Reimagining state responsibility for workers following COVID-19: A vulnerability approach

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Abstract
In this article it is argued that the COVID-19 crisis offers an important opportunity for engagement and reflection on the operation and effectiveness of laws regarding the workplace in the UK and beyond. The crisis underscores the temporality and partiality of labour law measures, and the need for a reimagining of that law based on more sustainable principles. I argue that this reimagining should coalesce around a human-centric approach to law, and the recognition of the need for deep and varied institutional support for workers. It is argued that these principles have been adopted historically in the context of health and safety law, but have not always been well applied, particularly in the context of the pandemic. In any event, the adoption of these principles and the greater integration of health and safety and labour law would encourage states to better promote worker agency and resilience and hence move towards meeting the aspirations of vulnerability theory.

Keywords
Vulnerability theory, labour law, workers, health and safety, human-centric approach

Introduction
The coronavirus crisis provides an important moment for engagement and reflection on the regulation of the workplace in the UK and beyond. Already, we have experienced
governmental interference and involvement in the management and operation of work unprecedented in peacetime. State instigation of ‘stay at home’ rules to stop the spread of the virus, the closure of workplaces, and restrictions on travel and social interactions are just some of the government policies which have fundamentally altered the working landscape in the wake of the crisis. Some of these interventions will inevitably be short term, such as income protection or ‘furlough’ policies, which act to try to reduce or delay unemployment during temporary business closure. Other policies present the possibility of permanent changes in the organisation of work into the future. In any event all of these interventions invite a reflection on the changing landscape of legal regulation of the workplace, and the best means of responding to these changes going forward.

Perhaps surprisingly, there have been few changes to labour law legislation in the UK in the wake of the coronavirus crisis, despite the very dramatic impact of the crisis on workplaces and the organisation of work. Indeed, in the immediate response to the crisis, the main action of the UK government has been to deregulate or provide derogations from labour law, to allow businesses the flexibility to respond to the crisis and thereby maintain employment and service delivery (Ewing and Hendy, 2020, p. 498). For example, in March 2020, the UK government introduced regulations to ease the requirements on businesses to ensure that workers take their annual leave in any 1 year (Working Time (Coronavirus)(Amendment) Regulations 2020). Two exceptions to the working time rules were enacted. The first exception permitted employers to require workers to carry over leave where it was not ‘reasonably practicable’ for them to take it due to the coronavirus emergency, and the second allowed the outstanding leave to be carried over into the 2 years immediately following the relevant leave year. These provisions ensure that employers can require staff to carry on working during the pandemic without financial penalty (Hoskins, 2020). By contrast, there has in some ways been a ‘re-regulation’ of the work environment through a series of health and safety measures. The UK government has enacted sweeping powers relating to potentially infectious persons in the Coronavirus Act 2020 and has introduced a huge wealth of guidelines for businesses with the aim of reducing the risks of virus transmission in the workplace (Department for Business, Energy and Industrial Strategy, 2020a). These have been supported by dedicated guidance and advice from the Health and Safety Executive (HSE, 2021), the principal health and safety enforcement body in the UK.

It is argued in this article that the limitations of the labour law response for workers during the COVID-19 crisis is a function of a number of systemic weaknesses in this model for the regulation of the workplace and the protection of individual workers. It is further argued that vulnerability theory provides the best means to articulate the reasons behind those weaknesses and understand labour law’s ineffectiveness in dealing with this crisis. The question then arises how best to rebuild or shape labour law to meet the ends of vulnerability theory and to ensure state responsiveness to the needs of labour. The argument put forward in this article is that, on its face, the scheme of health and safety law and protection is fertile ground for exploring effective responses to vulnerability in the workplace in the wake of the COVID-19 crisis. Health and safety law is not hindered by historic accountability to a certain set of ‘vulnerabilities’, but rather takes a wider view of vulnerability as human condition. Health and safety law also envisages a response which involves not only government directives, but also the involvement of
a wide range of institutions both in the workplace and outside in creating and enforcing health and safety protection for workers.

**Labour law and vulnerabilities**

The ‘vulnerabilities’ which are traditionally associated with employment and form the basis of employment law statutory intervention are twofold. First, there is a set of vulnerabilities associated with the ‘inequality of bargaining power’ in employment relationships (Davies and Freedland, 1983, p. 5). On this understanding of vulnerability, it is possible to read a greater inequality the greater the power differential between the parties. Hence, the lowest paid workers in the labour market would be the most vulnerable group because they suffer the greatest inequality of bargaining power with their employers. Statutory intervention can aim to improve that bargaining power and create a more level playing field through minimum standards of treatment (minimum wage) or through protection against arbitrary employer action (unfair dismissal law), although the way in which this intervention occurs means that its success in rebalancing bargaining power is usually limited (Davidov, 2016, p. 23 and the discussion in section 4 onwards). Indeed, labour lawyers have often argued that an elevation in social power through collective bargaining is a more effective means of redressing this social imbalance (Davies and Freedland, 1983, p. 18). Second there is a set of vulnerabilities associated with historically defined disparate treatment. On this argument, there are certain groups who have historically been treated less favourably in the labour market and continue to suffer discriminatory treatment on the grounds of their personal characteristics. Those individuals need to be protected from such treatment through anti-discrimination law, which prevents less favourable treatment on certain protected grounds (in the UK Equality Act 2010 section 4 these are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation).

However, the vulnerabilities which have been exposed as a result of COVID-19 are not aligned very closely with those identified as the basis for employment law statutory intervention. New divisions have opened up, while new coalitions have emerged. In terms of the disease itself, there is broadly a correlation of risk with age, with the elderly most severely affected, and children very rarely affected at all (Public Health England, 2020, p. 5). For working age people, some trends have been identified in line with sex and race (Public Health England, 2020, p. 6), but the illness can affect any person of any age, whether experiencing a history of health conditions or not. The economic fall-out from the virus has had a very wide and wide reaching (negative) impact. In a sense, the impact has been split along sectoral lines, with some sectors faring particularly badly during the COVID-19 crisis (Jones et al., 2020). Certainly, a number of those sectors rely on low-paid workers and so those have been the jobs hardest hit. However, it is not only the low-paid who have found themselves under threat of redundancy: for example pilots, engineers and other highly skilled workers have lost their jobs as a result of the fall-out from the pandemic (Dickenson, 2020). Likewise, vulnerability at work in the COVID-19 crisis has not respected historical categorisations of labour market disadvantage reflected in discrimination legislation. Although the burden of trying to combine childcare and
homeworking has resulted in disadvantage for some women, others have found that home working actually improves their experience of work (McCarthy, 2020; Templeman, 2020).

The mismatch between the vulnerabilities identified as worthy of protection in labour law and those actually experienced by workers during the coronavirus crisis is interesting. Given that labour law aims to improve labour market experience and counter disadvantage in labour markets, it is difficult to see how that can be achieved if the vulnerabilities labour law addresses do not reflect the patterns of advantage and disadvantage actually in play. Moreover, as vulnerability lines shift, and advantages and disadvantages change, this begs the question whether the equality aims of labour law are still fit for purpose (Fineman M, 2020, p. 51). If vulnerability is constantly shifting in response to external crisis factors, then this suggests that equal treatment between two individuals at one point in time cannot hope to provide enduring equality or improve labour market experience. At the very least this vulnerability mismatch provides an incentive to reassess how the relationship between labour and vulnerability is constructed as a matter of law and state responsibility.

**Labour law and limitations under COVID-19**

It is the argument of vulnerability theory that the identification of a mismatch between the ‘vulnerabilities’ protected as a matter of (labour) law and those actually experienced by workers, is both predictable and inevitable. According to vulnerability theory, although labour law might aim to assuage some of the harshness of the operation of liberal law, it still operates against the background of liberal private law (for example contract law) which has the ‘liberal legal subject’ at its heart. This liberal subject of the law is identified as a rational, autonomous, independent individual free from vulnerability constraints (Fineman and Grear, 2013, p. 17). It is these characteristics (rationality, autonomy and independence) which govern the understanding of the operation of the employment contract and the interaction between the individual and the state more generally (Fineman M, 2010–2011, p. 267). Moreover, a certain status is attached to the rationality and autonomy of the liberal subject, and the ability of that subject to act without state assistance (Fineman M, 2008, p. 5). Hence, the identification of ‘vulnerability’ as part of the scheme of (statutory intervention in) labour law, is both partial and exceptional (Fineman M, 2017, p. 142) Not only that, but state intervention is viewed negatively and limited to achieving individualised equalisation of disadvantage where that disadvantage is arbitrarily and unfairly created by an employer (rather than the labour market more generally). Therefore, labour law addresses only certainly kinds of vulnerability, and addresses them only to a certain extent. It is both a poor means of addressing different kinds of social vulnerability and adapting to shifting vulnerabilities over time (Satz, 2008).

This is an important contribution as it helps us to identify why labour law does not provide immediate or helpful solutions to problems arising from crisis conditions. One of the major changes brought about by the current crisis has been the ‘stay at home’ message which has precipitated much greater levels of working from home. From the perspective of liberal law, this change does not instinctively invoke a state response or
require statutory intervention. It is a question of the organisation of work. As equal (rational, independent) partners to the employment contract, employees and employers are free to negotiate the organisation of their work in any event. On this model, the location of work does not immediately suggest any new or different power inequalities. Furthermore, the move to working from home is not overtly discriminatory. Indeed, there are certain groups, for example disabled workers who might be positively advantaged by such a move (Policy Connect, 2020). If certain groups are identified as particularly disadvantaged, then provisions can be made. For example, working from home during a lockdown situation may put women at a disadvantage, as this group still bears the largest burden in terms of childcare in the home (Caracciolo di Torella and Masselot, 2020, p. 13). On the labour law model, this could be dealt with by specific and targeted regulations which allow the variation of working time to take account of childcare responsibilities during the lockdown (Alhambra, 2020, p. 3).

Indeed, in a lockdown situation brought about by a government mandate on grounds of health and safety, it is perhaps reasonable to assume a level of consensus between employers and workers as regards working from home. Individual employees may accept temporary disadvantage or inconvenience from home working on this basis. However, labour law’s protection gap really starts to become obvious when the possibility to return to the workplace arises. From the perspective of liberal law, this remains a point for individual negotiation between employees and employers with equal bargaining power. Individuals will be able to advocate for their personal preference as to work location going forward. This will be a win-win situation for both employers and employees. Employees or workers who prefer to stay at home will be able to do so, those who prefer to be at the workplace will have this option. Of course, the reality of the imbalance in power relationship between employers and workers means that in practice employers will be able to ‘force’ employees to return to the office unless there are particular vulnerabilities which imply that a return to the office would be a disproportionate risk for the employee or would violate discrimination law (Butler, 2020; Department for Business, Energy and Industrial Strategy, 2020b). In this regard, there is the possibility for employees to rely on the provisions under the Employment Rights Act 1996 which allow self-removal or ‘protective action’ in the face of serious and imminent danger to health and safety (sections 100 1(d)(e) and 44 (1)(d)(e) ERA). However, the usefulness of these provisions is undermined by their narrow scope (applying only to ‘employees’ rather than the wider category of ‘workers’). Indeed, the narrow scope of these provisions has recently been challenged through judicial review (IWGB v SoS for Work and Pensions [2021] IRLR 102), and as a result, the UK government has partially amended them (the ‘detriment’ provisions under section 44 ERA have now been extended to workers as well as employees through the Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021.

In terms of working from home arrangements, labour law does potentially provide assistance or protection to individuals through the ambit of discrimination law (Bell, 2020). For workers with disabilities, a working from home arrangement could constitute a reasonable adjustment for the purposes of equality law (Bell, 2020). Hence, employers refusing to allow the continuation of such an arrangement post lockdown would need very strong justificatory reasons to do so to avoid falling foul of this legislation.
Likewise, certain workers may be able to take the benefit of the protections of indirect discrimination law to enable them to continue to work from home post-lockdown. For example, older workers may be able to argue that they are at particular risk from the disease on the basis of widely available statistical information (Public Health England, 2020, p. 5). Therefore, requiring them to return to the office would potentially constitute indirect discrimination, unless the employer could demonstrate that this was an appropriate and necessary means of fulfilling a legitimate aim. Likewise, women whose caring responsibilities still required them to be at home post-lockdown may be able to challenge a return to the office through the provisions of equality law (Bell, 2020).

Moreover, some workers may have the right to ask their employer to consider a change in their contractual terms and conditions to allow home working. In the UK, employees have the right to request a contractual change to allow them to work from home, as long as they meet certain qualification criteria regarding length of service and the nature and form of the request (section 80F (1) (a) (iii) Equality Act 2010). An employer who receives such a request is mandated to deal with the application in a ‘reasonable manner’ and notify the employee of the decision within 3 months. However, this ‘right’ in practice is very limited. The employer is entitled to refuse the flexible working request as long as the reason for the refusal falls within the (long) list of permitted grounds. If there is a factual basis for the refusal within the scope of the permitted grounds, an employer will not normally be in breach of the legislation for refusing the request, although it is possible to challenge the employer’s refusal to allow flexible working on the basis of incorrect facts or the application of those facts in an unreasonable manner (Commotion Limited v Rutty [2006] ICR 290).

The problem of course with these labour law solutions is that they offer only partial solutions and benefit only certain groups of workers (Ewing and Hendy, 2020, p. 528). The discrimination law provisions rely on the employee or worker proving alignment with one of the protected characteristics and finding a relevant connection between the treatment complained of and that characteristic (Campbell and Smith, 2020, p. 258). Those characteristics do not necessarily align with actual vulnerabilities as they have arisen in this current crisis, or indeed wider social inequalities which affect the experience of work. Also, in the context of employment, the inequality between employers and employees is an important consideration which influences work experience and to which the law provides only partial and unsatisfactory solutions. This is amply demonstrated by the operation of the flexible work provisions in the context of a potential move to home working. These provisions give only a right to request flexibility which the employer can refuse on business grounds. Those business grounds are decided upon by the employer in the context of a potentially huge information and power gap between the requesting employee and employer. Not only does this mean that flexible working requests will rarely be granted, it also provides a disincentive for employees to exercise their rights. The upshot of this legislation is therefore to confirm to both the employer and the employee the permanent and all-pervasive nature of the power imbalance.

There is a further point to make about the shortcomings of labour legislation in terms of the crisis. Labour law provisions provide only individual solutions to what are collective or social problems (Davies and Freedland, 1983, p. 17). This has several results. First, the solutions do not reach (all) those in need. Second, the collective or social
problem itself remains unexplored, and with it the opportunities for improving the experience of work for all. Labour law is reactive, and thus appears defensive in the face of workplace change. A greater focus on the collective ‘problem’ might reveal either a more innovative set of ‘solutions’ or indeed, that the workplace change does not, with proper management need to be viewed as a ‘problem’ at all. This is potentially true with the shift to home working. Although it does present challenges, this workplace change might help to boost resilience, be a positive change for many employees or workers, and benefit employers in the long run.

The next section outlines how vulnerability theory identifies and analyses labour law’s problems and broadly the solutions that it proposes. Section 5 takes those proposals and applies them to the labour law context through an examination of the tools of health and safety law.

**The vulnerable subject and state responsibility**

Vulnerability theory claims that in order to find effective solutions to social problems, ‘vulnerability’ must be viewed differently as both a personal characteristic and as a matter of law. At the heart of these claims is the understanding of universality and constancy of vulnerability as part of the human condition. According to vulnerability theory, all human beings are vulnerable and prone to dependency as a result of their embodiment. The identification of ‘vulnerabilities’ or vulnerable groups implies a political choice, which does not reflect social vulnerabilities as they actually arise. Moreover, social institutions are themselves implicated in the creation of vulnerability, by favouring some groups over others and by labelling some more in need of protection than others. Indeed, the identification of vulnerable groups does not imply any ontological reality; rather this identification serves to highlight existing patterns of social support (Herring, 2016, p. 19).

Fineman argues that the recognition of vulnerability as a necessary and central element of the human condition implies an expanded role for the state. The non-interventionist approach of the liberal state, which responds only to a limited and historically contingent set of ‘vulnerabilities’, should be replaced by a much broader approach to responsibility for the ‘vulnerable subject’ (Fineman M, 2008, p. 10). Responsibility for the vulnerable subject implies that the state needs to reconsider its approach to allowing access to social institutions such as healthcare, employment and security, and the patterns of advantage and disadvantage that this creates (Kohn, 2014, p. 7). The state must realise that a ‘non-interventionist’ approach does not have neutral effect. Rather, a non-interventionist approach tends to perpetuate already existing inequalities embedded in legal and social structures, such as wage disparities and stigma. Moreover, on this scheme those who do need additional state support themselves face disadvantage and limited assistance as their needs are viewed as marginal or exceptional (Satz, 2008, p. 256). Vulnerability theory requires a change to institutional arrangements which create and perpetuate disadvantage and a move to a more responsive state which uses state institutions and provisions for the benefit of all (Herring, 2016, p. 19).
A further insight provided by vulnerability theory relates to the interlocking and overlapping nature of state facilitated institutions which provide opportunities and support for individuals (Fineman M, 2008, p. 1913). These institutions play an important role in lessening, ameliorating and compensating for vulnerability, through providing individuals a set of assets which allow them to build resilience (Fineman M, 2008, p. 13). This is important in the labour law context because resilience can be imagined in conjunction with the operation of collective bodies (trade unions) and other elements of civil society, which are recognised as providing a layer of support to workers (Busby, 2020; Coyle, 2013; Zietlow, 2017). More fundamentally, recent conceptualisations of ontological vulnerability stress the importance of vulnerability not only as a collective and shared experience, but also as a positive means through which to build connections and form collective solidarity (Boubil, 2018; Gilson, 2011). Hence, building resilience through collective shared institutions reflects a positive and enduring response to vulnerability as well as removing the negative association of vulnerability with dependence and inaction (Kohn, 2014, p. 1; Munro and Scoular, 2020). Of course, given the overlapping and integrated nature of social institutions, such a response is effective only in the context of detailed and proactive state facilitation and support.

The question then arises how the insights of vulnerability theory can be applied to recent changes in workplace organisation and the response to COVID-19. As we have seen, at the current time, labour law does not appear to hold the answers. Vulnerabilities are narrowly defined and historically contingent and do not reflect the vulnerabilities which emerge and have emerged in the current crisis. Moreover, labour law provides an individualised, reactive and at times temporary response to deep systematic factors and potentially fundamental labour market changes. In broad terms, vulnerability theory suggests that the concept of vulnerability should be generalised and also central to the response of law and social institutions. This does appear a valid aspiration and is on all fours with the empirical evidence of the mismatch between legally identified vulnerabilities and vulnerability in practice. However, it is difficult to immediately interpret this in the current landscape in terms of specific labour law changes. The reason for this is that this approach appears to require a more fundamental reimagining of the whole labour law project, rather than piecemeal tinkering with labour law rights. Indeed, suggesting minor changes to labour law or relationships would not appear to really tackle structural problems in any meaningful way, and may even serve to perpetuate the disadvantages that vulnerability theory is designed to address.

Indeed, previous attempts to use the tools of vulnerability theory to suggest a more equitable sharing of the benefits and burdens at work not only have limited effect but actually have the potential to undermine the vulnerability project as a whole (Rodgers, 2020, p. 139). These attempts have limited effect because they simply replicate the idea of labour law as rebalancing the (occasionally) pernicious effects of liberal law. They do not actually challenge the assumptions made in liberal law, namely a shared interest, status and experience as between all subjects of law in general and employers and employees in particular. Indeed, on this scheme, there is the assertion that both employers of labour law experience ‘vulnerability’, although this results from different pressures and has differential effects (Fineman J, 2013, p. 299; 2017, p. 30). Employers suffer vulnerability as a result of their position in the market, and this makes them
susceptible to price rises and falls and means they have certain (business) pressures which they have to meet to survive and thrive. Employees have vulnerabilities which are ontological but which are also a result of social factors and the failure of social institutions to offer sufficient support. Labour law can act to affect a more efficient allocation of vulnerability and rebalance in favour of employees where they appear to carry a disproportionate burden in terms of the employment relationship.

The problem with these assertions is not only that they do not move us beyond the theoretical grounding of labour law in liberal law. The problem is also that they potentially undermine the vulnerability project and represent a backward step in finding ways to improve the experience of individuals at work. The assertion of shared employee and employer vulnerability serves to downplay the very special vulnerability which is created and experienced as a result of embodiment. The crucial insight of vulnerability theory is that embodied vulnerability is central to human experience and so should form the bedrock of any theoretical or practical attempt to manage social institutions. Recognising that corporate entities can be ‘human’ too undermines this project, as it has undermined other legal projects which have purported to try to improve human experience (Grear, 2010).

Thus, it is argued in this article that any reimagining of social and legal provision on the basis of vulnerability must have human embodiment at its heart. It must also recognise the particular institutional context of the legal setting being imagined; the embeddedness of the embodied subject (Fineman M, 2019, p. 358). The next section of this article considers the potential to reimagine a labour law response based on the health and safety of its subjects. There are reasons why this does not reflect an instinctive response. Health and safety law is often considered marginal or even separate to labour law as a whole, with its own particular directives and methodology (Deakin and Morris, 2012, p. 349). However, the current (health) crisis has revealed how central health experience and healthy workplaces is to work and to its regulation. Moreover, the already recognised embodied nature of the subject at the heart of health and safety law means that there tends to be a more directed state response in conjunction with a range of other institutions which help build worker resilience.

**Health and safety, labour and the vulnerability approach**

It will be argued in this section that there are certain features of health and safety law in the UK which represent a tighter alignment with the ethos of vulnerability theory than is currently the case for labour law. First, health and safety law is on the face of it more inclusive than labour law. This manifests itself in the application of health and safety law beyond the ‘employee’ category to all those affected by the risks created by work activity. The inclusivity of health and safety law is also evident in the standard of care which applies across all workplaces by virtue of the Health and Safety at Work Act 1974 (HSWA). This inclusive approach aligns with the recognition of the generalised nature of the vulnerable subject, and the need to recognise the cross-cutting importance of embodiment under vulnerability theory. Second, the embeddedness of the law is apparently taken more seriously in making provision for the health and safety of workers. There is the recognition in health and safety law of the importance of worker
involvement through workplace representation, and the value of union advice and activity. This responds to the arguments in vulnerability theory that the embeddedness of the law must be taken seriously, and workers (and all individuals) given the best opportunities to develop resilience. At the same time, there must be strong state action to enforce the worker-protective action of unions and breach of workplace law. In the health and safety context in the UK, the enforcement of health and safety law through a government agency, the Health and Safety Executive, means that this aspiration is much more closely met than in the enforcement of labour law. For labour law, enforcement occurs through individual court action, which not only places far too much burden on workers, but it is also less effective in identifying problems and reaching permanent solutions to labour’s problems (Kirk and Busby, 2017).

Prior to the 1960s, health and safety law in the UK was neither inclusive nor effective. It constituted a fragmented mass of law which had developed in a piecemeal and reactive way to certain perceived threats, mainly in a set of ‘high-risk’ industries. Despite the amount of legislative provision, its scope remained limited, with over 8 million workers or one third of Britain’s working population not covered by statute (Sirrs, 2016, p. 255). This included workers at premises such as school and hospitals, with office workers only attaining statutory health and safety coverage in 1963. In response to this situation, Lord Roben was commissioned by the UK government in 1970 to evaluate the situation of health and safety law and to make proposals for its modernisation. The report was wide ranging and suggested a complete overhaul of the existing system of regulation. It was noted that, at the time, health and safety law consisted a set of technical requirements in respect of certain ‘dangerous’ industries, where a risk of death or serious injury was identified. There was no general statute regulating health and safety at work. As a result, health and safety law was piecemeal and fragmented and lacked any underlying logic or theoretical aspiration (Roben, 1972, p. 5). It was also largely ineffective in tackling problems of health and safety at work, because most accidents occurred in workplaces or industries which were unregulated by health and safety law.

The Roben report suggested that a systemic overhaul of the operation of health and safety in the workplace should involve ‘increasing the effectiveness of the state’s contribution to safety and health at work’ through better state regulation (Roben, 1972, p. 12). The primary means of ensuring this effectiveness was to introduce an Act which extended the duty of health and safety protection to all employers, all workplaces and in respect of all employees and the self-employed. It was only through the extension of responsibilities in this way that the existing uneven protection of health and safety could be addressed, and health and safety come to occupy the minds of all at work. The recommendations of the Roben report were subsequently adopted in the HSWA, which provided a general health and safety standard which would apply across all workplaces. This standard, which is still in operation today, provides that an employer must ‘ensure, so far as reasonably practicable, the health, safety and welfare at work of all his employees’ (s. 2 HSWA). This is supplemented by section 3 of the Act which extends health and safety protection beyond employees to other groups, such as ‘workers’, the self-employed and the general public. The inclusive approach of health and safety law is also evident in the common law. An employer’s tortious duty in the context of vicarious liability for injury at work applies to all employees and also
those in a relationship which is ‘akin’ to employment. This has led to an expansive reading of the liability of employers, with protection extending to employees but also those individuals who are ‘technically self-employed or agency workers [but] are effectively part and parcel of the employer’s business’ (*Barclays Bank plc v Various Claimants* [2020] UKSC 13, para 27).

This inclusivity stands in contrast to labour law, which limits many of its provisions to ‘employees’, with only some provisions extended to the broader category of ‘worker’. Self-employed persons are not as a rule covered by UK employment law. At one time, self-employed persons were thought to enjoy some protection through the application of the Equality Act 2010, but this position has been brought into question by recent case law decisions (*Jivraj v Hashwani* [2011] UKSC 40). The restrictive nature of this application has been extremely problematic for individuals seeking to enforce employment rights. In practice it turns out to be extremely difficult to distinguish between ‘employers’, ‘workers’ and the ‘self-employed’ because embodiment and vulnerability is experienced by all at work. This has led some academic commentators to suggest that employment status categories for the purpose of employment rights should be better aligned with status categories which exist in the common law pertaining to health and safety. It is suggested that this alignment would not only improve clarity and consistency across legal fields, but would also improve the capacity of the law for worker protection (Fraser and Allen, 2018).

The second feature of health and safety law which appears more aligned with the premises of vulnerability theory than labour law pertains to the ‘embeddedness’ of the law. On the face of it health and safety law recognises the need for an ‘embedded’ regime of application and enforcement of the law of the workplace. Indeed, the Roben report advocated not only for the better organisation of state regulation, but also the adoption of a health and safety ethos across industry through a system of ‘self-regulation’. Roben argued that it is only with ‘self-regulation’ that a more proactive approach to health and safety can emerge, and standards of protection across workplaces as a whole can improve (Roben, 1972, p. 25). This self-regulation would involve the greater co-operation of employer and worker groups at industry level, and the appointment of safety representatives in individual workplaces, who would sit on joint labour-management safety committees. These suggestions were subsequently enacted as a matter of law through the HSWA (section 2 (6) and 2 (7)) and accompanying regulations (Safety Representatives and Safety Committees Regulations 1977 and the Health and Safety (Consultation with Employees) Regulations 1996). It was also envisaged that the whole system would be enhanced by the establishment of a proactive and supportive inspectorate, which would work with employers to improve their health and safety provision. Through section 10 HWSA, two enforcement bodies were established: Health and Safety Commission and the Health and Safety Executive. These bodies have now been consolidated into one Health and Safety Executive which has assumed all functions relating to implementation and enforcement of the HSWA.

On the face of it, the inspectorate system works much more efficiently and effectively than the system of litigation adopted by labour law for the enforcement of rights. The inspectorate system is not only reactive, in responding to reports of health and safety breaches, it is also proactive in the sense that the Executive is empowered to carry out
routine inspections and spot checks at individual workplaces. The system also appears to be more efficient and effective in attaining workplace compliance than individual litigation. The HSE has a range of tools to ensure employer compliance, which can be deployed according to the severity of an employer’s breach. At the lower end, inspectors have the power to issue an improvement notice which allows time for an employer recipient to comply, or a prohibition notice which prohibits an activity until remedial action has been taken. In more serious cases, the HSE has the power to prosecute employers for non-compliance with health and safety law; in the year 2019/20 there were 342 cases prosecuted of which 325 resulted in secured conviction. In the same year, the HSE issued £35.8 million in fines to employers for non-compliance with health and safety regulations. (HSE, 2020a). Although the UK has toyed with the introduction of a labour inspectorate more generally, there is no overall inspectorate in existence, only a number of enforcement bodies covering various worker claims in a piecemeal and fragmented way (the Employment Agency Standards Inspectorate, the Gangmasters and Labour Abuse Authority and the HMRC for the enforcement of the National Minimum Wage).

The adoption of such an inspectorate model would appear to encourage the embeddedness of both health and safety and labour law. However, it must be pointed out that the HSE has been criticised for its coronavirus response (James, 2021), and over the years, it has been consistently dogged by underfunding and a lack of allocation of sufficient resources (Harrison, 2017). A ‘withering’ report (Ewing and Hendy, 2020, p. 526) by the Work and Pensions Committee indicated a lack of urgency on the part of the HSE in response to the coronavirus threat and an inadequate level of inspection and sanction in response to complaints (Work and Pensions Committee (2019–2021). A further major problem is the reporting mechanism of the HSE, which limits reporting of disease to instances where there is proof that the incidence of disease derives from workplace exposure (HSE, 2020b). This means that it has rejected coronavirus reporting by companies where the connection between workplace exposure and illness is not clear, and the figures on coronavirus in the workplace do not do justice to the scale of the problem (HSE, 2020c). Moreover, it can be criticised for a continued commitment to an understanding of enforcement based on ‘high’ and ‘low’ risk environments, which is unsuited to the risk profile associated with coronavirus. Indeed, the HSE does not appear to be in a strong position to respond to the particular challenges faced by home-workers, who are working in ‘low-risk’ environments not suitable for inspection under the traditional model.

It is also worth noting that in practice the ethos of ‘self-regulation’ has been a mixed blessing. Although this has spurred a greater depth and strength of institutional involvement in health and safety than in other areas of workplace regulation, the legacy of self-regulation has also been the downgrading of absolute rights in favour of codes of practice and workplace guidance which carry less legal weight. In light of these issues, the final section of this article discusses the potential for a greater integration of health and safety law with labour law in the wake of the pandemic. It is the argument in this article that the principles which form the central ethos of health and safety law, namely human-centric regulation and institutional diversity, are progressive and align with the aspirations of vulnerability theory, even though there have been problems with the implementation of
these principles in practice. The advent of the COVID-19 health crisis provides the impetus reconsidering the design and coverage of labour law to reflect these principles.

**COVID-19 and the protection of the worker through vulnerability theory**

The advent of COVID-19 has seen unprecedented state intervention into employer/employee relationships on health and safety grounds. This intervention has been justified as an emergency measure to halt the spread of the COVID-19 virus and thereby save lives. The emergency nature of the intervention has resulted in legislative provisions which are temporary in outlook and effect. For example, in the UK, the restrictions on business were implemented under legislation designed to expire after 6 months from the implementation date of 26 March 2020 (The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020 No. 350). It is argued in this article that this misses the opportunity to reconsider the regulation of workplaces with the health and safety of workers a more generalised consideration. This more generalised consideration would involve the integration of health and safety law with labour law to meet the aims of vulnerability theory and allow the insights of vulnerability theory to be put into practice in two main ways: first, through the adoption of a human-centric approach to the regulation of work, and second, through much greater institutional involvement and support to workers than generally afforded through traditional labour law. In this section, the opportunity to adopt the vulnerability approach to the changing landscape will be addressed in terms of the move to home working set in train by the COVID-19 crisis.

**Working from home: A human-centric approach**

Vulnerability theory is human-centric, as it puts the human condition of vulnerability at the heart of our understanding of the success and failure of states to improve the lives of its citizens. For example the traditional understanding of law as dominated by the ‘liberal subject’ strips the humanity out of the subject of law and means that legal provisions under this model fail to address need, and in many instances actually increase the existing social and economic divisions among citizens. Furthermore, the importance of a range of different institutions and relationships to building and fortifying individuals is either missed or deliberately ignored as irrelevant to justice or fairness. The argument from vulnerability theory is that the state needs to take a greater responsibility for the lives of its citizens through a recognition of their complex, shifting agency. The state response to the COVID-19 threat to health might be viewed as responding to this human-centric imperative in the first instance. Dramatic restraints were placed on businesses through closure and mandatory ‘stay-at-home’ orders for workers. These dramatic and far-reaching acts were taken on the basis of the vulnerability of workers: recognising that close contact with other workers in work environments constituted a severe risk to the health of workers (as a result of their human condition). However, it was made clear that these state-directed orders were temporary in nature, responded to a threat which would ultimately be contained, and ‘normal service’ would resume in due course. Indeed, the
shift to homeworking based on an emergency response meant that the health and safety and contractual considerations of such a move were hardly considered at all.

There are certainly provisions of health and safety law which cover home workers and which are inclusive as they apply broadly and in this way are more ‘human-centric’. There are particular obligations on employers with regard to home workers in relation to their working environment. Under the Health and Safety (Display Screen Equipment) Regulations 1992 (SI 1992 No 2792) (DSE) derived from European Law, employers are obliged to undertake a ‘suitable and sufficient analysis’ to identify any health and safety risks by all ‘users’ of display screen equipment (Regulation 2, DSE). Homeworkers, teleworkers and agency workers all come within the scope of the Regulations (Tolley, 2019, D8205). The obligations on employers include providing adequate training to staff (Regulation 6, DSE), conducting an assessment of the worker’s main workstation (or requiring a self-assessment for home workers) (Regulation 2 DSE), allowing and planning for frequent work breaks (Regulation 4 DSE), and providing eye tests on request (Regulation 5 DSE). In addition, the guidance from the Health and Safety executive supplementing the DSE Regulations provides that employers are required to take a ‘systematic approach’ to risk reduction and recognise that a basic assessment of risks may not be sufficient. If a worker reports a problem, and the factors underlying that problem appear to be complex, it will ‘generally be necessary to obtain expert advice on corrective action’ (HSE, 2003).

The problem in the current environment is that, although the DSE Regulations provide obligations in respect of ensuring a suitable work environment for home workers, they do not specify the point at which an individual becomes a ‘home worker’ rather than an office worker who occasionally works from home. This implies that under the emergency directives issued under COVID-19, there is a level of ambiguity as to when and to what extent employers are under an obligation to assess home working environments where contractually individuals are office-based. There is an obligation that health and safety assessments are reviewed and kept up-to-date, but this in itself does not change the obligation of the employer absent a particular contractual change (Tolley, 2019, D8223). The result is that many of the risk factors or vulnerabilities which employees (newly) experience from working from home are not the subject of effective regulation. Moreover, homeworking in the absence of homeworking status raises questions about where the costs of the provision of home equipment should lie (Collinson, 2020). In the UK, this is again not a matter of legal regulation but of contractual agreement and so there is a wide variation in business practice (Collinson, 2020).

Furthermore the home is inherently viewed as a low-risk environment and the risks associated with home working have a rather low status for the purposes of both health and safety and labour law. Particular risks which have been identified with homeworking include the difficulty of ‘unplugging’ and long working hours leading to heightened levels of stress at work. (Routley, 2020). In the UK, there has been a level of resistance to the idea that the regulation of working time is a health and safety matter (C-84/94 UK v Council of the European Union ECLI: EU: C:1996:431) and this is manifested by the availability and adoption in practice of the opt-out from the Working Time Regulations 1998 (Rimmer, 2014). As far as stress and mental health issues are concerned, these are not dealt with well by established labour law statutes such as the
Equality Act 2010, and judges have struggled with the interpretation of ‘disability’ in the context of mental health (Bell, 2015). Likewise, mental health problems at work do not align with the traditional priorities of the HSE and are not central to the guidance on dealing with the problems of coronavirus at work (HSE, 2020b). The guidance on stress focuses on management techniques to identify risk factors which may lead to stress at work but with no urgent or rights-based call to action (HSE, 2017).

This analysis reveals that despite the progressive aspirations of health and safety law, there are limitations in its response to new ways of working brought about by COVID-19. In terms of the short term, employers determine the contractual status and classification of employment contracts (as either ‘office-based’ or home-working, temporarily or permanently), and as a result the health and safety objectives of the law are not attained and many opportunities are missed to foster worker resilience. Adopting the premises of vulnerability theory in this regard, it might be suggested that a greater integration of health and safety and labour law is required to really achieve the recognition of embodiment and the responsiveness of the law; a re-regulation of the employment contract to account for emerging (health and safety) risks is required. For example, there might be the introduction of a right to home-work, already suggested in some countries, or home working status may be conferred after a certain time, with all the attendant rights associated with it (a similar mechanism already exists in relation to fixed-term work: Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP L 175/43, Clause 5).

Furthermore, the longer term move to home-work requires a rethinking of the embodiment of workers and how that is regulated through law. Home workers are embodied to the same extent as workers who work in a place separate from their home and face a set of risks in a similar way. These risks need to be taken seriously. For example, in the same way that there is the right of self-removal from a dangerous workplace without suffering detriment or dismissal, there needs to be in law the possibility of dramatic or drastic response to the dangers created in a home environment at work. One possibility could be the extension of the right of self-removal to serious or imminent mental health risk associated with excessive working hours. Another response is a much more robust approach to tackling mental health issues across the legal spectrum, through for example changes to discrimination law or stronger legal enactment and enforcement of health and safety guidelines. Finally, the institutional response to the risks of home-work needs to be stronger, and this will be discussed further in the next section.

Working from home and institutional involvement

The insight of vulnerability theory is that institutional support and design is central to a human-centric approach, and these two elements are constantly in a dialectic of adaption, accommodation and exclusion (Fineman M, 2012, p. 71). Institutions build resilience but resilience through vulnerability also builds those institutions, and hence institutions are both an example of and central to our experience of vulnerability and the human condition. From this point of view, a great benefit of health and safety law is the involvement of a range of different institutions in health and safety protection. Unions and union
representatives are structurally involved in the management of health and safety in workplaces, in a way which is not so apparent in other areas of the law. Moreover, the institutional involvement is triangulated, as employers are obliged to include health and safety representatives in any consultations with HSE inspectors, and those representatives are empowered to undertake their own investigations on the basis of employee complaints or other information about potential hazards and causes of accidents at the workplace (Safety Representatives Regulations 1977 (SI 1977 No 500) Regulation 6).

The challenge in the new home working environment is to maintain and strengthen this institutional involvement when working individuals are geographically distant. Models of trade union or collective representation have traditionally relied on building face-to-face relationships with both workers and employers (Smith, 2000, p. 54), and this is more difficult without a central workplace at which to organise meetings and discussions. Trade union action has also traditionally been organised around physical workplaces. For example, strike action is viewed as more effective when supported by picketing at the workplace to persuade non-union members to join the cause, and to gain political and community visibility for the action (Dukes and Kountouris, 2016). It is also potentially much more difficult for state institutions to enforce health and safety for home workers. Attending individual home workspaces is logistically difficult (if not impossible), and there are also privacy implications of attending a worker’s home to do a health and safety inspection. The result is that the institutional involvement of civil society and the state in health and safety is under threat by the move to home working.

The first step towards ensuring institutional involvement in home work is to ensure that home working is recognised as a structural fact of the (new) working environment, rather than just a temporary emergency response to crisis. Indeed, in some European countries, recognition of ‘structural’ home working acts as a trigger for separate regulation and trade union involvement. In Belgium for example, structural homeworking is regulated through a collective agreement, and this collective agreement sets certain conditions for the operation of home work (Convention collective de travail n 85 du 9 novembre 2005 concernant le teletravail) (CCTT). One condition is that a written annex has to be attached to the employment contract detailing the nature and conditions of home working. This includes the times during which the employee can be contacted, and the mechanisms through which home workers can attain technical support from the employer (Article 6, CCTT). This annex must also specify the distribution of home working costs, with employers under a duty to provide, install and maintain all the equipment necessary for home working (Article 9, CCTT). Employers are also under a duty to inform the employee of company health and safety policy, and can attend the home of the employee to conduct a health and safety inspection with notice and with the consent of the worker. Workers can also request a health and safety inspection of their workplace (Article 15, CCTT). Employers must ensure equal treatment as between home workers and office workers on their staff (Article 7, CCTT).

This collective agreement is progressive in recognising some of the particular needs of home workers and in specifically providing for a fair distribution of costs. In terms of collective institutional involvement and rights, the collective agreement does provide that home workers have the same collective rights as employees working in the office and have the right to communicate with employee representatives and vice versa (Article
17, CCTT). However, the underlying message of the collective agreement remains that home working is exceptional, and although "structural", is ultimately a voluntary action taken by both employer and employee which can be reversed (Hendrickx et al., 2020, p. 279). This is potentially unhelpful, as it militates against concerted action by the state and other institutions to really invest in understanding the specific needs of these workers and to improve the structural representation of their interests (Hendrickx et al., 2020, p. 279).

The vulnerability response might suggest a deeper resetting of institutional involvement in home working than is suggested by this agreement. This might involve new and better modes of achieving representation of home workers, through for example enabling or requiring home workers to be appointed as employee representatives and encouraging their participation in consultation remotely. Employers need to work harder to forge workplace connections for home workers to combat social isolation, and to set expectations and policies which support workers in achieving a separation of work and home time. The HSE also needs to understand the best mechanisms for intervention to ensure the enforcement of health and safety needs at home, given the difficult privacy issues involved. Although in the first instance, these measures would appear targeted to home workers, in fact they touch on vulnerabilities experienced by all workers, and effective measures to help this group would hold benefits for the whole workforce. Difficulties of isolation and the management of work-life balance are issues which are increasingly prevalent across the workforce and the better management of these elements would be beneficial to all (Caracciolo di Torella and Masselot, 2020, p. 27). Improving representation and strengthening enforcement would also benefit the entire workforce and should be a priority for any government seeking to redesign law in the post COVID-19 world.

**Conclusion**

The COVID-19 crisis instigated a government emergency response which made dramatic and wide-ranging changes to the organisation of work. Although many of those changes were viewed as temporary to prevent the spread of the coronavirus, they have set in train a set of more permanent changes to the way in which work is organised. This is particularly true for home working, which started as a temporary crisis response, but has now become the norm for many workers. The question then arises how and in what ways the state should regulate for these changes beyond the emergency measures instigated in the wake of the crisis.

It has been argued here that the recognition of the central importance of health and healthy workers to social and economic functioning brought about by the COVID-19 crisis is a perfect opportunity to reconsider and reimagine the regulation of workplaces based more centrally on worker health and the humanity of workers. Indeed, that reimaginationshould involve an assessment of the values associated with health and safety law, which traditionally has been viewed as separate from the labour law enterprise. As traditionally envisaged, health and safety law has the humanity of the worker at its heart and instigates strict and stringent duties on employers to ensure workers are not only protected, but that they are involved in and central to health and safety decisions and procedures in the workplace. Moreover, health and safety law envisages strong
enforcement measures to ensure that employers are meeting the needs of workers in terms of their protection and resilience.

Certainly these principles have not always been applied well in the field of health and safety (law) in the UK. In this field, a commitment to ‘self-regulation’ has led to a preference for ‘soft law’ guidance over strict legal measures, and the HSE has been criticised for its slow and reactive response. Furthermore, in the context of coronavirus, some of the emergent risks have been downplayed or poorly addressed. Vulnerability theory brings a new impetus for a reconsideration of the importance of these principles and their application to the regulation of the workplace in the post-COVID world. In the context of the (permanent) move to home working, a vulnerability analysis leads to a reconsideration of the interaction of health and safety and labour law, and ultimately the promotion of ways in which they could better work together to engender worker resilience in this new, uncertain environment.

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