

Special workshop n. 25

CONVENOR: Fabio Macioce (LUMSA University of Rome)

Individual and group vulnerability

The term vulnerability describes both a universal aspect of the human condition, and a peculiar condition of individuals or groups. The workshop will analyse the meaning and the legal/institutional value of both human vulnerability and group vulnerability, also with reference to the condition of ethno-cultural and religious minorities.

Participants and speakers are invited to explore the issue, considering individual / bodily vulnerability, the co-existential, social nature of human life, and the constant potential for dependency. Similarly, the workshop will focus the specific condition of vulnerable groups, and societal, political and institutional reasons of such a kind of vulnerability (economic factors, historical forms of prejudice, misrecognition, and patterns of cultural devaluation, etc...).

Among other things, the papers presented will address the case law of ECtHR, the condition of disable people, social practices related to healthcare and to death, as well as the interplay between vulnerability, dignity, and social justice.

Participants

L. Ardizzone, (Kore University, Enna) - **Vulnerability as a leitmotif of human life. Brief dissemination of some of the main studies on social fragility and on the condition of people affected by disability through a constitutional oriented reading.**

The paper analyses the concept of vulnerability within human life because in the human being as such, there are inherent weaknesses, physical and material needs that characterize him as social subject which relates the other human beings and is therefore, vulnerable because of the loss of a relative or abuse, lack of care, humiliation, etc...

The notion of vulnerability can therefore be usefully defined through the concept of oppression, understood as a structural phenomenon that places certain groups in a disadvantaged position, and certain others in an advantaged or privileged position in relation to the former, and it consist in a restrictive structure of forces and barriers tending to the immobilization and limitation of a group or a category of persons. Often, it is not only the individual subject to be vulnerable, but also the community that welcomes him and in which he lives, as well as the institutions that should provide for his needs. It is therefore clear that a study on individual vulnerability cannot disregard one, parallel, on the institutions that should - at least theoretically - devote themselves to the care of social frailties. In this sense, the elaborate considers "disability studies" that offer a revolutionary view on the condition of disability of the subjects turning the latter from the research object to active subjects of it.

Finally, the paper intends to give an account of the debate on human rights that has developed over the years, it has followed two directives: on the one hand, we must deal with their continuous enlargements, which are manifested through claims and pretexts, new awards and protections; on the other hand, it is necessary to analyse their exposure to the risk of vagueness, which could compromise the results to which the rights themselves tend. Some reflections must therefore be carried out, starting from the concept of "inequality" and of what is correlated with it, that is, the values of "dignity" and "humanity".

F. Macioce, (Lumsa University, Rome) - **Informed consent procedures between autonomy, vulnerability and trust.**

Much attention has been paid to the relationship between autonomy and trust, and even more to the problem of the relationship between autonomy and informed consent (Veatch 1984; Faden and Beauchamp 1986; Beauchamp 2009, 57; Miller and Wertheimer 2009). However, less attention has been given to the problem of the relationship between informed consent and trust, and above all to the question of how to model informed consent procedures so that the expression of consent is not a procedural alternative to fiduciary relationships. Moreover, little attention has been devoted to the link between informed consent, autonomy and vulnerability, and to the effects of such an understanding of informed consent: even if informed consent has been considered as a tool to improve patients' autonomy, thus reducing their vulnerability, the interplay between these dimensions is sometimes less clear-cut.

Rather than being a sort of inevitable surrogate of these relationships, informed consent procedures should be the regulatory context within which the subject's autonomy is guaranteed, as well as his/her vulnerability and needs are taken into account. My concern is to argue that informed consent procedures should take the relational character of autonomy into consideration, as well as the link between informed consent, autonomy and trust. In so doing, one might protect the exercise of personal autonomy, rather than its mere possibility, therefore fostering trust between the subjects involved, as well as in the whole health care system.

For this purpose, it is necessary to rethink both the modalities and the content of informed consent procedures, so as to model them on the person who is asked to express consent, also considering the specific situation in which such information is to be given. Moreover, it is necessary to take into consideration the asymmetry of power and information among the subjects involved, and make it the basis of an asymmetrical distribution of burdens: information providers must give evidence that they have taken due account of the specific vulnerabilities and needs of the person expressing consent, through appropriate choices of communication methods and contents. In other words, we need to go beyond the model in which some information is abstractly relevant, and a certain (pre-determined) amount of information is necessary, in order to adopt a perspective in which both the information and the way of giving or explaining it differ from person to person, according to their specific vulnerabilities and needs.

S. Riley, (Law School, University of Leicester, UK) - **Groups, Human Dignity and Justice.**

This paper addresses and connects two problems in the scholarship of human dignity. On the one hand, because human dignity is the basic normative framework for conceptualising individual human autonomy and vulnerability, is difficult to adapt it to the interests and ontology of groups. On the other hand, human dignity is not unequivocally a justice-based concept, but rather one as much virtue-based as it is justice-based. Through analysis of the possibility and conditions of justice I argue for two propositions. First, that group protection and group membership rights are a necessary condition of human dignity. Second, that human dignity is a justice-structuring principle necessary for encompassing defensible ideas of identity and change in legal and political orders. Human dignity insists on human plurality as a condition of justice, and it implies a conception of public reason that protects the possibility of that plurality through subsidiarity.

Aside from human dignity's complex genealogy, what relates the twin problems of connecting human dignity with both groups and justice is the conceptualisation of justice (from Hume onwards) using the idea of the 'circumstances of justice'. That is, using the relative limitations of our sociability, and the relative limitation of our resources, to explain our interests and vulnerabilities. Not only have these limitations and vulnerabilities changed radically in late modernity (how does 'sociability' have a single meaning in a globalised world? how do 'resource limitations' map onto catastrophic climate change?) but we have witnessed challenges to the very possibility of justice. The deliberate destruction of groups as such, and the possibility of collective complicity in environmental harms making group existence impossible, fit poorly with these prevailing conceptualisations of (in)justice. They demand that we revive (and exploring the

presuppositions of) natural duties and natural justice. These require (respectively) both the intrinsic value of self-determination (as an individual and group right) and acknowledgment that justice is impossible without subsidiarity (differentiation of responsibilities in response to common problems). These ideas not only offer to rethink our starting-assumptions regarding justice itself but also, I hold, govern our thinking about what human dignity entails for groups as a matter of justice.

S. Vantin, (University of Modena and Reggio Emilia) - **Vulnerability, pietas and death. The act of burial in the contemporary society.**

According to Marta Fineman (M. Fineman, A. Grer [eds.] 2013), the “vulnerability” paradigm is a heuristic device, which induce to examine hidden assumptions and prejudices folded into legal, social and cultural practices. Its universal nature is useful to overcome the potential conflict between different identities, by focusing on what people have in common. Its particular dimension leads instead to consider the institutional responsibilities in producing peculiar social, political or economic disadvantages or, vice versa, in arousing resilience.

The term “vulnerability” firstly evokes the body’s exposure to ageing, illness and death. Secondly, and by extension, it recalls the limitedness and fragility of the human condition, which entails interrelation and mutual dependency. After a conceptual clarification (§ 1), this paper will focus on a universal understanding of “vulnerability” close to “mortality”, arguing that, within a given society, the relevance given to dead bodies, and to the act of burial, offers a meaningful example of the living beings’ awareness about their own vulnerability (§ 2.1).

Considering the cultural legacy derived from Sophocles’ Antigone, the Gospels (which describe Christ’s deposition from the cross to the sepulchre), and Mary Shelley’s Frankenstein or the Modern Prometheus (§ 2.2), the reflection will lead to question the relationship we have with dead bodies. In a legal order where cemeteries have obsolete regulations, which are often discriminatory with reference to religious minorities, or non-religious people, the metaphor of the unknown migrant who dies unburied, floating in the sea, becomes the symbol of the contemporary loss of pietas in front of death (§ 3).

N. Zimmermann, (University of Geneva) - **Vulnerable, more vulnerable, the most vulnerable? Fifty shades of vulnerability in the European Court of human rights.**

Vulnerability has come a long way. Barely known a few years ago, the notion has evolved into the “leitmotiv of contemporary society” (Soulet 2014) and, within law, a concept of considerable scope and importance. Within human rights law, the “vulnerability turn” (Turner 2006) is characterised by a renewed focus on the rights of marginalised individuals and minorities, as well as persons in precarious situations for other reasons, and – above all – the acknowledgment of the limited effectivity of mainstream human rights law for persons in a vulnerable situation. In the European Court of human rights’ case law, this acknowledgment goes hand in hand with the recognition of specific state obligations – mainly, though not exclusively – via the doctrine of positive obligations – vis-à-vis particularly vulnerable individuals.

Far from being mere “rhetorical flourish” (Peroni/Timmer 2013), the recognition of some individual’s and group’s particular vulnerability entails thus legal consequences which are sometimes far-reaching. The question of who is considered to be (particularly) vulnerable – or, more specifically, whose vulnerability entails legal consequences – is therefore of crucial importance. Yet, it is also a difficult question that remains surrounded by uncertainties despite the notion’s omnipresence. The case law of the ECtHR shows a certain tension not only between individual and group vulnerability, but also between different degrees of vulnerability. The ECtHR distinguishes, for instance, between “vulnerability”, “particular vulnerability” and “extreme vulnerability”. Even though the case law is far from being consistent, this distinction has legal repercussions, determining the scope of the individual’s human rights protection in the case at hand.

In my presentation, I would like to focus on one specific strand of the ECtHR's rich and diverse case law using vulnerability reasoning, namely cases concerning migrants and, more specifically, asylum seekers. Retracing briefly the evolution of topic ECtHR case law from *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* in 2006 to *Khan v. France* in 2019 and including landmark decisions such as *M.S.S. v. Belgium and Greece* in 2011) and *Tarakhel v. Switzerland* (2014), I will discuss the tensions between individual and group vulnerability as well as the interplay of different factors of vulnerability (in an intersectional perspective). I will also address the question of degrees of vulnerability, trying to ascertain whether there is a threshold of vulnerability in order for special (positive) obligations to be triggered. The selected example also allows discussing some of the most salient pitfalls and risks of vulnerability reasoning, such as the risk of stigmatisation and loss of agency, but also the lowering of general (universal) human rights protection due to a focus on the rights of the more (most) vulnerable.

S. Zullo, (Department of Legal Studies – University of Bologna) - **Vulnerability and Theories of Social Justice: Attempting to Start a New Discourse on Norms of Justice.**

In the face of the increasing inequality we are confronted with in society, the question naturally comes up: Where to begin in laying new bases for a philosophically grounded discourse on justice? In light of the theories of justice that are still current—in the contractualist and utilitarian traditions alike—contemporary political and legal-philosophical thinkers are beginning to embrace the paradigm of vulnerability. The latter is no longer exclusively understood in the traditional way, that is, as a marginal condition distinctive to specific classes of persons regarded as vulnerable, thereby needing to be isolated and governed within a framework in which vulnerability is equated with fragility and weakness.

Proceeding from two models of analysis and reflection, an attempt is being made to revisit vulnerability not as a derived concept but as one that is central if we are to correctly configure our conceptual, doctrinal, and normative apparatuses, and if we are to achieve a proper functioning of politico-institutional systems and design better government services.

More to the point, a theory of justice and social rights could benefit by using vulnerability as an index by which to assess the quality of life and the quantity of well-being, and on which basis to make a case for moral and political obligations and social responsibilities, all the while containing the possible risk of enacting paternalistic policies, stigmatizing vulnerability, and encouraging a passive attitude among the vulnerable. In this framework, the method centered on vulnerability can also make it possible to clarify the terms of the theoretico-normative debate by highlighting the need for social policy that is truly inclusive, by embracing a new discourse on vulnerable persons that is not narrowly focused on certain classes of persons singled out as fragile.

In this article, we will first briefly consider the shortcomings of traditional theories of justice, and then we will turn to the vulnerability paradigm, considering how it applies to the legal and theoretico-political debate, to this end drawing on the work of Martha Fineman and Axel Honneth.