due to some quarantine measures affecting regular business operations. For this reason, the legislator repealed the provisions regulating unpaid leave, limiting its duration to 15 calendar days per year. Now, in accordance with the amendments made to Article 84 of the LC, unpaid leave may be taken until the end of the quarantine period. As early as in 1979,

[6] Simutina, Y. *Current Challenges of the Labour Law of Ukraine: On the Way to European Integration*. Juridica International, 27, 2018. P. 88–93. https://doi:10.12697/ji.2018.27.09.

[7] Жернаков, В. *Кодифікація трудового права: теоретичні принципи та практика їх імплементації*. Право та інновації. № 1 (13). С. 11-12. (2016). [Zhernakov, V. Codification of labour law: theoretical principles and practice of their implementation. Law and Innovation, No.1 (13), P. 11-12 (2016)]. http://ndipzir.org.ua/wp-content/uploads/2016/05/Zhernakov13.pdf. (Accessed 31 May 2020).

scholars considered this time off from work to be an innovation in labour legislation and a starting point to expanding workers' rights[8]. Therefore, the leave restrictions laid down in the previous version of Article 84 were regarded as a sort of guarantee for the employee. Despite the fact that unpaid leave can only be granted with the employee's consent, the employer can pressure the employee into taking time off from work. And because the quarantine was extended, there are many workers who risk being encouraged to take unpaid leave for much longer periods than 15 days

The paradox is that the norm that regulated this type of issues already existed in the LC. The statutory wording of the Article 84 (3) of the Code – which was in place between 1998 and 2003 – provided that, pursuant to the procedure established by the collective agreement, unpaid leave (or leave with minimum pay) can be granted in the event of downtime for reasons beyond employee control. This norm, which regulated unpaid leave provision in the event of downtime, was repealed, yet consultation with trade unions is now necessary in order to provide unpaid time off from work. The only drawback now is the lack of clarity in leave procedures. Currently, no indication is provided as to whether leave is granted discretionarily by the employer, or agreement must be sought with the employee. Furthermore, judicial practice favoured the employer. The Supreme Court has ruled that in the case of downtime for reasons beyond employee control, the employer may, in the manner prescribed by the collective agreement, provide unpaid leave. Under these conditions, granting leave is not made conditional on the employee's request[9]. Thus, this decision legalized the possibility of placing the employee on unpaid leave without his consent. Also, Article 60 of the LC was amended in March in connection with the regulation of remote working. It should be noted that, before the March amendments, remote work in Ukraine was not legally regulated and the following provisions governing this form of employment cannot be regarded as successful. This is due to the fact that new version of Article 60 of the LC combines two different types of work arrangements – 'remote work' and 'homework', without establishing any differences between them. Furthermore, the Article does not lay down clear provisions regarding employees' rights and obligations in relation to remote work and homework.

According to Article 60 of the LC, through remote and home work, an employee works at his place of residence or in another place of his choice, with the help of information and communication technologies, but outside the

[8] Венедіктов, В. *Право на неоплачувану відпустку*. Радянське право. № 10, С. 60 (1979). [Venediktov, V. Right to unpaid leave. Soviet Law, No. 10, 1979. P. 60.].

[9] Постанова Верховного Суду від 30 січня 2019 року, номер справи 210/5853/16-ц [The Supreme Court Judgement of 30 January 2019, No. 210/5853/16-ц]. http://www.reyestr.court.gov.ua/Review/79615943. (Accessed 31 May 2020).

employer's premises. However, pursuant to the old Regulations on the Working Conditions of Homeworkers No. 275/17-99 of 29.09.1981, homeworkers are "individuals who have an employment contract to perform work at home using tools and resources allocated by the employer, or purchased at the employer's expense. The employer may allow homeworkers to manufacture products using their own materials, machinery and tools". Therefore, these Regulations provide that homeworkers perform mainly physical labour only in their private premises, without using ICTs. This is precisely what distinguishes homework from remote work in Ukraine. The last one is characterized by an intellectual component, ICT use and the lack of any reference to one's home. Besides, the expression "remote work" can be used for two different ways of working, namely: 1) a special working scheme, which may be temporarily entered into with the employee's consent as a necessary measure should certain circumstances arise (e.g. quarantine or lockdown) 2) a special working scheme whereby remote workers – because of the nature of their work – can operate away from the employer's premises. Unfortunately, when introducing the latest amendments to the LC, the legislator did not take this difference into account. Moreover, the particulars of the contracts entered into to perform remote work and homework should be displayed in a special chapter of the LC. This move would be important to govern a number of issues, namely 1) the procedures for concluding a contract with employees working remotely, including the exchange of electronic documents 2) the procedures concerning information exchange and confidentiality, employee monitoring and task assignment 3) aspects such as working and rest time, including employees' rights to privacy and disconnect 4) trade union right protection, e.g. participation in collective bargaining, dispute settlement 5) equality of treatment between on-site and remote employees.

The last issue has been neglected by the Code. Therefore, on the one hand, Article 60 (12) of the LC states that the engaging in remote work does not entail any restrictions of labour rights. On the other hand, further on the Article specifies that, unless agreed otherwise in writing, remote work involves full payment within the time laid down in the employment contract. Accordingly, this provision favours discrimination of remote workers in relation to the amount and the terms of remuneration. Furthermore, while apparently attempting to legalise remote work, Ukrainian lawmakers made minor changes to the definition of the employment contract laid down in Article 21 of the LC.

Specifically, the employer's obligation to provide safe working conditions and the need for the employee to be subject to international labour regulations are no longer part of the definition of an employment contract provided for in this article.

This change has obviously brought about negative consequences, especially because the Code does not contain a definition of the 'employment relationship' and their specific aspects. Therefore, in the event of litigation, the legal definition of the employment contract is referred to.

It should be noted that the Ukrainian legislator has incorporated the legal definition of the employment contract into the original version of Article 21 of the LC, thus highlighting the relevance of internal labour regulations when entering into and terminating employment.

These labour regulations can be conceived as a number of obligations addressing the employee, which are formulated by the employer, within the limits established by law and formalized thanks to local legal acts[10]. The same applies to the obligation of the employer to provide safe working conditions for workers, which illustrates the protective function of labour law.

The Ukrainian labour market is characterized by segmentation between salaried employment and self-employment. However, Ukrainian legislation does not prohibit one from engaging in dependent work by entering into a civil contract (e.g. through task-specific contracts or contracts of services). These contracts can be concluded by individuals whose business activity is not registered and by the self-employed. There are no particular safeguards related to the use of civil contracts when making use of labour or services. The Supreme Court has established the existence of an employment relationship, based on criteria like the personal and continuous nature of work, the fact that workers are available for work at certain times, the existence of a place of work and the employer's supervision. It has also emphasized that a contractor working under a civil contract – as opposed to an employee performing work under an employment contract – is not subject to internal work regulations, thus operating at his own risk[11].

Amendments to Article 21 of the LC affect the mechanisms for identifying employment relations in the event of disputes over bogus self-employment. As a result, thousands of workers without a registered business activity are employed solely on civil contracts. Therefore, besides being granted low remuneration and insufficient social security, a large share of the Ukrainian workforce is not hired through legal employment relationships. According to official statistics, in 2019 the share of illegal or undeclared work in Ukraine

[10] Пилипенко, П. *Внутрішній трудовий розпорядок як об'єкт правового регулювання*. Наукові праці Пилипа Пилипенка. Вибране. Дрогобич: Коло, 2013. С. 362, 368. [Pylypenko, P. Internal labour regulations as an object of legal regulation. Scientific works of Pylyp Pylypenko. Excerptum. Drohobych: Colo, 2013. P. 362, 368.].

[11] Постанова Верховного Суду від 8 травня 2018 року, номер справи 127/21595/16. [The Supreme Court Judgement of 8 May 2018, No. 127/21595/16]. http://reyestr.court.gov.ua/Review/73902480. (Accessed 31 May 2020).

stood at 20.9 %, involving approximately one in four Ukrainians. Tellingly, these statistics do not take into account temporarily occupied territories in eastern Ukraine as well as Crimea[12].

It should be noted that the changes made to the LC in March 2020 also had a positive effect on the regulation of employment relationships, as a number of new provisions govern flexible working hours. Many scholars in Ukraine consider this work arrangement to be beneficial. Prokopenko (1998) has pointed out that the introduction of this working scheme helped to reduce stress and thus errors and defects, work-related accidents, the request for short leave and absenteeism. The ability to change one's working time increases a person's comfort[13], though a flexible way of working should be accompanied by an adequate level of protection. The purpose of introducing such a work regime is to rationalise production organisation, increase its efficiency, ensure labour discipline and the best combination of economic, social and personal interests for both parties[14].

Thus far, scholars' optimistic views towards flexible working hours and its widespread use have not resulted in proper legislation governing this way of working (exceptions include Regulations on the Procedure and Conditions for the Use of a Flexible Work Schedule for Women with Children No. 170/10-101, of 06.06.1984 and Methodological Recommendations for Establishing a Flexible Working Time Regime No. 359, of 04.10.2006).

It should be noted that these legislative acts do not fully regulate the application of flexible working hours and are rather obsolete (e.g. Regulations No. 170/10-101 have a narrow focus on employment relationships and apply to specific categories of workers, while Methodological Recommendations No. 359 are mostly declarative in nature). Thus, the amendments to Article 60 (1) – (9) of the LC – supplying the definition of flexible working hours and the procedure for its application – have been welcomed positively.

One of the main novelties introduced through the March amendments to the LC is the clarification of the procedures for remunerating workers during

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[12] *Неформально зайняте населення за статтю, місцем проживання та статусом зайнятості у 2019 році* [Informally employed population by age, sex, residence and employment status in 2019.] http://www.ukrstat.gov.ua/operativ/operativ2017/rp/eans/eans_u/arch_nzn_smpsz_u.html. (Accessed 31 May 2020).

[13] Прокопенко, В. *Трудове право України*. Харків: Консум, 1998, С. 298. [Prokopenko, V. Labour Law of Ukraine. Kharkiv: Konsum, 1998, p. 298].

[14] Вєтухова, І. Правове регулювання нетипової зайнятості в сучасних умовах. Проблеми законності: зб. наук. праць. Вип. 121. С. 81–92 (2013) [Vetuhova, I. Legal regulation of non-typical employment in modern conditions. Problems of Legality: Collection of Scientific Works. Issue 126. P. 81-92 (2013)] http://dspace.nlu.edu.ua/bitstream/123456789/6015/1/Vetuhova_rus_93.pdf. (Accessed 31 May 2020).

companies' downtime because of quarantine. Under Article 34 (1) of LC, 'downtime' is the suspension of work caused by the lack of the organizational or technical conditions needed for work performance, due to force majeure or other circumstances. Prior to amending LC, Article 113 provided that downtime had to be remunerated, so workers were granted 2/3 of their wages. In addition, the previous version of Article 113 determined that during downtime, when a life-threatening situation arises in the workplace, employees are entitled to average earnings. This provision raised the question as to whether workers should be paid full or partial remuneration in quarantine. The amendments made to Article 113 clarified this issue, unfortunately penalizing the employee. Specifically, the employee is paid at most 2/3 of his salary when downtime is caused by reasons beyond employee control and results in a quarantine period.

2.2. State Support for Employees and Employers during Quarantine

The introduction of quarantine in Ukraine has clearly affected employment levels, with statistics reporting a significant rise in unemployment. As of 20 May 2020, 501,000 unemployed people registered with the State Employment Service (SES), i.e. 64 % more than the same period in 2019[15]. To deal with this situation, on 13 May 2020 the government introduced a job-creation program, so 500,000 jobs were offered in a number of sectors (e.g. road construction and transport infrastructure, landscaping, agricultural development, digitization of documents and archives, postal services, forestry, micro and small business enterprises[16]).

Furthermore, Ukraine's Cabinet of Ministers adopted Resolution No. 244, of 29.03.2020, which improved employment services during the quarantine period. Obtaining unemployment status and benefits now take place soon after filing the relevant application, while before a seven-day period of active job search was required. In addition, in quarantine, a person was allowed to submit an application by e-mail and – after obtaining unemployment status –

[15] Нелегкий пошук. Кому вдасться знайти роботу на карантині? Державний центр зайнятості. Офіційний веб-сайт. 22 травня 2020 року. [Not an easy search. Who manages to find a job in quarantine? State Employment Center. Official website. 22 May 2020] https://www.dcz.gov.ua/novyna/nelegkyy-poshuk-komu-vdayetsya-znayty-robotu-na-karantyni. (Accessed 31 May 2020).

[16] План заходів щодо створення умов для підвищення зайнятості населення. Урядовий портал. Офіційний веб-сайт. Опубліковано 13 травня 2020. [Action plan to create conditions for increasing employment. Government portal. Official website. Published 13 May 2020.] https://www.kmu.gov.ua/news/plan-zahodiv-po-stvorennyu-umov-dlya-pidvishchennya-zajnyatosti-naselennya. (Accessed 31 May 2020).

communicate remotely with SES. Finally, the minimum unemployment benefit was increased by approximately 40%.

One of the measures addressing employers facing economic hardship due to COVID-19 is the partial unemployment benefit allocated to employees in small and medium-sized enterprises which shut down to prevent the spread of COVID-19. This financial support is provided to employers from the Compulsory State Social Insurance Fund during the quarantine period, in order to ensure continuation of the employment relationship. This benefit is equal to 2/3 of the employee's basic salary and is paid proportionally to the hours of work that have been reduced. The amount of the benefit is to be determined by the financial possibilities of the Fund and may not exceed the minimum wage established by law. Unless they are pensioners who are still in employment, it is up to employers to pay the partial unemployment benefit during quarantine, starting from the first day when working time was reduced due to work suspension, within 30 calendar days from the end of the quarantine period. If the employer receives this state allowance, it cannot dismiss employees on such grounds as: work reduction (unless the company's total liquidation takes place), the parties' consent, the employer's failure to comply with labour legislation within 6 months from the day the benefit ends (i.e. if the benefit was paid in a period shorter than 180 calendar days – which correspond to the period of payment). If the employer violates this obligation, it must return the entire amount of money received from the State Fund[17].

The measures taken by the Government have had a positive effect, though they will be in place only during the quarantine period. Yet the simplified procedures to register as unemployed should be implemented also in the future. One might also note that the issue of adopting new legislation on employment and mandatory state social insurance in case of unemployment was raised as early as 2018, but no progress has been made so far.

2.3. Future Challenges for Ukrainian Labour Law caused by COVID-19

The 2000s saw a surge in technological developments, e.g. the Internet, which favoured the growth of remote and platform work. Online platforms are used to perform crowdwork. They decide how information is collected and displayed, who can work on the platform and the status they will have, as well as whether or not to intervene and mediate disputes. It is not an unregulated

[17] Simutina, Y., Venediktov S. *COVID-19 and Labour Law: Ukraine*. Italian Labour Law e-Journal. Special Issue 1, Vol. 13 (2020). https://doi.org/10.6092/issn.1561-8048/10946.

market – it is a "platform-regulated" market[18]. According to various sources, in the 2013-to-2017 period, Ukraine ranked first in Europe and fourth in the world in terms of work performed on digital platforms, considering the amount of financial flows and the number of tasks executed. Ukraine also ranks first in the world in relation to "IT freelance work". It is estimated that at least 3% of the Ukrainian workforce is involved in online work. Eighteen per cent of Ukrainian white-collar workers already experienced digital work and would like to switch to it fully; one in two view it as an additional source of income. As of today, Ukrainians are accessing digital labour market through a variety of platforms, both international, regional, and local ones. As of March 2018, there were at least 500,000 registered workers from Ukraine on 6 platforms alone. This makes up roughly 3% of the employed population (estimated at 16.2 million people in January 2016)[19]. It should be noted that such a huge amount of labour force requires proper legal regulation. But the problem is that the LC does not make any provision for platform work, given its outdated character. Thus far, the Code has been amended 140 times, but still needs adapting to the XXI century and platform work. The legal regulation of this non-standard form of employment is also lacking in other legislative acts. Undoubtedly, this situation negatively affects people working on digital platforms, pushing them to independently claim their rights. In 2019, after a series of protests for their employment status, insurance, fuel and communication benefits, Glovo couriers organised to protect their interests. This was caused by recent events, namely the death of a courier in an accident on July 25, 2019 while carrying out an order, as well as changes in the payroll system[20]. The quarantine period worsened the situation of platform workers (i.e. an increase in orders and the number of staff). The founder of Glovo stated that if someone had gotten Covid-19, the company would have paid for treatment. Among the platforms providing work, only Uber Eats has promised to allocate up to 200 UAH for masks and antiseptics. On April 6, 2020, a strike took place at Glovo in Ukraine due to wage cuts, with many workers refusing to access the platform. Due to the limited number of couriers, only 50% of the

[18] Berg, J. *Income security in the on-demand economy: findings and policy lessons from a survey of crowdworkers*/International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch. Geneva, ILO, 2016, p. 25.

[19] Aleksynska, M., Bastrakova, A. & Kharchenko, N. *Work on Digital Labour Platforms in Ukraine: Issues and Policy Perspectives*. ILO. Geneva, 2018. https://www.ilo.org/travail/WCMS_635370/lang--en/index.htm. (Accessed 31 May 2020).

[20] *Профспілковий захист неформально зайнятих у гіг-економіці*. Профспілкові вісті, 31 жовтня 2020. [Trade union protection of the informally employed in the gig economy. Trade Union News, 31 October 2019]. http://www.psv.org.ua/arts/Ludina_i_pracia/view-4335.html. (Accessed 31 May 2020).

orders received were carried out. Most couriers were not aware of the strike and, apparently, the platform hired a lot of new workers to deal with this state of affairs. Furthermore, payment was increased on the days of the industrial action[21].

Some experts believe that in light of the COVID-19 crisis, now it is a good time to review the current systems. All workers – irrespective of their employment status – must access healthcare, stay at home when feeling unwell, and benefit from income support in case of a crisis-related reduction of working time or job loss[22]. We undoubtedly agree with this position. The quarantine period is unique in that it exacerbated problems that exist in the world of work, including those related to the lack of proper protection of people involved in platform work. Yet in Ukraine, legal regulation of platform work is not likely to take place soon.

The creation of trade unions of platform workers and their participation in strikes, as was recently the case in Ukraine, are factors that should be considered as the willingness to include platform work within the scope of labour law.

Furthermore, the number of rulings awarding employee status to platform workers is growing everywhere. To give an example, at the end of July 2019, a Court in Madrid ruled that the 537 Deliveroo riders working in the Spanish capital between October 2015 and June 2017 were 'disguised employees'. A month before, a Court of Valencia had also awarded employee status to 97 Deliveroo riders. The food delivery company was condemned to pay social security fees to each rider during the corresponding period[23]. Also, in 2020 the California Public Utilities Commission said in an order that drivers for Transportation Network Companies, which include services like Uber and Lyft, were to be considered as employees[24].

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[21] Губа Р. *Как карантин изменил работу доставщиков еды. Отвечает курьер.* Спільне, 14 квітня 2020 [Guba, R. How quarantine changed the work of food suppliers. The courier answers. Commons, 14 April 2020] https://commons.com.ua/ru/kak-karantin-izmenil-rabotu-dostavshikov-edy/?fbclid=IwAR1SWqrkF31AmKIM4FF1U_0f4mKmTiwpw2P89gVnXKa70W43IuuWTLptQf8. (Accessed 31 May 2020).

[22] Berg, J. *Precarious workers pushed to the edge by COVID-19*. https://iloblog.org/2020/03/20/precarious-workers-pushed-to-the-edge-by-covid-19. (Accessed 22 May 2020).

[23] Valdivia, A.G. Spanish Court rules Deliveroo drivers are employees not self-employed. Forbes, 26 August 2019 https://www.business-humanrights.org/en/spanish-court-rules-deliveroo-drivers-are-employees-not-self-employed. (Accessed 10 June 2020).

[24] Sonnemaker, T. *Uber and Lyft drivers are now employees under California law, according to a new ruling from regulators*. Business Insider, June 11 2020. https://www.businessinsider.com/uber-lyft-drivers-declared-employees-by-california-regulators-

3. Conclusions

Undoubtedly, COVID-19 prompted development in all sectors. On the one hand, this impulse for labour law can be assessed positively, because it stimulated the review of outdated legislation. On the other hand, quarantine posed many challenges for Ukraine related to increasing unemployment, the need to change conditions of work, the provision of labour protections for platform workers.

As for the many amendments made to the LC in March, they failed to meet the expectations. For instance, changes aimed at legitimizing remote work and improving the regulation of unpaid leave are not systemic. Thus, they did not lead to the proper resolution of issues related to remote work and unpaid leave, but generated new problems associated with outsourcing and ambiguity of new legal norms. A number of factors contributed to this situation: (a) tight deadlines for the adoption of legislation, which make it impossible to analyze the consequences of its implementation; (b) obsolescence of the LC, which requires a thorough review; (c) the inadequate involvement of labour market participants in the legislative process.

The implementation process of up-to-date labour laws is far from complete and discussions about drawing up a new LC have been going on for a long time. Nevertheless, the legislative process cannot be successful without the involvement of the social partners, scholars and relevant international organizations. Also in this situation, the conclusion by the Ukraine government of an Association agreement[25] with the European Union in 2014 constitutes an excellent starting point. This Agreement provides for the implementation of a significant number of EU directives in the field of labour law, consequently encouraging the overhaul of national legislation.

References

Aleksynska, M., Bastrakova, A. & Kharchenko, N. Work on Digital Labour Platforms in Ukraine: Issues and Policy Perspectives. ILO. Geneva, 2018. https://www.ilo.org/travail/WCMS_635370/lang--en/index.htm. (Accessed 31 May 2020).

20206?fbclid=IwAR0gRtIyUnj0gyhkAJMtBuyCN2h4r8jljYoZs10jh_dq3OVC19HAMZMDUSo. (Accessed 12 June 2020).

[25] Association Agreement between the European Union and Its Member States, of the One Part, and Ukraine, of the Other Part. (2014, May 29). Official Journal of the European Union, 161, 3–2137.

Association Agreement between the European Union and Its Member States, of the One Part, and Ukraine, of the Other Part. (2014, May 29). Official Journal of the European Union, 161, 3–2137.

Berg, J. Income security in the on-demand economy: findings and policy lessons from a survey of crowdworkers / International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch. Geneva, ILO, 2016, p. 25.

Berg, J. Precarious workers pushed to the edge by COVID-19. https://iloblog.org/2020/03/20/precarious-workers-pushed-to-the-edge-by-covid-19. (Accessed 22 May 2020).

Datskevych, N. Amid pandemic, Ukraine's unemployed grow by 36,000 people in one week. KyivPost, 13 April, 2020: https://www.kyivpost.com/business/amid-pandemic-ukraines-unemployed-grow-by-36000-people-in-one-week.html. (Accessed 20 April 2020).

Importance of the effective respect and implementation of ILO's International Labour Standards in the context of the outbreak of COVID. (2020, 02 May). https://www.ilo.org/actrav/info/pubs/WCMS_743402/lang--en/index.html. (Accessed 31.05.2020).

Simutina, Y. Current Challenges of the Labour Law of Ukraine: On the Way to European Integration. Juridica International, 27, 2018. P. 88–93. https://doi:10.12697/ji.2018.27.09.

Simutina, Y., Venediktov S. COVID-19 and Labour Law: Ukraine. Italian Labour Law e-Journal. Special Issue 1, Vol. 13 (2020). https://doi.org/10.6092/issn.1561-8048/10946.

Sonnemaker, T. Uber and Lyft drivers are now employees under California law, according to a new ruling from regulators. Business Insider, June 11 2020. https://www.businessinsider.com/uber-lyft-drivers-declared-employees-by-california-regulators-2020
6?fbclid=IwAR0gRtIyUnj0gyhkAJMtBuyCN2h4r8jljYoZs10jh_dq3OVC19HAMZMDUSo. (Accessed 12 June 2020).

Valdivia, A.G. Spanish Court rules Deliveroo drivers are employees not self-employed. Forbes, 26 August 2019 https://www.business-

humanrights.org/en/spanish-court-rules-deliveroo-drivers-are-employees-not-self-employed. (Accessed 10 June 2020).

Vyshnovetska, S., Vyshnovetskyi, V. Labour law under the conditions of the information society development. Jurisprudence in the modern information space. Collective monograph. Edited by prof. Irina Sopilko. Hamilton: Accent Graphics Communications and Publishing, 2019. P. 87. https://er.nau.edu.ua/bitstream/NAU/41335/1/collective%20monographLitvinova.pdf. (Accessed 31 May 2020).

51% підприємств в умовах карантину зможуть протриматися місяць – опитування, ZN,UA, 3 квітня 2020 [51% of enterprises under quarantine conditions can last a month – interview, ZN,UA, 3 April 2020] https://dt.ua/ECONOMICS/51-pidpriyemstv-v-umovah-karantinu-zmozhut-protrimatisya-misyac-opituvannya-343491.html. (Accessed 20 April 2020).

Венедіктов В. Право на неоплачувану відпустку. Радянське право. № 10, С. 60 (1979). [Venediktov, V. Right to unpaid leave. Soviet Law, No. 10, 1979. P. 60.].

Вєтухова І. Правове регулювання нетипової зайнятості в сучасних умовах. Проблеми законності: зб. наук. праць. Вип. 121. С. 81–92 (2013) [Vetuhova, I. Legal regulation of non-typical employment in modern conditions. Problems of Legality : Collection of Scientific Works. Issue 126. P. 81-92 (2013)] http://dspace.nlu.edu.ua/bitstream/123456789/6015/1/Vetuhova_rus_93.pdf. (Accessed 31 May 2020).

Губа Р. Как карантин изменил работу доставщиков еды. Отвечает курьер. Спільне, 14 квітня 2020 [Guba, R. How quarantine changed the work of food suppliers. The courier answers. Commons, 14 April 2020] https://commons.com.ua/ru/kak-karantin-izmenil-rabotu-dostavshikov-edy/?fbclid=IwAR1SWqrkF31AmKIM4FF1U_0f4mKmTiwpw2P89gVnXKa70W43IuuWTLptQf8. (Accessed 31 May 2020).

Жернаков В. Кодифікація трудового права: теоретичні принципи та практика їх імплементації. Право та інновації. № 1 (13). С. 11-12. (2016). [Zhernakov, V. Codification of labour law: theoretical principles and practice of their implementation. Law and Innovation, No.1 (13), P. 11-12 (2016)]. http://ndipzir.org.ua/wp-content/uploads/2016/05/Zhernakov13.pdf. (Accessed 31 May 2020).

Нелегкий пошук. Кому вдається знайти роботу на карантині? Державний центр зайнятості. Офіційний веб-сайт. 22 травня 2020 року. [Not an easy search. Who manages to find a job in quarantine? State Employment Center. Official website. 22 May 2020] https://www.dcz.gov.ua/novyna/nelegkyy-poshuk-komu-vdayetsya-znayty-robotu-na-karantyni. (Accessed 31 May 2020).

Неформально зайняте населення за статтю, місцем проживання та статусом зайнятості у 2019 році [Informally employed population by age, sex, residence and employment status in 2019.] http://www.ukrstat.gov.ua/operativ/operativ2017/rp/eans/eans_u/arch_nzn_smpsz_u.htm. (Accessed 31 May 2020).

Пилипенко П. Внутрішній трудовий розпорядок як об'єкт правового регулювання // Наукові праці Пилипа Пилипенка. Вибране. Дрогобич: Коло, 2013. С. 362, 368. [Pylypenko, P. Internal labour regulations as an object of legal regulation. Scientific works of Pylyp Pylypenko. Excerptum. Drohobych: Colo, 2013. P. 362, 368].

План заходів щодо створення умов для підвищення зайнятості населення. Урядовий портал. Офіційний веб-сайт. Опубліковано 13 травня 2020. [Action plan to create conditions for increasing employment. Government portal. Official website. Published 13 May 2020.] https://www.kmu.gov.ua/news/plan-zahodiv-po-stvorennyu-umov-dlya-pidvishchennya-zajnyatosti-naselennya. (Accessed 31 May 2020).

Постанова Верховного Суду від 30 січня 2019 року, номер справи 210/5853/16-ц [The Supreme Court Judgement of 30 January 2019, No. 210/5853/16-ц]. http://www.reyestr.court.gov.ua/Review/79615943. (Accessed 31 May 2020).

Постанова Верховного Суду від 8 травня 2018 року, номер справи 127/21595/16. [The Supreme Court Judgement of 8 May 2018, No. 127/21595/16]. http://reyestr.court.gov.ua/Review/73902480. (Accessed 31 May 2020).

Прокопенко, В. Трудове право України. Харків: Консум, 1998, С. 298. [Prokopenko, V. Labour Law of Ukraine. Kharkiv: Konsum, 1998, p. 298.].

Профспілковий захист неформально зайнятих у гіг-економіці. Профспілкові вісті, 31 жовтня 2020. [Trade union protection of the informally employed in the gig economy. Trade Union News, 31 October 2019]. http://www.psv.org.ua/arts/Ludina_i_pracia/view-4335.html. (Accessed 31 May 2020).

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 preoccupations. It can also

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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 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

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[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.

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 control[11]. If one considers employee protection, these risks make the distinction between salaried and self-

[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.
[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.

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.

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

[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.

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 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

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

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

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 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 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].

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[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.

[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

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].
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

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).

[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)

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 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].

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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).

[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.

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 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

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[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.

[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.

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 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

[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.

trade union representation and the guaranteed minimum wage, in line with Articles 39 and 36 of the Italian Constitution.

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 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

[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.

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 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.

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[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.

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. 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

[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".

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

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

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

[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.

Towards the Enforceability of Collective Agreements in Nigerian Law

Emuobo Emudainohwo [1]

Abstract
This paper examines the enforceability of collective agreements in Nigerian law. It argues that the common law position that held collective agreements not binding unless incorporated into the individual worker's contract of employment should no longer remain because it causes hardship to workers. It suggests a possible way of circumventing the position of the common law and enforcing such agreements. Section 254C (1) and (2) of the Constitution has conferred exclusive jurisdiction on labour matters on the National Industrial Court of Nigeria (NICN). Since Nigeria has ratified International Labour Organisation's (ILO) Convention 98 (concerning Right to Organise and Collective Bargaining) and the Constitution allows application of labour treaties that have been ratified, this becomes a possible way through which the NICN can enforce collective agreements in Nigeria.

Keywords – *Collective Agreement, Enforceability, Labour law, Industrial court, Nigeria.*

1. Introduction

In Nigeria over the years, the courts have taken the common law position that collective agreements are not binding. The courts have taken this position because of the doctrine of privity of contract,[2] as most collective agreements are usually between the employers on one hand and trade unions on the other. An individual employee seeking to benefit from it is regarded as not a party to it.[3] This has created hardship for the individual employee who seeks to enforce

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[2] *Union Bank v Edet* (1993) 4 NWLR (Pt 287), 288.
[3] *Union Bank v Edet*, *op.cit.*

the collective agreement (which usually is between the trade union and the employer). Common law principles and rules have been known to influence and control the enforcement of collective agreements and many aspects of the employment relationship.[4] In this regard, Wedderburn argued that labour law should work to counteract the inequality in the employment relationship.[5] He further argued that the common law approaches to the employment relationship based on the 'contract law' are conceptually inappropriate.[6] This Paper examines the enforceability of collective agreements in Nigeria, suggesting a possible way of enforcing collective agreements and circumventing the current common law position. The paper is divided into several sections. Section I is introductory. The concepts, collective bargaining, and collective agreements are analysed in section 2. The focus of section 3 is the legal framework for collective bargaining and collective agreement. Section 4 examines the common law interpretation and enforcement of collective agreement and suggests a possible way of enforcing collective agreements. Section 5 is the Conclusion.

2. Concepts: Collective Bargaining and Collective Agreements

International standards on freedom of association for workers are comprised of the right to organise, the right to bargain collectively, and the right to strike.[7] The focus herein is collective bargaining/collective agreement:

a) Collective bargaining: Collective bargaining can be explained to be a negotiation or process or activity which ends up or leads to collective agreement.[8] Section 91 of the Labour Act[9] defines "collective bargaining" as: "the process of attempting to arrive or arriving at a collective agreement;" Article 2 of the Collective Bargaining Convention, 1981 (No. 154) regards "collective bargaining" as negotiations between an employer or group of employers and one or more employees concerning working conditions or regulating employer

[4] K. W. Wedderburn, *Labour Law: From Here to Autonomy? in Industrial law Journal*, 1987, vol. 16, 1-29.

[5] K. W. Wedderburn, *op. cit.*

[6] K.W Wedderburn, *op.cit.* see also M. Moore, *The Role of Specialist Courts- an Australian perspective Lawasia Journa*l, 2000-2001, 139-154.

[7] L.A Compa, Workers' Freedom of Association in the United States: The Gap Between Ideals and Practice, Cornell University ILR School New York, United States, 2003 pages, ,https://digita lcommons.ilr .cornell. edu/cgi/viewcontent.cgi?artic le=1377&context=a rticles accessed 22 July 2020.

[8] B Gernigon, A. Odero, H, Guido, *ILO Principles Concerning Collective bargaining in International Labour Law Review* 2000, vol. 139 n.1, 33-53.

[9] Labour Act, Cap L1, Laws of the Federation of Nigeria 2004.

/employee relationship or regulating employer /employee organization's relationship.

b) Collective agreement: Section 91 of the Labour Act[10] defines "collective agreement" as: "collective agreement" means an agreement in writing regarding working conditions and terms of employment concluded between:

(a) workers' organization or an organization acting for workers of the one part; and

(b) employers' organization or an organization acting for employers of the other part;

Also, section 48 of the Trade Dispute Act, 1976 defines "collective agreement" as: any agreement in writing for the settlement of disputes and relating to terms of employment and physical conditions of work concluded between:
(a) an employer, a group of employers or organisations representing workers, or the duly appointed representative of any body of workers, on the one hand; and
(b) one or more trade unions or organisations representing workers, or the duly appointed representative of any body of workers on the other.

ILO Recommendation No. 91, Paragraph 2, also explained collective agreements as: "all agreements in writing regarding conditions of work and employment terms concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other".[11]

3. Legal Framework for Collective Bargaining and Collective Agreements

Collective bargaining is one of the components of freedom of association,[12] and freedom of association (including the right to form or belong to a trade union) has been guaranteed as a fundamental human right in the various Constitutions of Nigeria since independence in 1960.[13] In addition, labour

[10] Labour Act, *op.cit.*
[11] ILO Collective Agreements Recommendation, (No. 91) 1951.
[12] Lance A Compa, *op.cit.*
[13] 1960 Constitution section 25(1) 1963 Constitution section 26(1), 1979 Constitution section 37, 1989 Constitution section 40 and 1999 Constitution section 40. It is important to note that

legislations also provide for a right to associate. The labour legislations include: Labour Act 1971 (as amended),[14] Trade Unions Act 1973 (as amended)[15], Trade Disputes Act 1976, and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.[16] ILO Conventions 87 and 98 also guarantee Freedom of Association. But ILO Convention 98 specifically covers collective bargaining.

The Constitution

Section 40 of the Constitution guarantees freedom of association (including the right to form and belong to a trade union) as a fundamental human right. It states that "Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any …trade union for the protection of his interest." Even though the right to bargain collectively is not expressly provided in the Constitution, it may be implied from the guarantee of freedom of association by section 40 of the Constitution. This implication is so because it is generally understood that the right to negotiate collectively constitutes an essential element of freedom of association.[17] Though the right to bargain collectively is not expressly provided in the Constitution, the latter has expressly conferred exclusive jurisdiction on the NICN to hear and determine any question as to the interpretation and application of any collective agreement.[18] By that it can be said that the Constitution recognises the right to bargain collectively because the collective agreement is the end product of collective bargaining.

Labour Act

The Labour Act also protects freedom of association by making it unlawful for any employer to make it a condition of employment that a worker shall or shall not join a trade union or shall not relinquish membership of a trade union or

only the 1999 Constitution that is in force has been repealed, and the mention of them is to trace history of freedom of association in the Constitutions.

[14] Section 9(6).

[15] Sections 1(i) and 2-9.

[16] Section10. The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is a domestication of the African (Banjul) Charter on Human and Peoples' Rights 1981.

[17] ILO, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association,* (sixth edition) 2018 para.1232.

[18] Constitution 1999, section 254C(1)(f)(i).

cause a worker to be dismissed or in any way be prejudiced because of trade union membership or trade union activities.[19]

The Labour Act protects the union activities of a worker, and in this regard, section 9 (6) of the Labour Act provides that: no agreement or contract shall:

a. have a term or condition of employment that an employee or worker will or will not join any trade union or will or will not resign membership or involvement with a trade union, or
b. cause the dismissal or firing of, or otherwise prejudice an employee; or
   i. by reason of involvement with trade union or
   ii. because of activities relating to trade union outside working hours or, with the permission of the employers, during working hours or
   iii. by purposes of loss or deprived of trade union membership or was refused or unable to become, a trade union member.

Trade Union Act

The principle of collective bargaining is recognised in the Trade Union Act as amended by the Trade Union Amendment Act. Section 24 (1) stipulates that for the reason of collective bargaining, all unions that have been registered in an electoral college should choose members who will act for them in bargaining with the employer. Although parties are encouraged to bargain freely, they are required in section 3(1) of the Trade Unions Act (as amended) to deposit with the Minister of Labour and Productivity any collective agreement[20] reached. Any contravention is an offence punishable with a fine.[21] The latter provision seems to evince a government intention to control or regulate collective agreements.

[19] Labour Act, section 9(6). See also C. Agomo, Legal protection of Workers' Human Rights in Nigeria: Regulatory Changes and Challenges in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* Hart Publishing Ltd, UK, 2001 242-265.

[20] Trade Unions Act section 3 (1).

[21] Trade Unions Act section 3 (1) (b).

Trade Dispute Act

The Trade Dispute Act purports to recognise the principle of collective bargaining and voluntary settlement of trade disputes.[22] However, in reality, it entrenches compulsory processes that leave little room for the disputing parties to engage in free collective bargaining.[23]

African Charter

Article 10(1) and (2) of the African Charter (Ratification and Enforcement) Act[24] expressly guarantees both the right to associate and the right not to be forced to join an association. It states further that the Act shall be enforceable in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive, or judicial powers in Nigeria.[25]

ILO Conventions 87 and 98

The principles or goals of freedom of association stated in ILO Conventions 87 and 98 'are normally considered integrally[26] and have since been followed up by other ILO Conventions dealing with specific aspects of freedom of association.[27] Although both Conventions cover freedom of association, Convention 98 specifically provides for collective bargaining.

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[22] Trade Dispute Act sections 3, 4 and 5. Section 3 recognises at least three copies of any collective agreement for settlement of a trade dispute to be deposited with the Minister of Employment, Labour and Productivity. Section 4 makes it imperative for the parties to attempt to settle their disputes using any agreed means. However (by section 5), this is subject to the Minister's overriding discretion to prescribe a means of settlement once he or she apprehends a dispute. See Agomo *op.cit*

[23] Agomo *op.cit*.

[24] African Charter (Ratification and Enforcement) Act, cap 10, Laws of the Federation of Nigeria 1990.

[25] Preamble to African Charter (Ratification and Enforcement) Act.

[26] H. Dunning, *The Origins of Convention No. 87 on freedom of association and the right to organise International, Labour Review* 1998 vol. 137 n. 2, 149-163.

[27] It is also true that the Right of Association (Agriculture) Convention (No. 11) and the Right of Association (Non-Metropolitan Territories) Convention (No. 84) had been adopted in 1921 and 1947 respectively. Furthermore, over the past ten years the International Labour Conference has adopted four new Conventions in this field, namely the Workers Representatives Convention, 1971 (No. 135); the Rural Workers' Organisation Convention 1975 (No. 141); the Labour Relations (Public Service) Convention 1978 (No. 151); and the Collective Bargaining Convention, 1981 (No. 154). See A. J. Pouyat, *The ILO's freedom of*

ILO Convention 87

By Article 2 of Convention No. 87, employees and employers without discrimination have the right to form subject to the instruction of the organisation concerned, to join a union or organisations of their own choice.

ILO Convention 98

Article 4 of ILO Convention 98 stipulates that measures suitable to state conditions should be put in place to encourage or promote the development and operation of machinery for voluntary negotiation between employees and employers or employees' organisations and employers' organisations with the aim of regulating conditions of employment by procedure or instrument of collective agreements. According to the Governing Body of the ILO, collective bargaining is a 'fundamental aspect of the principles of freedom of association".[28] Convention 98 supplements certain aspects of Convention No. 87 and has three main objectives:

a) the promotion of collective bargaining,
b) protection against acts of anti-union discrimination both at the time of taking up employment and in the course and termination of the employment relationship, and
c) protection against any acts of interference in the internal affairs of workers' and employers' organisations.[29]

4. Enforcement of Collective Agreements in Nigerian Law

The courts have held that collective agreements are binding in honour only and not enforceable.[30] In *Ford Motor Co. Ltd. v Amalgamated Union of Engineering and Foundry Workers*[31] (an English case), the main issue was whether the parties intended the agreement to be a legally binding arrangement. The court held that there was no intention whatsoever that the collective agreement would be binding. In *Union Bank of Nigeria v Edet,*[32] the employee's contention that her

association standards and machinery: a summing up, International Labour Review 1982 vol.121 n.3, 287-290.

[28] ILO, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, (sixth edition) 2018 para. 1313.

[29] ILO, (2012) Para 166.

[30] *Union Bank of Nigeria v Edet* (1993) 4 NWLR (Pt 287), 298-299, see also *Afribank (Nig) Plc v Osisanya* [2000] 1NWLR (Pt. 642) 598.

[31] *Ford Motor Co. Ltd. v. Amalgamated Union of Engineering and Foundry Workers* (1969) 1 WLR 339.

[32] *Union Bank v Edet op.cit,* see also *Afribank (Nig) Plc v Osisanya* (*op.cit).*

termination flouted the collective agreement was rejected. It was held that collective agreements, except where they have been adopted as forming part of the terms of employment, are not intended to give or capable of giving an individual employee the right to institute an action for breach of any collective agreement, nor is it intended to complement the employee's contract of service.[33] It was noted that:

> Collective agreements are not intended or capable of giving individual employees a right to litigate over an alleged breach of their terms as may be conceived by them to have affected their interest, nor are they meant to supplant or even supplement their contract of service. In other words, failure to act in strict compliance with collective labour agreement is not justiciable.[34]

It can be argued that the courts' refusal to enforce collective agreements is based on the privity of contract,[35] as most collective agreements are usually between the employers on one part and trade unions on the other. An individual employee seeking to benefit from it is not party to it.[36] In *Afribank (Nig) Plc v Osisanya*[37] Amaizu JCA held that the dismissal procedure contained in the collective agreement was not binding on the employer as the agreement was not justiciable. In *ACB Plc v Nwodika*,[38] Ubaezonu JCA outlined factors which may determine whether a collective agreement is binding on individual employees and employers: namely: its incorporation in the contract of service, if any, the pleadings and evidence before the court or the parties' conduct.
In *Sampson Nnosiri & Ors v Eastern Bulkcem Co. Ltd*[39] (a case decided by the NICN in 2016 after the constitutional amendment in 2010[40]), the plaintiffs/claimants were former employees of Eastern Bulkcem Company Limited (the defendants). They brought this action to claim their entitlements, allowances, and salaries in terms with a collective agreement entered into in

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[33] *Union Bank v Edet,t op.cit* 288, 291 per Uwaifo JCA as he then was.
[34] *Union Bank v Edet, op.cit* 298–299.
[35] *Union Bank v Edet op.cit.*
[36] *Union Bank v Edet op.cit.*
[37] *Afribank (Nig) Plc v Osisanya op.cit.*
[38] *ACB Plc v Nwodika* {1996) 4 NWLR (Pt 443) 470, 485.
[39] *Sampson Nnosiri & Ors v Eastern Bulkcem Co. Ltd*, unreported, Suit No: NICN/PHC/69/2013, delivered on 13 January 2016 by Justice O.Y.Anuwe(Owerri Judicial Division,< http://nicn.gov.ng/> accessed 16 July 2020.
[40] The Constitution was amended in 2010 vide the Constitution (Third Alteration) 2010, It empowered the NICN to apply treaties which have been ratified notwithstanding any provision of the Constitution requiring domestication.

November 2006 between their union (National Union of Chemical, Footwear, Rubber and Non-Metallic Products Employee) and the defendant's union (Chemical and Non-Metallic Products Employers' Federation). The NICN held that collective agreements between employers' associations and employees' unions are not capable of conferring the right on an individual employee to sue on an alleged breach of the collective agreement. The NICN further held that failure to comply with a collective agreement relating to employment and labour is not enforceable or justiciable, except when the terms of the collective agreement have been clearly incorporated either into the letter of employment or subsequent letters and communication before the employee can enforce it.[41] Thus, consistent decisions of the courts, including the NICN,[42] are that collective agreements are not binding in Nigerian law except incorporated into the individual worker's contract of employment as shown in the case law. One pertinent question is whether collective agreements could be enforced through section 254C(2) of the Constitution in view of the constitutional amendment in 2010 empowering the NICN to exclusively enforce labour treaties that have been ratified even though not domesticated. I think it is possible.

Possible Way of Enforcing Collective Agreements

It may be possible to enforce collective agreements in Nigeria under the Constitution. A new provision - section 254C (2() - was introduced into the Constitution in 2010 empowering the NICN[43] exclusively to apply any treaty which Nigeria has ratified relating to employment, labour industrial relations, workplace, and matters connected thereto notwithstanding any other provision of the Constitution requiring domestication of treaties before enforcement. It is important to note that Nigeria has ratified[44] ILO Convention 98 (concerning collective bargaining). The implication is that the NICN could enforce that collective agreement through section 254C (2) since Nigeria has ratified Convention 98[45]. Domestication is not required before enforcement by the

[41] See also Rector, Kwara State Polytechnic v. Adefila (2008) All FWLR (Pt. 431) 914 at 958-959; Bank of the North Limited v Adegoke (2008) All FWLR (Pt. 398) 263 at 289; Oguejiefor v Siemens Limited. (2008) All FWLR (Pt. 398) 378 at 390; Anaja v UBA (2011) All FWLR (Pt. 600) 1289 at 1300.

[42] The NICN has been conferred with exclusive jurisdiction by the Constitution to hear all employment and labour matters.

[43] The Constitution was amended in 2010 vide the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010. This introduced section 254C(2) into he Constitution.

[44] Both ILO Conventions 87 and 98 were ratified on 17 October 1960, ,<http://www .ilo.org /dyn/ normlex/en/> accessed 16 July 2020.

[45] ILO Convention 98 was ratified by Nigeria in 1960.

provision. It can be argued that NICN can now move away from the common law position, which held collective agreements not binding and enforces such agreements. It could rely on section 254C (2) of the Constitution and ILO's Convention 98 (and its interpretation by the ILO Freedom of Association Committee.)[46] to deviate from the common law position and enforce collective agreements in Nigeria. The ILO Freedom of Association Committee has said that failure to enforce a collective agreement is a breach of the right to collective bargaining and honest bargaining.[47]

The Position in some African Countries

Labour statutes in some African countries contain comprehensive provisions regarding the enforceability of collective agreements. For instance, labour statutes in Ghana,[48] Kenya,[49] Zambia,[50] and South Africa[51] (which are of common law jurisdiction like Nigeria) expressly provide that collective agreements relating to employment and labour are binding and enforceable. The implication is that the courts in those countries will enforce any collective agreement concluded between an employer and his employees without

[46] The Committee on Freedom of Association is a tripartite body set up in 1951 by the Governing Body of the ILO to deal with cases relating to freedom of association and collective bargaining. the Committee on Freedom of Association has built up a body of principles on freedom of association and collective bargaining, based on the provisions of the Constitution of the ILO and of the relevant Conventions.

[47] ILO, Freedom of Association: Compilation of decisions of the Committee on Freedom of Association, (sixth edition) 2018 para.1340, see also paras. 1334-1336.

[48] For instance, section 105 (2) of the Ghanaian Labour Act (No. 651 of 2003) states that a collective agreement between employees and an employer is viewed as terms of the employment contract between each employee and his employer.

[49] In Kenya, section 59 (1) of the Labour Relations Act (No 14 of 2007) stipulates that every collective agreement relating to employment and labour binds all employees and their employers. Section 59 (3) also states that every collective agreement should be incorporated into the employment contract of an employee. Furthermore, section 59 (5) states that upon registration of the collective agreement, it becomes enforceable.

[50] Section 71(3) (c) of the Zambian Industrial and Labour Relations Act (No. 27 of 1993, Cap 269 of the Laws of Zambia) states that once a collective agreement has been accepted by the Minister, it becomes binding between the employer and employee or between the parties.

[51] Section 23 of the South African Labour Relations Act[51] (No. 66 of 1995) stipulates that every collective agreement relating to employment and labour binds not only the parties to it, but other persons to which the collective agreement applies. Also, section 199 states that an employment contract entered into before or after a collective agreement may not allow an employer to pay his workers remuneration less than what is stipulated in the collective agreement. It further provides that any contract that purports to waive any collective agreement is invalid.

considering the common law position. This conclusion is so because the provisions of a statute always prevail over the common law.

5. Conclusion

The paper examined the enforceability of collective agreements in Nigerian law. It argued that the common law position that held collective agreements not binding unless incorporated into the individual worker's contract of employment should no longer remain. The common law has been known to influence and control many aspects of the employment relationship, including collective agreements and in this regard, Wedderburn argued that labour law should work to counteract the inequality in the employment relationship.[52] He further argued that the common law approaches to the employment relationship based on the 'contract of law' are conceptually inappropriate.[53] Therefore, one of the purposes of labour law is to deal in collective negotiation categories rather than of contract. In this regard, the paper has suggested a possible way of circumventing the common law position through the Constitution as amended which empowered the NICN exclusively to apply employment and labour treaties that have been ratified notwithstanding any contrary provision of the Constitution. ILO Convention 98 (Concerning Collective bargaining) has been ratified, and collective bargaining/collective agreements can be enforced through it. Also, the Committee of Freedom of Association[54] has said that failure to implement a collective agreement, even on a temporary basis, violates the right to bargain collectively, as well as the principle of bargaining in good faith.[55]

[52] K. W. Wedderburn, *op.cit.*

[53] K W Wedderburn, *op.cit.* see also M. Moore, *op.cit*

[54] The Committee on Freedom of Association is a tripartite body set up in 1951 by the Governing Body of the ILO to deal with cases relating to freedom of association and collective bargaining. the Committee on Freedom of Association has built up a body of principles on freedom of association and collective bargaining, based on the provisions of the Constitution of the ILO and of the relevant Conventions.

[55] ILO, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, (sixth edition) 2018 para.1340, see also paras. 1334-1336.

Betting on the Future: A Comparison Macroeconomic Dynamics of Labour Income Share in the United States: Evidence From MARS

Orkun Çelik [1]

Abstract

Macroeconomic dynamics of labour income share (will be referred to herein as lis) in the United States for the period of 1948Q1-2019Q1 are tried to be determined in this study, where Multivariate Adaptive Regression Splines (will be referred to herein as MARS) approach is employed. In order to investigate sectoral differences, the business, non-farm, and non-finance sectors are evaluated, respectively. In accordance with the obtained results, it may be observed that the macroeconomic dynamics of lis in the business sector are productivity, export, profit, gross private domestic investment, unemployment rate, current account balance, gross domestic product, and tax revenue, respectively. Related macroeconomic dynamics of lis concerning non-farm sector are productivity, current account balance, gross private domestic investment, export, consumer price index, gross domestic product, profit, unemployment rate, and gross government investment. Aforementioned dynamics for non-finance sector are also profit, productivity, import, gross domestic product, tax revenue, gross government investment, consumer price index, and unemployment rate. In accordance with this, the most significant dynamic with respect to lis is profit in the non-finance sector, while it is productivity in the business and non-farm sectors.

Keywords: Factor Income Distribution, Wage Share, Labour Income Share, MARS.

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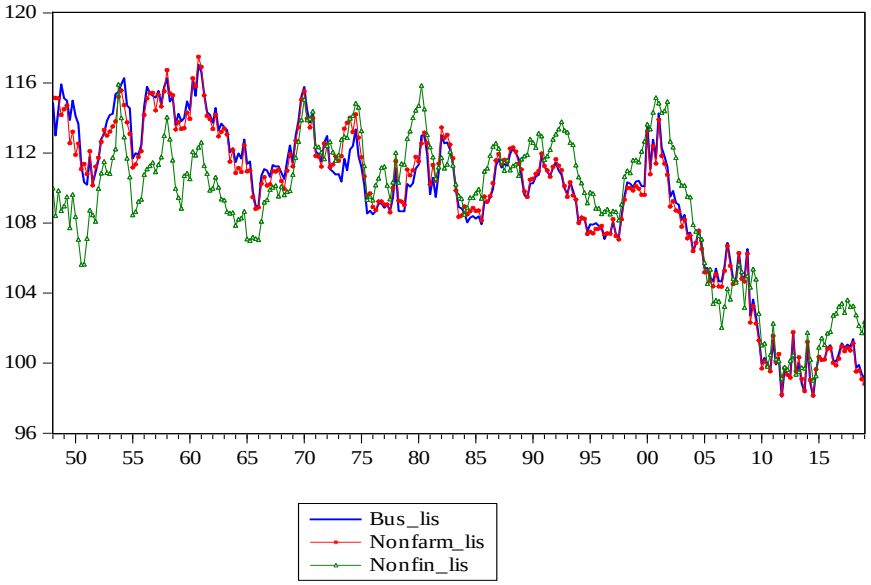
1. Introduction

Over the past quarter century, the labour income share (lis) in the United States has shown a diminishing tendency and has arrived at its lowest level in the post-war period after the Great Recession[2]. The decline of the lis in the US has stepped up since 2000, accounting for 3/4 of the decline since 1947. The lis of the private business sector in the US declined by approximately 5.4 percentage points between 1998 and 2002 and between 2012 and 2016[3]. The decline of lis of sectors in the US for the 1948Q1-2019Q1 period is shown in Figure 1. Accordingly, lis has decreased until 2000s but it has dramatically declined subsequently.

Figure 1. Trend of lis in the US (1948Q1-2019Q1) (index 2012=100)



Source: Own figure. The dataset is obtained from FRED[4] database. Note: Bus_lis: The lis in the business sector, Nonfarm_lis: The lis in the non-farm Sector, Nonfin_lis: The lis in the non-finance sector.

[2] M.W. Elsby, B. Hobijn, A. Şahin, *The Decline of the US Labor Share*, in *Brookings Papers on Economic Activity*, 2013, vol. 2, 1-63.

[3] J. Manyika, J. Mischke, J. Bughin, J. Woetzel, M. Krishnan, S. Cudre, *A New Look at the Declining Labor Share of Income in the United State*, McKinsey Global Institute, 2019,https://www.mckinsey.com/~/media/mckinsey/featured%20insights/employment%20and%20growth/a%20new%20look%20at%20the%20declining%20labor%20share%20of%20income%20in%20the%20united%20states/mgi-a-new-look-at-the-declining-labor-share-of-income-in-the-united-states.ashx (accessed July 15, 2019).

[4] FRED. https://fred.stlouisfed.org/.

Even though the downward decline in lis has become a global phenomenon[5] in literature, there are few studies regarding this decline in the US. Martin and Havlicek (1977)[6] conclude in their study that technological change affected lis negatively in cotton production for the period of years between 1952 and 1969. Wallace et al. (1999)[7] display that unions have a significant role in re-distribution of income from the employer to employees during the post-war period. Moreover, the strikes that took place in this period also had a re-distributional effect in the country. Rios-Rull and Santaeulalia-Llopis (2010)[8] present the existence of negative effects of productivity (Solow residual) on lis. Elsby et al. (2013)[9] explain the decline of lis in the US over the past quarter century by means of offshoring of the labour-intensive component of the US supply chain. Abdih and Danninger (2017)[10] indicate that the decrease in lis is broad-based but also express that the dimension of the aforesaid decrease varies exceedingly. Furthermore, it is stated that the decrease of lis takes place following alterations in labour institutions and technological change, but various shapes of trade integration also contribute to the situation. Bridgman (2018)[11] produce evidence that lis has not decreased as much once items, which do not add to capital, depreciation, and production taxes, are netted out.

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[5] M.Y. Abdih, M.S. Danninger, *What Explains the Decline of the US Labor Share of Income? An Analysis of State and Industry Level Data*, International Monetary Fund, IMF Working Paper No. 17/167, 2017, https://www.imf.org/en/Publications/WP/Issues/2017/07/24/What-Explains-the-Decline-of-the-U-S-45086 (accessed July 15, 2019)

[6] M.A. Martin, J. Havlicek, *Technological Change and Labor's Relative Share: The Mechanization of US Cotton Production*, in *Journal of Agricultural and Applied Economics*, 1977, vol. 9, n. 2, 137-141.

[7] M. Wallace, K.T. Leicht, L.E. Raffalovich, *Unions, Strikes, and Labor's Share of Income: A Quarterly Analysis of the United States, 1949–1992*, in *Social Science Research*, 1999, vol. 28, n. 3, 265-288.

[8] J.V. Rios-Rull, R. Santaeulalia-Llopis, *Redistributive Shocks and Productivity Shocks*, in *Journal of Monetary Economics*, 2010, vol. 57, n. 8, 931-948.

[9] M.W. Elsby, B. Hobijn, A. Şahin, *The Decline of the US Labor Share*, in *Brookings Papers on Economic Activity*, 2013, vol. 2, 1-63.

[10] M.Y. Abdih, M.S. Danninger, *What Explains the Decline of the US Labor Share of Income? An Analysis of State and Industry Level Data*, International Monetary Fund, IMF Working Paper No. 17/167, 2017, https://www.imf.org/en/Publications/WP/Issues/2017/07/24/What-Explains-the-Decline-of-the-U-S-45086 (accessed July 15, 2019)

[11] B. Bridgman, *Is Labor's Loss Capital's Gain? Gross Versus Net Labor Shares*, in *Macroeconomic Dynamics*, 2018, vol. 22, n. 8, 2070-2087.

As it may be observed in previous studies in literature, lis is associated with some variables such as technology, offshore, union, and strike. There is no study that directly considers all macroeconomic dynamics for lis in the US. We are of the opinion that this case creates a significant research gap in the literature.
Unlike the previous studies, macroeconomic dynamics of lis in the US are evaluated in this study. Furthermore, it shall be stated that the US is one of the countries with highest decrease in terms of lis. Therefore, determination of drivers of the aforementioned decline is quite significant for guiding policy makers. In order to realize this objective, the period of 1948Q1-2019Q1 is taken into consideration and MARS method is employed in the study. Detailed information of the process that is followed up, methodology and the dataset used are presented in Section 2, whereas findings of the study are displayed in Section 3. Section 4 comprises conclusions and discussions regarding the subject. The expected contribution of this study to literature is to comparatively determine macroeconomic dynamics of lis at sectoral level for the US.

2. Methodology and Data

MARS approach is used in the study, in order to determine the macroeconomic dynamics of the lis for the US. Related approach asserted by Friedman (1991)[12] is a multivariate non-parametric technique. The approach does not need any a-priori assumptions about the underlying functional nexus dependent-independent variable[13]. Therefore, this feature may be regarded as the main advantage of MARS approach. Additionally, it considers a specific class of basic functions as estimators rather than the original data. These functions administered as a set of functions representing the relation between the independent and the dependent variables[14];

(1)

[12] J.H. Friedman, *Multivariate Adaptive Regression Splines*, in *The Annals of Statistics*, 1991, vol. 19, n. 1, 1-67.
[13] C.K. Arthur, V.A. Temeng, Y.Y. Ziggah, *Multivariate Adaptive Regression Splines (MARS) Approach to Blast-Induced Ground Vibration Prediction*, in *International Journal of Mining, Reclamation and Environment*, 2020, vol. 34, n.3, 198-222.
[14] E. Quirós, Á. Felicísimo, A. Cuartero, *Testing Multivariate Adaptive Regression Splines (MARS) as a Method of Land Cover Classification of TERRA-ASTER Satellite Images*, in *Sensors*, 2009, vol. 9, n. 11, 9011-9028.

$$\hat{y} = c_0 + \sum_{m=1}^{M} c_m B_m(x)$$

In Equation (1), $\hat{y}$ is the dependent variable that is estimated by MARS approach. c_m indicates the coefficient of the m th basis function. c_0 and B_m also denote constant term and m th basis function, respectively[15]. Estimation model is generated based on this model. Hereunder;

(2)

$$Y_t = c_0 + \sum_{m=1}^{M} c_m B_m X_t + \varepsilon_t$$

where Y_t is lis for the US. In order to investigate sectoral differences (business, non-farm, and non-finance sector), three different types of lis are considered as dependent variable. Independent variables of the model are current account balance (ca), productivity (prod), gross domestic product (gdp), gross private domestic investment (gpdi), gross government investment (ggi), unemployment rate (unemp), consumer price index (cpi), export (exp), import (imp), profit (prof), and tax (tax), respectively.

These variables are determined in consideration with the previous studies. Carrera et al. (2016)[16] conclude that current account balance influences lis negatively. This finding is line with the theories that associate higher wages with higher aggregate demand, by means of higher consumption and less saving.

Many researchers have investigated the relationship between lis and productivity. They concluded that there is a negative nexus between them. Decreuse and Maarek (2015)[17] indicate that investment has a positive effect on lis. Breuss (2010)[18], Dünhaupt (2013)[19], Stockhammer (2017)[20],

[15] C.K. Arthur, V.A. Temeng, Y.Y. Ziggah, *Multivariate Adaptive Regression Splines (MARS) Approach to Blast-Induced Ground Vibration Prediction*, in *International Journal of Mining, Reclamation and Environment*, 2020, vol. 34, n.3, 203.

[16] J. Carrera, E. Rodríguez, M. Sardi, *Wage Share and the Current Account. How Income Policies Transmit to the Rest of the World*, 2016, http://www.siecon.org/online/wp-content/uploads/2016/09/CARRERA.pdf. (accessed July 15, 2019)

[17] B. Decreuse, P. Maarek, *FDI and the Labor Share in Developing Countries: A Theory and Some Evidence*, in *Annals of Economics and Statistics/Annales d'Économie et de Statistique*, 2015, vol. 119/120, 289-319.

[18] F. Breuss, *Globalization, EU Enlargement and Income Distribution*, in *International Journal of Public Policy*, 2010, vol. 6, n. 1/2, 16-34.

and Parisi (2017)[21] demonstrate in their study that unemployment influences lis negatively, whereas Lawless and Whelan (2011)[22] note that there is no evidence at the sectoral level to support the existence of a New Keynesian Phillips Curve.

The impact of export and import on lis is not clear regarding their positive or negative effects. Nevertheless, trade openness generally has a negative effect on lis[23]. The relation between profit and labour share is expounded by Dorn et al. (2017)[24], using the "winner-take most" approach. Desai et al. (2007) conclude in their study, which is carried out to analyse the effect of government's tax revenue, that the burden of corporate taxes (a part between 45% and 75%) is raised by labour with the balance borne by capital.

The dataset of this study encompasses the period of 1948Q1-2019Q1, and descriptive statistics are presented on Table 1. The observation number of the study is 285. The average of lis in the business sector, which is one of the dependent variables, was higher than other dependent variables of the model. Standard deviation of lis in non-finance sector is found to be relatively small in comparison with other dependent variables. All variables of the model are seasonally adjusted and related definitions of aforesaid variables are presented in Appendix 1.

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[19] P. Dünhaupt, *The Effect of Financialization on Labor's Share of Income*, Institute for International Political Economy Berlin, Working Paper No. 17/2013, 2013, http://hdl.handle.net/10419/68475 (accessed July 15, 2019).

[20] E. Stockhammer, *Determinants of the Wage Share: A Panel Analysis of Advanced and Developing Economies*, in *British Journal of Industrial Relations*, 2017, vol. 55, n. 1, 3-33.

[21] M.L. Parisi, *Labor Market Rigidity, Social Policies and the Labor Share: Empirical Evidence before and after the Big Crisis,* in *Economic Systems*, 2017, vol. 41, n. 4, 492-512.

[22] M. Lawless, K.T. Whelan, *Understanding the Dynamics of Labor Shares and Inflation*, in *Journal of Macroeconomics*, 2011, vol. 33, n. 2, 121-136.

[23] J. Hogrefe, M. Kappler*, The Labour Share of Income: Heterogeneous Causes for Parallel Movements?* , in *The Journal of Economic Inequality*, 2013, vol. 11, n. 3, 303-319; P. Dünhaupt, *The Effect of Financialization on Labor's Share of Income*, Institute for International Political Economy Berlin, Working Paper No. 17/2013, 2013, http://hdl.handle.net/10419/68475 (accessed July 15, 2019); M.C. Dao, M.M. Das, Z. Koczan, W. Lian, *Why is Labor Receiving A Smaller Share of Global Income? Theory and Empirical Evidence*, International Monetary Fund, IMF Working Paper No. 17/169, 2017, https://www.imf.org/en/Publications/WP/Issues/2017/07/24/Why-Is-Labor-Receiving-a-Smaller-Share-of-Global-Income-Theory-and-Empirical-Evidence-45102. (accessed July 15, 2019)

[24] D. Dorn, L.F. Katz, C. Patterson, J. Van Reenen, *Concentrating on the Fall of the Labor Share*, in *American Economic Review*, 2017, vol. 107, n. 5, 180-185.

Table 1. Descriptive statistics

Variables	Obs	Mean	Std. Dev.	Min	Max
Bus_lis	285	109.4569	4.597109	98.075	117.037
Nonfarm_lis	285	109.3988	4.574907	98.15	117.495
Nonfin_lis	285	109.1949	4.020317	99.018	115.917
ca	285	-162.1145	228.3346	-858.332	46.58
prod	285	58.65169	25.43057	21.007	107.153
gdp	285	6118.907	6132.816	265.742	21098.83
gpdi	285	1066.502	1059.541	36.241	3783.364
ggi	285	249.3144	223.5714	7.537	715.094
unemp	285	5.76	1.64	2.57	10.67
cpi	285	109.7973	76.61041	23.58667	253.3113
exp	285	658.9059	768.2853	11.704	2543.602
imp	285	833958.9	994852.2	8936	3194665
prof	285	506.6783	568.099	27.524	1896.281
tax	285	644.2712	622.4014	31.336	2042.913

Note: Obs: Observation, Std. Dev: Standard Deviation, Min: Minimum value, Max: Maximum value.

3. Empirical Findings

All variables shall be tested by unit root tests in order to determine whether they are stationary or not before the estimation of the model is established. Therefore, Augmented Dickey Fuller (1979) (will be referred to herein as ADF) and Phillips and Peron (1988) (will be referred to herein as PP) unit root tests are taken into consideration and results of ADF and PP unit root tests are demonstrated on Table 2.

Table 2. The unit root tests

Variables	ADF		PP	
	LV	FDV	LV	FDV
	Trend	Constant	Trend	Constant
Bus_lis	-2.92	-10.104***	-3.096	-20.782***
	(0.156)	(0.000)	(0.107)	(0.000)
Nonfarm_lis	-2.744	-9.921***	-2.973	-21.067***
	(0.218)	(0.000)	(0.139)	(0.000)
Nonfin_lis	-2.446	-11.015***	-2.292	-16.231***
	(0.356)	(0.000)	(0.438)	(0.000)
Ca	-2.403	-4.484***	-2.136	-17.171***
	(0.378)	(0.000)	(0.526)	(0.000)
Prod	-0.987	-10.201***	-0.941	-16.167***
	(0.946)	(0.000)	(0.952)	(0.000)
Gdp	0.711	-3.143**	1.268	-6.49***
	(1.000)	(0.024)	(1.000)	(0.000)
Gpdi	-1.049	-6.820***	-0.609	-10.417***
	(0.937)	(0.000)	(0.979)	(0.000)
Ggi	-1.447	-3.143**	-1.347	-17.671***
	(0.847)	(0.024)	(0.876)	(0.000)
Unemp	-2.654	-4.935***	-2.765	-6.599***
	(0.256)	(0.000)	(0.21)	(0.000)
Cpi	-2.514	-3.306**	-3.116	-9.899***
	(0.321)	(0.015)	(0.102)	(0.000)
Exp	-0.623	-6.823***	-0.622	-8.933***
	(0.978)	(0.000)	(0.978)	(0.000)
Imp	-1.084	-8.573***	-1.058	-8.527***
	(0.932)	(0.000)	(0.936)	(0.000)
Prof	-2.078	-11.455***	-2.069	-16.593***
	(0.558)	(0.000)	(0.564)	(0.000)
Tax	-2.044	-5.778***	-1.61	-14.737***
	(0.577)	(0.000)	(0.788)	(0.000)
Critical Values				
1% Critical	-3.989	-3.458	-3.989	-3.458
5% Critical	-3.429	-2.879	-3.429	-2.879
10% Critical	-3.13	-2.57	-3.13	-2.57

*Note: ***, **, * state p<0.01, p<0.05, p<0.1, respectively. The values in brackets indicate probability of coefficients. LV: Level Value, FDV: First Difference Value.*

All variables are not found to be stationary at level in ADF and PP unit root tests, whereas the first differences are determined to be stationary.

While the series with I (0) is used in classical linear regression, spurious correlation could have appeared when non-stationary series are used in the model. In order to overcome spurious regression, it is necessary to get the differences of the series, which have unit roots in the model, and aforesaid series shall be used. However, this process has eliminated the memories of long-run relationships between the series[25]. Therefore, in case there is a co-integration between series, then spurious regression problem would not be confronted in the studies, where level values of variables are used[26].

A set of non-stationary I (1) time series are considered to have co-integration nexus, if a particular linear combination of the series is stationary[27]. In accordance with what is stated above, the lag criteria shall be determined for Johansen co-integration analysis. According to Likelihood ratio (hereafter LR), final production error (hereafter FPE), and Akaike's information criterion (hereafter AIC), the lag of all variables is found to be 3 for the business and non-farm sector and 1 for the non-finance sector. Johansen's co-integration analysis also indicates that there is a long-run relation among variables. Hence, all variables can be used at level.

In this study, the macroeconomic dynamics of lis for US are investigated for the period of 1948Q1-2019Q and MARS approach is employed. The results are presented on Table 3 to Table 8.

Table 3 indicates the results of lis model for the business sector. F test is significant for 1 percent, which means that the whole analysis is significant, as well. The square of R is determined to be very high. The Pearson correlation test demonstrated that the lis is highly associated with independent variables.

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[25] G.S. Maddala, K. Lahiri, *Introduction to Econometrics* (Vol. 2), Macmillan, New York, 1992.; J. Wooldridge, *Introduction to Econometrics*. Cengage Learning, Hampshire, 2013. ; N. S Demirci, D. Özyakisir, *Finansal Gelismişlik ve Beşeri Sermaye Arasındaki İlişki: Türkiye İçin Zaman Serileri Analizi (1971-2013)*, in *Finans Politik & Ekonomik Yorumlar*, 2017, vol. 54, n. 624, 25-39.

[26] W. Enders, *RATS Handbook for Econometric Time Series*, John Wiley & Sons, Inc, 1996. ; A. Petek, A. Çelik, *Türkiye'de Enflasyon, Döviz Kuru, İhracat ve İthalat Arasındaki İlişkinin Ekonometrik Analizi (1990-2015)*, in *Finans Politik & Ekonomik Yorumlar*, 2017, vol. 54, n. 626, 69-87.

[27] P. Wang, *Financial Econometrics*, Routledge, 2009.

Table 3. The results of the best model for the business sector

	Basis Functions	Coefficients
CT	-	94.80
BF1	max(0, prod-23.772)	1.74
BF2	max(0, prod-25.935)	-1.55
BF3	max(0, prod-82.878)	-0.59
BF4	max(0, 1201.67-gpdi)	0.01
BF5	max(0, 418.727-exp)	-0.02
BF6	max(0, 737.311-prof)	0.03
BF7	max(0,-89.411-ca) * max(0, 82.878-prod)	0.00
BF8	max(0, ca- -89.411) * max(0, 82.878-prod)	0.00
BF9	max(0, 82.878-prod) * max(0, unemp-6.4)	0.10
BF10	max(0, 82.878-prod) * max(0, 6.4-unemp)	-0.06
BF11	max(0, 82.878-prod) * max(0, 19.365-exp)	0.01
BF12	max(0, 30.29-prod) * max(0, 737.311-prof)	0.00
BF13	max(0, prod-30.29) * max(0, 737.311-prof)	0.00
BF14	max(0, 510.33-gdp) * max(0, 1201.67-gpdi)	0.00
BF15	max(0, 8362.66-gdp) * max(0, unemp-6)	0.00
BF16	max(0, 8362.66-gdp) * max(0, 6-unemp)	0.00
BF17	max(0, 8362.66-gdp) * max(0, 153.08-tax)	0.00
BF18	max(0, gpdı-1201.67) * max(0, unemp-4.23333)	0.00
BF19	max(0, 1201.67-gpdı) * max(0, 105.844-prof)	0.00
BF20	max(0, 53.775-exp) * max(0, 737.311-prof)	0.00
BF21	max(0, exp-53.775) * max(0, 737.311-prof)	0.00
	F test	550*** (0.000)
	R^2	0.978
	Pearson Correlation Coefficient	0.989*** (0.000)

Note: All variables are significant for 1 percent. BF: Basis function. CT: Constant term.

As it may be observed on Table 3, in the business sector, the effect of productivity on lis is positive (as coefficient is 1.74) in case productivity is more than 23.772 in BF1. Nevertheless, it has a negative impact on lis (as coefficients are -1.55 and -0.59) in case productivity is more than 25.935 and 82.778 in BF2 and BF3. In consideration with this data, it means that the lis decreases, when productivity increases. These findings are

consistent with the results of Bentolila and Saint-Paul (2003)[28], Guscina (2006)[29], Jayadev (2007)[30], Kristal (2010)[31], Hogrefe and Kappler (2013)[32], Bassanini and Manfredi (2014)[33], Young and Lawson (2014)[34], Bengtsson (2014)[35], Perugini et al. (2017)[36]. Additionally, gross private domestic investment, export and profit have slight effect on the lis. In BF4, it affects the lis positively, in case gross private domestic investment is less than 1201.67 billion dollars.

In BF5, if export is less than 418.727 billion dollars, then it has a negative impact on lis. Moreover, BF6 indicates that the variable influences lis positively, if profit is less than 737.311 billion dollars. However, this result does not correspond to the study of Dorn et al. (2017). Therefore, profit may have a positive effect on lis until it reaches a certain level. In cross-correlation, BF9 demonstrates that these variables have positive effect on lis in case productivity is smaller than 82.878 and unemployment rate is greater than 6.4. Nevertheless, BF10 shows that these variables induce to reduce lis, in case productivity is smaller than 82.878 and unemployment rate is smaller than 6.4.

Table 4 displays the significance levels of independent estimators for lis in the business sector. In accordance with the results, the most outstanding variable is productivity with regards to lis of the business sector in the US. Moreover, lis is also affected by export, profit, gross private domestic

[28] S. Bentolila, G. Saint-Paul, *Explaining Movements in the Labor Share*, in *Contributions in Macroeconomics*, 2003, vol. 3, n. 1.

[29] A. Guscina, *Effects of Globalization on Labor's Share in National Income*, International Monetary Fund, Working Paper No. 06/294, 2006, https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Effects-of-Globalization-on-Labors-Share-in-National-Income-19244 (accessed July 15, 2019)

[30] A. Jayadev, *Capital Account Openness and the Labour Share of Income*, in *Cambridge Journal of Economics*, 2007, vol. 31, n. 3, 423-443.

[31] T. Kristal, *Good Times, Bad Times: Postwar Labor's Share of National Income in Capitalist Democracies*, in *American Sociological Review*, 2010, vol. 75, n. 5, 729-763.

[32] J. Hogrefe, M. Kappler, *The Labour Share of Income: Heterogeneous Causes for Parallel Movements?* , in *The Journal of Economic Inequality*, 2013, vol. 11, n. 3, 303-319.

[33] A. Bassanini, T. Manfredi, *Capital's Grabbing Hand? A Cross-Country/Cross-Industry Analysis of the Decline of the Labour Share*, OECD, Working Paper No. 133, 2012, https://www.oecd-ilibrary.org/docserver/5k95zqsf4bxt-en.pdf?expires=1590182407&id=id&accname=guest&checksum=CC8C9F00F05B065B49F8E6B675516ACE (accessed July 15, 2019).

[34] A.T. Young, R.A. Lawson, *Capitalism and Labor Shares: A Cross-Country Panel Study*, in *European Journal of Political Economy*, 2014, vol. 33, 20-36.

[35] E. Bengtsson, *Do Unions Redistribute Income from Capital to Labour? Union Density and Wage Shares since 1960*, in *Industrial Relations Journal*, 2014, vol. 45, n. 5, 389-408.

[36] C. Perugini, M. Vecchi, F. Venturini, *Globalisation and the Decline of the Labour Share: A Microeconomic Perspective*, in *Economic Systems*, 2017, vol. 41, n. 4, 524-536.

investment, unemployment, current account balance, gross domestic product, and tax, respectively.

Table 4. Significance levels of independent variables for the business sector

Variables	GCV	RSS
Prod	100	100
Exp	28.9	29.5
Prof	28.9	29.5
Gpdi	25.8	26
Unemp	25.8	26
Ca	21.4	21.6
Gdp	20	20.4
Tax	11.1	11.5

Note: GCV: Generalized cross validation, RSS: Residual sums of squares.

The results of lis in the non-farm sector in the US are presented on Table 5. The F test result is found to be significant for 1 percent, which also displays that the whole analysis is significant as well. The square root of R is also very high in the model. The Pearson correlation test results demonstrate that lis is highly associated with the independent variables of the model. In accordance with the aforementioned results, in case productivity is greater than 55.48, it contributes to the increase in lis (as coefficient is 2.914) and productivity being smaller than 82.88 also affects lis in a positive manner.

Table 5. Results of the best model for the non-farm sector

	Basis Functions	Coefficients
CT	-	21.260
BF1	max(0, prod-55.483)	2.914
BF2	max(0, 82.878-prod)	3.564
BF3	max(0, prod-82.878)	-3.285
BF4	max(0, 174.491-ggi)	0.132
BF5	max(0, unemp-3.4)	13.021
BF6	max(0, unemp-3.73333)	-10.880
BF7	max(0, 5.13333-unemp)	2.994
BF8	max(0, unemp-5.13333)	-2.521
BF9	max(0, 35-cpi)	-1.953
BF10	max(0, 77.494-prof)	0.091
BF11	max(0, prof-77.494)	-0.003
BF12	max(0, -109.201-ca) * max(0, 82.878-prod)	0.002
BF13	max(0, ca- -109.201) * max(0, 82.878-prod)	0.00
BF14	max(0, 82.878-prod) * max(0, 4084.25-gdp)	0.00
BF15	max(0, 82.878-prod) * max(0, gpdi-280.858)	-0.001
BF16	max(0, 82.878-prod) * max(0, exp-625.287)	0.001
BF17	max(0, 82.878-prod) * max(0, 625.287-exp)	-0.001
BF18	max(0, 82.878-prod) * max(0, prof-342.391)	-0.001
BF19	max(0, 1230.61-gdp) * max(0, unemp-4.23333)	0.001
BF20	max(0, gdp-1230.61) * max(0, unemp-4.23333)	0.00
BF21	max(0, unemp-3.4) * max(0, cpi-89.7667)	0.033
BF22	max(0, exp-19.365) * max(0, 77.494-prof)	0.008
	F test	583.6*** (0.000)
	R^2	0.98
	Pearson Correlation Coefficient	0.99*** (0.000)

Note: All variables are significant for 1 percent. BF: Basis function. CT: Constant term.

Nevertheless, as it may be observed on Table 3, BF3 demonstrates that it induces to reduce lis, in case productivity is greater than 82.88. Moreover, lis in the non-farm sector is further affected by increasing productivity adversely. BF4 displays that it affects lis positively, if gross government investment is smaller than 174.49 billion dollars. BF6 and BF8 indicate that the effect on lis is a negative one, if unemployment rate is greater than 3.73 or 5.13, while BF5 and BF7 present that the effect on lis is a positive one, if it is greater than 3.4 or less than 5.13. Furthermore, in

BF9, it may be observed that the effect on lis is negative in the case consumer price index is smaller than 35. BF10 expresses that the variable impresses lis positively, if profit is less than 77.49 billion dollars, while BF11 presents that it impresses lis if the value is greater than 77.49 billion dollars. The cross-correlations are found to be very small.
Significance levels of the variables of the model regarding lis in non-farm sector in the US are presented on Table 6. The most effective variable in non-factor business sector regarding lis is determined to be productivity. It is also observed that lis is also affected by current account balance, gross private domestic investment, export, consumer price index, gross domestic product, profit, unemployment rate, and gross government investment, respectively.

Table 6. The significance levels of independent variables for the non-farm sector

Variables	GCV	RSS
prod	100	100
ca	31.3	31.7
gpdi	28.4	28.4
exp	28.4	28.4
cpi	27.5	27.6
gdp	25.1	25.2
prof	25.8>	25.8>
unemp	20.2	20
ggi	10.5	11.3

Note: GCV: Generalized cross validation, RSS: Residual sums of squares.

In the last section of the study, lis in non-finance is taken into consideration and the results are presented on Table 7. The model is determined to be statistically significant as the F test rejects the null hypothesis for 1 percent. The Pearson correlation coefficient is also found to be very high, which means that lis is highly associated with independent variables of the model.

Table 7. Results of the best model for the non-finance sector

	Basis Functions	Coefficients
CT	-	76.65
BF1	max(0, prod-55.483)	1.67
BF2	max(0, 78.503-prod)	0.77
BF3	max(0, prod-78.503)	-2.05
BF4	max(0, 8362.66-gdp)	0.00
BF5	max(0, prof-387.879)	-0.01
BF6	max(0, 78.503-prod) * max(0, ggi-70.959)	-0.01
BF7	max(0, 78.503-prod) * max(0, 70.959-ggi)	0.00
BF8	max(0, 78.503-prod) * max(0, ggi-85.526)	0.01
BF9	max(0, prod-55.483) * max(0, 5.83-unemp)	0.02
BF10	max(0, 78.503-prod) * max(0, imp-58651)	0.00
BF11	max(0, 78.503-prod) * max(0, 58651-imp)	0.00
BF12	max(0, prod-78.503) * max(0, prof-1158.33)	0.00
BF13	max(0, prod-78.503) * max(0, 1158.33-prof)	0.00
BF14	max(0, 8362.66-gdp) * max(0, unemp-4.03333)	0.00
BF15	max(0, 8362.66-gdp) * max(0, 4.03-unemp)	0.00
BF16	max(0, 8362.66-gdp) * max(0, cpi-79.0333)	0.00
BF17	max(0, 8362.66-gdp) * max(0, 79.0333-cpi)	0.00
BF18	max(0, 8362.66-gdp) * max(0, cpi-92.2667)	0.00
BF19	max(0, 8362.66-gdp) * max(0, prof-74.271)	0.00
BF20	max(0, 8362.66-gdp) * max(0, 74.271-prof)	0.00
BF21	max(0, gdp-8362.66) * max(0, tax-1471.73)	0.00
BF22	max(0, gdp-8362.66) * max(0, 1471.73-tax)	0.00
	F test	451*** (0.000)
	R^2	0.974
	Pearson Correlation Coefficient	0.987*** (0.000)

Note: All variables are significant for 1 percent. BF: Basis function. CT: Constant term.

BF1 and BF2 state that lis is affected positively when productivity is greater than 55.483 and is smaller than 78.503. However, in accordance with BF3, if productivity is more than 78.503, it impresses lis negatively. In BF5, when profit is greater than 387.879 billion dollars, lis is affected negatively.

Significance levels of effective variables regarding lis in the non-finance sector in the US are represented on Table 8. The most important variable in the model is determined to be profit concerning lis in the non-finance factor. Moreover, it is also observed that lis is affected by productivity,

import, gross domestic product, tax, gross government investment, consumer price index, and unemployment rate, respectively.

Table 8. The significance levels of independent variables for the non-finance sector

Variables	GCV	RSS
prof	100	100
prod	47.7	48.1
imp	47.7	48.1
gdp	43.4	43.6
tax	36.1	36.1
ggi	26.7	26.6
cpi	25.7	25.4
unemp	18.5	18.4

Note: GCV: Generalized cross validation, RSS: Residual sums of squares.

4. Conclusion and Discussion

The macroeconomic drivers of lis at sectoral level in the US is tried to be determined in this study. The dataset of the study, where MARS approach is employed as a model, comprises the period of 1948Q1-2019Q1.

In accordance with the results of the study, the most significant predictors of lis in business sector are determined to be productivity, export, profit, gross private domestic investment, unemployment rate, current account balance, gross domestic product, and tax revenue, respectively.

Concerning the non-farm sector, the most effective variable regarding lis in business sector is found to be productivity. Furthermore, it is also observed in the study that lis is affected by current account balance, gross private domestic investment, export, consumer price index, gross domestic product, profit, unemployment rate, and gross government investment, respectively.

With regards to the non-finance sector, while the most significant variable in the model is defined to be profit concerning lis, whereas it is also determined that lis is also affected by productivity, import, gross domestic product, tax, gross government investment, consumer price index, and unemployment rate, respectively.

In addition to the findings listed above, it is concluded that productivity, which is observed to be the most prominent macroeconomic dynamic, affects lis negatively. It may also be declared that the result is consistent

with the studies of Bentolila and Saint-Paul (2003)[37], Guscina (2006)[38], Jayadev (2007)[39], Kristal (2010)[40], Hogrefe and Kappler (2013)[41], Bassanini and Manfredi (2014)[42], Young and Lawson (2014)[43], Bengtsson (2014)[44], and Perugini et al. (2017)[45].

Moreover, it is also detected that when productivity is greater than 82.88 in business and non-farm sectors, it is observed that the negative effect of productivity on lis is more profound in non-farm sector. However, this impact is seen only in the slightest sense in the business sector. Therefore, these findings produce evidence that employees could not afford their productivity in all sectors.

Consequently, it may be argued that lis has been in decline in the US for a long time, whereas this decline has become critical since the early 2000s. In respect of this, macroeconomic dynamics of lis in the US are determined in accordance with the objective of the study. As a result of the analyses, the most prominent dynamics are determined as productivity, gross domestic product and unemployment regarding lis of three sectors stated above. The results also demonstrate that the dynamics of sectors are different in terms of lis in the US and therefore, such sectorial differences shall be taken into consideration in policy response. The obtained findings in this study could guide in determining wage levels

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37 S. Bentolila, G. Saint-Paul, *Explaining Movements in the Labor Share*, in *Contributions in Macroeconomics*, 2003, vol. 3, n. 1.

38 A. Guscina, *Effects of Globalization on Labor's Share in National Income*, International Monetary Fund, Working Paper No. 06/294, 2006, https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Effects-of-Globalization-on-Labors-Share-in-National-Income-19244 (accessed July 15, 2019)

39 A. Jayadev, *Capital Account Openness and the Labour Share of Income*, in *Cambridge Journal of Economics*, 2007, vol. 31, n. 3, 423-443.

40 T. Kristal, *Good Times, Bad Times: Postwar Labor's Share of National Income in Capitalist Democracies*, in *American Sociological Review*, 2010, vol. 75, n. 5, 729-763.

41 J. Hogrefe, M. Kappler, *The Labour Share of Income: Heterogeneous Causes for Parallel Movements?* , in *The Journal of Economic Inequality*, 2013, vol. 11, n. 3, 303-319.

42 A. Bassanini, T. Manfredi, *Capital's Grabbing Hand? A Cross-Country/Cross-Industry Analysis of the Decline of the Labour Share*, OECD, Working Paper No. 133, 2012, https://www.oecd-ilibrary.org/docserver/5k95zqsf4bxt-en.pdf?expires=1590182407&id=id&accname=guest&checksum=CC8C9F00F05B065B49F8E6B675516ACE (accessed July 15, 2019).

43 A.T. Young, R.A. Lawson, *Capitalism and Labor Shares: A Cross-Country Panel Study*, in *European Journal of Political Economy*, 2014, vol. 33, 20-36.

44 E. Bengtsson, *Do Unions Redistribute Income from Capital to Labour? Union Density and Wage Shares since 1960*, in *Industrial Relations Journal*, 2014, vol. 45, n. 5, 389-408.

45 C. Perugini, M. Vecchi, F. Venturini, *Globalisation and the Decline of the Labour Share: A Microeconomic Perspective*, in *Economic Systems*, 2017, vol. 41, n. 4, 524-536.

in the US. Finally, it may be declared that further studies would add new factors and enhance the model.

Appendix 1. The definition of variables

Type	Variables	Abridgment	Unit	Resource
Dep. Var.	LIS of Business Sector	Bus_lis	Index 2012=100	FRED
	LIS of Non-farm Sector	Nonfarm_lis	Index 2012=100	FRED
	LIS of Non-Finance Sector	Nonfin_lis	Index 2012=100	FRED
Indep. Var.	Current Account Balance	ca	NIPA's, Billions of Dollars	FRED
	Productivity (Business Sector: Real Output Per Hour of All Persons)	prod	Index 2012=100	FRED
	Gross Domestic Product	gdp	Billions of Dollars	FRED
	Gross Private Domestic Investment	gpdi	Billions of Dollars	FRED
	Gross Government Investment	ggi	Billions of Dollars	FRED
	Unemployment Rate	unemp	Percent (Monthly)	BLS
	Consumer Price Index	cpi	All items in the US city average, all urban consumers	BLS
	Export (Goods and Services)	exp	Billions of Dollars	FRED
	Import (Goods and Services)	imp	Billions of Dollars	FRED
	Profits before tax (Corporate business)	prof	Billions of Dollars	FRED
	Tax (Federal government current tax receipts)	tax	Billions of Dollars	FRED

Note: LIS: Labour Income Share, FRED: Federal Reserve Data, BLS: Bureau of Labor Statistics, Dep. Var.: Dependent Variables, Indep. Var.: Independent Variable

The Hustle and Gig: Struggling and Surviving in the Sharing Economy, Edited by Alexandrea J. Ravenelle. A Review.

Daniela Bellani [1]

1. Introductory Remarks

For some, sharing-economy work represents a new opportunity for the masses in terms of empowerment of self-autonomy, personal responsibility and work-schedule flexibility. In *Hustle and Gig: Struggling and Surviving in the Sharing Economy,* Alexandrea J. Ravenelle questions such a neoliberal narrative, revealing that the sharing economy also exacerbates issues related to inequality and discrimination – already present in the US labor market.

From a theoretical point of view, the author clearly defines the overall concept of the sharing economy. The definition she proposes of the sharing economy as "a collection of app-based technologies that focuses on the lending/renting of assets or services either for profit or for higher good" represents a clear step forward in comparison to previous attempts. She also convincingly dispels some common myths of the gig economy[2] – understood as a part of the sharing economy platforms. First, while a gig economy looks like a return to a higher level of connection and to the sense of community (by bringing people together), *Hustle and Gig* unveils that gig workers do not perceive these feelings, complaining about the total absence of trust and lack of interaction with the app-users. Second, even if a gig economy promises to promote

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[2] In the context of this book review, the notions of a 'gig economy' and a 'share economy' will be used interchangeably.

entrepreneurship, the author clearly explains that it actually increases the number of workers with low paid, marginal benefits and economic insecurity, all factors that lead to the increase of the casualization of work. Finally, although the supporters of gig economy state that service-platforms play the role of promoter of the principle of 'opportunities for all', *Hustle and Gig* depicts a different scenario, identifying the gig economy as a trigger of social inequalities. One example refers to the gentrification of cities due to the massive creation of Airbnb empires, but this is only an example of the many inequalities Ravenelle reports in the book.

From an empirical point of view, the author implements a well-organized ethnographic study. The author explores in depth the perspectives of about eighty workers involved in the gig economy in New York. She conducted qualitative interviews uncovering interviewees' work experiences. The aim is to provide a real description of the promises and the reality of working in the gig economy in the US in the last few years. Ravenelle mainly focuses on workers of four gig platforms, (Uber, Airbnb, TaskRabbit and Kitchensurfing) given that these services have lots of factors in common (such as the level of popularity) but at the same time each is distinctive, e.g. in terms of levels of individual intake of capital and skills. The respondents, all living in New York City, are diverse in terms of age, gender, race, level of education and income.

The main goal of the study is to shed light on three elements: the working conditions within the gig economy, the types of skills and capital they bring to their work and the status they confer themselves. Based on these characteristics, the author presents a typology of gig economy workers, that, in my opinion, represents the main novelty of *Hustle and Gig*. Such ideal types are labelled "Strugglers", "Strivers "and "Success Stories". The first type includes those that have been long-term unemployed or undocumented and that, even if they struggle to make ends meet, cannot escape from the condition of precariousness. These workers need money to survive and the sharing economy potentially represents an opportunity. However, even if they jump from one platform to the other, they cannot recover from a condition of low wages, extreme insecurity and instability. An example of a Struggler reported in the book is represented by Donald, a white middle-aged man who, during the Great Recession, was fired by the enterprise he worked as financial professional for. After the job loss, he did not find any full-time jobs and thus he started moving from one short-term contract to the next. When Donald discovered TaskRabbit, "he found a way to staunch the financial haemorrhage" (pg. 61). As such, TaskRabbit represented, for him as a Struggler, a source of much needed cash even if it does not guarantee any contractual/economic stability, any real flexibility in time schedules or any autonomy in working.

The "Strivers" are those that have a stable job but use the sharing economy in order to have extra money and a more comfortable lifestyle, or to make a transition to a new business. An example of a striver, which the author reports in the book, is related to the story of Austin, a full-time engineer with a relatively high income who makes extra money working for TaskRabbit in the evenings or during the weekends.

The group of "Success Stories" is composed of those who have gained profitable conditions from the gig economy, such as autonomy, a flexible schedule and money. Ryan, one of the interviewed, age twenty-seven, fits well with this ideal type. When he moved to New York City after college, he started to rent out one of the bedrooms of his rented flat using the Airbnb app. Given the economic success of this activity, Ryan and his partner considerably increased their business, renting, at the time of the interview, six apartments – thus making significant money. Ravenelle makes the readers aware that it is important to consider there are a myriad of workers that are placed in the spectrum of the three ideal types.

In the second part of the book, the author attempts to provide some parallels between the working conditions in the gig economy, and those at the time of the early industrial age. Even if nowadays many workers benefit from the rights gained during the last centuries such as the minimum wage, the forty-hour work week, and the recognition of trade unions as representatives of workers, Ravenelle undoubtedly states that this is not the case for the majority of workers of the gig economy. In a nutshell, the author's thesis is that "a quick historical review of labor shows that for all its focus on technology, the sharing economy is truly a throwback to earlier age." The main proposition here is that most of the sharing economy platforms do not provide any workplace-safety protections because workers are classified as independent contractors. As such, they are outside the coverage of the National Labor Relations Act and the authority of other unions.

A key issue is when the author discusses the promises of the sharing economy as a new and idyllic form of work organization. She convincingly argues that the gig economy does not offer workers "a boss-free future where workers *control their incomes and hours*", but instead weakens labor standards along with the assault to working conditions started at the end of the 1970s.

As regards time control, in the case of Uber drivers, it is true that they can set their own schedules; however, the monthly income guarantees generally require that they accept about the 90% of rides. Freelance workers with Kitchensurfing have to respond to potential work within twenty-four hours. A similar situation is experienced by the Airbnb hosts who have to respond quickly to potential customers. TaskRabbit workers have only thirty minutes to reply to requests received between 8am to 8 pm – even if they are working.

The algorithm of these platforms is designed to deactivate gig workers' accounts if they do not accomplish these standards.

The book explains that workers in the gig economy, even if they are told that they choose their own income, are in competition for a limited number of tasks with lots of competitors. Given that these platforms have a high number of contractors, it is obvious that this negatively affects the amount of money that workers can make. As reported in the book, "in 2014, an Uber blog post […] noted that the median income on UberX is more than $90,000/year/driver in New York […]." However, as reported in *Hustle and Gig*, tweets from the general manager of Uber in New York City, and statements from Uber's head of communications for the Americas, claim that drivers' income is between $25 to $25.79 an hour after Uber's commission. As such, in order to make $90,000, Ravenelle reveals drivers should work 70 hours a week for 50 weeks a year! The explanation is that the Uber rate does not take into account that drivers have to bear the costs of gas, insurance and vehicle maintenance, and they have to account for depreciation, unemployment, health insurance, and paid time off. In fact, gig workers (about 3.4 million according to the American Bar Association in 2011), being classified by companies as independent contractors and not as employees, do not receive any unemployment benefits, paid vacation, compensation for work-related accidents, overtime, paid vacation, retirement, disability accommodation, family leave protection, protection for discrimination and the right to form unions.

Ravenelle reports that gig platforms seem to be aware of the workers' discontent. As reported in the book, when some have raised the issue of worker discontent, the Uber chief product officer declared to the Guardian "We're just going to replace them all with robots." Nonetheless adverse conditions, some workers remain working for the gig platforms. The reasons identified by the author are different - the need for extra income, the stigma of long-term unemployment, middle age, lack of experience, need of a work schedule that is more flexible or also because gig workers have invested time, effort and resources.

The author recognizes that other models of the sharing economy that improve workers' conditions do exist. The first model is the one that protects workers and recognizes them as employees. Munchery, a food delivery service, and MyClean, a cleaning service, are examples of gig platforms that follow the so-called human-relation perspective, hiring workers as employees and not as contractors. The second model is related to the experience of the group labelled as *Successful Workers* that, even if not covered by workplace protections, make a comfortable life in the gig economy. As the author explained, this is because *Successful Workers* are characterized by specialized skills and their own

initial financial capital that enables them to have a good career. As reported in the text, "just as in the mainstream marketplace, the work that requires a higher level of capital and skill is more remunerative in terms of financial and physical rewards, but it also allows for a greater level of professionalization and creativity."

The author convincingly concludes that the sharing economy is "part of a larger trend toward reshaping the employer-employee social contract" and that this shift reshapes workers' pay expectations. This is possible because sharing economy platforms are identified as technology companies or online marketplaces where the main component is technological business. The reality is that the economic growth of these platforms comes from people, not from algorithms and software. The main solution to the lack of rights of gig workers is called by the author *Time Rule*, which consists in a sort of legislative reclassification of gig worker, clearly determining if a worker is or not an independent contractor. Ravenelle explains that "if the hours/time of work are dictated by the employer or market, the worker is not independent". As such, he/she must have the rights of an employee.

Ravenelle's book is well-written and is characterized by a good balance between the presentation of the typology of gig workers, as well as the description of respondents' experiences and policy suggestions. As such, it represents an essential reading for scholars and students that want to deepen their knowledge of hidden consequences regarding workers' conditions in the sharing economy.

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