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RETROSPECTIVE
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LABOUR LAW AND COVID 19: OVERVIEW 2020 2022

The present paper provides an overview of the major contributions related to Covid 19 which appeared in 2021 in IALLJ journals, as well as in special issues that were published in 2020 and 2022. The International Association of Labour Law Journals is an increasingly expanding international consortium that now consists of thirty-one journals from all over the world¹. Since 2012 a group of editors have collaborated to provide (usually annual) overviews of the most relevant scientific trends in publications in IALLJ journals². Given the unparalleled impact of Covid 19 on the world of work and labour law, the 2022 overview will exclusively cover contributions dedicated to this topic.

While we acknowledge that many articles have been dedicated to tracing and analysing the response of national legal systems to the challenges posed by the pandemic - among the IALLJ journals we refer, in particular, to the special issue published in European Labour Law Journal in 2020³, this overview will follow a horizontal approach and organise relevant contributions around two axes that reflect a relationship of necessity or rather of contingency with the pandemic.

Firstly, we deal with issues that are strictly related to the health crisis. For these issues the pandemic itself can be considered, at least on the surface, as their cause. Measures

1 More information on this is available on the website: <https://www.labourlawjournals.com/>.

2 The authors were assisted by a team of colleagues, who guided their work and helped them listing and sorting all articles into categories. The members of this team were Mariapaola Aimo, Gian Guido Balandi, Milena Bogoni, Silvia Borelli, Matteo Borzaga, Antonio Bylos, Nunzia Castelli, Isabelle Daugareilh, Sebastián de Soto Rioja, Manuel Antonio García-Muñoz Alhambra, Eva Maria Hohnerlein, Daniela Izzi, Eri Kasagi, Barbara Kresal, Gratiela-Florentina Moraru. The article is the product of a shared reflection and elaboration; Venera Protopapa has drafted sections 1, 2.1, 2.2, 2.3, 3.3, 4, and Inga Thiemann has drafted sections 3.1 and 3.2.

3 See on Belgium (Hendrickx et al 2020), on France (Sachs 2020), on Germany (Sagan and Schüller 2020), on Ireland (Mangan 2020), on Italy (Biasi 2020), on Luxembourg (Ratti 2020), on Spain (García-Muñoz Alhambra 2020), on the Netherlands (Bennaars 2020), on the United Kingdom (Mangan 2020). For a critical overview of measures adopted in each national context (Mangan et al. 2020).

adopted in this regard tend to exhaust their effects with the end of emergency responses to the pandemic.

Secondly, we dedicate our attention to issues that were already widely discussed among labour lawyers and that acquired greater salience due to the pandemic. Contingency measures and the processes of transformation (or reversal) they triggered are potentially long-lasting.

Consequently, the first part of this paper is entitled on Covid 19 and provides an account of the academic debate concerning health and safety at work, income support and measures aiming to protect employment during the pandemic, while the second part, beyond Covid 19, deals with the issue of remote work, inequalities at work, and social dialogue and collective bargaining.

Finally, we conclude by drawing attention to the debate on how labour has performed in the face of the health crisis and its prospects in the post-pandemic context.

I - ON COVID 19

A - HEALTH AND SAFETY

There is full agreement among scholars that the pandemic crisis has highlighted in a dramatic and compelling way the need for renewed attention to the issue of health and safety in the workplace.

The urgency to prevent the spreading of the virus has imposed a major rethinking of health and safety tools. At the same time the rapid implementation of remote work as a form of organizing work such as to prevent exposure and its consequences has in turn raised a series of concerns about its impact in terms of social isolation, blurring of boundaries between work and private life⁴, as well as deepening inequalities and increasing workloads mainly to the disadvantage of women, given their role as primary caregivers of children and the elderly, as we will discuss in more detail in the second part of the paper.

As Natullo and Nunin observe in their editorial to a thematic dossier published in *Rivista giuridica del lavoro e della sicurezza sociale* dedicated to the role of health and safety during the emergency and to the future developments that such experience suggests exploring, the topic can be approached from two perspectives, that of the employers and that of the workers⁵.

From the employers' perspective, the academic debate has concerned mainly the reinforcing of employers' obligations regarding risk assessment and prevention.

In general terms, scholars have underlined how the pandemic has changed the way we think about risks that are relevant in the workplace.

4 V. Flohimont, « Santé au (télé)travail : quelles leçons tirer de l'expérience belge pour gérer l'après-crise, voire une prochaine pandémie ? », *Revue de droit comparé du travail et de la sécurité sociale*, no. 3, 2021, p. 30.

5 G. Natullo and R. Nunin, « Introduzione. La tutela della salute e della sicurezza sul lavoro alla luce delle sfide del prossimo futuro » *Rivista giuridica del lavoro e della previdenza sociale*, no. 2, 2021, p. 136.

While before the Covid 19 the relationship between the external environment and the workplace was described as following an established pattern with the workplace projecting its risks on society, the pandemic has challenged this pattern: except for health services, it is the work environment that undergoes the risk of contagion coming from outside, and although not responsible for such a risk in itself, the employer maybe nevertheless responsible for the failure to adopt adequate measures to prevent the spread of the virus in the workplace⁶.

The hybrid character of the risk, generic/exogenous or specific/occupational⁷, is reflected into the dynamic of the integration of health and safety as a critical component of a broader frame of public health interventions⁸.

Several contributions analyse the terms of this relationship: while some authors argue that the interaction of the two frames has resulted in lower standards of protection with the public health frames prevailing over health and safety⁹, others highlight the potential of health and safety regulations as a tool to support public health services in facing the health emergency¹⁰ and in favouring a human centred recovery from Covid 19¹¹.

Against this background, scholars have addressed employers' duties, both under the emergency legislation and in general under the existing regulations on health and safety, to assess risks associated with Covid 19 (in particular, whether employers were under the obligation to update the *document* on risk assessment in the workplace). They also emphasised the preventive function of health and safety regulation¹² as well as the consequences for employers' liability in case they failed to comply¹³.

Adopting a comparative perspective, one study looked at how different health and safety systems (English and Swedish) have performed under consideration of applicable

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- 6 G. Ludovico, « Sicurezza e infortuni sul lavoro nel rischio da contagio da Covid-19: profili di responsabilità e di tutela previdenziale », *Rivista giuridica del lavoro e della previdenza sociale*, no. 2, 2021, p. 212.
 - 7 G. Natullo, « L'organizzazione delle imprese a tutela dell'integrità psico-fisica dei lavoratori e dei cittadini », *Quaderni della Rivista Diritti Lavori Mercati*, no. 11, 2021, p. 129.
 - 8 P. Pascucci, « Salute pubblica e limiti all'attività di impresa dall'angolo visuale del diritto del lavoro e della sicurezza sul lavoro », *Quaderni della Rivista Diritti Lavori Mercati*, no. 11, 2021, p. 113.
 - 9 E. Bluff and R. Johnstone, « La législation en matière de santé et de sécurité au travail en Australie à l'aune de la pandémie de Covid-19 », *Revue de droit comparé du travail et de la sécurité sociale* no. 3, 2021, p. 44.
 - 10 C. O. Chidi and D. A. Ideh, « Occupational Health and Safety in Nigeria: Managing Employees' Well-Being in the Post-COVID-19 World of Work », *E-Journal of International and Comparative Labour Studies*, no. 2021, p. 76.
 - 11 S. Fernández Martínez, « Occupational Safety and Health and Workplace Health Promotion: an Essential Area for a Recovery from Covid-19 Based on Decent Work », *E-Journal of International and Comparative Labour Studies*, no. 2, 2021, p. 61.
 - 12 M. Véricel, « La loi Santé au travail du 2 août 2021 renforce-t-elle réellement la prévention en santé au travail ? », *Revue de droit du travail*, no. 12, 2021, p. 689; P. Pascucci, « Vaccini e green pass nel sistema di prevenzione del rischio pandemico », *Diritti Lavori Mercati*, no. 3, 2021, p. 545.
 - 13 G. Ludovico, « Sicurezza e infortuni sul lavoro nel rischio da contagio da Covid-19 », *op. cit.*; P. Pascucci, « Vaccini e green pass nel sistema di prevenzione del rischio pandemico », *op. cit.*

standards of « tolerable risk », the relevant risk factors, the role of different actors and scope for remedial redress¹⁴.

Further, building on the experience developed during Covid 19, other contributions argue for the importance of adopting personalised prevention measures with regard to specific categories of workers such as those working remotely¹⁵, women¹⁶ and the elderly¹⁷.

One major argument recurring among scholars concerns the importance of the role of social partners and collective bargaining. In Italy evidence emerged that trade unions have been crucial in the management of the health crisis. The health emergency was addressed through two tri-partite agreements adopting health and safety protocols, 14 March 2020 and 24 April 2020, the scope of which was extended *erga omnes* by two subsequent decrees, Decree of the President of the Council of Ministers of 22 March 2020 and of 26 April 2020, and further supplemented by sectoral and company level agreements. One of the main outcomes of this fruitful interaction between law and collective bargaining was the identification of a common standard for measuring the employer's compliance with the general obligation to protect health and safety according to the standard of the « highest technologically feasible safety »¹⁸.

Moving to the workers' perspective, unsurprisingly the academic debate has focused on the obligation for workers to undergo vaccination or provide proof of recovery or negative testing for the virus (« pass sanitaire » in France or « green pass » in Italy) and the possible consequences for the employment relationship in the event of workers' refusal to conform.

The discussion in this regard has dealt with the issue of the constitutional compatibility of such rules in the light of the collective and individual dimensions of the right to health¹⁹.

14 P. Andersson and T. A. Novitz, « Évaluation des risques sur les lieux de travail et Covid-19: les modèles anglais et suédois (et leurs limites) », *Revue de droit comparé du travail et de la sécurité sociale*, no. 3, 2021, p.14.

15 M. Peruzzi, « Nuove tecnologie e salute dei lavoratori », *Rivista giuridica del lavoro e della previdenza sociale*, no. 2, 2021, p. 179.

16 C. Lazzari, « Salute e lavoro: questioni di genere », *Rivista giuridica del lavoro e della previdenza sociale*, no. 2, 2021, p. 226.

17 M. D. Ferrara, « Il lavoratore fragile tra nuove tutele ed emergenti sfide: il fattore età », *Rivista giuridica del lavoro e della previdenza sociale*, no. 2, 2021, p. 236.

18 A. Tampieri, « Legislazione dell'emergenza sanitaria e sicurezza del lavoro. Verso una nuova configurazione della tutela della salute come bene collettivo », *Rivista giuridica del lavoro e della previdenza sociale*, no. 2, 2021, p. 191; G. Ludovico, « Sicurezza e infortuni sul lavoro nel rischio da contagio da Covid-19 », *op. cit.*; B. De Sario *et al.*, « Azione sindacale e contrattazione collettiva per la tutela della salute e della sicurezza sul lavoro nella fase 1 dell'emergenza da pandemia di Covid-19 », *Rivista giuridica del lavoro e della previdenza sociale*, no. 2, 2021, p. 91; E. Ales, « La tutela della salute sul lavoro nel prisma del metodo partecipativo », *Quaderni della Rivista Diritti Lavori Mercati*, no. 11, 2021, p. 231; R. Cassillo, « Legge e contrattazione collettiva nella tutela della salute », *Quaderni della Rivista Diritti Lavori Mercati*, no. 11, 2021, p. 269.

19 G. Natullo and R. Nunin, « Introduzione. La tutela della salute e della sicurezza sul lavoro alla luce delle sfide del prossimo futuro », *op. cit.*; L. Zoppoli, « Pandemia, lavoro, Costituzione: nuovi equilibri, nuovo bilanciamento? », *Quaderni della Rivista Diritti Lavori Mercati*, no. 11, 2021, p. 45; M. Julesz, « Vaccination against COVID-19 from a Hungarian perspective », *Zeitschrift für ausländisches und internationales Arbeits und Sozialrecht*, no. 2, 2021, p. 179.

In addition, besides analysing the legal provisions adopted at the national level and the way they affect the employment relationship²⁰, the discussion has also assessed the tensions and their potential long-term impact on health and safety systems from a critical point of view. Scholars have noticed a transformation of the role of the employer as a « sub-contractor » of the vaccination policies, highlighting its fundamental implementing role and, above all, the strengthening of its power of control over workers within a framework that does fit into the pre-existing structure of the employer's power. It has been argued that, provided that the law leaves no room for discretion on terms of the consequences that follow if the workers refuse to comply, the employer himself acts as a delegate of the public authority and is therefore himself under strict control²¹. At the same time, he is entrusted with the mission to inform and persuade workers in favour of vaccination. In France, for example, the law required the employer to invite the refractory worker to an interview to examine with him/her the means of regularizing his/her situation, in particular the possibilities of a (temporary) assignment to another post within the company that was not subject to obligations in this regard²².

In sum, in this context the threat of suspension has worked as the main lever for preventing the risk of propagation of the epidemic, in that it encouraged workers to submit to the vaccination obligation or to the presentation of the health pass, which is itself an incentive to vaccinate. In this light, suspension of the contract, a measure that traditionally has been used with a protective aim, has become the very threat²³. While these transformations are justified in light of needing to protect the collective dimension of the right to health, with regard to people working in the workplace and beyond²⁴, they also invite considerations as to whether the employer should be entrusted with the task of conducting a general interest policy at the company level, and moreover, at the cost of altering the legal framework of the employer's powers²⁵.

Similar concerns have been raised in relation to employers processing workers' personal data. In this regard, scholars have analysed the guidance issued by European Data Protection board as well as national authorities arguing for a more specific uniform pan-European vision concerning the processing of employee's data in times of emergency²⁶. They have also argued in favour of an approach that integrates the regulations concerning

20 A. Fabre, « Les obligations de vaccination et de présentation d'un passe sanitaire », *Revue de droit du travail*, no. 9, 2021, p. 512; P. Pascucci, « Vaccini e green pass nel sistema di prevenzione del rischio pandemico », *op. cit.*

21 L. Gamet and L. Jubert-Tomasso, « En quelle mesure l'employeur peut-il prendre en compte le statut vaccinal du salarié », *Revue de droit du travail*, no. 9, 2021, p. 490.

22 *Ibid.*, p. 489.

23 *Ibid.*, p. 491.

24 P. Pascucci, « Vaccini e green pass nel sistema di prevenzione del rischio pandemico », *op. cit.*

25 L. Gamet and L. Jubert-Tomasso, « En quelle mesure l'employeur peut-il prendre en compte le statut vaccinal du salarié », *op. cit.*

26 S. Suder, « Processing employees' personal data during the Covid-19 pandemic », *European Labour Law Journal*, no. 3, 2021, p. 322; S. Suder and A. Siibak, « Proportionate response to the COVID-19 threat? Use of apps and other technologies for monitoring employees under the European Union's data protection framework », *International Labour Review*, no. 3, 2022, p. 315.

data protection with the general obligation of employers to respect workers' privacy and pre-existing protections under labour law²⁷.

B - INCOME SUPPORT

With lockdowns and limitations to economic activities, income support measures have been adopted across different national contexts aiming to assist the population.

Overall, the ability of national social protection systems to face the challenges of the pandemic has been subject to investigation. Scholars have not missed to highlight serious shortcoming in the coverage of basic needs in some areas of the world²⁸ as well as inequalities within the EU, showing how social systems that have undergone cuts and reforms following the 2008 economic crisis, Greece being the primary example, have proved to be less able to provide protection to their citizens²⁹.

Issue 3/2021 of *Revue de Droit Comparé du Travail et de la Sécurité Sociale* investigates in depth the varying degree of institutional commitment as well as the variety of instruments that have been used to support income during the health crisis.

In general terms, the map of income support measures shows a mix of already existing and ad hoc protection measures.

The first group of measures includes temporary wage subsidies or short-time work schemes – though, as will be specified in the following section these schemes were new in a number of national contexts – , unemployment allowances, subsidies for parental and care leave, each of them adjusted to the health emergency context by extending the scope and duration of the entitlement, relaxing admissibility requirements and increasing the corresponding amount³⁰.

The second group, on the other hand, has been established to cover a multifaceted universe of employees and self-employed workers that, with some differences based on context, fell outside the scope of pre-existing income support measures. While demonstrating national authorities' awareness of the need of protection of these workers, they are also symptomatic of the gaps in social protection systems³¹.

27 L. D'Arcangelo, « Tutela della salute pubblica e privacy dei lavoratori: una nuova cultura dei controlli? », *Quaderni della Rivista Diritti Lavori Mercati*, no. 11, 2021, p. 369.

28 M. Araymo Alonso and A. Rivera Alvarado, « Peru: Soziale Sicherheit und die Pandemie des 21. Jahrhunderts », *Zeitschrift für ausländisches und internationales Arbeits und Sozialrecht*, no. 2, 2021, p. 129.

29 V. Koumarios, « Transformations du droit social en Grèce pendant et post pandémie », *Revue de droit comparé du travail et de la sécurité sociale*, no. 3, 2021, p. 112.

30 E. Ales, « La protection sociale en Italie durant la pandémie : une approche globale, évolutive et continue », *Revue de droit comparé du travail et de la sécurité sociale*, no. 3, 2021, p. 94; V. Koumarios, « Transformations du droit social en Grèce pendant et post pandémie », *op. cit.*; E. Räder and L. Blume, « Beschäftigungssicherung und Arbeitsrecht in Krisenzeiten », *Arbeit und Recht*, no. 1, 2021, p. 4.

31 C. Marzo, « Comparaison britannique des tentatives de protection sociale des travailleurs de plateformes au prisme de la pandémie : vers un nouvel équilibre entre acteurs publics et privés ? », *Revue de droit comparé du travail et de la sécurité sociale*, no. 3, 2021, p. 142; E. Ales, « La protection sociale en Italie durant la pandémie », *op. cit.*; V. Koumarios, « Transformations du droit social en Grèce pendant et post pandémie », *op. cit.*

From this perspective it has been argued that the pandemic has accelerated a process that has been in place since the economic crisis of 2008, the (partial) extension of employee protections to other workers, in particular to self-employed workers that are considered economically dependent³². Nonetheless, this expansion of protection has not reached all workers. Despite claims in different national contexts about « leaving no one behind », national authorities have failed to stand up to this promise. Assessing income support measures adopted in the UK and France, Marzo argues that both systems have ignored the specific needs of platform food delivery workers³³. In France, employees could claim payments under the « chômage partiel » scheme, whereas self-employed were granted access to an equivalent allowance. Although platform delivery workers could ideally access support as self-employed workers, they have hardly been able to meet eligibility requirements, which failed to take into consideration fluctuations in their turnover, absence of seniority as well as income insufficiency, at least during the first lockdown. Equally in the UK, platform delivery workers have been excluded from access to the « corona job retention scheme » (for employees) or to the « self-employed income support schemes » on similar grounds.

According to several scholars, universal income support measures, some of which pre-existing, and others established during the emergency, were much more successful in reaching a wider array of workers. This is the case in the UK of « universal credit », in France of the « revenu de solidarité active » or the « aide exceptionnelle de solidarité »³⁴, in Italy of the « fondo di ultima istanza » and the « reddito di emergenza » adopted in the wake of the « reddito di cittadinanza »³⁵.

Particularly significant in this regard is the Spanish « ingreso mínimo vital », a permanent non-contributory benefit established during the health emergency to address the situation of economic and social vulnerability caused by Covid 19³⁶. The measure has the objective to support social inclusion mainly through the integration of the beneficiaries in labour market, either as employees or autonomous workers and is compatible with the exercise of professional activity. The benefit is subject to two main conditions: the registration of the applicant as a job seeker and participation in inclusion strategies promoted by the government in collaboration with the Autonomous communities, local government, representatives of employers and trade unions as well as organizations of the non-profit sector. While the importance of the measure is fully acknowledged, scholars also highlight

32 C. Garbuio, « Lavoro autonomo e politiche attive e passive del lavoro: riflessioni in tempi di crisi », *Diritto delle relazioni industriali*, no. 1, 2021, p. 122.

33 C. Marzo, « Comparaison britannique des tentatives de protection sociale des travailleurs de plateformes au prisme de la pandémie », *op. cit.*

34 *Ibid.*

35 E. Ales, « La protection sociale en Italie durant la pandémie », *op. cit.*; P. Bozzao, « Gli istituti di sostegno al reddito per disoccupati e working poor: dall'emergenza ai nuovi assetti sistematici », *Quaderni della Rivista Diritti Lavori Mercati*, no. 11, 2021, p. 421.

36 S. Fernández Martínez, « Le revenu minimum vital, une nouvelle prestation non contributive du système de sécurité sociale espagnol », *Revue de droit comparé du travail et de la sécurité sociale*, no. 3, 2021, p. 164.

the fact that its effectiveness depends also on labour market policies on minimum wage, temporary work, and active employment policies³⁷.

One major theme of the contributions that we reviewed concerns lessons learned and future reform of social protections systems.

While such reflections are inevitably context-sensitive, it is nonetheless possible to identify some pivotal points in the development of the discussion ranging from the sufficiency of the measures to the responsiveness of the systems with regards to the diverse needs of differently affected workers, as well as to conditionality.

As far as sufficiency is concerned, O'Donnell and Arup observe that in Australia the previously unwitnessed generosity of the unemployment protection scheme is equivalent to an admission that the pre-existing rate did not guarantee a minimum standard of living, creating room for reforming the system in a way that gives greater weight to income adequacy³⁸.

The Canadian context is emblematic of the discussion on responsiveness. Here, the reduced ability of the unemployment regime to deliver a proper wage replacement, especially to precarious workers, has pushed the government towards ad hoc measures, such as the « prestation canadienne d'urgence » that proved flexible and accessible to anyone that had stopped working for Covid related reasons based solely on an income requirement. While it is acknowledged that these measures have been very important during the emergency, the post-pandemic raises the question of whether they represent valid alternatives to adapting the contributory model to the new realities of the labour market. Lamarche considers this possibility, pointing to the need to clarify the objectives of a possible reform, i.e., whether it is aimed at replacing lost income, fighting against poverty due to lost employment or poverty due to precarious employment³⁹. Elsewhere, such as in the Italian case, scholars have discussed prospective reforms emphasizing the need to integrate contributory and non-contributory models. According to Bozzao, the ability to develop an integrated vision of the two models is crucial. If the scope of measures to fight poverty also includes workers that are in a state of poverty linked to their working conditions, this results in an overlap of protection claims that have in the past been considered to be separate and distinct⁴⁰.

Finally, the debate over the future of social protection systems has also involved a reassessment of the role of conditionality following the decision in several national contexts to suspend conditionality during lockdowns and establish income support measures that did not provide any obligation in the regard. In agreeing with the reasons behind these choices, Buoso highlights the *importance* of preserving conditionality in order to prevent a levelling down of social protection measures and to fight undeclared work, while being

37 *Ibid*, p. 175.

38 A. O'Donnell and Christopher Arup, « Income support in a time of contagion », *Australian Journal of Labour Law*, no. 1/2, 2021, p. 43.

39 L. Lamarche, « Le chômage au temps de la Covid : le régime canadien d'assurance-chômage survivra-t-il à la pandémie ? », *Revue de droit comparé du travail et de la sécurité sociale*, no. 3, 2021, p. 140.

40 P. Bozzao, « Gli istituti di sostegno al reddito per disoccupati e working poor », *op. cit.*, p. 431.

aware that conditionality does not imply that work is always the privileged path to social inclusion, nor does it equate to effective active employment services⁴¹.

C - MEASURES TO PRESERVE EMPLOYMENT

Employment protection measures represent another element that has been central to the response that different legal systems have provided to the emergency.

We have already mentioned, in the previous section, temporary wage subsidies or short-time work schemes. While these measures have been associated with a variety of objectives that include income support, injection of money into the economy⁴², prevention of loss of human capital⁴³, the contributions under review have mainly discussed short-time work schemes in connection to their impact on employment, as they allow employers to suspend or reduce working hours as an alternative to outright dismissal.

This considered, articles appearing in the IALLJ journals provide insight on the complex legal framework of short-time work schemes (also known as job retention schemes), starting from eligibility requirements, the mechanisms of implementation, integration with existing labour law protections in general⁴⁴, as well as with regard to specific issues concerning the individual employment relationship such as the entitlement to annual leave⁴⁵.

While in some systems such measures were newly established (UK and Australia), in others they were modelled on pre-existing programmes (this is the case for France, Italy, Spain, Germany).

A comparative study of the experiences of different European countries shows that, despite differences, the evolution of short-time work schemes during the pandemic followed a common pattern: access has been made easier, employers have been exempted from related costs and in some cases their scope has been extended to employers that under pre-existing rules were not covered⁴⁶.

In turn, according to the same study, one major element of innovation compared to the past is represented by the decision in some national contexts to combine short-time work schemes with limitations on dismissals based on economic grounds, either through general bans or as a condition for access to public funding⁴⁷.

41 S. Buoso, « La condizionalità al lavoro nell'emergenza sanitaria », *Lavoro e diritto*, no. 3/4, 2021, p. 601.

42 I. Neil et al., « The JobKeeper Scheme », *Australian Journal of Labour Law*, no. 1/2, 2021, p. 24.

43 S. M. Ruesga and A. I. Viñas Apaolaza, « El uso de medidas de flexibilidad interna ante la crisis covid-19. Impacto sobre la temporalidad y el desempleo en España », *Temas laborales: Revista andaluza de trabajo y bienestar social*, no. 157, 2021, p. 257.

44 I. Neil et al., « The JobKeeper Scheme », *op. cit.*; G. Quadri, « Ammortizzatori sociali e "Covid-19", tra emergenza e ripresa », *Quaderni della Rivista Diritti Lavori Mercati*, no. 11, 2021, p. 435; E. Ales, « La protection sociale en Italie durant la pandémie », *op. cit.*

45 A. Engelmann, « Urlaubsanspruch in der Kurzarbeit - Einordnung der jüngeren Rechtsprechung zur Berechnung des Urlaubsanspruchs », *Arbeit und Recht*, no. 7/8, 2021, p. 306.

46 S. M. Ruesga and A. I. Viñas Apaolaza, « El uso de medidas de flexibilidad interna ante la crisis covid-19 », *op. cit.*, p. 251.

47 *Ibid.*

On the one hand, where the possibility for employers to resort to redundancies and dismissals has been left open, such as in the case of France, scholars have investigated the reasons that might explain institutional reluctance, pointing to an instrumental use of short-time schemes that has not translated into a paradigm shift in the general attitude of the state towards economic dismissals⁴⁸. On the other hand, where restrictions have been adopted, scholars have assessed their constitutionality. In Italy they have raised doubts about the compatibility of a ban on dismissals with the freedom to conduct a business, with regard to the post-full lockdown period as well as in relation to cases of permanent job suppression⁴⁹. In Spain they have built on this experience to articulate reform proposals that go in the direction of ensuring higher levels of protection in case of unlawful dismissals⁵⁰.

Beyond these aspects, the debate has evolved mainly around two issues: the impact of short-time work schemes on employment and their financial sustainability.

As to the first, short-time work schemes have been considered central for safeguarding employment during the pandemic⁵¹, including some temporary employment⁵², as well as for ensuring a more balanced distribution of risks arising from Covid 19 as compared to a scenario where employers make use of general stand down powers⁵³.

Nonetheless it is observed that such measures might raise concerns in the light of the duality of the labour market and structural unemployment since focusing exclusively on measures aiming to support those that are already employed might result in the deterioration of the labour conditions for women and in limited access to the labour market for young people⁵⁴.

As to the financial sustainability of these measures, while at the beginning of the pandemic they benefited from strong financial support, also through the SURE programme approved by the Eurogroup on 9 April 2020, over time their sustainability has been increasingly called into question.

Ruesga and Apaolaza⁵⁵ as well as Quadri⁵⁶ agree that overall short-time work schemes have determined lower costs compared to unemployment benefits, though they also highlight the fact that their ability to function as shock absorbers declined along the

48 A. Gouttenoire, « Le régime du contrôle du télétravailleur par la donnée : À propos des questions/réponses de la CNIL sur le télétravail du 12 novembre 2020 », *Revue de droit du travail*, no. 2, 2021, p. 88.

49 C. Pisani, « Divieto di licenziamento per emergenza Covid e tipologie di giustificato motivo oggettivo », *Diritti lavori mercati*, no. 1, 2021, p. 129.

50 E. Räder and L. Blume, « Beschäftigungssicherung und Arbeitsrecht in Krisenzeiten », *op. cit.*; A. Bylos Grau, « La reforma del despido », *Revista de derecho social*, no. 95, 2021, p. 13.

51 E. Räder and L. Blume, « Beschäftigungssicherung und Arbeitsrecht in Krisenzeiten », *op. cit.*

52 S. M. Ruesga and A. I. Viñas Apaolaza, « El uso de medidas de flexibilidad interna ante la crisis covid-19 », *op. cit.*

53 A. Forsyth and A. Stewart, « COVID-19, Employee Stand Downs and the Transfer of Economic Risk », *Australian Journal of Labour Law*, no. 1/2, 2021, p. 95.

54 S. M. Ruesga and A. I. Viñas Apaolaza, « El uso de medidas de flexibilidad interna ante la crisis covid-19 », *op. cit.*, p. 263.

55 *Ibid.*

56 G. Quadri, « Ammortizzatori sociali e "Covid-19", tra emergenza e ripresa », *op. cit.*

progression of the pandemic, with restructuring becoming inevitable in strongly affected sectors.

Beyond assessing costs and benefits, other scholars have investigated the significance of these measures for future public policies dealing with employment in times of economic restructuring.

According to Molina Navarrete the favouring of short-time work schemes over redundancies and dismissals during the pandemic has reinstated the legal and social principle of preservation of employment as an expression of a new model of « socially responsible » and « sustainable » employment management. In this new and different model of (re)composition of the interests at stake, the social takes precedence⁵⁷. While, as previously mentioned, the associated financial burden is difficult to sustain outside of exceptional crisis situations, it is argued that the experience of these measures during the pandemic holds important lessons for a state led governance of transitions that is based, in line with the Next Generation EU programme, on awareness of the fundamental importance of training and/or retraining programmes, both for those whose employment relationships are suspended and those that are affected by redundancies⁵⁸. In the same line, other scholars have stressed the importance of building a structural connection with active employment policies⁵⁹.

II - BEYOND COVID 19

A - REMOTE WORK

One of the key reoccurring themes during the pandemic was the issue of remote work. Various authors have addressed general and specific concerns regarding remote work in different European jurisdictions and contexts.

Remote work is one of the main areas of non-standard work (albeit sometimes with, sometimes without employee status), which existed prior to the Covid 19, but was amplified in its importance during the pandemic, particularly during the various lockdowns.

Sierra Benítez points out that there are multiple forms of flexible and remote working (telework, atypical telework, digital work, platform work), not all of which enjoy the same legal protections. While in various countries significant proportions of telework were classified as remote work with special social protection guarantees during the pandemic, this did not apply to all workers⁶⁰. Some subtypes of remote work, such as the so-called «digital nomads» did not fall under these protections, as they are neither standard

57 C. Molina Navarrete, « La gestión pública de los "ERTE" (regulación temporal de empleo) y de los "ERE" (regulación extintiva) en el autogobierno andaluz: balance y perspectivas pospandemia », *Temas laborales: Revista andaluza de trabajo y bienestar social*, no. 160, 2021, p. 159.

58 *Ibid.*

59 G. Quadri, « Ammortizzatori sociali e "Covid-19", tra emergenza e ripresa », *op. cit.*; A. Sartori, « Transizioni occupazionali e fragilità lavorative: il difficile compito per il diritto del lavoro post-pandemico », *Diritto delle relazioni industriali*, no. 4, 2021, p. 967.

60 E. M. Sierra Benítez, « Sozialschutz am Scheideweg. Die Ausbreitung der Fernarbeit und die Aufnahme von digitalen Nomaden in Europa », *Zeitschrift für ausländisches und internationales Arbeits und Sozialrecht*, no. 2, 2021, p. 195.

employees within a country's legal system, nor do they fall under the EU legislation on posting of workers⁶¹.

In addition to the emergence of new forms of remote work, another key consideration in the context of work from home during the pandemic is the variety of nomenclature for overlapping concepts, as well as the interchangeable use of different terminology.

Tufo criticises the unclear use of « smart work » and so-called « agile work » in the Italian context. In many cases, the concepts of « smart work », regular « agile work », telework and emergency « agile work » have been used interchangeably, despite describing different phenomena⁶².

Smart work describes a concept in which workers are measured by their achievements, rather than presenteeism. This approach increases workers' autonomy over their place of work, and the methods and hours worked, but also their responsibility for achievements. Regular « agile work », as it is named in Italy, can be conceptualised as a combination of telework with some attendance of events in the office or on site. It is enshrined in art. 18 Law 81/2017 and is characterised by high levels of flexibility on both the employer's and the employee's side, enabling them to increase both competitiveness and work-life balance. Emergency « agile work », however, has been primarily enacted as a preventive health and safety measure. Contrary to regular « agile work », employer could assign workers to (mostly) work from home unilaterally⁶³. Such shifts in workplace regulation have to be viewed with great caution, as their temporary role can have knock-on effects for post-emergency provisions.

Similarly, Bruurs and Huybrechts illustrate some of the differences between various types of remote workers in their critique of the Belgian approach: their case study demonstrates that the Belgian system includes four different legal categories of remote workers, who enjoy different protections depending on their categorization into the different legal schemes⁶⁴. The variance in categorization leads to varying provisions in regard to health and safety at work, non-discrimination, working time, and work-life balance, as well as issues of costs and employer's power regarding different workers. Ultimately, the need for further legislation brought about by the pandemic could have served as an impetus to create clearer categories of homeworkers, structural teleworkers and occasional teleworkers, but this opportunity was missed⁶⁵.

Bruurs and Huybrecht are not alone in their criticism of state's failure to create meaningful legislative change - in the Italian context both Romagnoli as well as Del Vecchio criticize the implication of emergency measures on workers' rights, particularly for remote workers.

61 *Ibid.*

62 M. Tufo, « Il lavoro agile emergenziale: un mosaico difficile da ricomporre tra poteri datoriali e diritti dei lavoratori », *Rivista giuridica del lavoro e della previdenza sociale*, no. 1, 2021, p. 41.

63 *Ibid.*, p. 46.

64 S. Bruurs and S. Huybrechts, « Telework in Belgium: a Patchwork of Legal Regimes », *E-Journal of International and Comparative Labour Studies*, no. 2, 2021, p. 4.

65 *Ibid.*, p 39.

Del Vecchio highlights the risk of emergency legislative measures to erode workers' rights, which are already being challenged in multiple legislative frameworks⁶⁶.

Romagnoli emphasises the need to question workers' ability to choose remote work and the protection of their private lives⁶⁷.

This concern for worker privacy, as well as the lack of choice with regard to working from home has been further highlighted by various authors in different legal settings: Regarding telework surveillance in France, Gouttenoire argues that algorithmic employee monitoring systems create a type of workplace surveillance that infringes upon workers' rights and invalidates workers' rights to privacy, as employers do not have a right to collect personal employee data⁶⁸.

Similarly, in the Spanish context, Villa Fombuena raises concerns about technology's ability to obtain employee data and how it enables employers to invade the workers' private sphere⁶⁹. She argues that this is particularly relevant in the context of telework in the pandemic, as there cannot be an assumption of optionality of telework. Workers did not freely choose to enter telework as an alternative to working in the office, but instead were compelled to work from home due to the risks of the pandemic⁷⁰. Thus, their consent was already constrained. At the same time Torres García points out that the new regulation, Law 10/2021 on remote work, clarified a number of issues and enshrines proportionality: whereas surveillance of workers has not been ruled out, employers need to inform workers about the purpose and scope of data collection, as well as how and for how long the information is stored and for which purpose⁷¹. Whether this suffices to protect workers' privacy remains to be seen.

In the German context, Franzmann and Best argue that the pandemic has created an influx of new judgements on dismissal in the context of the boundaries between private life and employees' obligations towards their employers, including some worrying developments. They caution that an expansionary reading of the legal concept on mutual obligations (contained in § 241[2] BGB [German Civil Code]) could hurt employees, as it places too much value on productivity⁷². Instead, they argue, decisions should be focused on pre-pandemic case law and a holistic reading of existing employment legislation. If this balance is maintained, German employment law may already offer sufficient protections to balance employer demands with the right to privacy and free development of one's personality⁷³.

66 L. Del Vecchio, « Il lavoro agile oltre l'emergenza », *Diritti Lavori Mercati*, no. 2, 2021, p. 371.

67 U. Romagnoli, « Hacia la normalización del trabajo a distancia », *Revista de derecho social*, no. 93, 2021, p. 17.

68 A. Gouttenoire, « Le régime du contrôle du télétravailleur par la donnée », *op. cit.*

69 M. Villa Fombuena, « La privacidad en el teletrabajo. Un análisis en el contexto de pandemia por Covid-19 » *Temas laborales: Revista andaluza de trabajo y bienestar social*, no. 157, 2021, p. 193.

70 *Ibid.*, p. 198.

71 B. Torres García, « Spain's Law No. 10/2021 on Teleworking: Strengths and Weaknesses », *E-Journal of International and Comparative Labour Studies*, no. 2, 2021, p. 41.

72 A. Franzmann and R. Best, « Corona als Einfallstor in die Privatsphäre von Arbeitnehmerinnen? - Erste Kündigungen zu Zeiten der Corona-Pandemie », *Arbeit und Recht*, no. 3, 2021, p. 112.

73 *Ibid.*

Brown and Witzleb⁷⁴, as well as Aloisi and De Stefano⁷⁵ are equally concerned about the increased surveillance of employees that accompanied the move to work-from-home during the pandemic. The ubiquity of telework during the pandemic has amplified long-standing concerns that employee tracking, electronic performance measurement and other forms of workplace surveillance are becoming both more common and more intrusive. Brown and Witzleb's article offers a critique of the current state of Australian law, as well as making some suggestions for reform. In their suggestions for reform, they call for comprehensive national workplace surveillance legislation, based on empirical research into post-pandemic surveillance practices and expectations of privacy on the part of employees, to create stronger and more coherent legal protections for employee privacy in Australia⁷⁶.

However, contrary to some of the concerns regarding missed opportunities to legislate, Howe and others⁷⁷ argue that governments and labour regulators still have the ability to create a more equitable future of work through the regulation of workplace surveillance and the enforcement of minimum labour standards.

Allen and Orifici demonstrate how, even though the Covid 19 pandemic created an unprecedented amount of flexible working arrangements through sheer necessity, the implementation of flexible work arrangements for workers with family responsibilities remains complex⁷⁸. The right to request flexible working arrangements is already enshrined in Australian law in § 65 of the Fair Work Act 2009 (Cth). Whereas employers might be willing to allow for greater flexibility post-pandemic, legislative change would be necessary to normalize such flexible working arrangements. Currently, flexible working is still viewed as « exceptional », not something employers need to make room for. According to Allen and Orifici's data, men are more often reluctant to request flexible working, and are also more regularly denied flexible working requests. This disparity reinforces gendered norms of paid and unpaid labour⁷⁹.

As Guaglianone and Parisi point out, mandatory remote work has further implications for gender equality and women's ability to equally participate in the workforce⁸⁰: in contrast to Allen and Orifici's example of employees' desire for greater flexibility of work and more remote work, they demonstrate how a forcible shift towards remote work increases women's

74 M. Brown and N. Witzleb, « Big Brother at Work - Workplace Surveillance and Employee Privacy in Australia », *Australian Journal of Labour Law*, no. 3, 2021, p. 170.

75 A. Aloisi and V. De Stefano, « Essential jobs, remote work and digital surveillance: Addressing the COVID-19 pandemic panopticon », *International Labour Review*, no. 2, 2022, p. 289.

76 M. Brown and N. Witzleb, « Big Brother at Work - Workplace Surveillance and Employee Privacy in Australia », *op. cit.*

77 J. Howe *et al.*, « The future of work and labour regulation after COVID-19 », *Australian Journal of Labour Law*, no. 1/2, 2021, p. 130.

78 D. Allen and A. Orifici, « Home truths: what did COVID-19 reveal about workplace flexibility? », *Australian Journal of Labour Law*, no. 1/2, 2021, p. 77.

79 *Ibid.*

80 L. Guaglianone and M. L. Parisi, « Smartworking? La teoría de la doble carga de trabajo », *Temas laborales: Revista andaluza de trabajo y bienestar social*, no. 159, 2021, p. 85.

risk of the « double shift » of both work from home as well as engaging in caring duties at home⁸¹. As we shall see in the next section, the impact of remote work on exacerbating traditional gendered division of unpaid work, as well as other inequalities, were often an afterthought for policymakers during the pandemic.

At the same time, both Peruzzi and Bono highlighted the potential of remote work to reduce inequalities for two other groups of workers, those living with disabilities and chronic illnesses and those providing unpaid care work⁸². « Agile work » or flexible work arrangements could be a way to meet reasonable adjustment obligations and could enable workers with disabilities to participate in the workforce. The flexibility demonstrated by employers during the pandemic highlights that a request for remote work should not normally be deemed unreasonable. Even though carers are not currently a protected group in their own right, they should nonetheless also be afforded the opportunity to work from home at their request⁸³.

Remote work has also created additional challenges for the realisation of collective rights and for collective action as we will discuss later in further detail.

B- INEQUALITIES

There is broad agreement that both the pandemic itself, but also the way governments responded to it, increased existing inequalities between workers⁸⁴. Both in terms of their effects on existing social inequalities, as well as gender inequalities, government policies shielded some workers more than others. Those deemed « essential workers » faced exposure to the disease in significant numbers, in many cases with insufficient or inappropriate protective measures in place for their protections.

The exacerbation of these effects also varied from country to country, with different policies leading to different levels of inequality. Soares and Berg's analysis of labour force survey data in seven middle and high-income countries shows that countries whose governments focused on wage subsidies over other forms of income support were able to lessen labour market volatility, but not necessarily overall inequalities⁸⁵.

In Germany, some groups of essential workers, such as workers in care homes and other medical contexts, as well as in the meat processing industry were also affected by

81 *Ibid.*, p. 90.

82 M. Peruzzi, « Nuove tecnologie e salute dei lavoratori », *op. cit.*; R. Bono, « Un virus che discrimina: la tutela dei lavoratori fragili e dei prestatori di assistenza ai tempi del Covid », *Rivista giuridica del lavoro e della previdenza sociale*, no. 3, 2021, p. 429.

83 R. Bono, « Un virus che discrimina », *op. cit.*, p. 445.

84 S. Soares and J. Berg, « The labour market fallout of COVID-19: Who endures, who doesn't and what are the implications for inequality », *International Labour Review*, no. 1, 2022, p. 5; R. F. Lavado *et al.*, « COVID-19 disparities by gender and income: Evidence from the Philippines », *International Labour Review*, no.1, 2022, p. 107; L. Beccaria *et al.*, « COVID-19 in Latin America: The effects of an unprecedented crisis on employment and income », *International Labour Review*, no. 1, 2022, p. 83; S. Verick *et al.*, « Is this time really different? How the impact of the COVID-19 crisis on labour markets contrasts with that of the global financial crisis of 2008-09 », *International Labour Review*, no. 1, 2022, p. 125.

85 S. Soares and J. Berg, « The labour market fallout of COVID-19 », *op. cit.*

discriminatory « work quarantines »⁸⁶. These « work quarantines » enabled workers to work as long as they showed no symptoms despite either a) waiting for pending Covid-19 test results, or even b) being infected, if there was a significant staff shortage and other options for staffing had been exhausted. Garloff convincingly argues that this was misinterpretation of the German Infection Law (IfSG) by some local authorities and that no legal scope existed for it. On the contrary, « work quarantines » both increased the risk for infection for the affected workers' co-workers, as well as for other members of the public. For care workers, who in some cases were allowed to use public transport during « work quarantines », there even was a risk of infecting other public transport users, making these « work quarantines » wholly inadequate as measures of disease prevention⁸⁷. The « work quarantines » also disadvantaged affected workers themselves as they would have normally been entitled to sick leave at full pay under German law, gaining no advantage from being allowed/forced to work.

Seasonal and temporary migrant workers were particularly disadvantaged in this context, as there was no possibility for unions or other groups to challenge «work quarantines» on their behalf. They would have had to legally challenge their employers individually, an extremely difficult task given the structural and linguistic barriers faced by many migrant workers in these industries.

Additionally, for meat industry workers as well as for other migrant workers in food production, group accommodation provided by employers did not meet the requirements for quarantine at home, as the cramped quarters in group accommodation facilitated infection rather than preventing it⁸⁸.

This failure to address the needs of migrant workers, particularly seasonal migrant workers, during the pandemic was echoed in many jurisdictions in Europe and beyond. In the Middle East, Syrian refugee workers lost their jobs during the pandemic and faced increasing levels of food insecurity, partially due to the uncertainty of their legal status. Formalising refugee labour may have ameliorated some issues but overall does not suffice to address exploitation⁸⁹.

This sentiment was also echoed by Chiaromonte and D'Onghia in the Italian context: while the authors strongly supported the Italian initiative for regularisation of irregular migrant workers in some Italian industries during the pandemic, wider-reaching measures, including a total amnesty for all irregular migrants, would have done more to reduce inequalities and destitution⁹⁰.

86 G. Garloff, « Rechtswidrigkeit von Arbeitsquarantänen (nicht nur) in der Fleischwirtschaft », *Arbeit und Recht*, no. 3, 2021, p. 107.

87 *Ibid.*

88 *Ibid.*

89 A. Zuntz *et al.*, « Syrian refugee labour and food insecurity in Middle Eastern agriculture during the early COVID-19 pandemic », *International Labour Review*, no. 1, 2022, p. 245.

90 M. D'Onghia and W. Chiaromonte, « Migranti, lavoro, pandemia: nuovi problemi, vecchie risposte? », *Rivista giuridica del lavoro e della previdenza sociale*, no.1, 2021, p. 3.

The pandemic also highlighted the exacerbated effect of a lack of existing labour protections in both informal work, as well as for some underregulated sectors, including entertainment, subsections of care work and domestic work⁹¹.

Chen and others illustrated the negative effect of the pandemic on female workers in informal sectors of work in many low to middle income countries. This effect exists both in terms of work and income, care and household responsibilities as well as with regard to access to basic necessities. They demonstrated that strategies targeted at informal workers were often insufficient on multiple levels: in terms of compensations, government measures provided too little support, leaving workers to fend for themselves or risk destitution. Sometimes government interventions also failed to reach sufficient numbers of informal workers, leaving too many to fend for themselves. In fact, Chen and others show also how informal worker organisations often stepped in to provide relief and other support⁹².

De Martino underlines the position of domestic workers as a subgroup of irregular workers who were both considered essential, but whose vulnerabilities were exacerbated during the pandemic⁹³.

Vitaletti's analysis of the effects on entertainment workers stresses the lack of labour regulations in some industries, and their effect on workers' rights, as well as their ability to form collective agreements. She highlights the structural weaknesses of highly sectorial and disjointed protection systems, which is highly visible in the context of the entertainment industry but can be extrapolated to other areas in which the workforce is fragmented and has a variety of worker/employee/self-employed statuses⁹⁴.

In addition to workers' inequalities due to factors such as gender, disability, migrant status or occupation, workers' position within global value chains also affected their likelihood to suffer disproportionately from the consequences of the pandemic⁹⁵.

Ultimately the pandemic has exacerbated and resurfaced existing inequalities, revealing the fragility of existing equality measures, the lack of protections for large subsets of disadvantaged workers, as well as the effect of government policies on inequality, as governments insufficiently focused on ensuring non-discrimination or protecting vulnerable workers equally in their pandemic responses.

91 C. de Martino, « Chi bada alle badanti? La specialità del lavoro domestico alla prova del Covid-19 », *Giornale di diritto del lavoro e di relazioni industriali*, no. 169, 2021, p. 53; M. Vitaletti, « La dimensione "collettiva" del lavoro nello spettacolo », *Diritto delle relazioni industriali*, no. 3, 2021, p. 666; M. A. Chen *et al.*, « COVID-19 and informal work: Evidence from 11 cities », *International Labour Review*, no. 1, 2022, p. 29; A. C. Ogando *et al.*, « Impacts of the COVID-19 pandemic on unpaid care work on informal workers' livelihoods », *International Labour Review*, no. 1, 2022, p. 171; E. Camilletti and Z. Nesbitt-Ahmed, « COVID-19 and a "crisis of care": A feminist analysis of public policy responses to paid and unpaid care and domestic work », *International Labour Review*, no. 1, 2022, p. 195.

92 M. A. Chen *et al.*, « COVID-19 and informal work: Evidence from 11 cities », *op. cit.*, p. 53.

93 C. de Martino, « Chi bada alle badanti », *op. cit.*

94 M. Vitaletti, « La dimensione "collettiva" del lavoro nello spettacolo », *op. cit.*

95 S. J. Frenkel and E. S. Schuessler, « From Rana Plaza to COVID-19: Deficiencies and opportunities for a new labour governance system in garment global supply chains », *International Labour Review*, no. 4, 2021, p. 591; M. Anner, « Power relations in global supply chains and the unequal distribution of costs during crises: Abandoning garment suppliers and workers during the COVID-19 pandemic », *International Labour Review*, no. 1, 2022, p. 59.

C - SOCIAL DIALOGUE AND COLLECTIVE BARGAINING

Our review of the publications that have appeared in IALLJ journals shows that the academic discussion has approached social dialogue and collective bargaining from different perspectives. Predictably, one of these is their role in the management of the health crisis. As previously mentioned in some national contexts - Italy and Spain appear to be two of the most prominent examples in this regard - the role of social partners has been crucial at all levels⁹⁶. The fruitful and affective engagement of trade unions in public policy making has strongly challenged anti-union rhetoric opening new scenarios on the future of tripartitism following its decline during the 2008 crisis⁹⁷. Also, where the infrastructure for a negotiated response to the crisis was missing and calls from unions to set up a taskforce « to pull together unions, business and government agencies to minimize the economic and health impact of the coronavirus pandemic » were dismissed, policies enacted during the health crisis have nonetheless reflected unions' « advice », such as in the case of the implementation of the UK job retention scheme⁹⁸.

At the same time, the important increase of the numbers of remote workers in connection to social distancing measures and the visibility that the pandemic has given to platform workers, especially those operating in food delivery, has brought to the centre the issue of their collective representation, both in terms of ensuring collective representation rights and the substance of collective bargaining.

Cordero Gordillo and Fita Ortega provide a critical assessment of the Royal Decree-Law 28/2020 that specifically regulates the exercise of collective representation rights in the case of telework⁹⁹. The law clarifies that teleworkers enjoy full equality of rights with those performing their duties in person that are assigned to the same establishment, while creating an obligation for the employer to provide union representatives with all the necessary tools for the development of their representative activity, such as access to communications and e-mails used in the company or the implementation of the virtual bulletin board, as well as to ensure effective participation to activities organised by their representatives, including participation of remote workers in person in order to exercise their right to vote. While these developments are welcomed, scholars have identified several issues that need to be properly addressed in the future such as the definition of guidelines to ensure that the identification of the relevant establishment is not left to the discretion of the employer, ad hoc solutions for cases in which the worker operates exclusively online and/or no physical

96 E. Ales, « La tutela della salute sul lavoro nel prisma del metodo partecipativo », *op. cit.*; S. M. Ruesga and A. I. Viñas Apaolaza, « El uso de medidas de flexibilidad interna ante la crisis covid-19 », *op. cit.*

97 S. Canalda Criado, « Social partner participation in the management of the COVID-19 crisis: Tripartite social dialogue in Italy, Portugal and Spain », *International Labour Review*, no. 1, 2022, p. 150.

98 K. D. Ewing and Lord Hendy, « Covid-19 and the Failure of Labour Law: Part 1 », *Industrial Law Journal*, no. 4, 2020, p. 517.

99 V. Cordero Gordillo, « Trabajo a distancia y derechos de representación colectiva », *Temas laborales: Revista andaluza de trabajo y bienestar social*, no. 157, 2021, p. 123; F. Fita Ortega, « El Real Decreto-Ley 28/2020 sobre el trabajo a distancia: un marco normativo que satisface el ejercicio del derecho de representación de los trabajadores a distancia? », *Temas laborales: Revista andaluza de trabajo y bienestar social*, no. 156, 2021, p. 125.

workplace exists, as well as the possibility of electronic voting in trade union elections¹⁰⁰. In addition, concern has been raised regarding the choice to determine the conditions for effective exercise of collective representation rights through a process of collective bargaining, which bears the risk of turning into a regulatory impasse¹⁰¹.

The vanishing of the relation between workers and a physical workplace motivates similar efforts with regard to the collective representation rights of platform workers. Also, in this case the Spanish legislation offers an experience that is worth mentioning though, as it has been observed, not in an unproblematic way. While extending to platform workers collective representation rights, albeit with varying degrees, the newly adopted provisions do not appear to be fully consistent with the context of service provision through platforms. This is clear in the case of unitary representative bodies whose electoral process and functions are strictly related to a specific establishment. This makes it necessary, as Valle Muñoz suggests, to adapt the understanding of the traditional delimitation of the workplace for the purposes of platform work, to think of new rules for determining the legal minimum dimensional threshold, as well as to explore alternatives to the development of the electoral process in a physical space¹⁰².

Beyond these considerations, scholars agree that the major challenge that trade unions face when it comes to representing both teleworkers and platform workers is the ability of traditional trade unions to act in a way that is responsive to their needs.

D'Onghia has analysed the content of collective bargaining on remote work: she suggests that both trade unions and employers appear willing to play a more prominent role compared to the pre-pandemic phase. She argues that in the case of « agile work », collective bargaining shows greater attention to risks that arise in connection to this mode of performing work¹⁰³. Examples of these developments include clauses on ensuring workers the right to disconnect, striking a balance between work and life, and preventing isolation of workers through periodic meetings with managers and colleagues.

The picture appears to be a bit more articulated in the case of platform workers. In the Italian context, D'Onghia spotlights the collective agreement signed between Just Eat and the transport and atypical workers unions belonging to the main three trade union confederations on 29 March 2021. The agreement refers to the application of the national collective agreement for logistics and aims at the inclusion of riders in the regulatory and organisational context of subordinate employment, offering to those who have already collaborated with the platform a specific right of precedence over access to employment on a permanent basis and ensuring a weekly number of hours corresponding to the average hourly work previously performed¹⁰⁴.

The crucial role of collective bargaining for governing the changes that digitalisation is producing at all levels is confirmed in the Framework Agreement on Digitalisation of

100 V. Cordero Gordillo, « Trabajo a distancia y derechos de representación colectiva », *op. cit.*

101 F. Fita Ortega, « El Real Decreto-Ley 28/2020 sobre el trabajo a distancia », *op. cit.*, p. 135.

102 F.A. Valle Muñoz, « Las representaciones colectivas de trabajadores en las plataformas digitales », *Temas laborales: Revista andaluza de trabajo y bienestar social*, no. 157, 2021, p. 59.

103 M. D'Onghia, « Remotizzazione del lavoro, relazioni sindacali e tutela della salute dei lavoratori », *Quaderni della Rivista Diritti Lavori Mercati*, no. 11, 2021, p. 251.

104 *Ibid.*, p. 261

June 2020 that was reached by the European partners under article 155 TFUE. The agreement has the objective to raise awareness and improve the understanding of employers, workers and their representatives of the opportunities and challenges in the world of work arising from the digital transformation. It is also intended to encourage, guide and assist employers, workers and their representatives to devise measures and actions to seize these opportunities and meet the challenges, while taking into account existing initiatives, practices and collective agreements. In terms of content, the Framework Agreement mentions training, digital disconnection, artificial intelligence, telework, dignity and digitalised surveillance, among other issues¹⁰⁵.

According to Sepuvela Gomez the timing of the agreement is particularly significant. Whereas the health emergency led to an « overwhelming dynamism » of State intervention that could be justified in the light of the exceptional nature of the situation, through the Framework agreement social partners are claiming their regulatory space at all levels of collective bargaining¹⁰⁶.

If up to this point the discussion has looked at the digitalisation process as an object of social dialogue and collective bargaining, Gea, analysing the French context, overturns the perspective showing that the health crisis has also played a role in accelerating the digitalisation of social dialogue¹⁰⁷. In this respect, several collective agreements have been concluded on remote social dialogue and to a lesser extent on collective bargaining. As the author notes digitalised social dialogue is likely not to be a temporary phenomenon, calling on social partners to ensure a balance between the digital and the physical¹⁰⁸.

III - LABOUR LAW: APPRAISAL AND PROSPECTS

Quoting Frank Snowden's analysis of Epidemics and Society throughout history, Deakin and Novitz remind us that of « all issues raised by pandemics, preparedness is the most important »¹⁰⁹. Looking at the UK, the two authors of the editorial to the special issue that *Industrial Law Journal* dedicated to Covid 19 observe that Britain was found dangerously unprepared.

Whereas this assessment can undoubtedly extend to other contexts, in no other case have labour law failures been analysed in such a systematic way. In an article published in the same special issue, Ewing and Hendy conclude that labour law has failed in its core functions of protection of workers¹¹⁰.

Although very much welcomed, the UK job retention scheme is described as « law without rights » leaving to the full discretion of employers the choice to claim payments

105 M. Sepúlveda Gómez, « El acuerdo marco europeo sobre digitalización. El necesario protagonismo de la norma pactada », *Temas laborales: Revista andaluza de trabajo y bienestar social*, no. 158, 2021, p. 213; M. D'Onghia, « Remotizzazione del lavoro, relazioni sindacali e tutela della salute dei lavoratori », *op. cit.*

106 M. Sepúlveda Gómez, « El acuerdo marco europeo sobre digitalización », *op. cit.*, p 243.

107 F. Gea, « La digitalisation du dialogue social », *Revue de Droit du Travail*, no. 11, 2021, p. 625.

108 *Ibid.*, p. 633.

109 S. Deakin and T. Novitz, « Covid-19, Labour Law, and the Renewal of the Social State », *Industrial Law Journal*, no. 4, 2020, p. 493.

110 K. D. Ewing and Lord Hendy, « Covid-19 and the Failure of Labour Law », *op. cit.*

under the scheme rather than dismiss for redundancy¹¹¹. Besides, this scheme excluded any information and consultation from its operation, while failing to prevent practices of firing and rehiring as a way to pressure workers to accept lower terms and conditions. Additionally, it has proven inadequate to protect the income of non-standard categories of workers: those on zero-hours contracts, agency workers as well as self-employed limb workers, many of whom are employed in the gig economy. While the latter could theoretically apply for relief as self-employed, as previously mentioned, they could rarely meet the eligibility criteria.

As the authors argue some profound failings were due in large part to the shortcomings of the infrastructure onto which emergency measure were bolted, starting from the absence of any pre-existing provision for sudden shocks as those generated by the pandemic and of any procedural architecture that could lead to a negotiated response; limited legal protection for those in precarious work; ambiguity affecting the employment status of workers in the gig economy, lack of enforcement of relevant standards of protection, including minimum wage and health and safety standards at work¹¹².

As the last overview shows some of the issues that are being high-lighted have long been at the centre of the academic debate in the IALLJ journals¹¹³. From this point of view the pandemic has accelerated the impact of new technologies bringing to a new level the discussion about labour law protections in a digitalised economy. It has also exacerbated pre-existing challenges concerning inequalities, as well as regarding noncompliance throughout different economic sectors and along the global value chains¹¹⁴.

At the same time, it has altered the trajectory of the discussion, bringing into the agenda with unprecedented urgency at least two issues.

The first concerns the need to investigate the implications of remote work for workers' privacy as well as new ways to regulate remote work in order to protect workers from unlawful intrusions and re-establish a frontier between work and private life¹¹⁵.

The second concerns the role of the state in managing employment crisis. The experience of the pandemic and the recession it has triggered call for a reassessment of the pre-existing regulatory responses through careful government planning and consultation

111 *Ibid.*, p 151.

112 *Ibid.*, p 518.

113 C. Carta and G. Moraru, « Labour law beyond national borders: major debates in 2018-2019-2020 », *Lavoro e diritto*, no. 3/4, 2021, p. 699.

114 S. Soares and J. Berg, « The labour market fallout of COVID-19 », *op. cit.*; R. F. Lavado *et al.*, « COVID-19 disparities by gender and income: », *op. cit.*; L. Beccaria *et al.*, « COVID-19 in Latin America », *op. cit.*; S. Verick *et al.*, « Is this time really different? », *op. cit.*; S. J. Frenkel and E.S. Schuessler, « From Rana Plaza to COVID-19 », *op. cit.*; M. Anner, « Power relations in global supply chains and the unequal distribution of costs during crises », *op. cit.*

115 J. Howe *et al.*, « The future of work and labour regulation after COVID-19 », *op. cit.*; A. Gouttenoire, « Le régime du contrôle du télétravailleur par la donnée », *op. cit.*; M. Brown and N. Witzleb, « Big Brother at Work - Workplace Surveillance and Employee Privacy in Australia », *op. cit.*; B. Torres García, « Spain's Law No. 10/2021 on Teleworking », *op. cit.*; U. Romagnoli, « Hacia la normalización del trabajo a distancia. », *op. cit.*; A. Franzmann and R. Best, « Corona als Einfallstor in die Privatsphäre von Arbeitnehmer*innen? », *op. cit.*; A. Aloisi and V. De Stefano, « Essential jobs, remote work and digital surveillance », *op. cit.*

with employers, unions and other stakeholders in order to prioritise efforts to support the growth of businesses that offer sustainable employment paths¹¹⁶, make access to public funding conditional upon the implementation and active participation in training and/or retraining programmes¹¹⁷ and ensure better design of active employment policies aimed at supporting occupational transitions as well as social protection measures for all affected workers¹¹⁸.

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~ I. Thiemann, « The idealized victim-terminology in human trafficking for sex workers. Providing access to protections or rendering rights conditional? », *Wisconsin Journal of Gender and Society*, 2022, no. 37(1), p. 1.

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