

VULNERABILITY AND THE (DISABILITY) LAW: STATUS, CHALLENGES AND PROMISES OF A CONTROVERSIAL CATEGORY

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Abstract: Despite the increasing confidence in the transformative potential of the concept of “vulnerability”, its juridical use is still susceptible of producing some exclusionary consequences: the interchangeable use of terms “vulnerable”, “weak” and “fragile” referred to groups whose members are intended to need a special protection, is likely to have a “labelling-effect” on those who take part to some specific groups, reinforcing their distance from the paradigmatic subject of law. After addressing the current use of the category at stake, the Author will analyse the *Convention on the Rights of Persons with Disabilities* (UNCPRD), which constitutes a break with the liberal tradition and implements a universal (therefore, non-exclusionary) notion of vulnerability. Particular attention will be paid to the new conception of legal capacity welcomed by art. 12 UNCPRD.

Keywords: vulnerability – legal capacity – UNCPRD – persons with disabilities – guardianship

Introductory remarks

Nowadays, vulnerability can be considered one of the most challenging legal, philosophical and political concepts: due to its indeterminacy – or despite it – it has acquired a privileged status in many of the most important contemporary debates, not last the ones concerning resilience, public insecurity, ontological or pathological vulnerability, labelling and stereotypes, responsiveness and responsibility (just to name a few).

Currently, the concept is especially present in feminist philosophical debate(s), where – in particular, in its ontological dimension – it is largely considered a fruitful foundation for a critic to the “liberal subject”, as well as for the

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renewal of the entire category itself (cf. Butler, 2004; Cavarero, 2013; Ferrarese, in this volume; Fineman and Gear, 2013; Guaraldo, 2012; MacKenzie et al., 2014). It should not be surprising, then, the widespread reference to an “ethics of vulnerability” (Gilson, 2014), which is intended to be able to promote a radical transformation at a societal level, as well as at the institutional one, favouring also the visibility of those subjects who rhetorically do not fit the liberal assumption of a rational, independent, unencumbered and self-sufficient subject.

Still, while the fruitful insights of this concept should not be put in doubt, it should also be acknowledge that its indeterminacy and malleability are susceptible of a stigmatising and discriminatory usage. This occurrence is extremely evident in the legal field, where it is easy to verify the interchangeable use of expressions like “vulnerable”, “weak” and “fragile”, referred to groups whose members are intended to need a special protection, due to their particular condition. In this sense, the current equivalence of the above mentioned terms is likely to have a “labelling-effect” on those who take part to some specific

groups, reinforcing their distance from the paradigmatic subject of law and legitimising patronising attitudes toward them.

For this reasons, in paragraphs 2 and 3 I will firstly address the current legal use of the category at stake, and then consider the paradigm shift operated in 2006 in the *Convention on the Rights of Persons with Disabilities* (UNCPRD), while in par. 4 I analyse promises and challenges of the new conception of legal capacity that emerges from art. 12 UNCRPD. I conclude by observing that, although there are some aspects which need to be further explored in the concept of vulnerability, nevertheless its juridical affirmation should be welcomed and promoted. In this light, also a critical analysis of UNCRPD may contribute to the still almost lacking affirmation of a universal and non-discriminatory notion of vulnerability.

Law’s attitude to vulnerability

Although currently widespread, the presence of terms like “vulnerability” and “vulnerable groups/individuals” in the legal field is recent: it is used to stress the particular protection granted to certain

individuals, because of their specific characteristics, or given the peculiar conditions they are living in. A strong incentive to a legal use of the concept comes from the international context, where various documents explicitly make use of this term in order to stress the necessity to offer a differentiated treatment, because of the presence of particular conditions: for example, pregnant women, children, elderly people, persons with disabilities and refugees can be considered – amongst others – “vulnerable subjects”². The occurrence of being in a “state of vulnerability” (regardless of whether it is personal or social), then, calls for (and legitimise) the adoption of special legal instruments, which are intended to offer an additional legal protection to certain individuals. To sum up, we could affirm that we are in presence of a legally relevant “state of vulnerability” when a certain personal

condition, contingent, transient or stable in its nature, requires a special legal attention, often expressed in terms of a “special protection”.

At first glance, this attention to individual peculiarities seems to translate in the legal realm the philosophical concept of “equal valorisation of difference” (Ferrajoli, 2007: 795-797), whose aim is that of promoting a full legal recognition of all the subjects, in contrast to whatever form of assimilationist attitude, normally associated to the liberal subject.

Nevertheless, cautions in its use should not be abandoned, while the current reference to the concept in question runs a real risk to evoke a notion of otherness that, by supporting the introduction of a double-track protection, is likely to produce exclusionary practical consequences, legitimizing – amongst others – patronising legal practices and

² This trend is present at least since the beginning of the 21st century. See, for example, dir. 2011/36/UE, concerning the prevention and repression of the trade of human beings and the protection of the victims, where the European Union calls on governments of the Member States to develop a legal definition of “vulnerable persons”, taking into account features like age, gender, health condition, the presence of a mental or physical disability, the occurrence of being victim of torture, rape or other forms of sexual

violence, as well as of gender violence. In the same vein, but with a richer enumeration of the conditions that can lead to vulnerability, see dir. 2013/33/UE. An attention to “vulnerable groups” is present also in the jurisprudence of the European court of human rights which, starting from the first decade of the new millennium, make reference to “vulnerable groups”. On the latter aspect, cf. Peroni and Timmer, 2013; Timmer, 2013.

arrangements. The legal use of the particularistic notion of vulnerability, indeed, can have at least two relevant effects: on one hand, it suggests the idea that, normally, persons non pertaining to “vulnerable groups” are not touched by any kind of vulnerability. On the other hand, it reinforces the theoretical and practical separation of those labelled as “vulnerable” from the norm, legitimising a different legal treatment that, due to its culturally biased origins, justifies and normalises presumptions of incompetence, as well as patronising attitudes and norms.

An additional criticism of the concept, only partially related to those analysed up to now, lies in the fact that “vulnerability” is commonly associated with “weakness”, the two words being very often used as synonyms, at least in the Italian legal context (cf. e.g. Azzena, 2006; Cendon, 2008; Stanzione, 2009). In my mind, however, there are at least two reasons to consider very critically this connection, which I think ultimately should be abandoned.

The first reason of inadequacy is the deep indeterminacy of the association at stake: it is not clear what the elements of the supposed weakness pertaining to the

“weak subjects” are. Should we consider their corporealities? Their social conditions? The power relations they are embedded in? Something else?

Not surprisingly, in this regard currently some Authors consider the relationship between strength and weakness a “paradox”, to be overcome abandoning the use of the expression “weak subjects” and referring instead to concrete human beings, with their own characteristics (Mazzoni, 2013: 235). “Weak”, indeed, is not used in relation to the abstract subject of law we inherited from the liberal tradition, but only with reference to “other” and concrete subjects, perceived as opposed to the “pure” one, the one without other (explicit) connotations, who embodies the “standard for point-of-viewlessness” (MacKinnon, 1983: 639).

The second reason to consider the relation between the two words detrimental lies in the fact that, rhetorically, it not only adopts, but also reinforces the myth of a juxtaposition between a regular, strong subjectivity and an exceptionally weak one(s), therefore giving substance and perpetuating the anthropological model the legal sphere

inherited from the liberal thought. A model, we should not forget, which is increasingly under suspicion, given the mythic and legendary features of its supposed subject, and its very discriminatory and oppressive outputs (*ex multis*, Bergoffen, 2012: 109; Otto, 2006: 318).

As mentioned, the association between weakness and vulnerability in the legal sphere legitimizes frequently a double standard of protection, where the provision of *ad hoc* legal instruments, while giving visibility to non paradigmatic subjectivities, is actually based on the failure of some persons to fit the standard of normality, i.e. the invulnerable subject who does not experience any kind of weakness. Thus, the existing legal norms which are referred to weak and (exceptionally) vulnerable subjects not only justify, but also solicit a pervasive and patronizing intervention, based on the need of “protecting the vulnerable” (Goodin, 1985)³.

As it is clear, instead of favouring a true recognition of everyone’s

specificity, a joint use of the two terms normally amplifies the practical and symbolic disadvantage of those labelled as vulnerable and/or weak, perpetrating also the adoption of legal instruments coherent with the mentioned patronizing attitude. Therefore, given the dangerous – or, at least, ambivalent – effects of the current use of the term vulnerability in the legal context, many commentators have suggested abandoning any reference to vulnerability (and weakness), frequently expressing also a real aversion for those preferential measures provided in consideration of the alleged vulnerability of the beneficiaries. In this critical perspective, if anti-discriminatory measures are criticised because they do not challenge the existing structural discrimination (Gianformaggio, 2005), preferential measures should equally be rejected, because they do not challenge the symbolic imaginary they are modelled upon and, therefore, also their pressure to conform to a supposed standard (namely,

³ Furthermore, in the political field some Authors aim at realising a more egalitarian society calling for a “responsive State”, which should address the needs of all the vulnerable subjects (Fineman, in

this volume), eventually including the principle of responsibility to care among those principles which are considered fundamental to govern a liberal society (Fineman, 2004; Kittay, 1999).

the liberal one)⁴. The presence of this insoluble dilemma suggests to some that the wiser option could be abandoning the concept of vulnerability. At a closer look, however, this option reveals its inadequacy. On one hand, critics of vulnerability are right: the particularistic notion effectively seems to allow for the individuation of groups of vulnerable subjects, as opposed to others without other predicament (therefore, the invulnerable ones). In this perspective, it is hard to deny (and it is not my intention do it) that the particularistic idea of vulnerability is used by liberalism as part of a strategy directed to reproduce and perpetrate well known social hierarchies, exactly through the separation between the allegedly neutral subject of law and the “vulnerable” ones, who need to be “named” by the law as “vulnerable categories” or “persons in a state of vulnerability”.

On the other hand, the sole identification of conditions of special vulnerability, as well as the presence of specific legal provisions for particular

situations or conditions, might be not necessarily unreasonable: normally, it is directed to ensure a better legal appreciation of the circumstances, in order to minimize the risk of abuses, exploitation, violence, unintended side effects, etc.

In this light, the attention to singular and concrete subjects and/or situations should be welcomed, if not characterised by a groundless and oppressive aim of protection: the need to overcome the formally equal treatment reserved to the abstract subject of law is remarked *exactly* by the presence of multiple existential conditions, which cannot be reduced to an assimilationist singularity.

What critics fail to acknowledge, is the *double dimension* of vulnerability: the particular notion of vulnerability coexists with a universal one, related to the ontological dimension that we all share as human being: “[u]ndeniably universal, human vulnerability is also particular” (Fineman, 2008-2009: 10). And this second dimension – the universal, related

⁴ The critic to the parameter of inclusion is very widespread in the feminist debate. For some of its legal implications in the legal sphere (with a

particular look to the Italian context), cf. Bernardini and Giolo, 2014.

to the ontological truism of being humans – seems to have a great transformative potential, while promoting a great renewal of many legal concepts and rights⁵. As we will see, vulnerability's ability to favour both the juridical move from the liberal and exclusionary subject, and the specific, non-patronising attention to non-paradigmatic subjectivities, lies in the dialectical relationship between the universal notion and the particular one.

A paradigm shift

The *Convention on the Rights of Persons with Disabilities* (UNCRPD), adopted by the United Nations in 2006 and entered into force in 2008, is probably the most relevant example of the juridification of the above-mentioned dialectical relationship. Indeed, although UNCRPD is related to the specific situation of persons with disabilities, for its most part it does

not affirm new rights, but extends the scope of the already existing ones, favouring – as some commentators already argued – the transition of the disabled individuals from a condition of legal “objectification” and passivity to one of “full subjectivity” (Quinn and Degener, 2002: 1).

Apparently, then, the UNCRPD constitutes solely a further step in the long process of specification of those subjects who have been recognised internationally as human rights holders; a process, as famously Bobbio observed some time ago, which has favoured the transition from an abstract subject (of law), modelled upon a generic human being, to multiple subjects of law and subjectivities (Bobbio, 1990: 68-69).

Nevertheless, the novelty of UNCRPD seems greater than the operation of widening the range of those subjects who are considered human rights holders.

⁵ In its broader philosophical dimension, as previously stated, the truism at stake normally acquires relevance in its attitude to be provocative for ethics: many feminist thinkers, indeed, locate this attitude in its capacity to elicit a response (Murphy, 2011: 577). In my opinion, however, by emphasising the responsiveness to a vulnerable condition, the current perspectives focus mainly on those charged of responding to the needs of vulnerable persons, instead of on the latter. In this way, they suggest the idea of vulnerable

individuals as *passive* subjects and, therefore, undermine their agency and autonomy, risking also perpetrating a patronising attitude toward those depicted as vulnerable. Similarly, both children's rights theorists and disability rights theorists have highlighted the danger in considering vulnerability as exclusion of agency and passiveness, denouncing its totally disempowering outcomes (Timmer, 2013: 153; Vandehole and Ryngaert, 2012).

In this respect, particular attention should be paid to its art. 12, which may be interpreted as a great challenge to the anthropological paradigm inherited from the liberal thought. As mentioned, normally the implicit parameter of law is a rational and independent subject, who is the sole recognised as fully legally capable and, therefore, the only one with a non-conditioned right ownership and with a non-constrained possibility of exercising the ascribed rights. And it is precisely this emphasis on rationality and independence that constitutes a relevant obstacle in interpreting the UNCRPD as referring to the traditional liberal model of subjectivity.

Indeed, art. 12 UNCRPD (modelled upon art. 15 CEDAW) states indisputably, at par. 1 and 2, that persons with disabilities have the right to be recognised everywhere as persons before the law and to enjoy legal capacity on an

equal basis with others in all aspects of life. As it is easy to notice, this unconditional recognition of persons with disabilities as having the right to enjoy full legal capacity fits hardly in a paradigm where rationality is considered almost the sole individual feature that matters, in order to be considered a subject of law on equal basis with others. Indeed, among the disabilities – the word “disabilities” considered without any other specification – we should unquestionably include also the mental ones⁶. For this reason, the provision at stake fits better with a paradigm where the importance of the requirement of rationality, even though present, is nevertheless reduced, not having a decisive importance for the recognition of a full subjectivity. Like a paradigm modelled upon vulnerability.

Furthermore, the idea that UNCRPD is the legal expression of a paradigm different from the one based on

⁶ Given the fact that art. 12 UNCRPD is modelled upon art. 15 CEDAW, it could be argued that the paradigm shift should be traced back to CEDAW. In my mind, however, there is at least one reason to consider UNCRPD as having a much greater impact in terms of renewal of the current law-paradigm: while the historical denial of legal capacity to women is currently recognised as having a *purely* cultural origin (given the absence of any “proof” concerning the supposed women’s

total or partial lack of reasoning), the case of mental disabilities is partially different. Indeed, although the medical model of disability has to be firmly rejected in favour of a socio-contextual one, where disability is the result of the interaction between a person with impairment and the wider environment(s), nevertheless the presence of an impairment (even if socialised) cannot be overcome, since it is not the result of sole prejudices.

rationality seems confirmed by par. 3 of the same article, which lays down the obligation, for State Parties, to take appropriate measures to provide access by persons with disabilities to the *support* they may require in exercising their legal capacity.

And exactly the above mentioned possibility of a non-controversial coexistence between support and full legal capacity (to be intended as the possibility to be subject of law, as well as to act in a legally binding way) reveals the deep distance of the UNCRPD from a liberal legal system modelled upon an unencumbered and rational self, while disclosing its compatibility with the theoretical paradigm of vulnerability and with the related notion of relational autonomy (on the latter, cf. at least Mackenzie and Stoljar, 2000).

Indeed, giving legal relevance to a renewed notion of legal capacity, UNCRPD carries out the dialectic between

the two conceptions of vulnerability mentioned previously, a universal and a particular one, providing an additional argument in favour of their compatibility not only at a theoretical level, but also in the legal sphere.

On one hand, the presumption that persons with disabilities are legal actors with a full legal capacity (although it should be noticed that evidence to the contrary is always admitted⁷) is susceptible of favouring the visibility of persons with disabilities as full subjects of law. In this sense, we could consider these provisions as a legal implementation of the particular notion of vulnerability that favours the “emersion” of non-paradigmatic subjectivities in the legal sphere and, therefore, the juridical recognition of their specificity.

At the same time, the Convention does not create for such persons a special system of rights, a double-track legal provision with foreseeable patronising

⁷ Cf. art. 12 par. 4 UNCRPD, which establishes that State Parties shall ensure that all measures related to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that all the measures relating to the exercise of legal capacity respect the rights, will and preferences of persons

with disabilities, are free of conflict of interest, proportional and tailored to person’s circumstances. They shall also be applied for the shortest time possible, and subject to regular review by a competent and impartial authority of judicial body.

outcomes, but reaffirms for its most part the already existing rights, i.e. rights currently available for the “normal” subject of law. Roughly speaking, the UNCRPD states that persons with disabilities have the same rights of able-bodied individuals: in this framework, the circumstance that they may require a support for the exercise of some or all the rights affirmed in the Convention, as well as the one concerning a possible lack of a “normal” standard of rationality, should affect neither their rights ownership, nor the rights effectiveness.

Therefore, if the Convention does neither adopt any division between able-bodied individuals and disable ones regarding the rights ownership, nor bases the recognition of a full legal capacity on the presence of a strong notion of individual rationality, then it is reasonable to conclude that the anthropological model UNCRPD is modelled upon is not the individualistic and rationalistic one. Rather, the Convention seems coherent with the universalistic notion of vulnerability, the one that considers

vulnerability as part of the ontological dimension of every human being. For this reason, UNCRPD seems one of the existing clearest legal attempts to overcome the liberal paradigm, being it modelled on a subject whose rationality is not decisive in ascribing legal subjectivity, and who acts in a network of relationship: a vulnerable subject.

Toward a new idea of legal capacity

The relevant shift carried out by UNCRPD is intended to have a highly transformative impact: indeed, the juridical recognition of the full legal capacity of individuals with disabilities is likely to lead to remarkable juridical consequences primarily for disabled persons, but also for all those categories of subjects who see their legal capacity restrained, because of their supposed lack of rationality. In this sense, the theoretical affirmation of a paradigm framed starting from a universal notion of vulnerability⁸ is susceptible to produce very practical effects, because of its ability to favour the

⁸ It is worth to notice that this framework is not incompatible with the particular notion of vulnerability (as explained above) that, when

included in a paradigm based upon vulnerability – instead of in a rationalistic one – loses its current discriminatory features.

juridical implementation of a universal legal capacity.

In practice, it means that the concept at stake (legal capacity) should be separated from its reference to mental, functional or contractual capacity, in order to become a person's interface with the legal system. Theoretically, this detachment of the subject from a strong notion of rationality enshrines the crisis of the liberal subject of law, who is undoubtedly and primarily presumed as a rational agent. Factually, the possibility to be subject in the legal field adopting a vulnerability paradigm is completely freed by any judgement about personal decision-making skills; in this sense, legal capacity becomes an inviolable right, one of the most fundamental ones, given the fact that it is the precondition of all the other ones⁹.

In this framework, the current presence of legal provisions that normatively state a denial of legal capacity for a whole class of subjects (like persons with certain kinds of mental disabilities) on the basis of their pretended lack of

rationality should be put under careful scrutiny and, ultimately, reformed. While compatible with the liberal (and rationalistic) paradigm, it appears – on the contrary – inconsistent with the vulnerability one, as well as with the concept of universal legal capacity it promotes. Indeed, since in this paradigm all individuals inherently possess legal capacity, regardless of any presence of disabilities or lack of decision-making skills, therefore any legal provision denying legal capacity for a full class of subjects because of a supposed lack of rationality has undoubtedly to be considered discriminatory¹⁰. Therefore, those legal systems that ratified the Convention are also required to guarantee its effectiveness, repealing any general provision concerning the denial of legal capacity for an entire class of subjects, on the basis of their disabilities or lack of rationality. In practice, this obligation results in the necessity to dismantle the existing status-based systems of legal capacity, which allows for the imposition

⁹ See Minkowitz, 2014 at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx> (last access 1.3.2016). Minkowitz's position, however, is much stronger and radical than the one I am adopting here.

¹⁰ More widely, Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law*, Geneva, 10th session, 2-13 September 2013, especially par. 21.

of a substituted decision-maker solely on the basis of a particular diagnosis¹¹.

Two issues, then, immediately arise: what about those legal provisions that allow for a substitute decision making not presumptively, but in concrete circumstances? And what alternative decision-making paradigm should be specifically adopted?

Regarding the first question, the existing systems of guardianship certainly require a careful scrutiny, directed at evaluating their conformity to UNCRPD. Guardianship, as it is widely known, is a legal process which is utilised when a person is considered no (or no longer) able to make or communicate her decision about her person or property; currently intended as the better system available in

order to protect the interests of “fragile” persons, nowadays its establishing may remove considerable rights from a person, having also relevant effects on her legal capacity.

The legal arrangement at stake, indeed, may constitute a strong restraint – if not a denial – of individual’s legal capacity. A restraint that is totally compatible with the liberal notion of the “normal” subject of law: if only the fully rational subject is recognised as legal capable, therefore a lack or diminished rationality not only justifies, but rather requires a legal restriction of a person’s legal capacity. In presence of a person who is lacking any form of rationality, it is also admissible to deny her any residual capacity; not by chance, in a “traditional”

¹¹ In the opinion of the Committee on the Rights of Persons with Disabilities, the existing legal systems should remove also functional tests of mental capacity, as well as outcome-based approaches that lead to denials of legal capacity, if they are either discriminatory or disproportionately affect the right of persons with disabilities to equality before the law. In this regard, the reports adopted by Tunisia, Spain, Peru, Argentina, China and Hungary on the basis of art. 35 UNCRPD revealed that all these legal systems do not respect art. 12 UNCRPD. On the contrary, Czech Republic is the first State, which reformed the notion of legal capacity, in conformity to the one contained in the UNCRPD. Following the *Rapporto dell’Osservatorio Nazionale sulla condizione delle persone con disabilità* (2013), the *First Alternative Report to*

the UN Committee on the Rights of Persons with Disabilities (2016) and the *Concluding observations* on the Italian report concerning the implementation of UNCRPD (released in September 2016), Italy is only partially respecting the duties derived from the Convention. It is not by chance, then, that the *Programma di azione biennale per la promozione dei diritti e l’integrazione delle persone con disabilità* (2013) reiterated the opportunity to intervene with a reform of civil law, in order to ensure the greatest respect of the decision-making capacity of persons with disabilities. The *Proposta di II Programma d’azione biennale per la promozione dei diritti e l’integrazione delle persone con disabilità* (Fish, 2016: 6) highlights the same point.

liberal system the guardian is legally authorised to take decision on behalf of the persons under guardianship, on the basis of “her own good”, sometimes also allowing some practices which can be considered controversial in respect to the protection of the beneficiary’s human rights¹².

Such a system of guardianship, however, does not appear equally compatible with a paradigm based on the valorisation of a universal notion of vulnerability and legal capacity. As already observed, the paradigmatic case which undoubtedly falls under UNCRPD’s provisions is that of a person who may need a support to form her own conception of the good, and/or achieve her goals in a legally relevant way. On this basis, every decision taken by a guardian in a regime of substitute decision making should be rejected, not ensuring the respect of will and preferences of the assisted subject; decisions taken “for the own good” of the assisted person should equally be avoided. However, there are also extreme, concrete and exceptional cases, where the person is not able to

express her own preferences or take decisions by herself, even in presence of some forms of support; I will consider this possibility in a while. Before that, it is necessarily to explore if an alternative to the model of substitute decision making is currently available, and which are its characteristics.

As already observed, theoretically the vulnerable subject is able to exercise autonomous actions thanks to intersubjective dynamics, which operate in the moment of the formation of a proper conception of good, as well as for the entire individual’s life (Francis and Silvers, 2007). In this framework, the presence of various forms of support does not disqualify an individual from the realisation of autonomous actions. What theory is suggesting, then, is the shift from a system of substitute decision making, to a one of “supported” one, intended as “a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions

¹² For instance, it is the case of the authorisation of forced sterilization, as well as of very invasive and irreversible treatments, like in the famous American case “Ashley X”, concerning a girl with

severe disabilities, who received very invasive treatments allowed by the parents in order to favour her “manageability” and prevent violence and abuses against her. For a critic, cf. Kittay, 2011.

about the individual's life" (Dinerstein, 2011: 3). As mentioned, we find this idea of support also in art. 12, par. 3 UNCRPD which incorporates the idea of support to persons with disabilities in the exercise of their legal capacity. Such a system, a novelty in the field of international law, can be considered as "an accommodation in legally-regulated decision making processes to protect the right to exercise self-determination for those vulnerable to losing this right" (Bach, 2006: 16).

Within the system of support decision making, the presence of persons who are in a relationship of trust with the supported one is legally considered; those persons have the duty to assist individuals with disabilities in taking legally-binding decisions, and are forbidden in substituting their willingness to the one of the assisted person. Third parties (like healthcare services, services providers, etc.) have a monitory duty.

The support can be provided at least in three different areas: (1) in the formulation of a person's own purpose, as well as in the evaluation of the options of choices available and in the final decision; (2) as assistance in legal transactions with third parties; (3) support directed at

ensuring that the supported person will behave in accordance with the obligations already assumed (Bach and Kerzner, 2010: 73; Devi, 2013: 795-797).

Furthermore, some Authors individuated also three subjective status pertaining to the paradigm, differentiated on the basis of the individual's ability to express her intention and to understand nature and consequences of the decision she has taken: the "legally independent decision-making", the "supported decision-making" and the "facilitate decision-making" status (Bach and Kerzner, 2010: 83-85; *contra*, Flynn and Arstein-Kerslake, 2014: 95).

The latter status, however, is susceptible to be somehow controversial. This status operates towards individuals who live in the so called "hard cases" (like vegetative state, or the presence of a disability which totally impedes the understanding of individual's will and preferences), and in absence of relatives or persons bound to the beneficiary by a relation of trust, who can facilitate the understanding of the desires of the individual in need of support. In this cases – the ones I considered exceptional above – the support person should rebuild the

beneficiary's will on the basis of the available information and, as *extrema ratio*, she should decide by herself, trying to preserve (where present) the residual autonomy of the beneficiary. Theoretically, the distance from a system of substitute decision-making lies in the fact that the trustee bases her choices on the basis of the beneficiary's preferences (previously expressed), and not referring to an objective criterion, like the one of the "best interest". Practically, however, the distance from the mentioned paradigm is very labile, and the reference to a *support* rather than to a *substitution* in the process of decision-making is likely to be a kind of rhetorical exercise, if not a fiction¹³.

In these cases, a possible solution could be to distinguish the concept of "substitute decision making" from the one of "substitute judgement" (Jaworska, 2009), therefore admitting that, in presence of hard cases (and only in those ones), the person who acts as decision-

maker has to take decisions *instead of* the beneficiary, also within a system which generally adopts the paradigm of support decision making. The difference between the two forms of judgement lies in the fact that, while the surrogate takes decision based on what, in general, would objectively be good for the beneficiary (considering, then, her best interest), in a supported-decision making system the person charged of this decision should act on the basis of the individual's will and preferences. What characterises this solution from Bach and Kerzner's "facilitate decision-making" status is the plain rejection of any idea based on support, in the hard cases¹⁴.

It should be noted also that, while the support decision-making paradigm should indubitably be theoretically referred to the vulnerable subject, nevertheless it goes beyond the current debate concerning the latter. Normally, indeed, critics to a rational subject are

¹³ "Now what about those whose will is undetectable or for whom it is not possible to ascribe a will or preference? [...] I think the hard reality which is that sometimes decisions will be made "for" and not "with" does not mean that substituted decision-making *as usual* is the correct response. But what worse: stretching a fiction (100% support) to the point that it is visibly at odds

with reality [...] or admitting the obvious and then using our talents to lock in the exception and transform how decisions are "made for" people" (Quinn, 2010: 14).

¹⁴ It should be stressed, however, that this concept is not a new: it is currently used in the in clinical practice by physicians and bioethicists, particularly for what concerns advance directives.

carried on by focusing on the weaknesses of theories like Frankfurt's comparabilist theory of free will, as well as on the relevance of emotions – instead of pure rationality – in the deliberative process. These critics are certainly highly important in their action of revealing the fictional nature of the rational subject who is the standard both in the political and legal spheres. Current debates are of little help in addressing topics like the one concerning an individual's capacity to act on the legal sphere, as well as the functioning of the existing systems of guardianship. On the contrary, implementing the paradigm of “supported decision making”, art. 12 UNCRPD fills the gap, legally stating a minimalist conception of legal capacity, separated from strictly cognitive standards and based on a person's capacity to express her will and preferences, eventually through support. In this paradigm, the inability to elaborate abstract thoughts or the use of a plain language in expressing a subject's own preferences, do not affect the validity of the communication at stake: what

counts is only a person's capacity to express her own view.

This idea, actually, is not totally new: the Italian legal tradition, for instance, widely refers to the similar notion of “capacità di discernimento” (a person's capacity to have a proper, own view), which is more flexible than that of “capacità d'agire” (the capacity to act in a legally binding way), and is frequently used to evaluate the children's capacity to directly take decisions about themselves. The concept is present in the international context as well: as mentioned, art. 12 of the *Convention on the Rights of the Child* and art. 3 of the *European Convention on the Exercise of Children's Rights*, for example, refer to a child who is “capable of his or her own views” (art. 12 *Convention on the Rights of the Child*)¹⁵. However, the novelty of UNCRPD is given by the fact that it *universalises* the concept, laying the foundation for a non-sectorial application (and exceptional) of the concept and, therefore, revealing the need to reform the existing legal systems.

¹⁵ It should be stressed, however, that this concept is not a new: it is currently used in the in clinical

practice by physicians and bioethicists, particularly for what concerns advance directives.

Conclusion: ways forwards

Except for some remarkable examples, the current theoretical reflection on vulnerability is still struggling to be transposed in the legal sphere, where the association between this concept and the notions as weakness and frailty has historically produced exclusionary and discriminatory effects. The adoption of UNCRPD is likely to represent a further step in the affirmation of this paradigm, given the downsizing of the importance of rationality, the evaluation of the relational component of the existence and the adoption of a universal notion of legal capacity it contains.

UNCPRD provisions, as I briefly sketched out, should not be intended as a legal point of arrival for the paradigm of vulnerability; they open, instead, further relevant problems, like the one concerning individual responsibility, or the one related to possible abuses in the relation of support. Legal experts, therefore, will be increasingly called upon to deal with challenging, although sometimes only partially new, problems.

What is new, however, is the emphasis of UNCRPD on the universal

experience of vulnerability, as well as its attempt to break the divide between able-bodied and disabled persons, toward a more inclusive system, where – assuming the individual’s decisional competence – every person has the right to express her preferences about her life: a right that has to be respected both by policy-makers and legal actors. Furthermore, the opportunity to take seriously into account the UNCRPD would benefit enormously also the current theoretical debates on vulnerability, especially the legal-philosophical ones, because of the Convention’s attitude to strongly determine the crisis of the traditional liberal subject, therefore working in the direction of an inclusive notion of legal subjectivity.

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