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VULNERABLE IDENTITIES: POLITICAL AGENCY AND THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

abstract

The aim of this paper is to analyze the effects of the vulnerable group-based approach in the case law of European Court of Human Rights (ECtHR). ECtHR mostly use the notion of vulnerability to identify, isolate and protect some specific groups of population. I will highlight two important effects of these policies: the construction and affirmation of stable identities and the consequent limitation of the political agency of the social actors through the boundaries defined by the list of the available vulnerable groups. I will conclude the paper by providing a different, multifaced conception of vulnerability meant to take into account at the same time its universality and its specificity.

keywords

vulnerability, agency, identity, group, European Court of Human Rights

1. Vulnerability and human rights law

In accordance with the classical liberal tradition, the moral person and the rights-holder were the autonomous, rational and “quasi-disembodied”¹ (Gear 2007, p. 511) archetypal subject. Law was perceived as a rational discourse, while in turn rationality was viewed as a structure independent from the human body. Western legal systems, constructed on this basis, have influenced the grammar of human rights. Although in the late-modern process of dismantling the traditional modern dividing line between state and society,² new significant aspects, dimensions and experiences of the human life have appeared in the light of the public dimension out from the obscurity of the private sphere in which they had been traditionally relegated (Fineman 2004). Issues such as the caring labor of the weakest and marginalized people, dependency from others (Kittay 1999), vulnerability of the human body and human condition (Fineman 2008) started to be perceived as central issues in the public and legal discourses. In addition to it, they were able to solicit the responsibility of the state and the institutions towards the citizen. As a result, an attempt to repair the fallacies of the liberal frame has been made: “specific treaties have proliferated, such as the Convention on the Rights of Persons with Disabilities; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention on the Elimination of Racial Discrimination; and the Convention on the Rights of the Child” (Peroni & Timmer 2013, p. 1062). Their declared aim is the protection of vulnerable groups previously excluded by the tangle of human rights, since they could not be inscribed on the archetype of the liberal legal subject – “rationalistic” and “quasi-disembodied” (Gear 2007) and, therefore, invulnerable – around which they had been elaborated. For example, women have long been excluded from the protection of human rights, in that sex/gender differences were not taken into consideration in their provision (Radacic 2008); migrants were excluded for their staying on the blank side of the citizenship’s

1 According to the genealogy of human rights elaborated by Anna Gear (2007), human rights contain two different and conflicting impulses. On one side, they have been elaborated after the horrors and tragedies of the Second World War, and from this point of view the whole grammar of human rights contains a constant worry for embodied vulnerability. On the other side, the liberal subject has been introduced in the structure of human rights, too: the result is the partial exclusion of the subjects who cannot be caught in it. She adopts the expression “quasi” disembodiment of the subject of human rights, because it can well describe “this paradoxical form of disembodiment” (Gear 2007, p. 522). The body is not totally extraneous from the grammar of human rights, but “when the law does have a human body in mind, that body is ‘the bounded heterosexual male body’, ‘immutable’” (Gear 2007, p. 522).

2 See Poggi (1978).

protection; children's rights were not taken into account since they do not have autonomous capability to take rational choices; and homosexuality was regarded as an act of "an essentially private manifestation of human personality" (Johnson 2010), and thus beyond legal controversy. Instead of being overtaken, the binaries that drive this traditional conception – public/private, invulnerable/vulnerable, autonomous/dependent – still act through the notion of vulnerability, but in the different modality of a grid of intelligibility able to manage some groups of population remained out from the regularity of the independent, autonomous and self-sufficient liberal legal subject. Thus, as the notion of vulnerability became a powerful instrument in the hands of the Courts, with the ambitious hope of promoting measures aimed at protecting some specific portions of population, it changed the way state and institutions can handle the terrain left empty by the previous liberal politics.

I will devote the next paragraph to the examination of the way vulnerability is used by one of the most important international Courts – European Court of Human Rights (ECtHR) – to trace and test its social effects.

ECtHR tends to use the notion of vulnerability through the identification of some specific groups of people in need of a special protection – among others, asylum seekers, children, persons living with HIV, homosexuals, transgender persons, victims, elders, migrants, pregnant women (Ippolito & Sánchez, 2015). Although, the ECtHR have never provided an accurate definition of vulnerability³, it seems to be synonymous of 'particular exposition to harm' or 'being at risk' due to some specific characteristics shared by the social actors framed in vulnerable groups. Moreover, its meaning emerges through a process of exemplification (Wrigley 2015) expressed by the names of the groups. The evaluation of the risk is measured by considering the "inherent" or "situational" (Mackenzie, Rogers *et al.* 2014, p. 7) sources of vulnerabilities.

Inherent vulnerabilities arise from some internal factors which typify a vulnerable group. For example, the vulnerable group of the elderly is characterized by the inherent source of vulnerability expressed by the age; persons living with HIV have a place in the list of vulnerable groups because of their disease. Inherent vulnerabilities can emerge "from our corporeality, our neediness, our dependency on others, and on our affective and social natures" (Mackenzie Rogers *et al.* 2014, p. 7). Conversely, situational vulnerabilities arise from a set of situations, conditions and social statuses 'outside' the individual. For example, in *M.S.S. v. Belgium and Greece* (2011) ECtHR have defined asylum seekers as a "vulnerable population group"⁴ referring to the condition of an applicant because of "everything he had been through during his migration and the traumatic experiences he was likely to have endured previously"⁵. However, the situational sources of vulnerability can be so totalizing that what seems to be an external condition of weakness becomes a fundamental, natural, non-questioned feature of a group, which is supposed to be shared by *all* its members. As emerges from the ECtHR judgements, being vulnerable primarily means being a member of a group or, more generally, *inscribable* in some specific group of population. In a separated opinion of the previously mentioned judgement *M.S.S. v. Belgium and Greece*,

2. Vulnerable group-based approach and the construction of identities

³ ECtHR is not the only institution to adopt this approach. Among the others, it is commonly adopted by non-governmental organizations (such as CIOMS), national and international Courts, legislations (such as the institution of "incidente probatorio" in Italy), reports or declarations of research committees, international organizations or ministries (such as the *Belmont Report* of 1979, the Declaration of Barcelona of 1998, the Declaration of Helsinki of 2000 art. 8).

⁴ *M.S.S. v. Belgium and Greece*, 2011; 53 Eur. H.R. Rep. 2, ¶ 251 (2011).

⁵ *Id.* ¶ 232.

Judge Sajò expressed his disagreement: according to him asylum seekers cannot be viewed as a homogeneous group, and not even as a group. In fact, he claims they do not share two main factors which are the *condicio sine qua non* of being a vulnerable group, as it emerges by the ECtHR case law. One is a long history of discrimination (namely, a situational source of vulnerability), the other is an innate or derivative internal characteristic of the applicant (an inherent source of vulnerability), such as being a pregnant woman, a child or a person with disabilities. Without these features, they cannot achieve the status of a group and, least of all, the status of *vulnerable* group.

Although many authors (Fineman 2008, 2010; Luna 2009; Peroni & Timmer 2013; Wrigley 2015) have advanced criticisms about this approach to vulnerability, they do agree on believing vulnerability frame as a new important step forward for human rights. Peroni and Timmer (2013) have pointed out that addressing vulnerability only to specific groups could in some cases reinforce “[their] vulnerability (...) by essentializing, stigmatizing, victimizing and paternalizing them” (p. 1070). Wrigley (2015) and Wrigley and Dawson (2016) argue that the problem with the vulnerable group-based approach is inherent in its definitory method. From an epistemology point of view, Wrigley and Dawson (2016) bring out some significant inconsistencies of this approach. According to Wrigley (2015), the exemplificatory method inherent in the group-based approach is deeply inadequate when it is used to provide the definition of a “substantive concept” (p. 6). In fact, even if it were possible to include all the elements of the ‘vulnerable groups’ set, without a criterion for defining and delimiting the whole thing – of the kind “all and only those attributes, contexts, and categories listed” (p. 6) – there are no means to determine whether somebody should or should not be inscribed on it. Moreover, it seems that such an assembly cannot be completed, since the emergence of new health, political, economic and social issues make necessary the indefinite creation of new vulnerable groups which require special protections. Indeed, Wrigley and Dawson (2016) state, as this approach does not explain what it means to be vulnerable, it cannot solve the issues arisen in such cases where it is unclear whether a group can or cannot be considered vulnerable, as it emerges for example in *M.S.S. v. Belgium and Greece*. Therefore, this approach is too broad, as it fails to delimit the categories of subjects to which it wants to provide a special protection.

Another methodological problem of the group-based approach is that the name of each vulnerable group indicates one specific feature which allows to include or exclude on it certain people. However, it is possible that the source of vulnerability of the person inscribed, for example on the vulnerable group of the elderly is not her age-status, but another specific feature not included in the vulnerable groups lists yet. In other terms, this approach focuses on certain traits of a group and it is not able to take into account other individual features which are outside their membership in a specific group. As Wrigley and Dawson (2016) conclude, “it will potentially miscategorize certain individuals or groups as *not* being vulnerable if, for example, they are a group that has not been encountered previously or if some trait has not made it onto the list of specified characteristics” (p. 207). Therefore, on top of being too broad, this approach is also too narrow, since it fails to cover the whole wide range of features, contexts and conditions which can make a person vulnerable.

From these methodological issues, it is possible to highlight other important criticisms which pertain not only formal problems of the group-based approach, but also its inner, diffusive social effects. The process of tracing, naming and inscribing specific groups of population by individuating some features through the filter of vulnerability implies the creation or the maintaining of some identities built on what is evoked by a standardized representation of the name of the group. What a person is, what is important to her, what should be taken into account to establish her *situated* vulnerability emerges only from the name of the group within

she is inscribed on. As Luna (2009) points out, the notion of vulnerability ends up becoming a label which indicates that a person is essentially vulnerable because of the characteristics she shares with the other members of the group. In a sociological perspective influenced by Max Weber, Pierre Bourdieu and Michel Foucault, Brubaker and Cooper (2000) observe how the process of grouping in the social field involves the productive power of the state and the institutions that “seek to monopolize not only legitimate physical force but also legitimate symbolic force (...). This includes the power to name, to identify, to categorize, to state what is what and who is who” (p.15). The ‘groupness’ mechanism leaves a little space of political agency to the social actors and narrows their possibilities of actively create identifications, forcing them to use what the institutions provide as a legitimate vocabulary of self-description. Being inscribed in some specific group means being fixed in some specific identities which, contrary to what the dynamic process of identification implies, “designat[e] a *condition* rather than a *process*” and entails “too easy a fit between the individual and the social” (Brubaker and Cooper 2000, 17).

The inscription on a vulnerable group or the inherent potentiality of ‘being inscribable’ by the possession of a particular vulnerable body or by the living in a presupposed vulnerable condition means to be put under an intense power pressure. In fact, the applicant is brought to struggle between her demand of having her rights recognized and her friction with the available vulnerable groups within which she has to position herself in order to acquire them. Being labelled as vulnerable becomes an inevitable consequence of some features that the subject shares as a group member, such as gender, race, disability or sexual orientation. Since the group-based approach is at the same time too broad and too narrow, a social actor might happen to be inscribed in a group which cannot catch her source of vulnerability, and/or to be inscribed in a group which does not reflect her self-identification. This means for her a constraint to be integrated as a member of that group in order to have her right recognized. Therefore, defining a group as vulnerable implies creating or maintaining a fixed identity which invests the whole subjectivity of the social actor who has no choice but to come to terms with it. By this process, the “cultural inscription” (Butler 1989, p. 603) power of institutions reveals its capability to engrave the identity of the subject constructed as if it had a truth or an available knowledge which the social actor has to overlap.

Chapman v. the United Kingdom (2001) is the first judgement of ECtHR in which the vulnerable group-based approach was adopted (Peroni & Timmer 2013, p. 1063) and in which its effects clearly emerge. The applicant was a gypsy woman who had decided to buy a plot of land and to live there in a caravan. She took her decision “due to harassment while she led a travelling life, which was detrimental to the health of the family and the education of children”⁶. The permission was negated, and she addressed the ECtHR because according to her there was a violation of Article 8 of the Convention. As Dembour (2006) stated, “the Court found that what was at stake in Chapman was not the right to respect for the home of the applicant but the ability for her to maintain her identity as a gypsy and to lead her private and family life in accordance with that tradition”. Nevertheless, “the applicant’s lifestyle could have been worthy of protection only if she had stuck to a tradition of itinerancy” (p. 199). If her lifestyle had conformed to that of “the vulnerable position of Gypsies as a minority”⁷, she could have been inscribed in that group and her vulnerability recognized as having the potentiality to redeem her right. But since her choice to live in a sedentary way conflicted with the common representation of gypsy identity, the applicant lost the case.

⁶ Chapman v. United Kingdom (GC), 2001-I; 33 Eur. H.R. Rep. 18, ¶ 12 (2001).

⁷ *Ib.* ¶ 96.

In spite of her position as a weak party, the conception of vulnerability provided by the group-based approach was not sufficient to prevent her from harm. But this is not a sufficient reason to drop the notion of vulnerability. As Dembour (2006) has pointed out, there were other important aspects of the condition of the applicant which could have been important to recognize her vulnerability. As emerges by the separated opinions of some judges, she was “the principal carer for some members of her family (no longer her children by the time the case was heard by the Court, but her 90-year-old father who required constant care)” (Dembour 2006, p. 199). Analyzing her situated condition, the problem of her possible membership in the vulnerable group of the gypsies is inconsistent in the recognition of her vulnerability. The vulnerable group-based approach was too broad because it failed to offer a valid reason to recognize the person as vulnerable, and too narrow because it could not take into account the wide range of situated conditions which may render the person vulnerable. In addition, it contributes to produce and maintain fixed identities – in this case the gypsy one – through the definition of what a person should embody to be inscribed in a group and to be recognized as vulnerable. It seems there were a truth of the identities by which the vulnerable subject should perfectly fit together– as if she were a crystalline mixture of the individual and the social. Moreover, identity emerges as what the Court or, more generally, the institutions recognize as such, and not as what the social actors perform in their unpredictable self-identifications. Finally, the identities that emerge through the vulnerable group-based approach are inserted within a discourse marked by traditional binaries. Instead of upturning the traditional liberal paradigm, this approach to vulnerability reinstates the demarcation line between the normal, autonomous, invulnerable subject on one side, and groups of individuals which are vulnerable and in need of protection on the other side. These binaries imply the same assumption which the traditional frame of human rights law and liberal politics sustain behind an unattainable neutrality: human beings *normally* enjoy a healthy body with the same *normal* abilities and needs, and *normally* they are male, heterosexual, adult and white. All those categories of population outside these attributes are inscribed on specific vulnerable groups in need of protection. The potential expressed by the social and corporeal vulnerability shared by all human beings is recognized only to a certain portion of population and it works as an inscription device which negates that “human vulnerability is universal, constant and complex, and (...) also particular” (Fineman 2010, p. 31).

**3. Vulnerability:
a promising
concept?**

Vulnerability gives an account of a multifaced condition which is more complex than the membership of a group. It is a concrete experience of dispossession which deals more with being different in situated conditions, than being similar due to the sharing of the identity features of a group. It can be both a positive and a negative condition, or even a matter of voluntary choice, as Cooper (2013) has pointed out. As a relational experience, it cannot be fixed in some pre-constructed identities, but rather it should be seen as a result of a situated process of identifications.

The question at stake is whether the notion of vulnerability could be a promising tool aiming at the protection for the weaker party, or as a concept that is so vague – as some authors have stressed (Brown 2011; Chambers 1989; Daniel 2010) – that it should be abandoned. As Butler (2004, 2005) has highlighted, being vulnerable means experiencing a condition of dispossession, an epidermal openness to alteration which could be neither willed nor accepted, but as a fundamental experience of human beings it constitutes an “ever present possibility” (Fineman 2010, p. 28). It is qualified as a general condition that “foregrounds our frailty, dependence, susceptibility, interrelatedness, and the contingency of our development” (Gilson 2015, p. 230), and it constitutes our capacity to dismantle our self, to learn by and to be interrelated with our susceptibility of the ambient and the others.

Seen from this ontological and universal point of view, vulnerability seems to become a concept that explains our capability of agency, rather than negating it. Vulnerability deals with our sociality and affectivity, the capacity of altering and being altered by the world and the social actors around us. As Gilson (2015) has pointed out, most fundamentally, the idea of intersubjective vulnerability indicates that vulnerability is our ability to be open to others, to be shaped by them, to become a self only through relation to them; it is the condition that makes it possible for us to become who we are and will make it possible for us to become otherwise. Given vulnerability's intersubjective nature, conceiving vulnerability as a fundamental condition also entails recognizing how that condition is actualized and experienced differently given the varying ways people are situated in the social milieu (p. 231).

As such, vulnerability is the condition of possibility of our agency, because it forms the space within which we can move. It will be different to one another, because it forms the uniqueness of the condition of each human being in its interrelation with the others and the world. Vulnerabilities, which are differently lived, differently experienced and differently performed, cannot be trapped in preconstructed identities, since they form the unpredictable, wide and rich situations of the social actors. Only by recognizing at the same time its uniqueness, its intersubjectivity and its universality as an unavoidable state that "cannot will away without ceasing to be human" (Butler 2004, p. xiv), it is possible to face its challenge. We can react to it only by considering the situated conditions of all social actors, who do and undo their selves through their own performative processes of susceptibility with the world.

REFERENCES

- Brown, K. (2011). Vulnerability: handle with care. *Ethics and Social Welfare*, 5(3), 313-321;
- Brubaker, R. & Cooper F. (2000). Beyond "identity". *Theory and Society*, 29, 1-47;
- Butler, J. (1989). Foucault and the paradox of bodily inscriptions. *The Journal of Philosophy*, 86(11), 601-607;
- Butler, J. (2004). *Precarious life: the powers of mourning and violence*. London: Verso;
- Butler, J. (2005). *Giving an account of oneself*. Fordham: Fordham University Press;
- Chambers, R. (1989). Editorial introduction: vulnerability, coping and policy. *IDS Bulletin*, 20(2), 1-7, doi: 10.1111/j.1759-5436.1989.mp20002001.x;
- Cooper, D. (2013). *Everyday utopias: the conceptual life of promising spaces*. Durham: Duke University Press;
- Daniel, B. (2010). Concepts of adversity, risk, vulnerability and resilience: a discussion in the context of the 'Child Protection System'. *Social Policy and Society*, 9(2), 231-241;
- Dembour, M. B. (2006). *Who believes in human rights? Reflections on European Convention*. New York: Cambridge University Press;
- Fineman, M. A. (2008). The vulnerable subject: anchoring equality in the human condition. *Yale Journal of Law and Feminism*, 20(1), 1-23;
- Fineman, M. A. (2010). The vulnerable subject and the responsive state. *Emory Law Journal*, 60(2), 251-257;
- Gilson, E. (2015). Intersubjective vulnerability, ignorance, and sexual violence. In M. Gross & L. McGoey (Eds.), *Routledge International Handbook of Ignorance Studies*. Abingdon: Routledge;
- Grear, A. (2007). Challenging corporate 'humanity': legal disembodiment, embodiment and human rights. *Human Rights Law Review*, 7(3), 511-543;
- Ippolito, F. & Iglesia Sánchez, S. (2015). *Protecting the vulnerable groups. The European rights framework*. Bloomsbury, Oxford and Portland, OR: Bloomsbury;
- Johnson, P. (2010). An essentially private manifestation of human personality: constructions of homosexuality in the European Court of Human Rights. *Human Rights Law Review*, 10(1), 67-97;

- Kittay, E. F. (1999). *Love's labor: essays on women, equality, and dependency*. New York: Routledge;
- Mackenzie, C., Rogers W. & Dodds, S. (2014). *Vulnerability: new essays in ethics and feminist philosophy*. New York: Oxford University Press;
- Luna, F. (2009). Elucidating the concept of vulnerability: layers not labels. *International Journal of Feminist Approaches to Bioethics*, 2(1), 121-139;
- Peroni, L. & Timmer, A. (2013). A quiet revolution: vulnerability in the European Court of Human Rights. *International Journal of Constitutional Law*, 11(4), 1056-1085;
- Poggi, G. (1978). *The development of the Modern State. A sociological introduction*. Redwood City, CA: Stanford University Press;
- Radacic, I. (2008). Feminism and human rights: the inclusive approach to interpreting international human rights law. *UCL Jurisprudence Review*, 14, 238-276;
- Wrigley, A. (2015). An eliminativist approach to vulnerability. *Bioethics*, 29(7), 478-487;
- Wrigley, A. & Dawson, A. (2016). Vulnerability and marginalized populations. In D. Barrett, H. Ortmann et al. (Eds.), *Public health ethics: cases spanning the globe*, Springer Open.