



Vulnerability and Human Rights: Which Compatibility?

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Abstract

By embracing the ontological view of vulnerability and stressing its social basis, the paper aims to clarify the role of vulnerability within human rights paradigm.

Vulnerability is conceived of by the author as a heuristic notion, which works as a pillar for a general approach to some crucial challenges to human dignity. Both this heuristic notion and these challenges are regarded in the paper as hallmarks for the human rights paradigm.

In order to ground this view, the coherence between “vulnerability turn” and the rationale of human rights relies on a four-steps argument dealing with: (i) the denial of a necessary mismatch between the notion of vulnerability and the principle of autonomy; (ii) the appreciation of *relation* in human rights conceptualization; (iii) the complementarity between vulnerability, as a heuristic notion, and the principle of equality; (iv) the understanding of vulnerability as a “vehicle of empathy” not necessarily involving paternalist trends and therefore not in conflict with the empowerment purposes of human rights.

The relevance of “vulnerability turn” in human rights paradigm is defended in the paper within a view of human rights as basic rights, i.e. as means to prevent or fight against those threats that seriously affect basic human needs.

Keywords Basic rights · Equality · Human Rights · Judicial Reasoning · Ontological Vulnerability · Relational Autonomy

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1 Introduction

The reference to *vulnerability* in human rights justification and application has been increasing in the latest decades. Regional Human Rights Courts gave room to this notion in order to qualify the condition of the right holder and to assess the degree of violation. The Committee on Economic, Social and Cultural Rights, in its General Comments, have often referred to vulnerable people (women, children, refugees, stateless, national minorities, elderly people, especially HIV positive, Roma/Gypsies/Sinti, LGBT people) [1, 27, 28, 36, 39, 41–43].

The reference to vulnerability has been appreciated as capable of a positive contribution to the qualification of the subject of rights (and not - it should be remarked - to its identification) in concrete contexts, to account for his/her exposition to rights infringement or his/her inability to claim for the rights at issue.

At the same time, the role and consequences of the idea of vulnerability in human rights implementation are an open matter.

Some criticisms point out that this “vulnerability turn” in legal reasoning would bring or increase judicial discretion in rights interpretation, even resulting in narrowing the scope of their application, and deny that it may be a suitable way to address cases of systemic or institutional discrimination.

Furthermore, in spite of the increasing reference to vulnerability, it has been pointed out that the meaning of ‘vulnerable’ is vague, that vulnerability is “a chameleon concept, able to change its content depending on who uses it in which context” [41 p. 195], the use of which has produced “piecemeal and unpredictable jurisprudence” [23 p. 207], and that the criteria for identifying the vulnerable have not been specified by either legal sources or judicial decisions [10 pp. 683, 723].

Finally, it seems that the link between vulnerability and human rights paradigm has not been worked out in a systematic way. This latter is the level of analysis I want to address here. I aim to show that, while these remarks are well-grounded, they should not be regarded as pitfalls of the very notion of vulnerability. They are rather consequences, to be managed, of its structural and desirable vagueness, which is precisely at the roots of its coherence with the rationale of human rights.

The notion of vulnerability seems to have a specific potential in human rights discourse and practice: It may support an understanding of the overall impact of human rights in terms that are more comprehensive compared to the most diffused and traditional view. If this latter looks at human rights mainly or exclusively as means to protect against power, maintaining that human rights have the aim of protecting the vulnerable leads to taking into consideration a condition that is much more diffused and multifarious and that has to do with dominance. In other terms, the reference to vulnerability may enlarge the sphere of relevance of human rights language for the human condition. This is basically why I think it is important understanding at what conditions a fruitful relationship between vulnerability and human rights can be identified.

In human rights field, the theoretical inquiry into vulnerability deals with three main levels, which respectively concern the *meaning*, the *conception* and the *role* of vulnerability.

In what follows, as to the meaning, I would like to emphasize the relevance of the semantic vagueness of ‘vulnerability’ as a condition for the role that the notion of vulnerability should play. With regard to the right holder condition, it expresses his/her *exposure* to threats that may seriously affect freedom, equality and dignity, or his/her inability to claim rights. Vulnerability is seen as characterized by different degrees and, in human rights domain, reaches a significant intensity when it features a condition in which the person is at the mercy of others [31–33 pp. 33–59].

As to its conception, two views have been developed so far in human rights framework.

The first view looks at vulnerability in a narrow sense, as a specific condition of certain groups, which are acknowledged as made up of people particularly exposed to the risk of harm or to the domination of others. This approach was adopted by some human rights treatises, courts and monitoring bodies, especially in cases dealing with forms of systematic or institutionalized discrimination.

From a theoretical perspective, this collective and classifying understanding has become the target of strong criticisms, arguing that qualifying someone as vulnerable would foster victimization and stigmatization of the vulnerable, justify forms of paternalism and, therefore, achieve results that are opposite to the intended ones. By addressing the impact it has on individuals who belong to the group at stake, Martha Fineman rejected the idea of group vulnerability because it “transforms our shared vulnerability into a personal liability and renders the individuals so designed susceptible to alienation, stigma, or demonization” [18 p. 1750].

Moreover, the problem with designating only specific categories of people as vulnerable is that the way it protects such people actually “reinforces and valorizes the ideal of the liberal subject who is conceived as autonomous and independent” [42 pp. 194–195].

A second conception looks at vulnerability as a universal, ontological, condition of human beings. It is at the same time a condition that pertains to every human being but occurs in specific forms and degrees, depending on individual situations and concrete contexts. In this perspective, the risks to which vulnerability exposes are regarded as caused by endogenous (bio-psycho) variables together with exogenous variables, i.e. variables that are linked to social, political, economic and cultural settings and to the process of recognition that is, in various forms, the basis of social relations and personal identity. Human beings are regarded as ontologically vulnerable, due to their being placed, with given personal characteristics, in a relational context and into recognition processes. This view of vulnerability acknowledges the mutual interaction of two dimensions: the dispositional one, depending on the subject, and the occurring one, depending on external factors.

It is important to stress that the ontology that is referred to, in order to qualify the vulnerable condition, is a *social* ontology. This explains the structural interconnection between internal and external factors in assessing the rights holder condition and the weight of social relations in determining the degree of exposure to the relevant risks.

In my view, ontological conception can account for the entire range of the taxonomy for vulnerability that can be reconstructed into literature, which lists: *inherent* vulnerability, i.e. intrinsic to the human condition; *situational or extrinsic vulnerabil-*

ity which is context-specific and “caused or exacerbated by the temporary or enduring conditions which agents find themselves in, including personal, social, economic, and environmental conditions” [29 p. 7]; *pathogenic vulnerability* which refers to sources of vulnerability that arise from the exacerbation or compounding of existing types of vulnerability; *discretionary vulnerability* dealing with forms of contingency that follow a choice. Finally, the idea of “*compounded vulnerability*”, pointing out that ‘layers of vulnerability’ may arise when different kinds of vulnerability are superposed and suffered within the same group [29 p. 7].

2 Assessing the Distinctive Role of Vulnerability in Human Rights Paradigm

Regardless of the embraced conception, the notion of vulnerability risks to be regarded as a synonymous of weakness and a condition to be avoided. However, I aim to show that the ontological view of vulnerability has the potential, on the one hand, to overcome the risks of stigmatization and stereotyping, and, on the other hand, to act as a critical input within the human rights paradigm.

By ‘human rights’ I mean freedoms, entitlements, powers and immunity justified by strong moral reasons and recognized by international legal norms to human beings as such. The notion of *human rights* is, in my view, a complex notion, which keeps together different dimensions, each of them performing a specific role in the processes of institutionalization, concrete emergence and developing of rights. They have roots in moral values, may be institutionalized into legal norms, and then require to be promoted and implemented through political decisions, actions and programmes and through legal mechanisms of protection. Moral dimension acts as an open source of meaning for rights, political and legal dimensions make their institutionalization possible, and the latter is needed for human rights to concretely affect social, economic and political settings.

By ‘human rights paradigm’ I mean the set of aims, norms and implementation mechanisms that have being worked out firstly at the international level, in order to recognize, implement and protect human rights. I also refer to the complex of justificatory reasons that come along with this practice and that stem from both institutional and civil society understanding of it. Human rights paradigm, in my perspective, links together discourses, which express a wide range of different approaches, and practice. Very relevant, moreover, are the theoretical views that have being developed on the very paradigm, in terms of conceptualization and justification.

To start understanding the role of vulnerability turn in human rights paradigm, we need to stress, first of all, that referring to vulnerability in human rights field should be regarded as functional not to classify people but to qualify situations. Vulnerability discourse should not be oriented to identify *who* is the vulnerable but rather to recognize the *causes* and *conditions* underlying a specific exposure to risks of rights violation.

The ontological view of vulnerability seems to be consistent with some characteristics of human rights, such as (a) their intrinsic universality; (b) the non-abstract nature of this universality; (c) their relational character, concerning both the good to

be protected and the processes of recognition and institutionalization required for rights being warranted.

However, I am aware that, in order to ground this perspective, some recurrent criticisms to the ontological view need to be addressed.

In particular, there is a criticism to the ontological notion of vulnerability that challenges my stance. According to this criticism, the ontological approach, by regarding the condition of vulnerability as universal, would fail to support the identification of situations to be qualified as unjust and to be removed. The argument underlines that, if everyone is vulnerable, then we will lack criteria for identifying those who deserve specific attention when assessing the impact of economic, social, cultural and political models. As a consequence, the ontological view would nullify the very role the concept of vulnerability could be called to play.

This argument highlights the need to address a number of issues, which can be summarized as follows: (i) how exactly is the relationship between universality and particularity articulated within the ontological paradigm? (ii) Can the ontological approach support in capturing not only individual conditions, but also the social conditions that create, perpetuate or prevent the exposure to risks? Does the ontological approach allow for the identification, within concrete social arrangements, of systematic and structural elements responsible for a negative condition experienced by specific groups? To point out this latter concern, some argue that the ontological view of vulnerability, especially the one that emerged from the judgements of the European Court of Human Rights, did not succeed in protecting discriminated groups or at least did not result in a uniformly effective trend on this matter.

These issues deal with the possibility that the ontological meaning of vulnerability ends in a “naturalization” of social injustice or masks the failure to counteract it. This is why it seems relevant to show that the ontological approach is suitable to give account for vulnerability also when it depends on factors common to groups. I want to maintain that this is the case and that the ontological view of vulnerability is not focused on individuals only, but is suitable to give weight to both individual and group conditions, at the same time. It can drive the attention to groups when (i) the exposure to the risk of rights infringements is higher precisely because of the group belonging; (ii) looking at the vulnerable subjects at stake as having a collective weight may strengthen their political standing.

To address this issue, the relationship between vulnerability and equality is to be analysed.

It is important to underline that, on one hand, the content and the aims of the equality principle go beyond the antidiscrimination purposes and that, on the other hand, the attention toward the vulnerable exceeds the equality principle. Several forms of inequality may be linked to specific forms of vulnerability, but the latter may stem from, or stratify according to, further factors, which cannot necessarily be brought back to inequality. Therefore, equality concerns are covered by the attention to the vulnerable, but taking the vulnerable condition as a starting point is functional to assess if and how much rights may be infringed.

Exactly due to the semantic openness of ‘vulnerability’, a relevant difficulty may arise: the factors at the basis of the risks of rights violation may deal with both elements that have to be simply acknowledged (and eventually even protected) in social

settings and elements that are to be contrasted and removed. In other terms, vulnerability deals with conditions that may fall under both the inequality domain and the difference domain [5 p. 369]. So the question arises whether a notion endowed with such a wide range of applications should be given a specific and high relevance.

It seems to me that part of the problems with the notion of vulnerability are to be brought back to the tendency to look at it as a principle. In some perspectives, vulnerability is implicitly or explicitly seen as a principle [28, 29] and very often as having a binary relation with the other core principles in human rights domain: mainly concurring with dignity in justification of human rights and alternative to autonomy and equality in orienting their application.

My point is, on the contrary, that the idea of vulnerability is suitable to play a normative role, for both policy and legal reasoning, due to its *link* with values/principles but that it is not a principle itself [25 p. 286]. Compared to the principle of dignity, the concept of vulnerability shares the comprehensive scope but not the foundational one [2]; compared to the principles of autonomy and equality it is not endowed with any direct normative force.

It is not, actually, either a value or a disvalue. Rather it is a condition that – once acknowledged – *may be given* (or not) a certain normative strength, on the basis of given premises and of given aims. The reasons at the basis of the acknowledgment of vulnerability determine its function. To conclude, vulnerability may take an (indirect) normative significance if its recognition is put within a more articulated framework of principles and by virtue of the previous acceptance of the responsibility towards vulnerable people as a moral and political value [24 p. 44].

Moreover, the notion of vulnerability should not even be considered to function as a standard: differently from standards, it cannot be directly applied. It is not the notion of vulnerability that is applied in concrete cases, but the construct that links its acknowledgment within circumstances to those values and principles that push and drive the action aiming to remove the risks of rights infringement.

All what above leads to conclude that, in practical reasoning, vulnerability should not be referred to in order to substitute any principle. We should rather frame the relation between vulnerability, on the one hand, and the core principles in human rights realm, on the other hand, in non-binary terms [4]. It is not a matter - to address one of the most relevant criticisms – of replacing the principle of equality with the idea of vulnerability, but of resorting to the idea of vulnerability to better understand the contexts in which the concretization of the principle of equality is required.

Again, vulnerability can be fruitful resorted to not much to directly pursue the warrant of rights, but rather to improve their interpretation and implementation in concrete cases. The very reference to vulnerability cannot be *per se* a way for either neglecting or “naturalizing” social injustice [6 pp. 318–319]. Rather, it is to be thought of as a hermeneutic notion, useful to principles optimization.

The notion deploys a potential both at critical level and at constructive level. By deconstructing the traditional idea of rights holder and by detecting the circumstances containing risks for threats to dignity, vulnerability supports the assessing of the actual functioning of some social settings (heuristic function) and the shaping of norms and policies able to take into account a “complex rights holder”, together with several relevant circumstances, instead of an abstract and disembodied one (critical

function) [15]. Then, as a consequence, it may drive the transformation of social, economic and political settings (constructive function).

3 Vulnerability and the Rationale of Human Rights

On the basis of what above, once the ontological approach to vulnerability is embraced, pointing out the structural link between vulnerability and rights holder conceptualization has some relevant implications that I want here to point out.

First, if we agree on the view that the empowerment of the rights holder is the comprehensive aim of human rights, and since this idea has been often summed up in the idea of autonomy, then the reference to vulnerability can be seen to support the empowering function of human rights but only if the aspiration to autonomy is understood as an aspiration to integrity, authenticity and freedom from dominance rather than to mere independence [33 p. 41].

Second, referring to vulnerability contributes to detect the risks of violations of human dignity.

Third, this reference orients the content of human rights towards the satisfaction of a non-derogable threshold, under which human dignity would be seriously hampered [13 p. 351; 43 p. 110].

However, a conceptual issue remains: we might doubt that, if qualifying the vulnerable is an ascriptive move, then mixing rights protection, which is supposed to pursue empowerment purposes, with vulnerability recognition is tantamount to improperly joining conflicting logics at both application and justificatory levels.

Is the logic of vulnerability ascriptive and radically different from the logic of rights, which is supposed to be a claiming one? Is the “vulnerability turn” in human rights justification and interpretation really compatible with the logic of rights? The question arises whether bringing vulnerability into human rights framework may open the door to some kind of paternalism. Indeed, some worry that “[t]he use of vulnerability language can then act as a moral justification for social control” [42 p. 195]. How much is this point well-grounded?

We have to admit that the reference to vulnerability does not seem to be uniquely suited to rights-based approaches to matters of justice. Actually, it seems to fit duties-based approaches to justice as well. This is a further evidence, to my mind, that vulnerability does not work as a foundation for rights [2]. However, we need to ask if vulnerability may coherently operate (also) within the language of human rights. To answer the question, we need to take a stance on the conceptualization of both vulnerability and human rights as well as on their mutual relationship.

Some scholars start from the implicit premise that, at the current stage, international law of human rights relies on the conception of rights holder that is shaped by the liberal tradition. In this perspective, the vulnerable view, as a reference point that structures action by giving emphasis to “the other”, who needs protection [13 p. 359; 43 p. 162], may be seen as a kind of “Trojan horse” within human rights practice [7 p. 74]. For, it may indirectly determine the content of rights as a consequence of paternalist recognition processes, which might take critical and empowering force away

from rights. Briefly speaking, the concern is that the ascriptive logic of vulnerability would clash with the claiming logic of rights.

This tenet rests on an implicit and debatable premise: the idea that rights are instrumental to achieve precisely the “invulnerability” and the independence that have being highly criticized into the liberal view of rights holder. Interestingly enough, moreover, the premise that human rights are necessarily associated with a individualistic approach to autonomy is taken for granted even within the theory of ontological vulnerability. That is why, strictly speaking, even this latter tends to put human rights and vulnerability in mutual opposition [19 pp. 115–116].

If we think that the rationale of rights goes or stands together with the liberal idea of the subject of rights in the individualist version and with the idea of autonomy understood as independence, then certainly vulnerability may be regarded as distant from the language of rights.

Nevertheless, it is clear that not only vulnerability but also human rights rest on relation. In order to understand how vulnerability can play a role in human rights paradigm without taking the empowering force away from rights, we need to work on both the way we conceptualize vulnerability and the way we conceptualize human rights. An evidence of the possibility to combine the claim for human rights and the focus on vulnerable condition comes from the United Nation Convention on the rights of persons with disabilities [8 pp. 941–945]. Here, the concept of vulnerability works together with the promotion of relational autonomy, which, starting from the premise of universal legal capacity, is understood as a result of the implementation of rights and policies, aiming to transforming social settings.

In order to show not only the possibility to merge the resort to both human rights and vulnerability in the same approach but even their mutual support, I am making a twofold argument.

First, the conceptualization of rights holder that was proposed within the liberal tradition in its individualist version has been targeted by several criticisms, coming from different cultural and theoretical trends, and should not be regarded as the self-evident basis when we come to the human rights justification. Such criticisms have shown how an abstract and disembodied model of rights holder cannot be a proper basis for human rights. It cannot really ground or justify either the content of rights or a comprehensive view of correlative duties, including not only negative obligations but also positive ones [16–18, 20, 22]. Also within the international law of human rights it has become clear that equality and universality, to be coherent with the protection of human dignity, need to be specified in the light not only of concrete contexts (as it happens for any legal norm) but also of some relevant aspects that determine the condition of the right holder. In this direction, the resort to vulnerability as “the focal lens of protection” confers even more particularization to that protection [14 p. 121]. Such specialization - as it has been pointed out - is “complementary rather than contradictory to the idea of a coherent and efficient human rights framework” [14 pp. 127–128].

Second, autonomy should not be understood in terms of independence and as a starting condition of the rights holder to be merely *preserved* through rights, but rather as a target having to do with one’s control on himself/herself, consistent with the relational perspective and to be *achieved* through rights. According to this view,

the principle of autonomy underlines the normative relevance of agency and personal integrity. This, however, does not exclude that relational dynamics are given a weight. And, indeed, rights themselves rest on relations and at the same time structure relations [38, pp. 14, 17],.

As a normative reference point, the idea of autonomy should be thought of as a condition to be reached and promoted through a social and political organization that fights against what may increase the degree of exposure to the risks of rights infringements [33 pp. 41, 55]. Vulnerability does not challenge at any rate the three conditions of autonomy, i.e. freedom, competence and authenticity [21 p. 9]. Moreover, the emphasis on the social ontology associated to the notion of vulnerability leads to overcome a dichotomous view of the nexus between vulnerability and autonomy and orients towards a relational view of autonomy [33 p. 42; 12; 21; 29 pp. 13–15; 37 pp. 35–36; 38; *contra*: 30], which “underscore[s] the social components” of self-concept and emphasizes “the role that background social dynamics and power structures play in the enjoyment and development of autonomy” [11, p. 143]. The idea of relational autonomy stresses that relations with other persons, institutions, traditions are essentially part of the person and that sociability is a condition for autonomy rather than a limit to it.

Therefore, it can be concluded that the “inherently socially embedded” and “embodied vulnerable” subject [19 p. 116] is suitable to the human rights paradigm, far from being in contrast with it.

As to the concern that the vulnerability turn undermines the empowering force of rights, it may find an answer just in the ontological view of vulnerability. The latter is suitable to avoid a pejorative view of the vulnerable, by embracing vulnerability as a universal condition, suitable to take different degrees and forms depending on the contexts. Vulnerability as heuristic notion should not be applied to represent actual conditions of marginalization, inequality, exploitation. It should rather be used to monitor the possibility that someone may be threatened in ways that are relevant for given principles (freedom, equality and dignity) and standards. Therefore, referring to vulnerability does not aim at defining and crystallizing specific needs, but at letting universal factors and preconditions emerge that might lead to the infringements of human rights and human dignity. It is the emerging of *vulnus* that depends on specific situations or on social, economic, political settings, not the definition of vulnerability or the qualification of who the vulnerable is. As a disposition, vulnerability is universal; the emergence of *vulnus* is specific and context-dependent.

Therefore, putting vulnerability into the grammar of human rights, acknowledging its weight when approaching matters of justice, aims not at labelling people *ex post* but at preventing the shift from the condition of vulnerability to the occurrence of *vulnus*. In this line, the ontological approach to vulnerability turns out to be fruitful basically because it does not involve an ascriptive understanding of vulnerability.

To the extent that the notion of vulnerability is understood with an emphasis on its relational as well as prospective dimensions, as referring not to a static condition but to a condition that may have undesirable outcomes, vulnerability turn can contribute to the concretization and promotion of the principles of equality, autonomy and dignity and on these principles it relies.

All this also lead to maintain that vulnerability is “a vehicle of empathy” [23 p. 201] much more than of paternalism.

Therefore, we can conclude that, if it is seen as a human condition, vulnerability cannot be regarded as a “label” suitable to qualify people and it cannot have any ascriptive function. This is an important conclusion, given that exactly to this alleged ascriptive character the main criticism to (group) vulnerability can be brought back. And this is a crucial point also in order to conceive an approach that puts vulnerability and human rights together.

A role for vulnerability in human rights paradigm can be properly found provided that we pay attention not only to choose the approach to vulnerability but also to conceptualize human rights by giving relevance to some elements which are not either obvious or widely acknowledged.

The first element is the structural relational character of rights. Content and justification of rights cannot be worked out beyond relations. The way human rights refer to background values rests on relations and the latter structure the concrete contexts of application. A radically individualistic understanding of the claims covered by human rights is not fruitful in interpreting the content of rights and in applying them, if they are to be regarded as a guide for action and source of correlative obligations. Correlativity between rights and duties *per se* brings the reference to relation into the language of rights: A human right can be regarded as universal and binding not because the right holder can strongly claim it but *if* its content is suitable to put correlative obligations on others, and this is the case when it is acknowledged that it protects something valuable for everyone. Moreover, paying attention to the relational aspect underlines that choices/interests/needs covered by rights are affected by social relations [33, p. 43] and that even autonomy cannot be either claimed or achieved without taking external conditions into considerations.

The second features deals with the relevance of prioritization in rights discourse and practice, when the qualification of a claim to freedom or to means of substantial equality as a human right is at stake. I do not use the idea of *basic rights* in the same meaning as the minimalist theories of human rights [26], i.e. to refer to a selected list of rights, established according to their coherence with some chosen and exclusive principles. Neither I embrace the idea of basic rights that has been worked out by Henry Shue [40], by which he refers to a sub-set of rights, selected – according one given feature - within those that are recognized into the international norms. Rather, I assume that all those rights that are established as human rights by international sources should be interpreted and justified as basic, first, in the sense that they are to be qualified by their suitability to fight against, and hopefully to prevent, those threats that *most seriously* affect dignity and – I would add - basic human needs [9 p. 37; 33].

To set up the basic nature of human rights it can be helpful applying the idea of vulnerability to such threats. Precisely because, in concrete situations, vulnerability is experienced at different degrees, the resort to the perspective of the vulnerable people is necessarily linked not only to the recognition of forms of exposition to threats but also to the “measuring” of their intensity. Therefore, the same reasoning applied to allege the vulnerable condition, a reasoning that proceeds through a negative path, by looking at what is lacking or what could be infringed, also drives in establishing what counts as the content of rights involved. Need and dominance are in this sense

the two key-notions. Within this view, vulnerability could be said to play a specific role and successfully support rights concretization [22 p. 185; 34, 35].

Vulnerability, in its heuristic function of detecting vulnerable conditions can support the identification of the needs to be protected by human rights.

Nevertheless, I am aware that problems would arise if the use of vulnerability, as a lens to read the condition of the rights holders, worked as “gatekeeper for competing claims to protection” [14 p. 132] and means to lower the general level of protection [14, 43]. Some scholars have shown the exclusionary side-effects – or even the exclusionary intended purposes - linked to the use of the notion of vulnerability in specific domains, such as those involving disabled asylum seekers and humanitarian interventions for forced migrants.

With regard to the first domain, it has been concluded that, vulnerability-based approaches fail to address systemic causes of injustice and “have further detrimental outcomes” consisting in “reinforcing distinctions between deserving and undeserving”, since “the identification of people as ‘vulnerable’ becomes a means of distinguishing those worthy of support from those who are not” and fostering the so-called “moral regression to sufficientarianism” [45].

In the same line, with regard to the second domain, it has been concluded that the idea of vulnerability is “counter-productive” [41 p. 3], since it works as “an unevenly distributed label causing the uneven distribution of humanitarian assistance within forced migrant communities” [41 p. 2].

According to these analyses, into the process of “vulnerabilisation” that is emerged in international law and politics, vulnerability stops referring to a human condition and becomes a label for classification, which may even be functional to narrow the access to rights [14 p. 136].

This is surely the dark side of the unavoidable discretionality that may go along in coupling the qualification of the rights holders condition with the application of rights. However, it seems to be more a problem related to the *use* of the notion rather than to the *notion* in itself. On the conceptual level, pointing out the heuristic function of the notion of vulnerability is the first condition for avoiding this outcome. Furthermore, if associated with a need-based view of human rights, the reference to vulnerability performs a meaningful function, aiming to establish and implement the non-derogable threshold of rights and not to narrow the access to rights.

On the overall, the notion of vulnerability may work as a tool to keep enlightening the failures of human rights paradigm and to critically orient its shaping. Along this path, of course, the reference to vulnerability does not give a prompt solution but rather shows a path, along which establishing criteria and indicators for assessing the kind and degree of vulnerability in concrete circumstances and in specific domains remains the most relevant task to be performed.

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References

1. Al Tamini, Yussef. 2016. The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights. *Journal européen des droits de l'homme; European journal of human rights* 5: 561–583.
2. Andorno, Roberto. 2016. Is Vulnerability the Foundation of Human Rights? In *Human Dignity of the Vulnerable in the Age of Rights*, eds. A. Mansferrer, and E. Garcia, and Sánchez, 257–272. Dordrecht: Springer.
3. Bagnoli, Carla. 2016. *Vulnerability and the Incompleteness of Practical Reason*. New York: Routledge.
4. Bedford, Daniel, and Jonathan Hering. 2020. *Embracing Vulnerability*. New York: Routledge.
5. Bernardini, Maria Giulia. 2018. Dangerous Liaisons. Critical Reflections on Vulnerability, Disability and Law. *Sociologia del diritto*. <https://doi.org/10.1023/A:10.3280/SD2018-01005>.
6. Brown, Kate. 2011. 'Vulnerability': Handle with Care». *Ethics and Social Welfare* 5: 313–321.
7. Casadei, Thomas. 2018. La vulnerabilità in prospettiva critica. In *Vulnerabilità. Analisi multidisciplinare di un concetto*, ed. Oretta Giolo e Baldassare Pastore, 73–99. Roma: Carocci.
8. Celik, Elif. 2017. The Role of CRDP in Rethinking the Subject of Human Rights. *The International Journal of Human Rights* 21: 933–955.
9. Chapman, Andrew R. 1996. A "Violations" Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly* 18: 23–66.
10. Chapman, Andrew R., and Benjamin Carbonetti. 2011. Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights. *Human Rights Quarterly*. <https://doi.org/10.3316/agispt.20114372>.
11. Christman, John. 2004. Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves. *Philosophical Studies* 117 (1): 143–164.
12. Delgado, Janet. 2019. Re-thinking Relational Autonomy: Challenging the Triumph of Autonomy through Vulnerability. *Bioethics Update*. <https://doi.org/10.1016/j.bioet.2019-12.001>.
13. De Lomba, Sylvie. 2014. Vulnerability, irregular Migrants' Health-Related Rights and the European Court of Human Rights. *European Journal of Health Law* 21: 339–364.
14. Engström, Viljam, and Mikaela Heikkilä. 2022. Vulnerabilisation: Between Mainstreaming and Human Rights Overreach. *Netherlands Quarterly of Human Rights*. <https://doi.org/10.1177/09240519221092599>.
15. Ferrarese, Estelle. 2016. Vulnerability: a Concept with which to undo the World as it is? *Critical Horizons* 17: 149–159.
16. Fineman, Martha A. 2008. The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law and Feminism* 20: 1–23.
17. Fineman, Martha A. 2010. *The Vulnerable Subject and the Responsive State*, Public Law and Legal Theory. *Research Paper N. 10-130*<http://ssrn.com/abstract=1694740>.
18. Fineman, Martha A. 2012. Beyond Identities: The Limits of an Antidiscrimination Approach to Equality. *Boston University Law Review*. 92 (6), available at SSRN: <https://ssrn.com/abstract=2192316>.
19. Fineman, Martha A. 2022. Rights, Resilience, and Responsibility. *Emory Law Journal* 91: 101–121.
20. Furusho Carolina Yoko. 2016. Uncovering the Human Rights of the Vulnerable Subject and Correlated State Duties under Liberalism. <https://doi.org/10.14324/111.2052-1871.067>.
21. Gómez-Virseda, Carlos, Yves de Maeseneer, and Chris Gasrmans. 2019. Relational Autonomy: What does it Mean and how is it used in end-of-life care? A Systematic Review of Argument-based Ethics Literature. *BMC Medical Ethics* 20: n. 76: pp. 1.15. <https://doi.org/10.1186/s12910-019-0417-3>.
22. Goodin, Robert E. 1985. *Protecting the Vulnerable: A Reanalysis of our Social Responsibilities*. Chicago: University of Chicago Press.
23. Heri, Corina. 2021. *Responsive Human Rights. Vulnerability, Ill-Treatment and the ECtHR*. Oxford: Hart Publishing.

24. Hoffmaster, Barry. 2006. What does Vulnerability Mean? *Hastings Center Report* 36: 38–45.
25. Kottow, Michael H. 2004. Vulnerability: What Kind of Principle is it? *Medicine Health Care and Philosophy* 7: 281–287.
26. Ignatieff, Michael. 2001. *Human Rights as Politics and as Idolatry*. Princeton (MA): Princeton University Press.
27. Ippolito, Francesca, Iglesias Sánchez Sarah (eds.). 2017. Protecting Vulnerable Groups: The European Human Rights Framework. *Human Rights Law Review* 17: 187–192.
28. Ippolito, Francesca. 2019. Vulnerability as a Normative Argument for Accommodating “Justice” within the AFSJ. *European Law Journal* 25: 544–560.
29. Ippolito, Francesca. 2020. *Understanding Vulnerability in International Human Rights Law*. Napoli: Editoriale Scientifica.
30. Khader, Serene J. 2020. The Feminist Case against Relational Autonomy. *Journal of Moral Philosophy*. <https://doi.org/10.1163/17455243-20203085>.
31. Mackenzie, Catriona. 2008. Relational Autonomy, Normative Authority and Perfectionism. *Journal of Social Philosophy* 39: 512–533.
32. Mackenzie, Catriona. 2010. Autonomy: Individualistic or Social and Relational?. In *Risk, Welfare and Work*, eds. Greg Marston, Jeremy Moss e John Quiggin: 107–127. Melbourne: Melbourne University Press.
33. Mackenzie, Catriona. 2014. The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability. In *Vulnerability. New Essays in Ethics and Feminist Philosophy*, eds. Catriona Mackenzie, Wendy Rogers and Susan Dodds: 33–59. Oxford/New York: Oxford University Press.
34. Miller, Sarah C. 2005. Need, Care and Obligation. In *The Philosophy of need*, ed. S. Reader., 137–160. Cambridge: Cambridge University Press.
35. Miller, Sarah C. 2012. *The Ethics of Need: Agency, Dignity and Obligation*. New York: Routledge.
36. Morawa, Alexander H.E. 2003. Vulnerability as a Concept of International Human Rights Law. *Journal of International Relations and Development* 6: 139–155.
37. Nedelski, Jennifer. 1989. Reconceiving Autonomy: Sources, Thoughts and Possibilities. *Yale Journal of Law and Feminism* 1: 7–36.
38. Nedelski, Jennifer. 1993. Reconceiving Rights as Relationships. *Review of Constitutional Studies* 1 (1): 1–26.
39. Peroni, Lourdes, and Alexandra Timmer. 2013. Vulnerable Groups: the Promise of an Emerging Concept in European Human Rights Convention Law. *International Journal of Constitutional Law*. <https://doi.org/10.1093/icon/mot042>.
40. Shue, Henry. 1980. *Basic Rights. Subsistence, Affluence, and U.S. Foreign Policy*. Princeton: Princeton University Press.
41. Sözer, Hande. 2020. Humanitarianism with a neo-liberal Face: vulnerability intervention as vulnerability redistribution. *Journal of Ethnic and Migration Studies*. <https://doi.org/10.1080/1369183X.2019.1573661>.
42. Timmer, Alexandra. 2013. A Quiet Revolution: Vulnerability in the European Court of Human Rights. In *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*. Anna Grear, Farnham: Ashgate: eds. Martha Fineman.
43. Timmer, Alexandra, Moritz Baumgärte, and Louis Kotzé. 2021. The Potential and Pitfalls of the Vulnerability Concept for Human Rights. <https://doi.org/10.1177/09240519211048009>.
44. Turner, Brian S. 2006. *Vulnerability and Human Rights*. University Park: The Pennsylvania State University Press.
45. Yeo, Rebecca. 2020. The Regressive Power of Labels of Vulnerability Affecting Disabled Asylum Seekers in the UK. *Disability & Society*. <https://doi.org/10.1080/09687599.2019.1639688>.

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