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DIFFERENT DISCIPLINES, A SHARED OBJECTIVE

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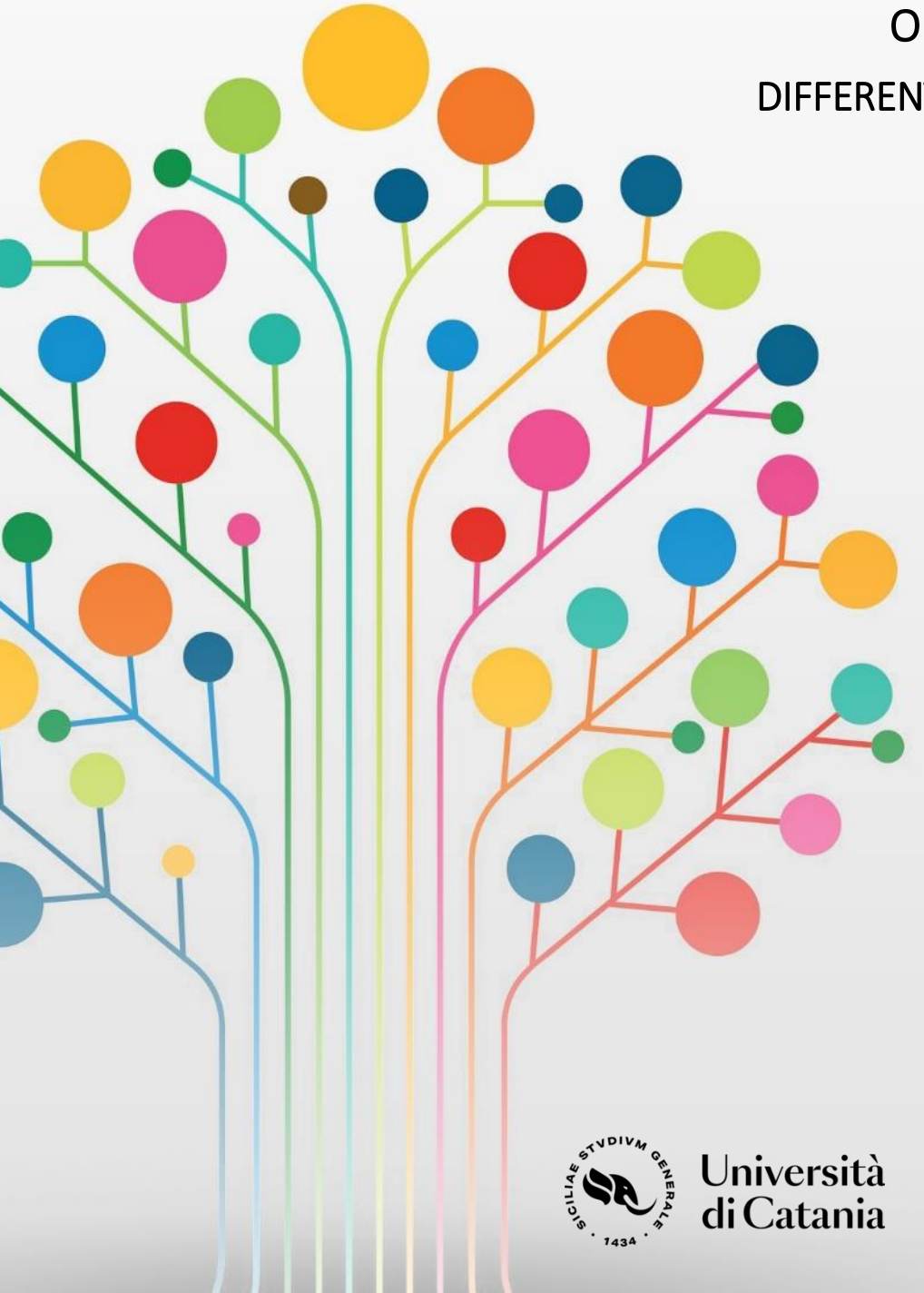
Stefano Angeleri
Laura Calafà
Venera Protopapa



Università di Catania

Centre for the Study of European Labour Law "MASSIMO D'ANTONA"

Con contributi di

STEFANO ALGERI, National University of Ireland Galway

LAURA CALAFÀ, Università di Verona

VERONICA PROTOPAPA, Università di Verona

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Promoting the health and safety of migrant workers. Different disciplines, a shared objective*

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Laura Calafà
Venera Protopapa

OVERVIEW

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The health, safety and associated rights of migrant workers in international and european human rights law

Stefano Angeleri

1. Introduction.

The purpose of this paper is to explore the normative inputs (of hard and soft law) that international and European human rights law can offer agricultural migrant workers in the areas of health and associated socio-economic rights, particularly in relation to occupational health and safety and working conditions. This piece of research employs a vulnerability-focussed approach to the right to health as the conceptual framework to analyse and evaluate the normative contribution of applicable international and European law.

The chapter is composed of this three substantive sections and a concluding section, the first of which addresses how the two elements of the theoretical framework – the principle of vulnerability and the interrelatedness and indivisibility of human rights law, as reflected in the concept of 'social determinants of health' – can form the basis for the enhanced protection of the right to health and other (socio-economic) rights for migrant workers. Section two identifies certain structural and competence-related constraints of the legal frame(s) of reference, namely, the difficulty of conceptualising and implementing the human rights of migrants and issues relating to the nature and quality of international obligations and recommendations regarding the right to health and other associated socio-economic rights.

While keeping in mind the enabling and constraining factors discussed in the previous two sections, Section three scrutinises how the human rights machinery of the United Nations (UN) and the jurisprudence of the Council of Europe's bodies have elaborated on the health and associated socio-economic rights of migrant workers. To discuss health and safety standards for migrants, I will mainly refer to the many interpretative activities on the right to health as its normative scope largely overlaps that of the right to health and safety at work. The last section draws conclusions on the structural and substantive state duties and recommendations that should be considered by domestic powers when determining their actions in relation to the socio-institutional vulnerabilities of migrant workers.

2. Theoretical framework: The concept of vulnerability and the interrelated nature of universal human rights.

This section explores two enabling arguments that shape international human rights law in relation to the extension of socio-economic protection to migrant workers: the concept of vulnerability, as elaborated in international and European case law on migrant rights, and the interrelatedness (also interdependence and indivisibility) of human rights. The special vulnerability of certain people or groups concerns a relationship of comparison between human rights holders in different circumstances and is linked to the disproportionate effect of positive state measures or lack of action on the actual enjoyment of rights by the worst-off. Interrelatedness of human rights refers to overlaps between the scopes of different human rights, which must generally be granted equal emphasis.

2.1. The construction(s) of vulnerability.

Vulnerability is a recurring concept in human rights law, which derives from the idea that certain people or groups are at a greater risk (than an average person) of suffering harm of a physical, moral, psychological, economic or institutional nature.

This increased risk of harm is caused by circumstances of inherent vulnerability (arising from

corporal factors or dependence on others, as in the case of children) or situational vulnerability (which relates to socio-institutional contexts). Especially vulnerable people may encounter greater difficulties in enjoying their human rights on a non-discriminatory basis. Vulnerability is a complex and contested concept. Some scholars reject its validity as a beneficial concept in the social sciences on the grounds that it may be paternalistic and victim-blaming, whereas others support its centrality as a criterion for identifying priorities in human rights practice, although there is no agreement on its conceptualisation. Vulnerability is described by some scholars as an inherent trait of every human being, which emerges when people command a lower quality and quantity of assets and resources than the average person. Another approach emphasises group-based vulnerability, where membership places a person in a disadvantaged position to the extent that certain regulatory frameworks recognise the group as especially vulnerable. Human rights law and practice – which also works with categories – is closer to the latter approach, often identifying people as especially vulnerable because their features correspond to prohibited grounds for discrimination (either of a formal or substantive nature).

The benefit of a legal recognition of group-based vulnerability would consist of targeted treatment of favour in human rights adjudication and monitoring, including the conceptualisation of international positive duties of states towards vulnerable people. For instance, as far as especially vulnerable people are concerned, human rights adjudicators tend to both reduce the state margin of appreciation for implementing measures that operate differentiations and lower the threshold for qualifying state practices as human rights violations in the case of alleged violation of a non-limitable right.

While migrants as a general category may be considered to be exposed to the above-mentioned risks of vulnerability because of their lack of stable or long-term membership of a certain polity, certain migrants – such as asylum seekers, trafficked and exploited people and children and women on the move – are traditionally considered more vulnerable than others. Irregular migrants are at times included in the category of vulnerable people, including by the UN Committee on Economic Social and Cultural Rights (CESCR) and the Inter-American Court of Human Rights. However, they are not legally qualified as such by the European Court of Human Rights (ECtHR). Migrants workers in the field of agriculture, who often have precarious or irregular migration status, are de facto especially vulnerable to human rights violations because of, inter alia, their institutional exclusion, their reduced power to improve their living conditions, linguistic barriers and difficult, dangerous and even exploitative working conditions. Actual vulnerabilities and the consequences of their legal recognition in international and European human rights law are circumstances that domestic policymakers and lawmakers must consider when they adopt measures that impact the enjoyment of socio-economic rights for migrant workers, as required by a non-discrimination-centred human rights-based approach to law and policy.

2.2. The interrelatedness of human rights and health.

Discussions of health, employment and living conditions cannot ignore the fact that the international doctrine of human rights recognises that «all human rights are universal, indivisible and interdependent and interrelated». While universality as a source of rights is linked to personhood and not to citizenship or residence (in other words, every person is a human rights holder), indivisibility, interdependence and interrelatedness refer to the fact that states must «treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis». Interdependence and interrelatedness relate to the fact that each human right require

the enjoyment of other human rights and that each of them may be a precondition or an element of others. For example, Article 25 of the Universal Declaration of Human Rights (UDHR) indicates that the right to social security and the right to an adequate standard of living are inextricably linked and that both are necessary for the realisation of a dignified healthy life.

These characteristics of human rights are consistent with the idea of underlying or social determinants of health, a public health concept that is now incorporated into human rights law. According to this concept, health outcomes are determined by a series of intersectoral factors: access to health or medical care and the enjoyment of decent living and working conditions are equally important for the achievement of health equity. Health promotion requires intersectoral public measures and empowerment processes, the realisation of which is also linked to the actual enjoyment of several human rights, in particular social rights, as elements of a framework (human rights based approach to public policy) that contribute to state accountability. Accordingly, contemporary conceptualisations of the scope of the right to health embrace both health care and the underlying determinants of health. Indeed, for the International Covenant on Economic Social and Cultural Rights (ICESCR) and its monitoring body (CESCR), the right to health is the right «to enjoy a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of physical and mental health».

A recent example of an international human rights body's promotion of the right to health through a determinant of health comes from the jurisprudence of the European Committee of Social Rights (ECSR), the monitoring body of the European Social Charter (ESC). In the case of Eurocef v. France, the ECSR held, inter alia, that providing inadequate accommodation for unaccompanied foreign minors is likely to make them more vulnerable to homelessness. This circumstance directly led the ECSR to find a violation of Article 11 ESC on the right to protection of health.

3. Structural barriers: Migrants' socio-economic rights in international and European law.

While the previous sections identify vulnerability and interrelatedness as bases for arguments that may enhance, in principle, the socio-economic protection of migrant workers, this section shows that there are structural limits that prevent full implementation of migrants' socio-economic rights in these legal frameworks.

3.1. Migration: The «last bastion of state sovereignty».

It is worth noting that although several treaties of international and European human rights law are universal in nature (the corresponding entitlements and freedoms are for every person), these agreements, until the 1970s, were thought to mainly protect state nationals against the arbitrary exercise of state power. Migrant-targeted human rights initiatives have only developed since the 1980s, although international labour standards had already addressed issues of social justice for migrant workers since the 1950s. Over the last twenty years in particular, international and European human rights bodies have increasingly elaborated on state obligations regarding the rights of migrants, including their socio-economic dimensions, using the provisions of general human rights treaties and emphasising non-discrimination clauses therein.

However, most of the applicable European case law and some pieces of international law tend to counterbalance the equal enjoyment of human rights by migrants with adherence to the rule that access, stay and treatment of non-nationals on a state territory should remain an area where domestic legal orders can maintain a high level of sovereignty. This is considered a «matter of well-

established international law», although many observers dispute that this rule should be considered as a maxim of international law. The absence of any global or international migration law (unlike international refugee law) reflects the above approach, and the few ratifications to the 1990 UN Convention of Migrant Workers and the outcome of the negotiation of the 2018 Global Compact for Migration demonstrate that migration and the rights of migrants – in particular those of irregular migrants – remain very controversial issues. As I made a mention to international labour law, it is worth noting that the standards set forth in the framework of the International Labour Organization (ILO) – in particular, the 1949 Convention concerning Migration for Employment and the 1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers – provide that regular migrant workers should enjoy socio-economic rights to a level that is «not less favourable» than that enjoyed by country nationals. However, according to the ILO conventions, irregular migrants should only enjoy human rights at a survival level.

3.2. The unequal treatment of socio-economic rights vis-à-vis civil rights.

Discussions of socio-economic rights – including those that protect and promote health and socio-economic well-being of migrant workers (regardless of their status) – expose another flaw of international and European human rights law: the "traditional" gap that exists in the conceptualisation and implementation of civil and political rights, on the one hand, and socio-economic rights, on the other. Even though this divide is not as wide as it once was, its structural consequences have not ceased to exist.

The 1948 UDHR did not create a hierarchy of civil and social rights. However, the ideological clash between the free-market-oriented Western world and the socialist bloc affected the formulation of subsequent treaties and undermined for decades the equal evaluation and effective enforcement of socio-economic rights. Accordingly, different human rights treaties, with differentiated state obligations, were adopted: while civil and political rights were thought to be fully justiciable, social rights (often identified as resource-demanding policy issues) were conceptualised as either programmatic goals or rights to be progressively realised and thus as unsuitable for adjudication. Therefore, even if some normative development has bridged this gap in certain legal frameworks, international and European human rights complaint mechanisms are still disproportionally oriented towards direct adjudication of civil rights, at the expenses of a full, clear and unified conceptualisation of state obligations in relation to all human rights, including social and health-related entitlements.

The impact of sovereignty arguments on migrant rights and the unequal treatment of socio-economic rights vis-à-vis immediately enforceable civil rights create a "perfect storm" whereby the socio-economic well-being of migrants remains an extremely delicate issue of international and European human rights law.

Keeping these observations in mind, the next section identifies the main international and European legal sources relating to health care, occupational health and socio-economic rights in the ICESCR, the ESC and the European Convention on Human Rights (ECHR) and presents an overview of the findings of their respective human rights monitoring bodies (the CESCR, ECSR and ECtHR). The CESCR and the ECSR are quasi-judicial in nature: indeed, even if their decisions elaborate an authoritative interpretation of binding treaty obligations, they have only recommendatory force. The ECtHR, an international court of law, although it is primarily

mandated to adjudicate on civil and political rights, has, since the 1980s, gradually begun to protect social interests through the lens of the ECHR's provisions, while also granting states a wide margin of appreciation in social affairs. In the matter at hand, non-binding decision-making in relation to international obligations has developed especially protective arguments and standards that are worth exploring.

4. The legal standards concerning migrant workers' health in human rights practice.

As this article is dedicated to the right to health care and its interplay with other (socio-economic) human rights, the enjoyment of which constitute positive determinants of health, it is worth recalling that:

Employment and working conditions have powerful effects on health and health equity. When these are good, they can provide financial security, social status, personal development, social relations and self-esteem, and protection from physical and psychosocial hazards.

The following sub-sections scrutinise – without claiming completeness, due to the large number of applicable decisions – how human rights law establishes and interprets treaty norms that give people, including migrants, the opportunity to satisfy their basic needs or to realise their capabilities and flourish as human beings, with particular emphasis on health and safety at work.

4.1. The International Covenant and the Committee on Economic, Social and Cultural Rights.

Since the ICESCR is the major international treaty in the area of socio-economic rights, this analysis is conducted with reference to its normative contribution, the interpretative activity of its monitoring body (CESCR) and certain interesting remarks of the advisory bodies of the UN Human Rights Council (UN Special Rapporteurs).

The international obligations regarding health and safety are covered by Articles 7 (just and favourable conditions of work) and 12 (the right to health) of the ICESCR. The realisation of the right to the highest attainable standard of physical and mental health requires states to adopt preventive, curative and promotional measures, which, under Article 12 ICESCR, includes workplace measures. Just and fair conditions of work, according to Article 7 ICESCR, are realised by recognising the right of «everyone» to, at the bare minimum, remuneration that provides «a decent living» for the worker and the enjoyment of «safe and healthy working conditions». Thus, Articles 7 and 12 ICESCR are strongly interrelated, as exemplified by the following statements of the CESCR:

"Remuneration" goes beyond the more restricted notion of "wage" or "salary" to include additional direct or indirect allowances in cash or in kind paid by the employer to the employee that should be of a fair and reasonable amount, such as grants, contributions to health insurance, housing and food allowances.

Furthermore, the regulation of health and safety at work is extremely significant for the protection and promotion of the right to life and health of every worker. State duties in this area are important determinants of the highest attainable standard of health of everyone and are explicitly listed as health-related obligations of conduct in Article 12 ICESCR.

Whereas the ICESCR's general obligations are to be realised progressively, the CESCR, emphasising Article 2(2) ICESCR, has indicated that states should immediately «adopt and implement a national

public health strategy and plan of action, on the basis of epidemiological evidence [that] shall give particular attention to all vulnerable or marginalized groups». Furthermore, immediate measures include the enactment of «a national policy for the prevention of accidents and work-related health injury by minimizing hazards in the working environment», and the duty to ensure a broad participation of stakeholders «in the formulation, implementation and review of such a policy». Referring to the applicable ILO Occupational Safety and Health Convention (n. 155/1981), the CESCR, focussing on processes of right-realisation, recommends establishing a regulatory system that makes employers directly accountable for the health and safety of their workers, complemented by state duties of protection focussed on monitoring in the form of labour inspections.

In its General Comment n. 23, the CESCR, whose international human rights monitoring, and interpretative activity has always been vulnerability-focussed, raises particular concerns regarding the working conditions of specific workers, including workers in the informal economy, migrant workers and agricultural workers. In the case of migrant agricultural workers, the above categories and the risk of abusive working conditions overlap. Many agricultural migrant workers are employed informally, and may, therefore, be «excluded from national statistics and legal protection, support and safeguards», with the result of exacerbating their vulnerability. The CESCR recommends reversing this situation by reforming laws and policies to ensure «that migrant workers enjoy treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work». A coordinated and genuinely intersectoral approach should address socio-economic disadvantages, forced labour, income insecurity and lack of access to basic services, which many agricultural workers face on a daily basis.

Finally, the CESCR's General Comments establish a list of core obligations according to which states must guarantee that the right to just and favourable conditions of work and health are immediately exercised without discrimination on the ground of nationality. A similar focus on the work-related vulnerabilities of migrants (in connection with concerns for their health) can be found in the "concluding observations" of the CESCR, with regard to their monitoring of domestic laws, policies and practice for compliance with international duties concerning economic, social and cultural rights.

4.2. The UN Special Rapporteurs, the Human Rights Council and the Global Compact for Migration.

A number of detailed reports of both the UN Special Rapporteur on the Right to Health and the Special Rapporteur on the Rights of Migrants contributed to unpacking international states duties regarding the health and safety of migrants working in agriculture. These rapporteurs are independent human rights experts mandated by the UN Human Rights Council to report and advise on human rights from a thematic or country-specific perspective.

In a 2012 report on "occupational health", the Special Rapporteur on the Right to Health specified state obligations to formulate, implement, monitor and evaluate occupational health law and policy. The special vulnerability of migrants in agriculture is palpable in the Rapporteur's statement on the factors that need to be considered to examine occupational health and the relationship between work and health, which include «harmful exposures during work, specific varieties of working conditions, working environment, working relationships, and the social, environmental and political contexts in which work is situated». In this report, informal economies

are acknowledged as a significant direct and indirect risk factor for the health and safety of workers because of the absence of state regulation on collective bargaining, maximum working hours and anti-discrimination protection. Furthermore, the right to health is likely to be violated because informal workers often experience lack of access to:

legal protection and formal financial services, lack of social protection or social health insurance afforded to formal sector employees, exposure to harsh law enforcement, lack of job security, discrimination and others. Moreover, […] when informal workers are injured, they are not granted compensation for their injuries.

As the right to health requires that states provide prevention, promotion and treatment measures, collective measures that prevent work-related disease and promote healthy conditions are as important as the provision of individualised health care.

Both this report and the subsequent 2013 report on "migrant workers' health" identify migration itself as a major determinant of health, especially when linked to a racist social context and irregular migration status. Building on influential epidemiological studies, the Rapporteur recognises that migrant agricultural workers, who are generally exposed to (hazardous) pesticides and whose work environment often coincides with their home environment (which may be crowded and unsafe), are in situations of particular socio-economic vulnerability. Accordingly, states should prioritise the needs of these vulnerable people and take targeted measures to prevent or minimise their exposure to health-related hazards.

Due to the use of pesticides and farm chemicals, agricultural work has been associated with increased levels of physical and mental health problems. Together with the remote settings that this work may involve and the language barriers that short-term migrants experience, the use of these substances can negatively affect migrants' effective enjoyment of the right to health and other associated rights. Therefore, states should identify and monitor stress factors and potential harms to migrant's health and guarantee non-discriminatory access to health services – including mental health support and care – that are linguistically and culturally sensitive.

In the case of Italy, the two visits to this country of the Special Rapporteur on the Rights of Migrants (in 2012 and 2014) exposed widespread labour exploitation of migrants, in particular irregular migrants. On those occasions, the Rapporteur recommended increasing the number of labour inspections but without granting inspectors any power in relation to migration enforcement, a practice that other human rights bodies have endorsed to make migrant rights effective. This situation has not been fully addressed, or it is quite the opposite: the UN Special Rapporteur on Contemporary Forms of Slavery recently issued an alarming report following her country visit to Italy in 2018. Migrant farm workers in parts of southern Italy – victims of the caporalato system – were found to endure extreme levels of labour exploitation and coercion, inhuman working conditions and lack of basic access to water, food, health care and humane shelter. Raising issues about slavery, forced labour, inhuman or degrading treatment and trafficking of human beings represents a conceptual angle from which to grapple with extremely severe cases of labour exploitation and denial of health and safety standards for migrant workers, as indicated by the case law of the ECtHR.

Furthermore, the human rights of migrant workers have received special attention during the last cycle of the Universal Periodic Review by the UN Human right Council (HRC) on the situation of human rights in Italy. The outcomes of this intergovernmental process recommended Italy to

closely monitor living and working conditions of migrants and take effective measures against trafficking in human beings for labour exploitation. Italy has accepted these recommendations, by undertaking the political commitment to address the HRC's concerns during the next cycle of periodic review.

To conclude this section, it is worth mentioning the 2018 Global Compact for Migration, which, although it is solely political in nature, authoritatively restated applicable state obligations and best practice. In doing so, it inter alia emphasised the need to guarantee basic health services to every migrant without discrimination and strengthen the «abilities of labour inspectors and other authorities to better monitor recruiters, employers and service providers […] ensuring that international human rights law and labour law is observed to prevent all forms of exploitation, slavery, servitude and forced, compulsory or child labour».

Finally, the Global Compact added that, to comply with human rights obligations, states should provide equalised human, social and labour rights to regular migrant workers and:

ensure [all] migrants working in the informal economy have safe access to effective reporting, complaint, and redress mechanisms in cases of exploitation, abuse or violations of their rights in the workplace, in a manner that does not exacerbate vulnerabilities of migrants that denounce such incidents and allow them to participate in respective legal proceedings.

4.3. The European Social Charter and its applicability to migrant workers who are third country nationals.

At first sight, it appears that the ESC and ECHR jointly guarantee all human rights on a universal basis for people who fall under the jurisdiction of one of the member states of the Council of Europe (CoE). However, both instruments lack full competence regarding the social rights of migrants, particularly irregular migrants. On a general level, the ESC contains labour and social rights provisions that extend to the areas of just conditions of work (Article 2), health and safety at work (Article 3), the protection of health, medical and social assistance (Articles 11 and 13) and the general rights of (regularly resident) migrant workers (Article 19).

The ECSR interprets Article 3 ESC as granting everyone a right to safe and healthy working conditions, a right that stems directly from the right to physical and mental personal integrity. In the case of MFHR v Greece, the Committee interlinked Article 11 ESC (protection of health), Article 3 ESC (occupational health) and Article 2 ECHR (the right to life) to hold that the responding state had violated the Charter by failing to adopt protective health measures, including those to address work-related risks to migrants' health and lives. Article 3 ESC requires states to issue health and safety regulations, regularly update them, monitor their enforcement and consult with stakeholders and workers to improve them. Supervising and monitoring of health and safety include the regulation and organisation of an appropriate system of labour inspections «to ensure that the largest possible number of workers benefit from the right(s) enshrined in Article 3».

The ECSR, since its first interpretative activity, has recognised that health and safety regulations should apply to all economic sectors and that agriculture is a particularly dangerous sector in which to be employed. Furthermore, particular mention is made of the unsafe situation of workers in «insecure employment or working under fixed-term contracts». Recently, the ECSR explicitly stated that health and safety regulations and supervisors of those regulations must address the mental health risk factors «work-related stress, aggression and violence when

examining whether policies are regularly assessed or reviewed in the light of emerging risks».

While Article 3 ESC grants everyone the right to health and safety at work – with an emphasis on agriculture, mental health and precarious work – the personal application of the Charter extends to «foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned». This personal scope, which also applies to Article 19 ESC (on the rights of migrant workers), does not extend the entitlements of the Charter to third country nationals – regardless of their migration status – who work in the jurisdictions of the countries of the CoE without holding the nationality of one of those countries. Similar conclusions apply to Article 11 on the protection of health.

This is why, in the absence of any applicable case law, I offer some remarks that build on the specific characteristics of this treaty text and on the case law that the ECSR has developed in the interrelated areas of social and medical assistance of migrants during the last two decades.

First, although it cannot be said that all migrant workers in agriculture or in any other sector are genuine human rights holders under Article 3 and 11 ESC, it is worth examining the nature of the obligations generated by these articles. These provisions mainly require the adoption of collective measures («the contracting parties undertake […] to issue health and safety regulations, [to provide enforcement of such regulations] to remove causes of ill-health […], to prevent […] diseases»). Health and safety regulations and their monitoring (which includes labour inspections) that apply to a certain sector or employer – because of their collective nature – can benefit both migrant and non-migrant workers, in particular when incompliance with these leads to either criminal or civil sanctions for employers and when labour inspectors do not have immigration management powers.

Second, the ECSR has long started to apply the ESC beyond its personal scope in cases regarding (irregular) migrants' health and social well-being because the spirit of the Charter would be hindered if these people were left without the bare minimum of assistance and care. According to the ECSR, the Charter must be interpreted «in the light of other applicable rules of international law», which allows for an extension of the personal scope of those Charter-related obligations that realise the «most fundamental human rights [such as the right to life and physical integrity of all migrants] and protect everyone's human dignity». Accordingly, the ECSR has held that – at least – emergency social assistance, which includes food, shelter, emergency medical care and clothing, should be provided to every person, including migrants. The principles of the interrelatedness of rights and the vulnerability and dignity of migrants were cornerstones of the arguments resulting in these decisions.

Even though explicit cases on the topic at hand are missing, in the light of the fact that the ECSR considers health and safety at work – as indicated above – so deeply connected to the right to life and personal integrity of the ECHR, it is not unlikely that the measures set out in Articles 3, 11 and 19(4) ESC may be employed to protect migrants (working in agriculture) from particularly abusive practice (of their employers), which constitute threats to the enjoyment of their fundamental civil, social and labour rights.

It is a relatively common – although constrained – practice of the ECtHR to view the protection of social and labour interests through the lens of civil rights. The next section elaborates on the potential and limitations of this "indirect protection" approach to addressing the socio-economic well-being of migrants in and outside the workplace.

4.4. The contribution of the ECtHR to the standards on health and socio-economic well-being of migrant workers and the recommendations of the Group of Experts on Action against Trafficking in Human Beings (GRETA).

Since 1979, the ECtHR has passed several judgements that address socio-economic human interests by recognising that there is not «a water-tight division separating» civil and political rights from socio-economic rights. Particularly over the last twenty years, in situations where the basic needs of especially vulnerable and dependant people were at stake, the Court has increasingly made use – although on an ad hoc basis and avoiding overly general statements and definitions – of the concept of positive obligations to establish state duties in this area.

As far as health and associated rights are concerned, state (in)compliance with ECHR's Article 2 (the right to life), Article 3 (the prohibition of torture), Article 8 (the right to respect for private and family life) and Article 1 Protocol 1 (the protection of property) is claimed before the ECtHR but with often uncertain outcomes. Indeed, while the number of such cases has increased, interpretative techniques have limited the extension of the ECHR to socio-economic rights to exceptional cases. For example, where limitable rights, such as those contained in Article 8 ECHR, are concerned, socio-economic deprivation must reach a certain level of severity to infringe the ECHR, and most state duties are of due diligence, because states enjoy a:

wide margin [of appreciation] when it comes to general measures of economic or social strategy […]. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".

Furthermore, the assessment of the Court has often been unsystematic where positive state obligations (of a socio-economic nature) are concerned, insofar as it weighs the definition of the scope of the rights protected against the justification for limiting measures. A fair balance needs to be struck between «the general interest of the community [to limit economic expenditures] and the interests of the individual».

The justifications of judgements and decisions regarding Article 2 and Article 3 demonstrate that the threshold of severity to trigger the applicability of these articles is particularly high: a systemic denial of health care, extreme circumstances of individual health and socio-economic deprivation, state knowledge of the violation combined with a certain negligence in implementing protective duties and multi-layered vulnerability based on restriction of personal liberty and dependence of the victims are some of the common features of these cases.

When these reflections on the limited applicability of the ECHR to socio-economic rights meet the phenomenon of immigration – a politically sensitive and domestic field of regulation – further interpretative constraints emerge. While a generally protective approach to the socio-economic rights of regular migrants and asylum seekers is under development, access to dignified socio-economic conditions by irregular migrants is somewhat hindered by an interpretation of non-discrimination that does not fully apply to differentiation on legal status. For example, the Court held that it would not be unreasonable for a state to limit the use of «resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding». Again, in another case, it added that «given the […] choice involved in immigration […] the justification required [for legitimate

differentiation] will not be as weighty as in the case of a distinction based, for example, on nationality».

Without forgetting all the above remarks, the findings of the certain judgements, including the following ones, may establish a path for the protection of health and safety standards of migrants at work. Issues of occupational health have been adjudicated by the ECtHR for compliance with Article 2 and 8 ECHR in the cases of, inter alia, Vilnes et al. v. Norway and Brincat et al. v. Malta. Therein, the Court held that positive obligations to protect life and to respect the private lives of those engaged in dangerous activities largely overlap, and these include duties to take legislative and any other practical measures to ensure that workers are adequately protected (with regulation) and informed about work-related risks to their health and lives. It is worth noting that, in the case of Brincat, the ECtHR held a violation of both Articles 2 and 8 ECHR because the state failed to provide adequate protective measures when it was supposed to be aware of the serious danger that working in that sector entailed for the health and lives of the applicants.

The widely known Chowdury et al. v. Greece was a significant case regarding abusive working conditions of migrants in the field of agriculture, although it was not directly linked to matters of health and safety. This case was pioneering in qualifying the labour exploitation of irregular migrant workers as forced labour and trafficking in human beings. It also shed lights on the appalling living and working conditions that many migrants experience in southern Europe. The applicants in this case were recruited to work in a strawberry farm (for 12 hours per day, 7 days per week, earning €3 per hour and working under the supervision of armed guards) while living nearby in cardboard tents with no running water or sanitation. The Court acknowledged that the applicants, as irregular migrant workers (in a situation of economic dependence on their recruiters and in fear of being reported to the authorities for deportation), were extremely vulnerable to exploitation, which did take place in the form of trafficking for forced labour. To fight against situations of labour exploitation and human trafficking, the Court stated that state parties have positive obligations, under Article 4(2) ECHR to, inter alia, put in place an appropriate anti-trafficking legal and regulatory framework and adopt protective operational measures. Regarding the latter, the response of the Greek authorities, who were aware of the abusive conduct of the employers, was found to be lacking or insufficient.

A joint reading of the unmet obligations in Chowdury and Brincat, in the light of the above preliminary remarks, points to the fact that the case law of the ECtHR leaves room for considerations of the health, safety and well-being of migrant workers. While migrants in a regular situation more easily fit the personal scope of the ECHR, in the case of irregular migrant workers, only severely abusive conditions in extreme circumstances seem to trigger the applicability of the ECHR. Where the case of migrant workers in agriculture in Italy is considered, the above-mentioned report of the Rapporteur on Contemporary Forms of Slavery described the details of situations that may, in principle, be able to reach the level of severity suitable to fall under the protection offered by the ECHR. Furthermore, multiple and intersectional vulnerabilities to right violations were analysed in the extensive and recent report of the Group of Experts on Action against Trafficking in Human Beings (GRETA) on the implementation of the Convention against human trafficking by Italy. GRETA urged Italian authorities to intensify domestic measures that target trafficking in human beings for the purpose of labour exploitation, including «expanding the capacity of labour inspectors so that they can be actively engaged [also] in private households» as well as «consider[ing] measures to expand legal routes to migration as an effective

[action] to reduce vulnerability to trafficking».

5. Conclusions.

This paper offered examples of how legal recognition of human and group vulnerability and the indivisibility of rights that feature in major human rights treaties and international jurisprudence can enhance the protection and promotion of work-related safety and health for migrants. The ICESCR, ECHR and ESC are international treaties that establish binding universal norms for ratifying states to be interpreted not only according to the ordinary meaning of words but also in a purposive and contextual way.

For a series of conceptual and structural reasons, monitoring and adjudication of migrant social rights are not straightforward tasks to undertake. Decisions of human rights procedures that directly target socio-economic rights, at both international and European level, generally have only recommendatory effects. At international level, compliance with binding treaties is generally supervised by quasi-judicial bodies, while, at European level, the ECtHR does not have full competence to rule all aspects of social rights, including health and safety at work, because it is beyond its explicit mandate to adjudicate on civil and political rights. Notwithstanding these remarks, this paper aimed at providing major examples of international and European human rights practice other than those emerging from the well-known case law of the ECtHR.

State parties to the European Social Charter, who have opted in the applicable articles, have the duty to take preventive, curative and promotional measures to ensure the right to health (Articles 11 and 13 ESC), which includes the duty to regulate, supervise, enforce and periodically review (in consultation with all stakeholders) norms on the health and safety of all agricultural workers according to Article 3 ESC. Even though the personal scope of the ESC is normally limited to migrant workers who hold the nationality of any one of the 43 members states, the jurisprudence recalled above has extended its scope to cover urgent situations of socio-economic need of all migrants, as otherwise the spirit of the Charter as human rights treaty would be jeopardised. As indicated in the respective section, the ECSR heavily relies on the principles of interdependence between human rights norms and contextual interpretation of human rights treaties, and this has contributed to the adoption of migrant vulnerability- or precariousness- aware findings. Furthermore, the treaty obligations, as interpreted by the ECSR, to adopt collective measures, such as conducting labour inspections and granting inspectors the power to sanction in cases of irregularities, may indirectly benefit the health and well-being of all workers, including migrants. Considering the limited personal scope of the ESC, this is mostly in cases where other legal frameworks applicable to the state party mandate a duty of non-discrimination on the grounds of nationality.

Nationality is, for example, a suspect ground of discrimination for the ECtHR's case law, including in relation to socio-economic affairs. Within this legal framework, state apparatuses have procedural duties to enact regulation that prevents violations of the right to life and the right to private and family life of those engaged in dangerous activities and to actively promote information campaigns. As far as health and well-being are concerned, both in and outside the work environment, only systematic and severe socio-economic vulnerability of migrants have given rise to a finding of violation of the provisions of the ECHR. One such exceptional case is that of Chowdury, which concerned human trafficking for forced labour of 42 Bangladeshi nationals with irregular status who worked in a strawberry farm in Greece, which was heard to determine

compliance with Article 4 ECHR. The Court served a judgement that set forth positive state obligations to, inter alia, take operative measures to prevent trafficking and forced labour and protect especially vulnerable undocumented victims, including through psychosocial interventions.

The required standards and measures to ensure the health and safety of migrant workers, as especially vulnerable people, are more generously spelled out in soft law initiatives of international human rights law (e.g., the above-mentioned reports of the Special rapporteurs and the CESCR's General Comments) that provide authoritative interpretation of UN treaty law, in particular the ICESCR. Recognizing the right to health and the occupational health and safety of migrant workers, states are recommended, first, to ratify all core human and labour rights instruments and, subsequent, to incorporate and operationalise those instruments. The ratification of the ICESCR requires states to fulfil both procedural or methodological obligations and substantive normative duties.

Among the former are the duties to enhance participation and the provision of information by relevant stakeholders in norm-making, monitor standard implementation, periodically revise occupational health policies and ensure that genuine instruments of state accountability exist. Accountability-related duties include setting up accessible redress mechanisms with the authority to enforce, for example, incident-related compensation for workers and sanctions for employers.

With regard to substantive international duties, states are required to adopt comprehensive health and safety regulations that do not produce any direct or indirect discrimination based on nationality or legal status and that cover informal workers. Information on occupational risks should be disseminated in a linguistically accessible manner. Migrant workers, including seasonal workers and irregular migrants, should be considered an especially vulnerable group that should be offered interventions of essential primary health care, including work-related prevention, treatment and rehabilitation measures. Most notably, states have the duty to allocate adequate resources to fund independent and frequent labour inspections by specialised staff. The staff of the labour inspectorate should adopt best practices that do not exacerbate the vulnerabilities of migrants and should not report migrants in irregular situation to the immigration authorities. They should also provide information about available health facilities that provide prevention, treatment and rehabilitation measures to protect physical and mental health and that employ cultural mediators.

As the right to the highest attainable standard of health, including occupational health, must be realised with no discrimination on the ground of nationality and legal status, states should be particularly responsive to migrant workers' situations of socio-economic and human vulnerability, to which exploitative phenomena such as the caporalato system give rise. Italy – a country that ratified all previously mentioned human rights treaties – has the duty to adopt, at all level of governance, actions that positively affect the close relations between employment standards, living conditions and health of migrant workers. These areas of action are inherently interconnected and only a genuine commitment to the adoption of measures targeting the worst-off as part of the human family can result in the universal realisation of human rights, as including socio-economic rights, regardless of one's migration status.

Developing an interdisciplinary approach to the health and safety of migrant workers

Laura Calafà- Venera Protopapa

1. The link between law and health.

The paper focuses on migrant workers' health and the relation between health and the law through interdisciplinary dialogue, involving in particular the fields of health studies, medicine and law. For this purpose, it is worth clarifying that the Preamble to the 1946 Constitution of the World Health Organization offered an authoritative conceptualisation of health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.

Medicine and public health adopt two different approaches that grapple with human health. The first has traditionally employed a 'bio-medical' approach to health and is focused on investigating the mechanisms of causation of disease and its treatment, while the second grapples with health as a social phenomenon and incorporates considerations on how social conditions affect health outcomes. This second approach, based on health promotion, is commonly known as the 'social determinants of health' approach (SDH approach). The idea underlying the 'social determinants of health' approach is that the bio-medical perspective on health is inadequate for improving the health status of the population at a national and global level, and in particular to the benefit of impoverished and socially excluded people.

In 2005, the World Health Organisation launched the Commission on the Social Determinants of Health (CSDH) that produced in 2008 a final Report which collected evidence on the social determinants of health and made recommendations on how to target health equity by addressing social inequalities. According to the CSDH, health outcomes can be explained through reference to intermediary and structural determinants (see Figure 1). The intermediary determinants include: living and working conditions (factors such as housing and neighbourhood quality, the financial means to buy items such as healthy food and warm clothing and the physical work environment), social and community networks (factors such as psychological stressors, stressful living circumstances and relationships, social support and coping styles or the lack thereof), individual and lifestyle factors (including nutrition, physical activity, tobacco consumption and alcohol), and biological factors (age, sex and other 'constitutional' factors). Such determinants are in turn shaped by structural determinants that encompass the social, economic and political conditions whereby populations are stratified according to income, gender, education, occupation, race, ethnicity, and other factors.

Research exploring the mechanisms through which such determinants operate explains differential health outcomes through reference to the concept of 'relative inequality' along the social hierarchy. Rather than the absolute level of resources, what people living in poverty in different contexts around the world share is their state of disempowerment.

In literature disempowerment is associated with the inability to meet three fundamental conditions (that are included among the social determinants of health): material (the ability to access tangible goods in order to satisfy fundamental requirements); psychological and social (the ability to control one's own life) and political (the ability to make oneself heard and to exercise one's own rights).

All the above considered, it is worth asking what the potential of an interdisciplinary dialogue between law and health studies (social epidemiology and social medicine) is. Such potential has been particularly explored with regard to human rights and health studies.

On the one hand, the social determinants of health approach would surely benefit from better incorporation of human rights into their discourse. Human rights have been observed as providing an instrument for turning diffuse social demands into focused legal and political claims, as well as a set of criteria by which to evaluate the performance of political authorities in promoting people's wellbeing.

On the other hand, the human rights approach should give greater attention to the social determinants of health. Research findings in social medicine suggest that societies aiming to improve the health status of their population and reduce significant health inequalities should not limit their action to improving the availability of health services. While indeed necessary and significant determinants of health, better health services cannot counterbalance the way the other 'social' determinants of health affect health outcomes. Therefore, social and economic policies addressing social and health inequalities constitute a more promising health policy approach: 'If the goal of the right to health is to improve health status in a society, particularly of vulnerable groups, then it is vitally important for those working on rights-based approaches to health to pay far greater attention to the conditions in which people "grow, live, work, and age" and to better understand how such conditions shape health and well-being'.

Such considerations show that there is room for deeper interdisciplinary dialogue. Besides providing standards and frameworks to assess the efficacy of health policies, law and legal research may actively redress health inequalities. In other words, the SDH approach provides a framework for assessing the way law, might contribute to health inequalities and the extent to which changes in law might address such inequalities. According to such approach, attempts to improve the health status of migrant workers should investigate whether the law contributes to their condition of disempowerment and how to legally redress the same, that is to say their ability to access tangible goods, services and resources to satisfy fundamental needs, control their life, make themselves heard and exercise their rights.

Gaining a better knowledge on how law affects health outcomes raises a number of research questions. Addressing the health-related standards of migrant workers requires us to question the role of immigration law, on the one hand, and to reflect on the potential of a labour-rights approach, on the other. Indeed, work has always been regarded as a prerequisite for enjoying fundamental existential conditions (of a material, social and psychological and political nature), while labour law, as a discipline, has been traditionally informed by, among other values, the normative commitment to counter inequalities of power and enhance worker's autonomy.

Employment and working conditions have been highlighted as having powerful effects on health. 'When these conditions are good, they can provide financial security, social status, personal development, social relations and self-esteem, and protection from physical and psychosocial hazards'.

This choice of method requires a transformation of legal research in response to the fact that regulatory systems, rather than being descriptive of socio-economic and medical conditions, play in fact a constitutive role in shaping those very conditions.

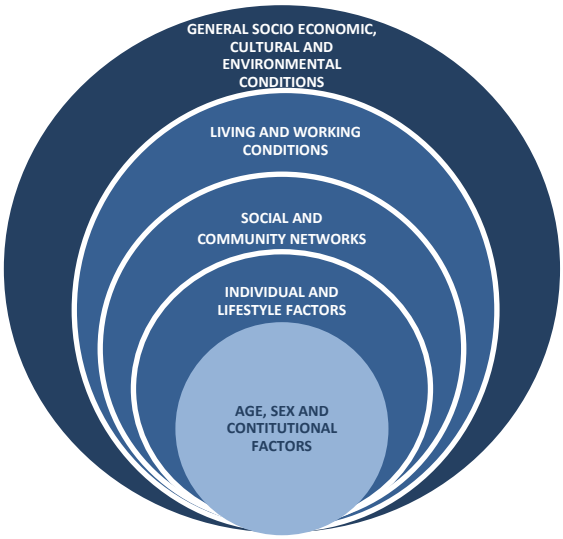

Fig. 1 The social determinants of health (WHO, 2008)

2. The disempowering effect of immigration law.

In order to explore how law affects migrant workers' health, this section will focus on the way immigration law, by creating a continuum of immigration statutes that go from undocumented to permanent status, shapes precarious work that is characterized by uncertainty, low income, limited social benefits and protections.

The metaphor of the continuum has been used by scholars to describe both how immigration law creates precarious immigration statuses, and how these statuses affect employment relations by creating an additional layer of dependence of migrant workers on their employers.

Research exploring this relationship highlights the inherent contradictions of the recent developments in immigration rhetoric and policy. While restrictive immigration policies are increasingly presented to the general public, in Europe and beyond, as a means for prioritising the national workforce and a way for protecting migrant workers from trafficking and exploitation by criminal networks, they do neither.

There is evidence that migrants are more likely than nationals to work in sectors that are characterised by low labour protections and work under lower conditions even when compared to national workers in the same sector. These findings have been, in part, described as a result of the perception of temporariness of certain jobs, associated, during the early stages of the migratory project, to the belief that the worker is going to move to something better soon or to the limited time frame of the migratory project itself. Discrimination, lack of recognition of qualifications and low language proficiency play an important role as well, but these provide a rather incomplete picture of the dynamics that push migrant workers into precarious work. The likelihood of migrant workers to end up in these kinds of working arrangements has been convincingly explained as a consequence of precarious migration status. Immigration controls

operate both as 'a tap regulating the flow of labour' and as 'a mould shaping certain forms of labour.' In other words, immigration controls, besides defining who has the right to come in, determine also the conditions under which the migrant is going to work.

As Anderson puts it, 'through the creation of categories of entrant, the imposition of employment relations and the construction of institutionalised uncertainty, immigration controls work to form types of labour with particular relations to employers and to labour markets. They combine with less formalised migratory processes to help produce "precarious workers" that cluster in particular jobs and segments of the labour market'.

The process is realised through mechanisms that reinforce the dependence of the worker on the employer. To illustrate how these mechanisms affect the condition of a migrant worker with a temporary right to work and stay, it is helpful to consider how immigration law, by tying the renewal of the right to residence to employment, adds to the already known vulnerabilities related to fix-term employment a further layer of dependence of the worker on the employer.

Where an employer is dissatisfied with a worker's performance or even in case of a personal conflict with the worker, not only is the employee's job at stake but also their right of residence. In certain sectors, such as domestic work and agriculture, housing might become an issue as well. It is not surprising that in such contexts migrant workers feel unable to negotiate terms and conditions of employment and challenge the employer, also in cases in which such terms and conditions are systematically violated.

Immigration law shapes a category of workers that is much more likely to accept to work under conditions that are unacceptable for national workers (longer hours, less safe, lower pay, lower protections). Ironically, 'temporary status thus creates permanent demand' for migrant workers, ultimately undercutting labour protections in specific sectors that become as a consequence almost segregated.

Precarious immigration status and precarious employment result in a vicious circle that perpetuates disadvantage undermining the chances for migrant workers, also in cases where there are no legal limitations, to access a more stable or permanent residence status.

The consideration of the constitutive role of immigration law into the creation of precarious work provides the opportunity to question the belief that poor working conditions as well as exploitation of migrant workers should be considered as anomalies of the labour market and a consequence of undocumented status.

First, it is important to note that the dividing line between documented and undocumented status is, in practice, much more blurred compared to how it is presented, with workers moving from documented to undocumented status over time. Second, it is crucial, in this regard, also to highlight the fact that undocumented status is, just like other migratory statuses, a product of immigration laws and policies and in part their inevitable consequence. The higher the level of complexity and the more restrictive nature of such policies, the higher the risks for states to lose control of the system, thus 'producing' great numbers of people working illegally.

Such perspective, therefore, allows to clearly highlight the role of the state in creating the conditions that favour the exploitation of migrant workers and the limits of criminal law as a legal framework to protect migrant workers. Ignoring the role of immigration law and the state

promises no real achievements in terms of protecting migrant workers, irrespective of how strongly institutions commit themselves in this regard.

Precarious work is not the simple result of the behaviour of individual employers, but structurally produced by the interaction of immigration and employment legislation. Rather than the individual employer, it is the institutionalised uncertainty and the risk of deportation, again enforced by the state, that more commonly shape migrant workers' everyday experiences.

By pushing migrants into almost segregated sectors, precarious migration status also amplifies the dangers of social exclusion limiting the possibility for migrant workers to acquire proper knowledge on their rights and to access mechanisms of redress, such as collective representation, legal advice or other forms of assistance for claiming their rights. Likewise, precarious migration status further contributes to social exclusion in a number of other ways that include limited access to social benefits and possibility for family reunification.

From the point of view of the SDH approach, since immigration law contributes to reinforcing migrant workers' condition of disempowerment, it also strongly affects their health status. Such impact appears with immediate evidence when it comes to occupational health (see Figure 2).

On the one hand, migrant workers end up in sectors that are characterized by low protections, very demanding working conditions, high occupational health risks and basic violations of health and safety, as in the case of agriculture. On the other hand, additional dependence on the employer and social exclusion prevent such workers from challenging their employers in this regard, limiting right enforcement where it is needed the most.

Finally, precarious migration status is also likely to affect the individual behaviour of migrant workers in relation to their risk perception, making them more likely to engage in dangerous practices. While language proficiency and cultural factors play an important role, the need of migrants to maximise earnings during the limited time for which they are allowed to work in the country or the idea that they have no other choice can be reasonably expected to influence their assessment of costs and benefits.

The impact of immigration status on migrant workers' occupational health has already been considered within the 'layers of vulnerability' framework that explains differential occupational health outcomes of migrant workers compared to national workers by taking into consideration three different layers of vulnerability. The first includes 'migration factors' such as the existence of legal status in the receiving country, whether the status is tied to the contract of employment and its duration, the conditions of the right to remain and the role of recruitment agencies. The second layer includes 'migrant worker factors' such as socio-economic conditions in the home country, education and skills level and language abilities. The third refers to 'receiving country factors' and includes among others, the socio-economic conditions in the receiving country, the sector in which the migrant is employed, access to collective representation and regulatory protection and the degree of social inclusion and exclusion of migrants. The main limit of such model, from the perspective of the SDH approach is that it considers 'migration factors' and 'receiving country factors' as distinct variables that contribute to explain differential outcomes without exploring the extent to which the former affects the latter, failing therefore to highlight how migration status pushes migrant workers into specific sectors of the economy that are characterised by high risks, low enforcement of health and safety regulation, and limited access to mechanisms of redress.

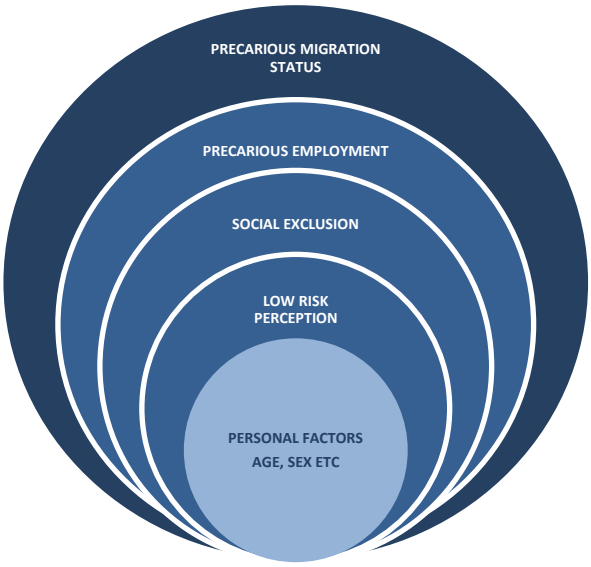

Fig. 2. The disempowering effect of migration status

3. A labour rights-based approach: the case of seasonal work in agriculture.

The above considerations on precarious immigration status are possibly even more challenging when it comes to migrant workers in agriculture, in particular in relation to the seasonal nature of work in this sector.

This section will illustrate how labour protections can contribute to counterbalance the disempowering effects of immigration law in determining health inequalities. For this purpose, we will focus in particular on analysing the EU legal framework on seasonal migrant workers. As known the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers are regulated at the EU level by Directive 2014/36/EU ('the Directive').

Besides its importance for work in agriculture, the Directive provides a very interesting case study, since it combines rules on the entry and stay of migrant workers with labour protections, exemplifying the tensions that characterise this interaction.

The Directive applies to all activities that are dependent on the passing of the seasons, specifically mentioning agriculture, horticulture and tourism, as typical seasonal activities. It was adopted with the objective to fulfil the need of Member States for low skilled workers willing to be employed in jobs that, because of their precarious nature, have become increasingly unattractive for nationals while also protect migrant workers from exploitation.

This considered, the Directive harmonises the rules for the recruitment of seasonal migrant workers, though it leaves the crucial decision as to the actual number of third country nationals (TCNs) that can be admitted to Member States of the European Union ('Member States').

It applies only to TCNs that reside outside of Member States and therefore excludes the possibility for undocumented migrants that are already in the territory of a Member State to access regular

status through an authorisation for seasonal work. It is more flexible with regard to migrant workers that have not complied with obligations arising from a previous decision on admission as a seasonal worker, to the extent to which it provides that the violation of such obligations represents a case in which Member States may, and therefore are not required to, reject an application for authorisation.

It articulates an employer driven entry system for temporary employment requiring, for the purposes of admission, a valid work contract or a binding job offer and allows Member States to establish a maximum period of stay for seasonal workers which shall be not less than five months and not more than nine months in any 12-month period.

After the expiry of this period, the TCN is required to leave the territory of the Member State, though the Directive leaves open the possibility for the TCN to remain in cases where the Member State concerned has issued a residence permit under national or European Union law for purposes other than seasonal work.

As to the length of stay, the Directive includes some elements of flexibility. Member States are required to permit one extension with the same employer within the maximum period and they have the discretion to allow more than one extension with the same employer. Member States are also required to allow seasonal workers to extend the stay when changing employers, and such applications can be submitted from within the Member State in question.

As previously highlighted, the level of dependence of the worker on the employer in relation to the right of residence plays a crucial role in limiting the ability of the migrant worker to challenge the employer in case of violations of their rights. It has been noted, in this regard, that there is nothing in the Directive that prevents a Member State from tying a migrant worker's legal status to an ongoing employment relationship with the sponsoring employer, though the above-mentioned possibility to allow one extension within the maximum period in case the migrant changes employer should to a certain extent mitigate the possibility of abuse.

While the initial proposal of the European Commission aimed to create a circular migration scheme, the final version of the Directive is limited to requiring Member States to facilitate the re-entry of third-country nationals who were admitted to that Member State as seasonal workers at least once within the previous five years, and who fully respected the conditions applicable to seasonal workers under the Directive during each of their stays, but the mechanisms through which 'facilitation' is to be pursued are left to Member States' full discretion.

In addition to regulating the entry and stay of seasonal migrant workers in the territory of a Member State, the Directive also provides a number of measures that aim to protect this category of workers from exploitation.

To begin with, Article 5 of the Directive requires that a contract or a binding job offer, in order to be valid for the purposes of admission, should provide information about the essential terms and conditions of employment, more specifically, the place and type of the work, the duration of employment, the remuneration, the working hours per week or month, the amount of any paid leave. Such conditions are required to conform to applicable laws and collective agreements and/or practice.

With regard to cases in which accommodation is provided by the employer, the Directive includes a number of safeguards such as requiring the rent not be excessive, that it cannot be automatically

deducted from remuneration, that a rental contract shall be provided, and that the accommodation shall meet general health and safety standards.

The fulfilment of the obligations that employers are subject to under the Directive is backed by a double mechanism: firstly, incompliance might give rise to a decision of rejection or withdrawal of the authorisation for seasonal work and secondly, sanctions may be held against the employer. With regard to the first mechanism, the Directive establishes a number of criteria that can be classified according to the level of discretion that is left to Member States for the purposes of the decision to reject or withdraw authorisation. Member States enjoy no discretion in cases in which admission criteria are not complied with or the relevant documents have been falsified or fraudulently acquired. By contrast, Member States are required to reject or withdraw an authorisation only if considered appropriate in cases in which the employer has been subject to sanctions for undeclared work or illegal employment or for failing to fulfil the obligations arising from the Directive. Finally, Member States enjoy a much wider margin of discretion where the employer has failed to meet legal obligations regarding social security, taxation, labour rights, working conditions, or terms of employment, as provided for in applicable law and/or collective agreement.

With regard to the second mechanism, Member States are required to provide for sanctions against employers who have not fulfilled their obligations under the Directive, specifically mentioning the exclusion from employing seasonal workers of employers who are in serious breach of such obligations.

The Directive goes beyond sanctioning the employer to protect migrant workers from the consequences of withdrawal of the authorisation to work, in situations in which the employer's work authorisation is withdrawn for reasons that range from insolvency and employing undocumented workers to violating legal obligations regarding social security, taxation, labour rights, working conditions, or terms of employment as provided for in applicable law and/or collective agreement. Such provision holds particular importance since it protects migrant workers' legitimate expectations in those Member States that link the withdrawal of work authorisations to violations of labour law and working conditions without having to choose between claiming their rights and the realisation of such expectations. Additionally, the Directive provides that, in situations in which the main contractor and any intermediate subcontractor have not undertaken any due diligence with regard to a subcontractor's infringements of the Directive, the Member State may sanction the main or intermediate contractor or make them liable for compensation or back pay owed by the subcontractor.

The core protection of migrant workers under the Directive is represented by the provision on equal treatment with nationals, as regards terms and conditions of employment and a number of social security benefits. The Directive explicitly mentions that the principle of equality applies to the terms of employment, including the minimum working age, and working conditions, including pay and dismissal, working hours, leave, and holidays, as well as with regard to health and safety requirements in the workplace. Equality of treatment also covers the right to strike and the freedom of association.

The Directive further specifies that seasonal migrant workers are entitled to those branches of social security defined in Article 3 of Regulation no. 883/2004, which include sickness benefits, maternity, invalidity benefits, unemployment benefits, and family benefits; access to public goods

and services, advice services on seasonal work offered by employment offices, education and vocational training, recognition of professional qualifications, and tax benefits.

It is worth noting that Member States have the discretion to limit equal treatment of migrant workers with regard to family and unemployment benefits and access to education and vocational training may be restricted to those which are directly linked to the specific employment activity. Tax benefits can be also limited to cases where the registered place of residence of the family members of the seasonal worker for whom they claim benefits lies in the territory of the Member State concerned. Finally, the principle of equality covers back payments to be made by the employers regarding outstanding remuneration to the third-country national.

The enforcement of the rights of seasonal migrant workers under the Directive is supported through a multiple enforcement approach.

The Directive requires Member States to put in place effective tools through which seasonal workers can file complaints against their employers, either directly or via third parties (actors who have, in accordance with the criteria laid down by national law, a legitimate interest in ensuring compliance with the Directive or through a competent authority of the Member State when provided for by national law).

Member States shall also ensure that seasonal workers have the same access as other workers, in a similar position, to measures protecting against dismissal or other adverse treatment by the employer, as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the Directive.

Individual enforcement should be supported by institutional monitoring. Member States shall ensure that services in charge of inspection of labour or competent authorities, and where provided for under national law for national workers also organisations representing workers' interests, have access to the workplace and, with the agreement of the worker, to the accommodation. However, the Directive does not in any way articulate a clear obligation to actually monitor the implementation of the Directive through inspection services.

While the Directive provides a number of labour protections that are likely, despite their limits, to contain, to some extent, the impact of the precarious status of seasonal migrant workers, their relevance for the lives of these workers will ultimately depend on the terms and conditions available to national workers in the same sector. The equal treatment principle is likely to have limited scope in situations in which all workers are equally poorly treated, unless is it argued that such conditions have a disparate impact on migrant workers provided that they are overrepresented in these sectors. Collective action for better working conditions and right enforcement in such sectors appear to represent essential strategies to any attempt to enhance the working conditions migrant workers.

4. The international right to health of migrant workers.

After having traced, within the framework of the social determinants of health, how immigration law affects health inequalities and how labour protections might contribute to contain in the case of migrant seasonal workers its impact, this section will reflect on how the protection of the right to health of migrant workers at the international level, as a standard that should inform national

authorities' action, might support reform objectives concerning both immigration law and labour protections.

The most widely used and comprehensive articulation of the right to health in international law is set out in the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Article 12 ICESCR provides that 'the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', to which the right to occupational health represents an integral component. General Comment no. 14 of the Committee on Economic Social and Cultural Rights (CESCR) elaborates and interprets the right to health as requiring States to respect and fulfil such right to everyone, including migrant workers.

The General Comment specifies that, though the drafting of article 12 of the ICESCR did not adopt the definition of health contained in the preamble to the Constitution of WHO, the reference in article 12(1) of the Covenant to 'the highest attainable standard of physical and mental health' is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12(2) acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

The Report of the UN Special Rapporteur on the right to health dedicated to migrant workers clarifies that the right to health requires States to adopt and implement an evidence-based national health policy which does not discriminate against non-nationals and addresses the needs of irregular and regular migrant workers, at all stages of the migration process, including pre-departure and return. As an aspect of their right to health obligation, States should ensure availability and accessibility of quality health facilities, goods and services, including existing health insurance schemes, to migrant workers, on the basis of equality with other nationals.

With regard to the occupational health of migrant workers, the Report specifies that States should ensure that occupational health laws and policies address the unique vulnerabilities of migrant workers in dirty, dangerous and degrading (3D) industries and are implemented, monitored and enforced. It then considers that the vulnerability of migrant workers in 3D jobs may be further intensified in connection with the legal status of migrants, especially undocumented ones, putting them in a weaker position to negotiate their rights with employers, and that sponsorship mechanisms tying a migrant's authorisation to work with one specific employer encourage such exploitative practices.

It also considers the condition of migrant workers in agriculture dedicating particular attention to the particular occupational risks of work in agriculture, such as informal arrangements and lack of coverage under labour and occupational health and safety laws, leaving little room for migrant farm workers to negotiate working and living conditions necessary to facilitate the realisation of their right to health and protection from inadequate and unhygienic living conditions, food insecurity, underpayment of wages and excessive hours among migrant farm workers.

The report concludes that the right to health approach fills gaps in existing frameworks that protect migrant workers and their families and bolsters protections contained therein.

What are particularly interesting, for the purposes of this paper, are the recommendations concerning immigration policies and labour protections for migrant workers. The Special Rapporteur, in the same report, recommends that States establish labour corridors through enforceable bilateral agreements, in accordance with the right to health framework, which clearly define the rights of migrant workers, obligations of recruitment agencies, employers and States, and remedies, including compensation for violations, in line with the right to health; ensure protection of migrant workers, especially those in dangerous industries, from abuse and exploitation by employers by providing accessible redress mechanisms and compensation in cases of violation.

Such recommendations are in line with General Comment no. 23 CESCR on the right to just and favourable conditions of work that identifies migrant workers as a group that is particularly vulnerable to exploitation in connection to abusive labour practices that give employers control over the migrant worker residence status or that tie migrant workers to a specific employer, long working hours, unfair wages, and dangerous and unhealthy working environments and requiring States to refrain from adopting labour and migration policies that increase the vulnerability of migrant workers to exploitation.

Further investigation should be dedicated to the provisions of the European Social Charter (ESC) that protects under Article 3 the right to health and under Article 11 the right to health and security in the workplace. While the ESC does not include migrants within its personal scope of application, its Appendix extends the applicability of Articles 1 to 17 and 20 to 31 to nationals of other Parties that are lawfully resident or working regularly within the territory of the Party concerned.

5. Conclusions.

Better awareness of how law affects the health of migrant workers sets the ground for designing and implementing better policies which aim to effectively promote their right to health. Acknowledging the role of precarious migration status on health inequalities represents an essential precondition for doing so. The paper illustrates an example of how labour protections can be used to contain the impact of immigration policies, contributing to ease the ties that create additional dependence of migrant workers on their employers as well as realising an objective that is shared with medicine and health studies: to address the disempowerment of migrant workers. In this view, better employment protections should be central to any attempt to effectively enhance the health status of migrant workers. The way the right to health has been interpreted at the international level might provide further insights as to how the claims for health equity could be framed.

Such considerations invite reiteration of a question that has already been addressed elsewhere with regard to undocumented migrant workers: after removing the alibis (associated with real contrasts between immigration rules and the labour market), the paradoxes (the national legislation that contributes to creating precarious status, discouraging workers from exercising their rights, even in situations in which they are being exploited) and the abuses (of criminal sanctions), what is left over of the issue of migration? Sociologists have answered this question identifying, at a macro level 'the interests of governments, nationalist and/or merely ideological policies and bureaucratic approaches to the management of the public administration, and at a micro level, the expediencies of employers (companies and families), of associations that deal

with migrants; and finally workers (who are anything but encouraged to make complaints, even if they are suffering from serious labour exploitation)'.

The answer to this question allows us to situate the way immigration law and employment law interact with regard to the health status of migrant workers within a wider frame where immigration law exposes labour law to major systemic challenges, such as that concerning the tensions between migration status and employment status, that end up calling into question claims of autonomy of labour law 'as a body of law dealing with a discrete set of social relations or phenomena, namely employment relations.'