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*The COVID-19 Crisis, Human Rights
and Unfair Models of Production:
The Case of Migrant Workers in the Agri-food Sector
in European Countries****

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1. *Introduction*

In recent years, institutional and scholarly attention has been paid to the exploitation and systematic denial of the rights of workers – in particular migrant workers – which characterizes key sectors, such as the agri-food sector, in many European Union (EU) countries, including in both Southern and Northern Europe¹.

Since its outbreak in March 2020, the Covid-19 health emergency has aggravated this situation. It has clearly revealed, on the one hand, the condition of vulnerability and exploitation frequently experienced by migrant persons employed in many important labour market sectors (including the agri-food system) and, on the other, their essential role

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¹ A. CORRADO - F. CARUSO - M. LO CASCIO - M. NORI - L. PALUMBO - A. TRIANDAFYLIDOU, *Is Italian agriculture a 'Pull Factor' for irregular migration – And, if so, why?* Open Society European Policy Institute, Bruxelles, 2018; L. PALUMBO - A. CORRADO (eds.), *Covid-19, Agri-food systems, and migrant labour. The situation in Germany, Italy, the Netherlands, Spain, and Sweden*, Open Society European Policy Institute, Bruxelles, 2021.

in these sectors. Indeed, the COVID-19 crisis has sharply exacerbated the structural inequalities that characterize the socio-economic systems of EU countries, disproportionately impacting people most affected by discrimination and social exclusion. At the same time, a rise in the demand for necessary goods has also meant that workers in key sectors, such as agri-food, have been acknowledged as fundamental to the economic and social functioning of EU countries. Furthermore, the pandemic has disclosed the limits of supply chains – with respect to price distortion, unfair competition, and distribution dynamics – and the impact of these in terms of contributing to dynamics of labour exploitation and abuse.

A clear tension therefore has arisen between preventing the spread of the pandemic through mobility restrictions on the one hand, and limiting foreign labour shortages (particularly in core sectors) on the other². This tension, in turn, has clearly exposed the complex issue of preventing and protecting situations of vulnerability at work when market efficiency and competitiveness are at stake.

In this scenario, since the outbreak of the pandemic, EU institutions and Member States have adopted several legislative and policy measures to address the consequences of the Covid-19 crisis in key sectors (including the agri-food system) and migrants' conditions of vulnerability. However, despite the initial enthusiastic and optimistic tones, these interventions have shown shortcomings that significantly limit their impact and outcomes, especially regarding the protection of fundamental rights of migrant workers, including the right to health.

This paper provides a critical comparative analysis of relevant EU and national emergency legal measures and responses adopted during the current pandemic to address migrants' access to essential services and benefits, focusing on migrants' working and living conditions in the agricultural sector. As is known, the Covid-19 crisis has raised several legal issues, within several fields of law, from human rights to market regulation³. In this paper, by taking into account the recent development of the pandemic and consequent measures to address it (including vaccination), we explore to what extent the current health emergency may

² A. CORRADO - L. PALUMBO, *Essential Farmworkers and the Pandemic Crisis: Migrant Labour Conditions, and Legal and Political Responses in Italy and Spain*, in TRIANAFYLIDOU A. (eds.), *Migration and Pandemics*, Imiscoe, Research Series. Springer, 2022, pp. 145-166.

³ M. KJAERUM - M.F. DAVIS - A. LYONS (eds.), *Covid-19 and Human Rights*, Routledge, London, 2021. G. SMORTO, *The Right to Health and Resource Allocation. Who Gets What and Why in the COVID-19 Pandemic*, in *Global Jurist*, 21, 2021 pp. 59-72; S. ŽIŽEK, *Pandemic! Covid-19 Shakes The World*, OR Books, 2020.

constitute an opportunity for a European and national rethinking of the dominant socio-economic model of production, and an enforcement of the rights of migrant persons, or if it instead only fosters inequalities by exposing persons in conditions of vulnerability (in particular many migrant persons) to the risk of being subject to further forms of discrimination and fundamental rights violations.

The first section of this article focuses on the notion of labour exploitation, unpacking its legal definitions. In particular, the section explores the relationship between exploitation and human dignity, seeing this latter notion in its social dimension and not only as an innate quality of the persons. The second section will then address the complex relationship between vulnerability and consent to exploitation, referring to the contextual/situational conception of vulnerability as shaped by multiple factors, rather than as inherent to certain persons and/or groups of individuals. Building on this conceptual framework, and by taking as emblematic the specific case of migrant workers in the agri-food system, the following sections of the article highlight the interplay of factors contributing to creating migrants' situations of vulnerability to exploitation. Then we examine the impact of the Covid-19 crisis and related measures adopted, at the EU and national levels, to address migrants' situations of vulnerability in the agri-food system, exploring whether these measures have contributed to a stronger protection of human rights.

1. *Unpacking and Contextualizing Legal Concepts and Definitions*

1.1. *Labour Exploitation and Human Dignity*

Labour exploitation is a highly contested concept, from both a socio-economic and a legal perspective.⁴ The notion of exploitation is at the heart of interventions and discourses aimed to guarantee decent work, and accordingly it is a prominent notion in legal frameworks concerning crimes such as 'trafficking', 'forced labour' and 'slavery'. These offences are prohibited by human rights instruments, such as the 1948 Universal Declaration of Human Rights (art. 4) or the 1950 European Convention

⁴ V. MANTOUVALOU, *Legal Construction of Structures of Exploitation*, In H. COLLINS - G. LESTER - V. MANTOUVALOU (eds.), *Philosophical Foundations of Labour Law*, Oxford University Press, Oxford, 2018, pp. 188-204.

on Human Rights⁵ (Art. 4) or the 2000 Charter of Fundamental Rights of the European Union. However, as is known, the notion of exploitation is not defined by any international legal instruments.

It is worth mentioning that, until the adoption of the 2000 UN Protocol on Trafficking in Human Beings (the so-called “Palermo Protocol”)⁶ relevant international documents did not refer to labour exploitation as such⁷. Indeed, before the adoption of this Protocol, early international Conventions on trafficking focused on sexual exploitation⁸, in particular on prostitution, considered always as a form of violence in line with a feminist ‘abolitionist’ approach, which has been strongly criticized by sex workers’ rights feminists⁹. Alongside these treaties referring to sexual exploitation, exploitation appeared mainly in international legal provisions concerning children¹⁰.

With the Palermo Protocol, exploitation appears as a new legal concept¹¹. Although it does not contain a definition of exploitation, the Protocol offers some examples of exploitation, including «the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs» (art. 3). The Protocol therefore provides an open list of forms of exploitation, leaving relevant actors with the important role of filling it with ever more examples of exploitative practices. From this perspective, the innovative aspect of the legal concept of exploitation found in the Palermo Protocol is its extent, which goes beyond the sexual

⁵ Council of Europe. *Convention for the Protection of Human Rights and Fundamental Freedoms*. Rome, 4.XI.1950.

⁶ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, New York, 15 November 2000.

⁷ For an interesting reconstruction of the notion of exploitation in international law see S. MARKS, *Exploitation as an international legal concept*, in S. MARKS (ed.) *International Law on the Left*, Cambridge University Press, Cambridge, 2008, p. 301.

⁸ For instance, the UN 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*.

⁹ See J. CHUANG, *Rescuing Trafficking from Ideological Capture: Anti-Prostitution Reform and its Influence on U.S. Anti-Trafficking Law and Policy*, in *University of Pennsylvania Law Review*, vol. 158, 2010, pp. 1655-1728. See also, in this regard, M.R. MARELLA, *Bocca di Rosa, Roxanne e le altre. Considerazioni in tema di sesso, mercato e autonomia privata*, in *Pòlemos*, vol. 2, 2008, pp. 35-72.

¹⁰ For instance, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery identified among these practices the “exploitation of the child or young person of his labour” (Art. 1(d)).

¹¹ J. ALLAIN, *The law and Slavery, Prohibiting Human Exploitation*, Brill, 2015.

dimension and is not limited to some specific categories/groups. This finds confirmation in the Model Law against Trafficking in Persons¹² – a soft-law instrument produced by UNODC to assist states in implementing the provisions of the Palermo Protocol – which noted that, although the term exploitation is not defined in the Protocol, it is generally «associated with particularly harsh and abusive conditions of work», or «condition of work inconsistent with human dignity»¹³.

With specific regard to European Union law, severe exploitation in all its forms entails the violation of article 1 of the EU Charter of Fundamental Rights¹⁴ stating the inviolability of human dignity, and of article 5 providing for the prohibition of slavery and forced labour. It also implies violation of rights protected in article 31 on fair and just working conditions, article 34 on social security and social assistance, and article 35 on the right to health care. If we then look at EU secondary law, in addition to the conception of exploitation contained in Directive 2011/36/UE on trafficking¹⁵, which reflects that found in the Palermo Protocol's definition of trafficking, special attention should be dedicated to the definition of «particularly exploitative working conditions» contained in Directive 2009/52 on Employers' Sanctions¹⁶. Indeed, by reflecting the above-mentioned provisions of the EU Charter of Fundamental Rights, Directive 2009/52 defines «particularly exploitative working conditions» as «working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects workers' health and safety, and which offends against human dignity» (art. 2 (i)). Despite being quite generic, this definition, which is the first (and the only) definition of exploitation contained in EU law, is extremely important as it covers diverse working conditions, also paying attention to those building on gender related discriminations. At the same time, it «points to a proportionality analysis and severity threshold as tools

¹² UNODC, Model law against trafficking, 2009 available at https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf

¹³ *Ibidem*, p. 28.

¹⁴ Charter of Fundamental Rights of the European Union, 2000/C 364/01.

¹⁵ *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*

¹⁶ *Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.*

for assessing exploitative circumstances»¹⁷, taking respect of the principle of human dignity as the main criterion to be considered.

The language of human dignity permeates the legal conception of exploitation found in the national legislations of some European countries, even before the adoption of the above-mentioned EU Directives. For example, in both Belgian¹⁸ and French¹⁹ legislation, exploitation is defined in the provision concerning the offence of trafficking as work or labour conditions contrary to human dignity. Italian legislation does not explicitly refer to exploitation as violation of human dignity. However, art. 603bis of the Italian Criminal Code, concerning the crime of «illegal gang-mastering and labour exploitation», contains some indicators of exploitation that refer to working and living conditions contrary to dignity according to the Italian Constitution, especially arts. 3 and 36.

The reference to the principle of human dignity with respect to the legal concept of labour exploitation brings us to the issue of the irreducibility of work to mere commodity and of the worker to object²⁰. From this perspective, as legal scholarship has pointed out, the principle of human dignity constitutes not only a criterion to assess working conditions, but also a measure of what can respond to economic logics and what is incompatible with these²¹. This latter conception explicitly emerges, for instance, in Art. 41 of the Italian Constitution, affirming that private economic initiative cannot be carried out «in a manner that could damage safety, liberty, and human dignity»²².

As is known, the notion of human dignity and its operational use have been the subject of an intense scholarly debate, that has critically focused on the dichotomy between the objective and subjective dimensions of this notion, and on its role as constraint or as empowerment²³. Relevant

¹⁷ V. STOYANOVA, *Human Trafficking And Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law*, Cambridge University Press, Cambridge, 2017, p. 186.

¹⁸ Belgium Criminal Code, article 433quinquies. Interestingly, already in the formulation of article 433quinquies of the Belgian Criminal Code previous to the implementation of Directive 2011/36, there was reference to the concept of human dignity in the definition of exploitation contained in the trafficking definition.

¹⁹ French Criminal Code (Article 225-4-1), as amended in 2003.

²⁰ S. RODOTÀ, *Il Diritto di avere diritti*, Roma-Bari, Laterza, 2012; B. LANGILLE, *Labour Law's Theory of Justice*, in G. DAVIDOV - B. LANGILLE (eds.), *The Idea of Labour Law*, Oxford Scholarship Online, Oxford, 2011, p. 101.

²¹ S. RODOTÀ, *Il Diritto di avere diritti*, op. cit.

²² Our translation in English.

²³ R. BROWNSWORD, *Freedom of Contract, Human Rights and Human Dignity*, In D. FRIEDMANN

in this debate has been important international and national case law²⁴. This includes the famous decision of the French *Conseil d'Etat* (27 Oct. 1995), which outlawed the spectacle of dwarf-throwing ('*lancer de nain*')²⁵ as it represented a threat to the respect for human dignity considered as one of the constituents of public order, and also the landmark judgment of the European Court of Justice in the case of *Omega Spielhallen* (Case C-36/02)²⁶ on laser-shows, in which the protection of dignity prevailed over the freedom to provide services. In these cases, the use of the principle of human dignity has been criticized by some legal scholars for imposing a scale of values, not necessarily accepted and shared, limiting freedom of private economic activity and/or individual autonomy, and as such risks supporting an 'oppressive moral order'²⁷.

By addressing the complex relationship between human dignity and freedom, legal scholars, amongst others Stefano Rodotà²⁸, have highlighted the socially embedded dimension/nature²⁹ of this notion, which opposes any paternalistic and/or 'authoritarian' visions. According to this view, human dignity should not be considered as a static and abstract principle, but as a guarantee of those «minimum living conditions that allow the person to actively participate in social life and the public sphere»³⁰. As Rodotà argued, social dignity is not limited to an innate quality of a person, but also refers to the «result of a construction that moves from the person, examines and integrates personal relationships and social ties, [and] requires consideration of the overall context within which existence takes place»³¹.

This social dimension of human dignity arises in the Constitutions

- D. BARAK-EREZ (eds.), *Human rights in private law*, Hart, Cambridge, 2001, pp. 181.

²⁴ *Ibidem*. See also G. RESTA, *Dignità, Persone, Mercati*, Giappichelli, Torino, 2004.

²⁵ Conseil d'Etat (27 Oct. 1995) req. nos. 136–727 (Commune de Morsang-sur-Orge) and 143–578 (Ville d'Aix-en-Provence).

²⁶ Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I 09609.

²⁷ J.Q. WHITMAN, *From Fascist 'Honour' to European 'Dignity'*, in C. JOERGES - N. GHALEIGH (eds.), *The Darker Legacy of European Law: Perceptions of Europe and Perspectives on a European Order in Legal Scholarship during the Era of Fascism and National Socialism*, Hart, Cambridge, 2003, pp. 243- 266.

²⁸ S. RODOTÀ, *Il Diritto di avere diritti*, op. cit.; M.R. MARELLA, *Il fondamento sociale della dignità umana. Un modello costituzionale per il diritto europeo dei contratti*, in *Riv. cir. dir. priv.*, Vol. XXV, 2007.

²⁹ M.R. MARELLA, *Il fondamento sociale della dignità umana. Un modello costituzionale per il diritto europeo dei contratti*, op. cit.

³⁰ *Ibidem*. Our translation in English.

³¹ S. RODOTÀ, *Il Diritto di avere diritti*, op. cit., p. 233.

of European countries, including the Belgian Constitution (art. 23) and in the Italian Constitution (articles 3(1), 36 and 41). For instance, article 3 (para 1) of the Italian Constitution affirms that «all citizens have *equal social dignity*», emphasizing a context and system of relationships in which persons are located in conditions of freedom and equality. With specific regard to working conditions, article 36 of the Italian Constitution states that workers have the right to a remuneration «such as to ensure them and their families a free and *dignified existence*», highlighting a necessary relationship between individual existence, dignity, freedom and development of personality in a context characterized by equality³². As legal scholar Resta argues, article 36 – in line with article 23(3) of the Universal Declaration of Human Rights – sets a mandatory limit suitable to conform to the exercise of private autonomy, by «hindering those agreements through which the workers, driven by necessity, consent to accept miserable wages that do not allow them to satisfy the needs of an existence worthy of dignity»³³. Lastly, the above-mentioned article 41 of the Italian Constitution identifies dignity as an insurmountable limit to private and economic activities, highlighting again that dignity and freedom are two inseparable principles.

As Rodotà has pointed out, the social conception of dignity found in European Constitutions sheds light on the non-abstract nature of this notion, which «finds in the person the place of its determination [...] to enable each one to freely determine his/her own life plan»³⁴. At the same time, such a conception of dignity entails an obligation on states to build and guarantee the necessary conditions for each person to make decisions in conditions of freedom and responsibility³⁵. Such a view on human dignity therefore relates to a more elaborate idea of private autonomy which builds on human rights law, and consequently «goes beyond negative freedom from interference, to place a duty on the state to promote conditions that enable individuals to realize their own conceptions of a worthwhile life»³⁶, in a context – it is important to stress this again – characterized by substantial equality³⁷.

The obligation on states to guarantee that nobody falls below a ‘dignified’

³² *Ibidem*, p. 189.

³³ G. RESTA, *Dignità, Persone, Mercati*, op. cit. p. 12. Our translation in English.

³⁴ S. RODOTÀ, *Il Diritto di avere diritti*, op. cit., p. 234.

³⁵ *Ibidem*.

³⁶ H. COLLINS, *On the (In)compatibility of Human Rights Discourse and Private Law*, in *LSE Law, Society and Economy Working Papers*, 7, 2012, p. 43.

³⁷ S. RODOTÀ, *Il Diritto di avere diritti*, op. cit.

level of existence has also been expressly recognized by national courts. For instance, the Italian Constitutional Court³⁸ and the French Constitutional Court³⁹ similarly affirmed that the principle of human dignity requires that decent housing is guaranteed to all citizens as a constitutional social right⁴⁰. In the same line, the German Federal Constitutional Court, by undermining the reforms of the national labour market introduced in 2005 (the so-called Hartz IV reform), held that that art. 1 of the European Charter «imposes an obligation on the state to provide at least minimal subsistence to every individual».⁴¹ Such an approach has been confirmed by the German Federal Constitutional Court in a recent decision on the constitutionality of welfare sanction (5 November 2019)⁴².

On the basis of this conceptual framework, going back to the specific topic of labour exploitation, the principle of human dignity ensures, in relation to the principle of equality and freedom of self-determination, that all persons must enjoy fundamental rights, regardless of position occupied in the social hierarchy, and have the right to work in conditions that allow them to have a free and dignified life. Decent work, as the International Labour Organization (ILO) highlights in its documents⁴³, refers to employment that contributes to the social and economic stability of workers, and is the foundation of a decent life. From this perspective therefore, the principle of dignity with regard to exploitation entails an obligation of states to guarantee that no person works and lives in exploitative and degrading conditions, and accordingly to prevent persons from being, and making decisions, in situations of vulnerability such as to lead them to 'accept' work in exploitative conditions.

1.2. *Exploitation as Continuum, Vulnerability and Consent*

These considerations lead us to look at the complex notion of vulnerability in relation to labour exploitation, which is in part specular

³⁸ Italian Constitutional Court., decision no. 217, 1988, I.

³⁹ French Constitutional Court, 94-359 DC of 19 January 1995.

⁴⁰ See also G. RESTA, *Dignità, Persone, Mercati*, op. cit. p. 40.

⁴¹ BVerfG, decision of 9 February 2010, in *Entscheidungen des Bundesverfassungsgerichts* 125, pp. 175 ss.

⁴² BVerfG, decision of 5 November 2019, in *Neue Juristische Wochenschrift*, 2019, pp. 3703 ss. See in this regard S. HABERL, *Hartz IV, il sistema delle sanzioni e ciò che il Bundesverfassungsgericht (non) ha detto*, in *DPCE online*, 4, 2020.

⁴³ See ILO's decent work documents available at <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm>.

and opposed to that of social human dignity.

As is known, vulnerability is a contentious notion and has been debated in various disciplines and from different perspectives, ranging from feminist scholars to those within the human rights field⁴⁴. One key contention is that the notion bears the risk of perpetuating stigmatization. Labeling people as ‘belonging to vulnerable groups’ may reinforce marginalization and be disempowering⁴⁵. By questioning the conception of vulnerability as something static or fixed, inherent to specific categories of people, individuals or groups, philosophical and legal scholars, especially feminist scholars⁴⁶, have rightly underlined the idea of vulnerability as a condition of shared humanity, and simultaneously as related to people’s positions in society and in power relations. Such a conception of vulnerability shifts attention to its contextual dimension, and accordingly to an interplay of factors and circumstances that create and/or exacerbate vulnerability. Within such a prism, vulnerability does not preclude a person’s agency/ autonomy. But, instead, it recognizes the ways in which people act (or try to act), negotiate and make their choice within a framework of economic, social, affective and power relationships⁴⁷.

By proposing a taxonomy of different sources of vulnerability, feminist legal and social scholars Mackenzie, Rogers and Dodds⁴⁸ have developed the concept of ‘situational’ vulnerability. This notion sheds light on the social and context specific dimension of vulnerability, that is caused and/or accentuated by personal, social, political, economic or environmental situations of individuals or social groups, including abusive interpersonal and social relationships and sociopolitical oppression or injustice. The

⁴⁴ See C. MACKENZIE - W. ROGERS - S. DODDS (eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy*, Oxford University Press, Oxford, 2014; O. GIOLO - B. PASTORE (eds.), *Vulnerabilità. Analisi multidisciplinare di un concetto*, Carocci editore, Roma, 2018.

⁴⁵ L. PERONI - A. TIMMER, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, in *International Journal of Constitutional Law*, 11(4), 2013, pp. 1056-1085. M. MUSTANIEMI-LAAKSO - M. HEIKKIL - E. DEL GAUDIO - S. KONSTANTIS - M. NAGORE CASAS - D. MORONDO - V.G. HEGDE - G. FINLAY, *The Protection of Vulnerable Individuals in the Context of EU Policies on Border Checks, Asylum and Immigration. Project Frame*. European Commission, 2016.

⁴⁶ Notably, M.A. FINEMAN, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, *Yale Journal of Law and Feminism*, 20, 1, 2008, pp. 177-1911; J. BUTLER, *Precarious Life: The Powers of Mourning and Violence*, Verso, London 2004.

⁴⁷ S. MARCHETTI - L. PALUMBO (eds), *Vulnerability in the Asylum and Protection System in Italy. Legal and Policy Framework and Implementing Practices*, Vulner research report, 2021.

⁴⁸ C. MACKENZIE, -W. ROGERS - S. DODDS, *Introduction: What Is Vulnerability and Why Does It Matter for Moral Theory?*, in C. MACKENZIE - W. ROGERS - S. DODDS (eds.) *Vulnerability: New Essays in Ethics and Feminist Philosophy*, op. cit., pp. 1-29.

category of situational vulnerability highlights «the ways that inequality of power, dependency, capacity, or need render some agents vulnerable to harm or exploitation by others»⁴⁹.

In this light, therefore, vulnerability is conceived as caused or exacerbated by the interplay of personal and structural factors (legal, economic, political, and social elements) rendering some people vulnerable. The latter factors refer to those policies, acts and norms producing structural injustice that – as political theorist and feminist scholar Iris Marion Young has argued – places large categories of persons «under a systematic threat of domination or deprivation of the means to develop and exercise their capacities»⁵⁰. The structural factors include, for instance, migrant policies prioritizing ‘skilled’ migration, as well as family reunification policies providing for strict requirements, including income and housing criteria putting large categories of migrants, especially migrant women, in conditions of general disadvantage and vulnerability.

Therefore, far from being a static, abstract notion, vulnerability is a socially embedded condition, that is variable in its form and its intensity, depending on the social relations and hierarchies of power that characterize the context in which a person is located⁵¹. In this sense, vulnerability is strongly related to the theory of intersectionality, introduced and developed among others by feminist legal scholar Kimberle Crenshaw⁵², as the form and intensity of vulnerability to abuse and exploitation are different according to the gender, class, age, race, nationality, dis/ability, and educational backgrounds of each person.

Looking at the notion of vulnerability in relevant international legal documents, this situational conception of vulnerability, with respect to exploitation, can be found in the definition of position of vulnerability contained in Directive 2011/36 /EU on trafficking. As is known, the

⁴⁹ *Ibidem*, p. 6.

⁵⁰ I.M. YOUNG, *Justice and the Politics of Difference*, Princeton University Press, 1990.

⁵¹ See, on this regard, L. PALUMBO - A. PERA, *Donne migranti e diritto all'unità familiare. Fattori di vulnerabilità e forme di tutela nella giurisprudenza italiana ed europea*, in G. DE MARZO - F. PARISI (eds.), *Diritto e Immigrazione. Un quadro aggiornato delle questioni più attuali e rilevanti*, Il Foro Italiano – LaTribuna, 2021, pp. 253-274; S. MARCHETTI - L. PALUMBO 2021, op. cit.; M.G. GIAMMARINARO - L. PALUMBO, *Vulnerabilità situazionale, genere e diritti umani. Analisi normativa e della giurisprudenza italiana e sovranazionale sullo sfruttamento lavorativo*, in G. GIOFFREDI - V. LORUBBIO - A. PISANO (eds.), *Diritti umani in crisi? Emergenze, disuguaglianze, esclusioni*, Pacini Giuridica, Pisa, 2021, pp. 45-62.

⁵² K. CRENSHAW, *Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, in *University of Chicago Legal Forum*, 1989, pp. 139-167.

‘abuse of a position of vulnerability’ constitutes one of the means of trafficking according to the definition of this offence contained in the UN Palermo Protocol and successively incorporated in both the Council of Europe Convention on Trafficking and EU Directive 2011/36. However, the Palermo Protocol does not include a definition of a ‘position of vulnerability’. This is contained in the Interpretative Note in the *travaux préparatoires* accompanying the Protocol, and has subsequently been integrated into the text of Directive 2011/36/EU, which defines the position of vulnerability as «a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved» (art. 2(2)). Rather than limiting vulnerability to the person’s inherent characteristics, this definition significantly stresses the importance of considering the circumstantial and structural factors that leave a person without any concrete and real alternative but to ‘accept’ being involved in abusive and exploitative relations and conditions.

This conception of vulnerability also emerges in the *Explanatory Report* of the 2005 Council of Europe Convention on Trafficking, which refers to both the personal and context-specific elements of vulnerability – including «insecurity or illegality of the victim’s administrative status, economic dependence or fragile health»⁵³ – explicitly recognizing that certain situations of vulnerability are created or exacerbated by relevant legislation and policies.

Such a situational dimension of vulnerability to exploitation has also been recognized in relevant national and supranational case law,⁵⁴ including the landmark decision of the European Court of Human Rights (ECtHR), *Choudhury and Others v Greece* (2017)⁵⁵, concerning forty-two undocumented migrant workers from Bangladesh who worked on a strawberry farm in Greece in severe degrading and exploitative conditions. In this case, the ECtHR found a violation of article 4(2) (‘Prohibition of slavery and forced labour’) of the European Convention of Human Rights (ECHR), and it paid specific attention in its reasoning to different factors – in particular the condition of the workers as «irregular migrants

⁵³ Council of Europe, *Explanatory Report Beings to the Council of Europe Convention on Action against Trafficking in Human Beings*, 2005, para 83, available at <https://rm.coe.int/16800d3812>

⁵⁴ M.G. GIAMMARINARO - L. PALUMBO, *Vulnerabilità situazionale, genere e diritti umani. Analisi normativa e della giurisprudenza italiana e sovranazionale sullo sfruttamento lavorativo*, op. cit..

⁵⁵ *Choudhury and Others v Greece*, Application no. 21884/15, 30 March 2017.

without resources and at risk of being arrested, detained and deported»⁵⁶ – producing a situation of vulnerability that exposes migrant workers to exploitation.

Central in this regard is the issue of voluntariness and consent. As the ECtHR affirmed in *Chowdury*, where employers abuse their power or take advantage of the vulnerability of workers in order to exploit them, these latter «do not offer themselves for work voluntarily».⁵⁷ The prior consent of the person concerned to abusive conditions is «not sufficient to exclude the characterization of work as forced labour»⁵⁸, as in a situation of vulnerability the person concerned has no concrete alternatives, and therefore no real choice. Thus, in line with international and European legislation on trafficking and forced labour, the ECtHR highlighted that the abuse of power, taking advantage of persons' vulnerability for the purpose of exploitation, excludes voluntariness, even when the person has initially consented⁵⁹.

Yet, difficulties emerge in those cases that do not amount to crimes of forced labour and trafficking and in which, therefore, there are not strong indications that the consent is not genuine. These cases, which are increasingly on the rise in the national labour markets in Europe, include situations where workers 'accept' a deprivation of rights and unfair treatment (such as being underpaid, having not contract and/or living in degrading conditions), because of their position of vulnerability and, therefore, of their weak bargaining power.

Far from being easily solved, the issue at stake here concerns the complex relationships between agency/autonomy of persons, conditions of vulnerability, and consent to forms of exploitation.

As several legal scholars, especially scholars from Critical Legal Studies⁶⁰, have significantly underlined, the persons' behaviours in bargaining, and the equilibrium achieved within the negotiation, depend on the structure of power relationships, on the resources that each one actually has, in a context marked by «class division, patriarchy and racialism»⁶¹. In

⁵⁶ *Ibidem*, para 95.

⁵⁷ *Ibidem*, para 96.

⁵⁸ *Ibidem*.

⁵⁹ This view has been confirmed by the ECtHR in its recent judgement on *Zoletic v. Azerbaijan*, application no. 9626/14, 7 October 2021.

⁶⁰ Seminally, see D. KENNEDY, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, in *Maryland Law Review*, Vol. 41, 4, 1982.

⁶¹ *Ibidem*, p. 566.

this framework, deciding where coercion and unfair pressure ends and freedom begins can be difficult. Even distinguishing wrongful threats from permissible offers might be challenging⁶².

Focusing on the specific conditions of workers, we know that today, especially in developed countries and particularly in Europe, the protection of their rights is committed to collective bargaining, a certain degree of re-distribution and social protection measures. However, in most European countries and everywhere globally, exploitation, including severe exploitation, is part of economic and labour market systems, involving primarily those persons who are in situations of vulnerability – such as many migrants, asylum seekers and refugees – deprived of several (if not, all) rights and social protections, and whose wages are just sufficient to ensure their survival, and eventually the survival of their families.

Now, considering that all forms of labour relations entail some degree of commodification, devaluation and coercive pressure, and may amount to diverse degrees of exploitation⁶³, the point here – as legal scholar Susan Marks has pointed out – «is not that wage-labour is indistinguishable from forced or trafficked labour, still less that the degree and nature of labour exploitation remain always the same, and always objectionable in the same measure. The point is simply that account must be taken of the compulsion that comes not from violence, threats or deceit, but from the limitation of options and the denial of opportunities»⁶⁴. Hence, the point concerns the conditions of vulnerability in which a person finds him/herself and that may strongly affect and limit his/her available alternatives, so that he/she 'accepts' the exploitative job, provided that it enables him/her to realize, at least partially, his/her life (and migration) projects. In such a condition of vulnerability, the persons find themselves facing an 'impossible choice' – to use the words of legal philosopher Eva Foeder Kittay⁶⁵ – between incomparable goods: life (of themselves and of their families) or dignified work; choices that no person should be faced with in a democratic society which should guarantee social human dignity.

On the basis of these considerations, exploitation may be better

⁶² See, for instance, J. MCGREGOR, 1988, *Bargaining Advantages and Coercion in the Market*, in *Philosophy Research Archives*, 14, 1988, pp. 23–50.

⁶³ K. SKRIVANKOVA, *Between decent work and forced labour: examining the continuum of exploitation*, Joseph Rowntree Foundation, London, 2010.

⁶⁴ S. MARKS, *Exploitation as an international legal concept*, op. cit., p. 301.

⁶⁵ E.F. KITTAY, *The Global Heart Transplant and Caring across National Boundaries*, in *South Journal of Philosophy*, Vol. 46, 2008, pp. 138-165.

understood, as some legal scholars⁶⁶ suggest, as a continuum of experiences characterized by an increasing level of unfair treatment, deprivation of rights and restriction of personal autonomy, «ranging from decent work through minor and major labour law violations, to extreme exploitation in the form of forced labour»⁶⁷ or trafficking. Along this continuum, forms of exploitation are linked to the different situations of vulnerabilities, and are characterized – apart from in extreme cases – by combinations of voluntariness and coercion, although to different degrees. Therefore, exploitation also includes cases which, while not necessarily amounting to crimes, are characterized alternatively or cumulatively by harsh or even degrading working and living conditions, low wages, inadequate safety measures, and a lack of basic social protections, especially if involving migrant workers.

Within this continuum, the lines between different forms of exploitation blur. To assess a specific form and degree of exploitation, and accordingly to identify the different lens and legal regimes through which they can be addressed, legal experts and actors should conduct a case-by-case basis assessment, taking into account both individual and external circumstances relevant to a determined situation. In particular, with regard to those cases of exploitation in which evident forms of coercion have not been used, and in which a person has ‘accepted’ unfair working conditions (such as, for instance, being underpaid) due to limitations of alternatives, attention should be devoted to assessing – according to a procedural approach – the conditions in which the person has consented to exploitative work. Therefore, such an assessment should not be limited to analyzing the fairness required in a specific transaction/contractual relationships, but should also focus on examining such a transaction against the «background conditions of fairness»⁶⁸. In other words, it is fundamental to look at the material conditions in which the concerned person gave his/her consent to certain exploitative conditions, examining the interplay of legal, social and economic factors that may have produced or exacerbated his/her situation of vulnerability, preventing her/him from having alternatives to that choice⁶⁹. This assessment should rely on objective indicators which

⁶⁶ K. SKRIVANKOVA, *Between decent work and forced labour: examining the continuum of exploitation*, op. cit.

⁶⁷ *Ibidem*, p. 4.

⁶⁸ V. MANTOVOLAU, *Vulnerability to exploitation is created by law*, in *OpenDemocracy*, 27 November 2020, available at <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/vulnerability-exploitation-created-law/>

⁶⁹ M.G. GIAMMARINARO - L. PALUMBO, *Vulnerabilità situazionale, genere e diritti umani*.

consider the sources of situational vulnerability, including the impact of specific migration and labour regulation policies. This approach was de facto followed by the ECtHR in *Chowdury*, by considering the condition of irregularity as a key source of workers' vulnerability to exploitation. A similar perspective emerges in two recent decisions of the Tribunal of Milan⁷⁰ that have granted humanitarian protection to two asylum seeker victims of labour exploitation in the agri-food sector in Italy. In these cases, in which migrant persons, being asylum seekers, were not in irregular conditions, the judges identified as a crucial element of vulnerability the lack of socio-economic protections preventing these persons from accepting exploitative conditions. As the judge argued in one of the two decisions, the condition of vulnerability of the concerned person «has its roots in the total absence of concrete alternative solutions, given the impossibility of finding a regular job combined with the fear of losing the one found which – although irregular and without the minimum guarantees of protection – allows [him] to survive in an extremely inhuman and degrading context»⁷¹.

On the basis of these considerations, it emerges how the perspective on the situational dimension of vulnerability and its link to exploitation, viewed as a continuum, sheds light on those factors producing a situation of vulnerability in which «labour exploitation becomes the only viable choice in the face of a worse alternative»⁷². In this light, the notion of situational vulnerability is strongly related to the above-discussed notion of social human dignity (see above section 2.1), viewed as the guarantee of those basic conditions allowing a person to freely determine his/her own life project – including making decisions concerning working conditions – in a context of freedom and equality. Indeed, the greater the conditions are for the realization of a person's social dignity, the lower the situations of vulnerability to dynamics of exploitation, and vice versa.

Building on this theoretical framework, and by focusing on the specific case of migrant workers in the agri-food system, the next sections of this paper focus on the main structural factors – including relevant legislation and policies – contributing to create the situations of vulnerability of many

Analisi normativa e della giurisprudenza italiana e sovranazionale sullo sfruttamento lavorativo, op. cit..

⁷⁰ Tribunale di Milano, decision of 12.5.2021, RG. 42440/2019; decision of 12.5.2021, RG. 57114/2018.

⁷¹ Tribunale di Milano, decision of 12.5.2021, RG. 42440/2019, p. 5.

⁷² E. SANTORO, *Vulnerability between political theory and normative texts: a new language to repeat old things or a new tool to problematize differences in social power?*, in *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* (RECHTD) 12(3), 2020, p. 331.

migrant farmworkers exposed to exploitative dynamics, and the impact of the Covid-19 crisis on this. We then explore whether the Covid crisis has contributed to a new institutional attention on preventing situations of vulnerability among migrant workers, strengthening their bargaining power and therefore protecting their fundamental rights.

2. Unfair Models of Production and the Creation of Vulnerability: the Case of Migrant Workers in the Agri-food Sector

Over recent years, many studies have highlighted the legal, economic and social factors that produce the situational vulnerability of migrant workers, exposing them to exploitation and abuse⁷³. Special attention in this scholarship has been paid to the working conditions of migrants in the agri-food sector, which – as already mentioned – constitutes one of the key sectors, in both Southern and Northern European countries, characterized by a significant presence of migrant workers⁷⁴.

Migrant labour has indeed become a structural element in the development of agri-food industries in European countries. This foreign workforce is composed of both EU and non-EU migrant nationals, and includes men and women⁷⁵. While there is a presence of undocumented migrants, non-EU agricultural labourers can also be regular seasonal workers and – especially in some countries such as Italy – asylum seekers and beneficiaries of international protection. This diversification in terms of legal status challenges the idea that labour exploitation occurs mainly in cases of irregular migrants. Indeed, while as stressed above with regard to the *Chowdury* case the condition of irregularity is certainly an element that creates and exacerbates situations of vulnerability, cases of serious exploitation often also involve EU citizens or non-EU migrants in regular conditions⁷⁶.

⁷³ C. COSTELLO - M. FREEDLAND, *Migrants at Work: Immigration and Vulnerability in Labour Law*, Oxford University Press, Oxford 2014; A. CORRADO - F. CARUSO - M. LO CASCIO - M. NORI - L. PALUMBO - A. TRIANDAFYLIDOU, *Is Italian agriculture a 'Pull Factor' for irregular migration – And, if so, why?* op. cit.

⁷⁴ L. PALUMBO - A. CORRADO (Eds), *Are Agri-Food Workers Only Exploited in Southern Europe? Case Studies on Migrant Labour in Germany, the Netherlands, and Sweden*, Open Society Foundations, 2020.

⁷⁵ F. NATALE - S. KALANTARYAN - M. SCIPIONI - A. ALESSANDRINI - A. PASA, *Migration in EU Rural Areas*, EUR 29779 EN, Publications Office of the European Union, Luxembourg, 2019.

⁷⁶ UNODC, *Global Report on Trafficking in Persons 2020*, United Nations publication, 2020.

The hard work and exploitative labour conditions characterizing this sector make EU nationals generally reluctant to work in it. Indeed, migrant farmworkers frequently experience substandard and even severe working conditions. These include long hours, low pay, irregularity in the employment contract, inadequate safety standards, poor accommodation, discrimination and abuse, amounting in some cases to forced labour and trafficking⁷⁷.

One of the main factors driving the recourse to a low-wage, flexible and exploitable migrant labour force in this sector is related to agri-food restructuring processes and imbalances of power in long supply chains, especially price pressure from industry, retailers and international buying groups⁷⁸. In fact, the latter use their oligopolistic market power to impose prices and conditions on farmers. This leads to an unfair distribution of risks, costs and profits along supply chains. Therefore, the margin for farmers across Europe to increase prices on wholesale markets is limited. In this context, most farmers tend to depress the cost of labour by lowering pay and eroding working conditions rather than looking for other strategies that allow them to remain competitive or developing alternative channels or shorter supply chains.

At the same time, this system takes advantage of the situational vulnerability of migrant workers, which is also produced by the inconsistencies of European and national legislation and policies in the field of migration, social and labour rights. As is known, since the 1990s, EU member states have increasingly striven to contain irregular migration while significantly reducing legal migration entry channels, especially for low and medium skilled third country national workers. EU policy making has followed this securitarian and restrictive approach, focusing mainly on highly skilled workers and paying minimal attention to human rights and long-term inclusion⁷⁹. Such an approach has recently been confirmed by the Pact on Migration and Asylum adopted by the European Commission

⁷⁷ A. CORRADO - F. CARUSO - M. LO CASCIO - M. NORI - L. PALUMBO - A. TRIANDAFYLIDOU, *Is Italian agriculture a 'Pull Factor' for irregular migration – And, if so, why?* op. cit.; L. PALUMBO - A. CORRADO, *Are Agri-Food Workers Only Exploited in Southern Europe? Case Studies on Migrant Labour in Germany, the Netherlands, and Sweden*, op. cit.

⁷⁸ A. CORRADO - C. DE CASTRO - D. PERROTTA, *Migration and Agriculture. Mobility and change in the Mediterranean area*, London, Routledge, 2007.

⁷⁹ E. GUILD, *The EU's Internal Market and the Fragmentary Nature of EU Labour Migration*. In C. COSTELLO - M. FREEDMAN (eds.), *Migrants at Work: Immigration and Vulnerability in Labour Law*, OUP, Oxford, 2014.

in September 2020⁸⁰.

In many European countries such as Germany, the Netherlands, Italy and Spain, channels for the admission of seasonal workers have proven unable to meet labour demand in agriculture⁸¹. In Germany for example, bilateral agreements with third countries have not been consistently in place, and when they have been the annual number of admitted workers has often been modest⁸². In the Netherlands, administrative obstacles and related costs prevent employers from applying for the recruitment of third country national seasonal workers⁸³. In Italy, the entry system for foreign workers has proven to be inadequate, and annual quotas for both seasonal and non-seasonal migrant workers are very limited. In Spain, the recruitment system for third-country migrant farmworkers, known as ‘contracts in origin’ or ‘at source’ (*contratación en origen*), has experienced a decrease in quotas and mainly applies in Huelva and Lleida through bilateral agreements with Morocco.

In addition to establishing inadequate entry channels, legislation and policies regarding seasonal workers – as several social and legal scholars have underlined⁸⁴ – provide migrants with limited access to rights and protection, and tend to accentuate workers’ dependency on employers, leading them to be more ‘docile’ and willing to accept abusive work conditions⁸⁵.

On the other hand, the lack of adequate national entry systems for foreign seasonal workers has been offset in many European countries, not only by undocumented migrants, but also by Eastern EU nationals (especially Romanians and Poles), and non-EU refugees and asylum seekers. In this context, the migrants’ different situations of vulnerability – with respect, for instance, to legal status and gender – seem to translate

⁸⁰ M. BORRACETTI, *Il nuovo Patto europeo sull’immigrazione e l’asilo: continuità o discontinuità col passato?*, in *Diritto, Immigrazione e Cittadinanza*, 1, 2021, pp. 1-27.

⁸¹ L. PALUMBO - A. CORRADO, *Are Agri-Food Workers Only Exploited in Southern Europe? Case Studies on Migrant Labour in Germany, the Netherlands, and Sweden*, op. cit.

⁸² *Ibidem*.

⁸³ K. A. SIEGMANN - T. WILLIAMS, *The Netherlands*, in L. PALUMBO - A. CORRADO, *Are Agri-Food Workers Only Exploited in Southern Europe? Case Studies on Migrant Labour in Germany, the Netherlands, and Sweden*, op. cit..

⁸⁴ See for instance, C. RIJKEN - T. DE LANGE (eds.), *Towards a Decent Labour Market for Low-Waged Migrant Workers*. Amsterdam, Amsterdam University Pres, 2018.

⁸⁵ E. HELLIO, “*They Know That You’ll Leave, Like a Dog Moving Onto the Next Bin*”: *Undocumented Male and Seasonal Contracted Female Workers in the Agricultural Labour Market of Huelva, Spain*, in A. CORRADO - C. DE CASTRO - D. PERROTTA, *Migration and Agriculture. Mobility and change in the Mediterranean area*, op. cit., pp. 198-214.

into a variety of possibilities for their exploitation⁸⁶. At the same time, the specific features of agricultural work – such as seasonality and high rates of irregularity – have contributed to exacerbating the position of vulnerability of migrant workers⁸⁷.

A further key problematic issue is the competition on labour costs both within the European internal market and on the global market⁸⁸. Mainly due to differences in pay levels and employment protection, labour costs vary greatly between EU member states, and businesses use this difference to improve their competitiveness, driving down wages and employment protection (including accommodation conditions). In a context of flexibilization and deregulation of the labour market, there is significant recourse to practices – including through subcontracting and posted work – aimed at hiring cheap labour, circumventing relevant EU and national legislation, and profiting from loopholes and ambiguities in laws. For instance, some research on migrant farmworkers in the Netherlands shows that a common technique is to create companies or affiliates in Member States where labour costs are low, such as Poland⁸⁹. These practices cause unfair competition and social dumping dynamics within the European internal markets and entail a serious risk of eroding workers' rights. Such a dynamics of social dumping has also been fostered in relevant cases of the Court of Justice of the European Union (CJEU) on posted work⁹⁰, such as in the *Laval* case (no. C-341/05), which subordinated the protection of fundamental rights to the functioning of the internal market.

In this scenario, indirect employment through agencies plays a crucial role, providing workers with staggered economic and social entitlements, and accordingly increasing their vulnerability⁹¹. Moreover, the recourse to

⁸⁶ L. PALUMBO - A. SCIURBA, *The vulnerability to exploitation of women migrant workers in agriculture in the EU: The need for a human rights and gender based approach*. Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, 2018.

⁸⁷ N. DINES - E. RIGO, *Postcolonial Citizenship Between Representation, Borders and the 'Refugeeization' of the Workforce: Migrant Agricultural Labour in the Italian Mezzogiorno*, in S. PONZANESI - G. COLPANI (eds.), *Postcolonial Transition in Europe: Contexts, Practices and Politics*, Rowman and Littlefield, London 2015, pp. 151-173.

⁸⁸ H. VERSCHUEREN, *The role and limits of European social security coordination in guaranteeing migrants social benefits*, in *European Journal of Social Security*, Vol. 22, 4, 2020.

⁸⁹ K.A. SIEGMANN - T. WILLIAMS, *The Netherlands*, op. cit.

⁹⁰ See S. SCIARRA, *L'Europa e il lavoro. Solidarietà e conflitto in tempi di crisi*, Editori Laterza, Roma-Bari, 2013.

⁹¹ Y. MOLINERO GERBEAU, *La privatización de los programas de migración temporal en España como efecto poscrisis*. *Anuario CIDOB de la Inmigración*, 2018, pp. 284-306.

these agencies makes monitoring and enforcement more difficult. As the case of the berry-picking industry in Northern Sweden reveals⁹², indirect employment via agencies also involves non-EU migrant workers (mainly Thai) who often work in exploitative conditions.

Prevailing gender norms aggravate the dynamics of exploitation of women workers, especially migrant women workers, in the agri-food sector. Indeed, migrant women farmworkers often receive lower wages than male farmworkers and tend to be more involved in irregular work. In countries such as Italy, they are often excluded from maternity and unemployment benefits⁹³. As research carried out in the Netherlands has shown⁹⁴, Polish women farmworkers with family responsibilities often have difficulties escaping their employers' demands. The fear of losing their jobs, and thus being unable to support their children financially, prevents them from reporting abuse. Similar dynamics occur in Italy and Spain. In the latter in particular, these are clearly facilitated by institutional policies. Indeed, within the above-mentioned 'contracts at source' system, the fact of having left children to be cared for in their country of origin constitutes a formal prerequisite for women's selection, as it guarantees their return to their countries at the end of the harvest. Under this system therefore, care and family responsibilities have become formal elements used for the recruitment of a flexible, 'docile' and, accordingly, exploitable feminized labour force⁹⁵. Research on Italy and Spain has also highlighted how in circumstances of significant dependency on employers or intermediaries, women's labour exploitation in the agricultural sector is often accompanied by sexual blackmail and abuse⁹⁶.

On the basis of these considerations, it clearly emerges how the interplay between value chain dynamics in the agri-food systems and the inconsistencies of EU and national legislation and policies on migration and labour protection have contributed to undermining the rights of migrant workers, producing and exacerbating their situations of vulnerability and resulting in a significantly weak bargaining position. Far from guaranteeing that nobody falls below a 'dignified' level of existence, EU and member

⁹² L. PALUMBO - A. CORRADO, *Are Agri-Food Workers Only Exploited in Southern Europe? Case Studies on Migrant Labour in Germany, the Netherlands, and Sweden*, op. cit.

⁹³ L. PALUMBO - A. SCIURBA, *The vulnerability to exploitation of women migrant workers in agriculture in the EU: The need for a human rights and gender based approach*, op. cit.

⁹⁴ K.A. SIEGMANN - T. WILLIAMS, *The Netherlands*, op. cit..

⁹⁵ E. HELLIO, "They Know That You'll Leave, Like a Dog Moving Onto the Next Bin", op. cit..

⁹⁶ *Ibidem*. See also L. PALUMBO - A. SCIURBA, *The vulnerability to exploitation of women migrant workers in agriculture in the EU: The need for a human rights and gender based approach*, op. cit.

states' relevant policies have contributed in this way to creating structural injustices⁹⁷ that facilitate the exploitation of migrant workers by private actors.

4. The EU and National Legal Responses to Address the Situations of Vulnerability of Migrant Farmworkers during the Pandemic

The global Covid-19 pandemic has sharply disclosed and, simultaneously, exacerbated the dynamics and factors illustrated in Section 3. In particular, while the pandemic has put the spotlight on the essential character of farm work and the importance of the agri-food sector overall, it has also revealed the limits of the legislative and regulatory framework that governs migration and labour mobility in Europe, and the real praxis of employment inclusion of migrant workers, especially in some key sectors such as agriculture⁹⁸. The pandemic has also shown the limits of long supply chains, including in terms of price distortions, unfair competition and distribution dynamics. Indeed, since the outbreak of the Covid-19 emergency, the border restrictions and lockdown – immobilizing thousands of foreign seasonal workers, especially from Eastern Europe – have led national farmers' organizations to sound the alarm on labour shortages, especially of Eastern European workers (mainly Romanians and Poles), highlighting the agri-food sector's dependence on cheap and flexible migrant labour.

At the same time, the pandemic has further aggravated the situational vulnerability of many migrant workers employed in the agri-food system, as it has disproportionately impacted people most affected by discrimination and social exclusion⁹⁹. Migrant farmworkers have reported wage deductions and poor housing conditions, as well as other violations of their rights¹⁰⁰. In countries such as Italy, Spain and Germany, the poor and degrading housing conditions of migrant farmworkers have raised even

⁹⁷ V. MANTOUVALOU, *Structural Injustice and the Human Rights of Workers*, in *Current Legal Problems*, Vol. 0, 2020, pp. 1-29.

⁹⁸ ISMU, *Libro verde sul governo delle migrazioni economiche*, 2021.

⁹⁹ M.G. GIAMMARINARO - L. PALUMBO, *Covid-19 and Inequalities: Protecting the human rights of migrants in a time of pandemic*, in *Migration Policy Practice*, X(2 April-June), 2020, pp. 21-26.

¹⁰⁰ L. PALUMBO - A. CORRADO, *Covid-19, Agri-food systems, and migrant labour. The situation in Germany, Italy, the Netherlands, Spain, and Sweden*, op. cit..

more concern at this time of health emergency, in terms of the dramatic consequences for both individuals and public health¹⁰¹. Moreover, the decrease in seasonal workers has resulted, in some contexts, in harder and more abusive working conditions¹⁰².

Since the beginning of the health emergency caused by the pandemic, EU institutions and national governments have adopted several measures to simultaneously address the effects of the Covid-19 crisis in core sectors (such as agri-food), especially with regard to labour shortages, and the conditions of situational vulnerability of workers, in particular migrant workers, employed in these sectors, who have been recognized as 'key/essential' workers.

In early 2020 the EU Commission issued Guidelines¹⁰³ on the free movement of workers during the crisis to facilitate the mobility of frontier workers, especially in the food and health sectors. This document was intended to guarantee effective border management to protect public health while preserving the integrity of the internal market, ensuring continued professional activity. However, the protection of rights – in particular the right to health – of concerned workers such as seasonal workers seemed to be overlooked. Indeed, the document only goes as far as to say that «Member States should also communicate to the employers the necessity to provide for adequate health and safety protection»¹⁰⁴. In July 2020, a Resolution of the European Parliament on the protection of seasonal and cross border workers during Covid-19¹⁰⁵ called attention to the safeguarding of workers' rights, highlighting the need to adopt structural interventions to strengthen wages and labour rights, ensure decent living conditions, develop welfare services and tackle subcontracting. Subsequently, in September 2020, the European Commission published its New Pact on Migration and Asylum¹⁰⁶, proclaiming a «fresh start on migration in Europe», by adopting a «human and humane approach». However, de facto the Pact pays minimal attention to human rights and

¹⁰¹ A. CORRADO - L. PALUMBO, *Essential Farmworkers and the Pandemic Crisis: Migrant Labour Conditions, and Legal and Political Responses in Italy and Spain*, op. cit.

¹⁰² L. PALUMBO - A. CORRADO, *Covid-19, Agri-food systems, and migrant labour. The situation in Germany, Italy, the Netherlands, Spain, and Sweden*, op. cit..

¹⁰³ Communication from the Commission, *Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak 2020/C 102 I/03*.

¹⁰⁴ *Ibidem*, para. 9

¹⁰⁵ European Parliament resolution of 19 June 2020 on *European protection of cross-border and seasonal workers in the context of the COVID-19 crisis* (2020/2664(RSP)).

¹⁰⁶ Available at https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en

legal paths for labour migration, and does not lead to any significant change in EU migration policies, especially with regard to low and medium skilled migrant workers¹⁰⁷. In particular, since the adoption of the Pact, an agreement on the EU Agency on Asylum has been made and there has also been an agreement on new rules for the EU Blue Card Directive (Directive 2009/50/EC)¹⁰⁸. Furthermore, the European Commission has adopted a renewed EU action plan against migrant smuggling¹⁰⁹ and a Communication on the application of the above-mentioned Employers Sanction Directive 2009/52¹¹⁰. However, far from specifically addressing the protection of migrants' rights, most of these actions are mainly aimed at limiting and addressing irregular migration, without focusing on creating and supporting safe and regular routes for labour migration, including for lower-skilled workers, or revising relevant Directives, such as the Seasonal Workers Directive 2014/36/EU¹¹¹ to strengthen workers' access to rights and their protection.

It is worth mentioning that over the last two years there have also been EU initiatives that, although beginning development before the pandemic, have been adopted and/or concretely debated and negotiated during the Covid crisis, marking an important step forward for migrant workers, in particular for the rights of farmworkers. These initiatives include, for instance, the adoption of a social conditionality mechanism in the Common Agricultural Policy (CAP), making CAP payments conditional on respect for labour standards. In addition, in October 2020 the European Commission adopted a proposal for a Directive on adequate minimum wages¹¹², which could contribute to possibly levelling down the wage competition between member states, especially in sectors such

¹⁰⁷ M. BORRACCETTI, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato?*, op. cit..

¹⁰⁸ In particular, changing employer will become easier, which reduces the migrant's dependence on any single employer.

¹⁰⁹ See in this regard https://ec.europa.eu/home-affairs/renewed-eu-action-plan-against-migrant-smuggling-2021-2025-com-2021-591_en

¹¹⁰ See *Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, COM (2021), 592, final.

¹¹¹ *Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers*.

¹¹² EUROPEAN COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on Adequate Minimum Wages in the European Union*, COM(2020) 682 final.

as the agri-food industry, in which such competition is strongly felt¹¹³. Furthermore, currently there are negotiations underway for the adoption of an EU Directive on mandatory human rights and environmental due diligence¹¹⁴. By reflecting relevant national laws on due diligences¹¹⁵, this Directive should introduce a corporate duty to respect human rights and environmental standards, and require companies and financial institutions to identify, prevent and account for abuses in their domestic and global activities, products, services and supply chains within and outside the EU. The adoption of this Directive, by leading to a harmonization of laws across EU Member States, can contribute to creating a level playing field for all actors, in which the protection of human rights and the environment is mandatory. Lastly, at time of writing, the European Commission has adopted an important Communication on decent work worldwide for a global just transition and a sustainable recovery¹¹⁶, aimed to strengthening EU efforts to promote decent work «at the heart of a just transition and an inclusive, sustainable and resilient recovery from the pandemic»¹¹⁷. Initiatives include, among others, preparing new legislation to ban products linked to forced labour from entering the EU.

The above illustrated EU responses and interventions have in part fostered, and at the same time reflected, Member States' legal and policy interventions. Indeed, in parallel to the EU actions, over the course of 2020 and 2021, several EU countries have adopted different legal and policy responses to sustain the agri-food sector, and to facilitate the mobility and recruitment of seasonal migrant workers and guarantee them adequate and safe services during the pandemic. For example, Austria and Germany have admitted migrants for farm and care work, exempting them from international travel bans, following the paths indicated by the above-mentioned Guidelines of the European Commission issued in March 2020. In particular, Germany was one of the first European countries to adopt controversial measures such as the establishment of flights for

¹¹³ L. PALUMBO - A. CORRADO, *Are Agri-Food Workers Only Exploited in Southern Europe? Case Studies on Migrant Labour in Germany, the Netherlands, and Sweden*, op. cit.

¹¹⁴ EUROPEAN COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM (2022), 71 final

¹¹⁵ The UK Modern Slavery Act (2015), the French Duty of Care Act (2017) and the Dutch Child Labor Due Diligence Law (2020).

¹¹⁶ *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery*, COM (2022) 66 final

¹¹⁷ *Ibidem* p. 3

seasonal workers coming from Poland, Romania and Bulgaria and subject to a strict hygiene protocol¹¹⁸. Similar flights have been arranged in Italy involving seasonal workers from Morocco, and in Spain involving seasonal workers from Uruguay¹¹⁹. Being in line with the market-based approach of the Guidelines of the European Commission, these national interventions have followed a utilitarian approach in which the protection of the rights of workers, including their right to health, has been subordinated to the needs of production in core sectors, such as the agri-food sector. Indeed, in all countries, these initiatives have been criticized for numerous violations of hygiene regulations and distance requirements during flights and during pick-up and transport to the farms¹²⁰.

EU countries such as Portugal, Spain and Italy have also adopted measures aimed at ensuring and/or providing conditions of regularity to migrant persons, especially essential workers during the Covid-19 crisis. In particular, Italy has adopted a regularization scheme (*Decreto Rilancio* no. 34 of 19/05/2020 converted into Law no. 77 of 17 July 2020) applying only to migrants working in the agri-food and domestic/care work sectors. Although this regularisation could be considered a step forward, significant inadequacies have limited its impact, especially on the agricultural sector, resulting in a sort of failure¹²¹. In Spain, the government has adopted measures to prevent targeted migrant workers from finding themselves in a condition of irregularity due to public administration delays or difficulties in renewing residence permits during the pandemic, with special attention paid to the agricultural sector (in particular, *Real Decreto-ley* (RD) no. 13/2020, of 7 April 2020, and *Orden* SND/421/2020, of 18 May 2020; and RD 19/2020 of 26 May 2020¹²²). In addition, in Spain, the government has rolled out specific

¹¹⁸ Federal Ministry of the Interior/Federal Ministry of Food and Agriculture (2020), Concept paper on seasonal workers with regard to health protection [Coronavirus (SARS-CoV-2)] of 2 April 2020.

¹¹⁹ See A. CORRADO - L. PALUMBO, *Essential Farmworkers and the Pandemic Crisis: Migrant Labour Conditions, and Legal and Political Responses in Italy and Spain*, op. cit.

¹²⁰ See for instance A. KÜHNEL, *Erntehelfer in der Corona-Krise: Ausgebeutete Retter*. In *Deutsche Welle* of 11 May 2020 (available at <https://www.dw.com/de/covid-19-erntehelfer-in-der-corona-krise-helden-oder-verbrecher/a-53395194>); Deutscher Bundestag, plenary protocol 19/159, 2020, pp. 19720-19723.

¹²¹ See A. CORRADO - L. PALUMBO, *Essential Farmworkers and the Pandemic Crisis: Migrant Labour Conditions, and Legal and Political Responses in Italy and Spain*, op. cit.

¹²² RD 19/2020 adopted in May 2020 allowed migrants employed in other sectors whose jobs had been affected by Covid-19 crisis to seek employment in agriculture. Furthermore, this RD provided a residence and work permit for two years (with a possible renewal of

short-term social measures (*Instrucciones*) to stop more migrants falling into undocumented status. Income thresholds and other requirements have been lowered to facilitate access to permit renewals, family reunification (*Instrucciones* DGM 4/2020), and temporary residence permits based on social integration (*arraigo social*) (*Instrucciones* DGM 6/2020)¹²³.

These regularization actions constitute undoubtedly important measures. However, they have primarily consisted of temporary and (especially in the case of Italy) selective regularization, aimed mainly at keeping the business model intact and sales prices stable in key sectors, and then, as in the Italian case, at reducing the number of undocumented migrant workers or, as in the case of Spain, at preventing migrants' condition of irregularity. While it is true that in Spain there have been some tentative steps towards more longer-term solutions, as in the case of measures for young third-country nationals, and stronger social support, even in this country, as in other European countries, including for instance Italy and Germany, the question of a profound change in migration policies and relevant actions in terms of protection of fundamental human rights, and in particular migrants' rights, have remained unaddressed.

However, some differences have emerged in the national responses addressing the protection of labour rights and value chain dynamics in agri-food systems. For example, Germany introduced important provisions concerning the meat industry through the adoption, in December 2020, of the Occupational Health and Safety Control Act (*Arbeitsschutzkontrollgesetz*), which was intended to 'clean up' abusive practices around subcontracted work in the meat industry¹²⁴. These provide for, among other things, the inclusion of migrant workers in the German social security system, digital recording of working hours, the full assumption of the costs for working materials by the employer, and regular inspections by the authorities. However, none of these reforms include the agricultural and horticultural sectors, and therefore do not address the precarious and vulnerable condition of many workers in these sectors.

In Spain, the Government has instead established a new increase in the minimum wage in agriculture and strengthened labour inspections

two more years and without sectoral limits) to young third-country nationals who obtained their first work contract thanks to the measure on work flexibility in the agricultural sector. This would allow these young migrants to potentially access long-term residence.

¹²³ Residence permits have been also renewed for those who are unemployed or receiving income support or the minimum living income, and for those who depend on their families.

¹²⁴ Deutscher Bundestag, plenary protocol 19/201, 2020, pp. 25240-25241.

in the countryside.¹²⁵ Even so, few interventions have been made in terms, for instance, of providing migrant farmworkers with adequate accommodation. On the other hand, important legislative provisions concerning value chain dynamics in the agri-food sectors have been adopted. In particular, between February and June 2020 Food Chain Act no. 12 of 2013 (*Ley de la Cadena Alimentaria*) was amended in line with EU Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. Urgent measures on agriculture and food were introduced by the Royal Decree Law RD 5/2020 issued in February 2020, and on the 13 November 2020 the Government approved a Draft Law no. 36-1 amending Law 12/2013 of 2 August on measures to improve the functioning of the food supply chain¹²⁶. These urgent measures made contracts obligatory in all transactions between producers and other actors in the chain, and prohibited sales at a loss and misleading offers at points of sale.

In Italy, the above-mentioned 2020 Relaunch Decree (*Decreto Rilancio*), under article 103, also provided that competent national and regional authorities adopt – including through the implementation of the measures established by the 2020–2022 national Plan against exploitation in the agricultural sector and illegal gang mastering – interventions and actions to guarantee adequate and safe accommodation and services, as well as to combat undeclared work and exploitation. These measures should also be adopted in accordance with the actions provided by Law no. 199/2016 addressing labour exploitation and illegal gang mastering¹²⁷, which constitutes an important milestone in the fight against exploitation but is still inadequately implemented, especially in respect to the development of the Network of Quality Agricultural Work (*Rete del lavoro agricolo di qualità*) at national and local levels¹²⁸. However, at time of writing, in practice no structural interventions have been adopted to support the effective implementation of specific provisions concerning the enforcement of labour rights and workers' transport and accommodation.

¹²⁵ I. LEÓN, *El campo pide el cese de Yolanda Díaz tras enviar inspectores de trabajo en busca de 'esclavitud'*, in *El Español*. May 15. 2020.

¹²⁶ See A. CORRADO - L. PALUMBO, *Essential Farmworkers and the Pandemic Crisis: Migrant Labour Conditions, and Legal and Political Responses in Italy and Spain*, op. cit..

¹²⁷ Legge 29 ottobre 2016, n. 199 *Disposizioni in materia di contrasto ai fenomeni del lavoro nero, dello sfruttamento del lavoro in agricoltura e di riallineamento retributivo nel settore agricolo*.

¹²⁸ A. CORRADO, ET AL., *Is Italian agriculture a 'Pull Factor' for irregular migration – And, if so, why?*, op. cit.

Indeed, so far, only emergency-based interventions have been developed in a few rural areas of Southern Italy, providing migrant workers in the informal settlements with water, food, health and legal assistance, and temporary housing structures. Lastly, regarding actions concerning value chain dynamics, in April 2021, the Italian Parliament approved Law no. 53/2021 (so-called 2021 European Delegation Act) which delegates the Government to transpose EU Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (art. 7). Yet, this Act has inadequately (and with a significant delay) transposed Directive 2019/633/EU establishing provisions that seem to be in contrast with the main approach of such an EU instrument¹²⁹.

Lastly, regarding access to social benefits, there has been significant national case law that has marked an important step forward in the recognition and protection of migrants' fundamental rights. For instance, in Italy, some local Civil Tribunals have recognized the right to essential services and benefits (such as food vouchers) of migrant persons, including undocumented migrants, during the current health emergency¹³⁰. In particular, the Tribunal of Rome¹³¹ has recognized the right to food vouchers of undocumented migrants, highlighting that the only criterion for providing this benefit is the condition of vulnerability and, therefore, the needs of a person. The food voucher – as the judge argued – «has been established in the current health emergency to guarantee the most vulnerable people the opportunity to satisfy a primary need and a fundamental right such as the right to food»,¹³² which cannot be violated and belongs to all people as such, regardless of their legal-administrative status. In line with this perspective aimed at protecting fundamental rights, the Administrative Court of Huelva (decision No. 345/2020) addressed the degrading living conditions of migrant farmworkers during the lockdown and pandemic crisis, by allowing migrants living in informal settlements to register in the Municipality of Lepe (*empadronamiento*). This allowed irregular migrants access to citizens' rights and, at the same time, initiate

¹²⁹ D. DONGO, *Pratiche commerciali sleali e legge di delegazione europea, analisi critica*, in *GIFT*, 2021.

¹³⁰ M.G. GIAMMARINARO - L. PALUMBO, *Covid-19 and Inequalities: Protecting the human rights of migrants in a time of pandemic*, op. cit.

¹³¹ Tribunale di Roma, decision of 22 April 2020, RG n. 18957/2020. See, in this regard, E. SANTORO, *Buoni spesa: un diritto fondamentale che non ammette discriminazioni di sorta*, in *ADIR- l'Altro Diritto*, 2020, available at <http://www.adir.unifi.it/odv/adirmigranti/buoni-spesa-diritto-fondamentale/>

¹³² Tribunale di Roma, decision of 22 April 2020, RG n. 18957/2020, p. 9.

a process of regularization based on social integration (*arraigo social*)¹³³. By reaffirming the principles of equality and non-discrimination, and the universalistic character of human rights, such as the rights to food and health, these court decisions have disclosed that a number of fundamental rights are at stake regarding the impact of emergency measures to contain and address the pandemic.

In this scenario, the access of migrants, refugees and asylum seekers to the anti-Covid-19 vaccination campaign is certainly another key issue. In most European countries, Covid-19 vaccination programs do not make any specific reference to migrants¹³⁴. Considering that access to health assistance is often problematic for migrants, especially for those who are in a condition of irregularity, this oversight in vaccination plans is a significant limitation. Indeed, in many EU countries, undocumented migrants risk immigration sanctions – detention and deportation – if they register for the vaccine¹³⁵. Significantly, in Spain, the national vaccination strategy clearly states that vaccination should be applied to socially, economically and occupationally vulnerable groups, such as homeless people, people in the horticultural sector and undocumented migrants. However, in the beginning migrant agricultural workers were not prioritized in the vaccination process. As agricultural seasons started, employers requested from the Government specific programs to prioritize the vaccination of these workers. In April 2021, some changes were managed and agricultural workers became a priority group, revealing once again the prevalence of a utilitarian/market logic over the protection of fundamental rights, such as the right to health, instead of the other way around¹³⁶.

5. *A new push for the protection of human rights?*

It might be useful to briefly recapitulate before concluding. We began this paper by unpacking the legal conception of labour exploitation. In

¹³³ P. SAINZ, *La Justicia obliga al Ayuntamiento de Lepe a admitir el empadronamiento en chabolas*, in *El Salto*, November 14, 2020.

¹³⁴ PICUM, *The Covid-19 Vaccines and Undocumented Migrants: What Are European Countries Doing?*, available at <https://picum.org/covid-19-vaccines-undocumented-migrants-europe/>

¹³⁵ *Ibidem*.

¹³⁶ A. CORRADO - L. PALUMBO, *Essential Farmworkers and the Pandemic Crisis: Migrant Labour Conditions, and Legal and Political Responses in Italy and Spain*, op. cit.

particular, we explored the relationship between exploitation and human dignity, seeing this latter notion in its social dimension and not only as an innate quality of the person. In this light, as Rodotà has pointed out, human dignity is viewed as a guarantee of minimum living conditions that allow a person a dignified life¹³⁷. Such a social conception of dignity – which sheds light on the material conditions in which persons act and make choices – entails, in turn, an obligation on states to guarantee that each person makes their own decisions in conditions of freedom and responsibility, and, accordingly, to guarantee that nobody lives and works in exploitative and degrading conditions. Along this perspective, we then focused on the related notion of situational vulnerability, highlighting how this notion brings us to focus on the interplay of individual and structural factors (legal, social and economic factors) creating those conditions of vulnerability where the person does not have the possibility to freely determine his/her own life project, and where his/her only alternative is to ‘accept’ abusive working conditions.

Building on this conceptual framework, and by considering the specific case of migrant workers employed in the agri-food sector as emblematic, we successively focused on those legal, economic and social factors contributing to producing migrants’ situations of vulnerability to exploitation. These factors include value chain dynamics in the agri-food system and the inconsistencies of EU and national legislation and policies on migration and labour and social protection. We highlighted the impact of the Covid-19 crisis in exacerbating these conditions of vulnerability and in sharply revealing the contradictions of systems, such as agri-food, whose functioning depends on the position of vulnerability of workers, especially of migrant persons. In fact, the pandemic has clearly shown the consequences of inadequate and restrictive EU and national migration policies (especially labour migration policies) and, in general, the lack of a uniform approach by the EU and member states in the management of intra and extra-European mobility, revealing the costs that this situation produces on the rights of migrants, as well as on the sustainability of the European social model and on resilience in emergency situations¹³⁸.

In view of all these considerations, and on the basis of the analysis of the EU and national legal and policy initiatives adopted to address the protection of migrants’ rights during the pandemic, is it possible to argue that the current health emergency caused by Covid-19 has led to a new

¹³⁷ S. RODOTÀ, *Il Diritto di avere diritti*, op. cit.

¹³⁸ ISMU, *Libro verde sul governo delle migrazioni economiche*, op. cit.

European and national push to revise dominant socio-economic models of production and, accordingly, to enforce human rights – and in particular migrants’ rights – by challenging the dominant market based approach that in the name of productivity has progressively dried out fundamental rights? Or instead, has the emergency caused by Covid-19 only contributed to fostering and exacerbating social inequalities?

To answer these questions is not an easy task, and probably it is too early to provide for an exhaustive response. Yet, on the basis of our analysis, it is possible to offer some critical remarks concerning the main approach/orientation.

As we have highlighted, since the outbreak of the health emergency a clear tension has arisen between limiting the spread of the pandemic through mobility restrictions, on the one hand, and addressing foreign labour shortages (particularly in core sectors) and protecting migrants’ situations of vulnerability, on the other. In this context, there have been important national initiatives and responses, including some significant decisions of national civil courts, aimed at recognizing and protecting the fundamental rights of persons in conditions of vulnerability, such as migrants, and recognizing the essential role of farmworkers. However, in many European countries the situations of vulnerability of migrants have been addressed by mainly implementing emergency and short-term legislative and policy measures to mitigate the effects of the pandemic and provide them with some degree of social protection and with temporary residence permits. Nothing has been done in terms of profound change of migration policies. Little has been done in terms of structural interventions supporting, for instance, the effective implementation of specific provisions concerning the enforcement of labour rights and workers’ transport and accommodation. All this has highlighted a prevailing, utilitarian/economic logic behind the measures adopted during pandemic, aimed at responding primarily to market needs and pressures rather than the declared purposes of the protection of vulnerable people, especially migrant persons, and their right to health.

The EU approach in part both fosters and reflects this orientation, echoing the need of Member States to protect their exclusive competences in the field of regular migration, welfare measures and social-related issues. For instance, as we have underlined, the EU Pact on Migration and Asylum has not led to a change in the paradigms of migration policies, which still rely on a securitarian and restrictive approach. This trend has recently been exacerbated by a new pressure from many European countries to build walls

and physical barriers to limit and contain migration¹³⁹, including so-called ‘forced migration’ – actions that clearly go in the opposite direction of the idea of a new EU and national drive towards a stronger social, solidarity and human rights-based approach.

It is also true that over the last two years there have been other important EU initiatives, contributing to the strengthening its social dimension. These include – as we have underlined – the reform of the Common Agricultural Policy (CAP), which has approved a social conditionality mechanism, making CAP payments conditional on respect for labour standards, the negotiation for the adoption of a Directive on Minimum Wage and an EU mandatory Human Rights and Environmental Due Diligence (mDD) legislation, as well as the recent adoption of the European Commission on Decent Work. All these actions constitute important steps for the protection of social and labour rights, and in particular for a new drive, at EU and national levels, towards a more rights-complaint, sustainable and greener agri-food system.

However, this response is not enough. A more profound change on European and national legal and political frameworks on migration, labour and social-related issues is necessary.

Since its beginning, the Covid-19 pandemic appeared as an unprecedented opportunity to rebuild social and political framework and values undermined by the neoliberal economic paradigm¹⁴⁰. The recognition that ‘no one is saved alone’ (*nessuno si salva da solo*) seemed to entail a revision of national and European social and economic models, putting at the centre the principles of social dignity, solidarity, and a relational conception of freedom¹⁴¹. Yet, as EU and national initiatives to address situations of vulnerability in the agri-food system clearly show, while important interventions have been adopted, a merely reparative response, especially at national level, seems to have prevailed again, leaving untouched the structural factors producing and intensifying social and economic inequalities.

In contrast to this, the momentum spurred by the Covid-19 crisis and

¹³⁹ C. PITCHERS, *Should Brussels fund border walls at EU frontiers to stop migrants?*, in *Euronews*, 8 November 2021 available at <https://www.euronews.com/my-europe/2021/11/08/should-brussels-fund-border-walls-at-eu-frontiers>

¹⁴⁰ A. SOMMA, *Diritto e capitalismo. Leggi dello Stato e leggi del mercato nella costruzione della soggettività neoliberale*, in M.G. BERNARDINI - O. GIOLO (eds.), *Le teorie critiche del diritto*, Pacini Giuridica, Firenze, 2017.

¹⁴¹ A. PASTORE, *Soggettività giuridica e vulnerabilità*, in O. GIOLO - B. PASTORE (eds.), *Vulnerabilità. Analisi multidisciplinare di un concetto*, op. cit., pp. 127-146.

all the inequalities and discriminations that the pandemic has made evident and exacerbated, should be inducing the adoption of structural interventions to overhaul a system that takes advantage of – and simultaneously engenders – the vulnerability of persons, especially of migrant workers. These interventions should be aimed, among other things, at: creating safe and legal entry routes for low and medium-skilled workers and supporting their social and labour inclusion on a long-term perspective; promoting fair and sustainable supply chains by ensuring that businesses effectively implement both human rights and environmental due diligence; fostering the strengthening of the enforcement of labour rights – for instance, by effectively implementing the new CAP’s social conditionality mechanism at national level; and, more generally, guaranteeing migrant workers the conditions to have a free and dignified existence, for instance by ensuring them the right to social and housing assistance in accordance with the EU Charter of Fundamental Rights (in particular article 34 (3)). Only by moving in this direction will we avoid situations where some persons accept, through ‘willful coercion’¹⁴², abusive and exploitative working conditions.

However, at time of writing, the path towards these goals seems still to be long and tortuous.

ABSTRACT

Since its outbreak, the COVID-19 crisis has sharply exacerbated the structural inequalities that characterize the socioeconomic systems of European Union (EU) countries, disproportionately impacting people most affected by discrimination and social exclusion. The Covid-19 crisis has also brought under the spotlight the significant role of migrant workers in core sectors – such as the agri-food sector – disclosing how they are fundamental in the economic and societal functioning of EU countries. At the same time, the pandemic has sharply disclosed the limits of long supply chains (in terms of price distortion, unfair competition and distribution dynamics), as well as the conditions of exploitation and vulnerability experienced by many migrant farm workers. Accordingly, an evident tension has emerged between containing the pandemic through mobility restrictions, on the one hand, and preventing foreign labour shortages (especially in key sectors) and making business work as usual, on the other.

In this scenario, EU institutions and national governments have adopted several measures to address the social and economic consequences of the Covid-19 crisis in core sectors (such as agri-food) as well as migrants’ conditions of vulnerability.

This paper provides a critical comparative analysis of relevant EU and national

¹⁴² E. SANTORO, *Vulnerability between political theory and normative texts: a new language to repeat old things or a new tool to problematize differences in social power?*, op. cit..

emergency measures adopted during the current pandemic to address migrants' access to essential services and benefits, focusing on migrants' working and living conditions in the agricultural sector in Italy and Spain. The paper also examines relevant decisions of national civil courts on this matter. In so doing, we explore to what extent the current health emergency may constitute an opportunity for a European and national rethinking of the dominant socio-economic model of production, and an enforcement of the rights of migrant persons, or instead only foster inequalities by exposing vulnerable people (such as migrants) to the risk of being subject to further forms of discrimination and fundamental rights violations.