CONCLUSIONS: VULNERABILITY AND STRENGTH: A TIMEWORN PAIRING IN NEED OF RECONSIDERATION[1]

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Abstract: The notion of vulnerability is extremely broad and has been interpreted in a variety of ways by different disciplinary spheres. This multiplicity of meanings and usages certainly represents a resource and attests to the indisputable theoretical and practical relevance of this term and of the vocabulary that has developed around it. Reflections on vulnerability would acquire greater utility if they were aimed at reconfiguring the proposal-generating capacity of this notion, not so much with a view to replacing significant principles such as equality but rather by drawing attention to the fact that some existing political institutions and legal institutions are already implicitly based on vulnerability. In this case, the reflection would be directed at proposing a sort of overturning of the paradigm. Thanks to this alternative perspective, in fact, we would be able to recover the "classic" positioning of the notion of vulnerability: namely, a key element of political and legal thought by virtue of its being an intrinsic feature of all human beings and, as such, highly relevant for the establishment of political institutions and the production of legislation, which in turn makes it an implicit "assumption" in contractarian and utilitarian philosophies. This change in outlook would inescapably lead to a new re-consideration of the issue of violence/force from a contemporary perspective, and therein lies what I see as the true significance of vulnerability.

Keywords: vulnerability, force, equality, political and legal institutions foundation

As the essays collected in this special issue of *Gênero & Direito* clearly show, the notion of vulnerability is extremely broad and has been interpreted in a variety of ways by different disciplinary spheres. This

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multiplicity of meanings and usages certainly represents a resource and attests to the indisputable theoretical and practical relevance of this term and the vocabulary that has developed around it. At the same time, however, there is no doubt that this plurality of interpretations also necessarily entails excessive vagueness, numerous inconsistencies and dangerous misunderstandings. The various articles presented here mainly engage in philosophical reflection on the issue of vulnerability, with some forays into the regulatory domain; thanks to the diversity of disciplinary approaches employed by our contributing scholars, it has become even more evident that the international debate on vulnerability involves two different perspectives which appear to proceed down separate tracks: the first from a legal and political philosophy perspective, and the second in the sphere of political and legal debate.

The first perspective comprises a set of reflections that have been evolving for some time now and have given rise to an extensive body of literature, mainly focused on analyzing the concept of vulnerability in an attempt to understand its theoretical repercussions and thus arrive at a definition of it. In particular, as the essays collected here also show, the majority of scholars seek to reaffirm the universal character of this dimension of human existence: all human beings are vulnerable, not just a few of them.

As for the second perspective, it is known that the term vulnerability is already commonly used in the regulatory environment, primarily to identify the (highly problematic) class of so-called "vulnerable" subjects; however, it has also become commonplace to use this concept to characterize situations and things, such as a local area that is subject to particular climatic or geological risks (seismic risk, for instance)[3].

While at first glance these two perspectives might appear convergent, upon closer examination they reveal themselves to be only apparently similar in that they actually proceed along paths that are separate and even, in some cases, contrasting. Indeed,

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[3] This is why the cover image for this special issue is an image depicting an earthquake: it effectively represents the potential vulnerability of the environment and people as a result of natural forces and human activities.

the paths are so distinct that at times the tension between the two seems unmanageable: on the one hand, philosophical reflection tends to deconstruct the very category of "vulnerable subjects", uncovering the specific mechanisms of domination and power concealed beneath it; on the other hand, legal scholarship aims to normatively identify the class (or classes) of individuals who are particularly vulnerable and therefore in need of care and protection. Furthermore, while on one hand the philosophical debate critiques the versatility of vulnerability on the grounds that this versatility threatens to strip the concept of all meaning, on the other hand legislation tends to exponentially expand the range of cases in which this notion is used.

At times it seems as if vulnerability raises more problems than it resolves, especially in view of the promises made by the theorists who first initiated contemporary investigations of this topic[4].

In fact, we might recall that, according to these thinkers, the notion of vulnerability has clear implications in legal and institutional frameworks aimed at resolving a set of problems which have not even been raised in some jurisdictions, such as the US: think for instance of the recognition of social rights and its correlate, substantive equality.

In proposing her theory of the vulnerable subject Martha Fineman, the most authoritative and well-known champion of the so-called *vulnerability turn*[5], explicitly identified the primary objective she intended to pursue, an aim she has reiterated in the essay presented here (Fineman, 2008, 2012)[6]: to remedy a situation in which US regulations and institutions are unable to meet the needs of the people because they wholly lack effective guarantees for the enjoyment of social rights. Her intention, therefore, is to direct a harsh critique at the United States' "legal and political" system, proposing the concept of vulnerability as a new foundation on the basis of which citizens might be granted the fundamental rights hitherto denied them, beginning from a redefinition of

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[4] By way of example, see the significant essays collected here by authoritative authors such as Martha Fineman, Eva Kittay and Estelle Ferrarese.

[5] This expression was used to good effect by Dolores Morondo Taramundi in her article entitled

Vulnerability: a new foundation for social rights? presented at the seminar "A Workshop on Vulnerability and Social Justice" held June 17-18, 2016 at Leeds University.

[6] See also her essay published in this special issue.

the theoretical subject of law (no longer independent but rather dependent or interdependent).

It is curious, however, that these theoretical formulations have attracted a greater following in Europe and within international organizations, which were already sensitive to both the substantive dimension of the principle of equality and the defense of social rights, thus giving rise to the legislation mentioned above (for a philosophical distinction between debates about vulnerability taking place in the United States and Europe, see for example Ferrarese, 2016). Indeed, significant developments appear to be taking place in this regard at the supranational and European levels thanks to the consolidation of political and legal debates around the term "vulnerability" in contrast to the concept of "equality". As mentioned above, the adjective "vulnerable" is currently used most often to identify "non-self-sufficient" persons and to indicate classes of individuals in conditions of economic difficulty or who, for various reasons, risk being discriminated against (for an initial attempt to analyze this heterogeneous category see Casadei, 2012). This use does not meet with unanimous approval, however, especially in view of the fact that it lumps together both forms of identity and forms of inequality under a single label, without distinction: there is no differentiation between the specific identity of a person (for example, being a woman and/or disabled and/or Muslim, and so on) and disadvantageous situations produced by a condition of inequality (such as being poor, unemployed, and so on). It therefore appears that the "new" vulnerability lexicon in Europe seeks to supplant the use of categories that are philosophically and legally better-defined, such as the categories of inequality, difference and discrimination, in favor of a generic indication of individual "disadvantage".

All the while, it seems that reflections on vulnerability in the US context have paradoxically failed to produce the same material outcomes in terms of legislation and institutional reforms.

It should also be stressed that, unlike the principle of equality, wherever the lexicon of vulnerability has been put into operation it has contributed to focusing attention exclusively on the subject defined as vulnerable. In so doing, this terminology has had two main effects: first, it has led to an

almost total conceptual equivalence between the notions of vulnerability and those of weakness and fragility; since in some cases these qualities refer to identity and not solely changeable conditions such as social class, they end up being defined as "constitutive" characteristics inherent to certain parties, unlike "strength" which instead characterizes other subjectivities (for example, ones that are less subject to discrimination than the bearers of "strong identities"). Second, by focusing on the vulnerable persons themselves, the lexicon of vulnerability acts to remove the question of the causes of vulnerability from the level of public discussion, especially when these causes have to do with inequality. Consequently, any systemic critique of the legal-political-economic framework that is responsible for generating these vulnerabilities is silenced, if not erased altogether: these vulnerabilities end up being defined as characteristics (all of them, without distinction) of the subjects in question and not the products of structures that are currently or potentially discriminatory.

As it has been implemented thus far, therefore, the vulnerability lexicon is not altogether unconvincing.

However, this in no way implies that the notion of vulnerability is somehow lacking in substantial theoretical and practical relevance.

Indeed, the problematic aspects mentioned above seem to derive specifically from the use of this notion in its "subjectivist" sense, both when it is understood as "particular" (only some people are vulnerable) and when it is instead proposed in a universalist sense (we are all vulnerable). The "promises" of vulnerability would seem to disintegrate, in fact, when the vulnerability-subject pairing becomes entangled in a bottomless theoretical vortex. It is worth mentioning, moreover, that until now the two perspectives (one philosophical and the other legal) outlined above only agree about this particular point: we need to redefine the subject of law by "breaking it down" (if the vision is subjectivist-particularist) or "reconfiguring it" (if the vision is instead subjectivist-universalist) on the basis of his/her (particular or universal) vulnerability. This point of convergence becomes even more problematic given that this "subjectivist" view of vulnerability appears to contribute to a series of legal-political setbacks which, as stated above,

essentially revolve around the goal of transcending or redefining certain legal fundamental and philosophical principles such as equality by returning to the pre-modern fragmentation of the subject of law while also failing to solve the problem of simplistic overlapping among terms such as "weak subject", "fragile subject" and, obviously, "vulnerable subject".

In light of these issues, we might try to reveal the fundamental character of vulnerability by moving in new directions and considering vulnerability through a different lens, with two specific aims: one critical-deconstructive and the other proposal-oriented and constructive.

The essays collected here also shed light on the critical capacity of the notion of vulnerability: indeed, this capacity allows us to verify how certain legal institutes (such as those designed to protect the rights of individuals with disabilities, for example[7]) actually function[8] by deconstructing the notions of autonomy and independence as implicit assumptions underlying legal

subjectivity. It also enables us to launch another reflection, not about the fragmentation or dissolution of the legal entity but rather about the possibility of conceptualizing rules and policies that take into account Fineman's "complex subject", that is to say, the diverse reality of actual human existence (Fineman, 2008).

Furthermore, reflections on vulnerability would acquire greater utility if they were aimed at reconfiguring the proposal-generating capacity of this notion, not so much with a view to replacing significant principles such as equality but rather by drawing attention to the fact that some existing political institutions and legal institutions are already implicitly based on vulnerability. In this case, the reflection would be directed at proposing a sort of overturning of the paradigm: in fact, the desired effect would be to clarify the element on which many institutes and institutions are actually founded. In this way, the principle of equality would no longer constitute the privileged object of investigation and

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[7] See, for example, Maria Giulia Bernardini's discussion in the essay of hers contained in this collection.

[8] For instance, Thomas Casadei expressed himself in these terms in his speech at the seminar "On

vulnerability", held June 15, 2016 at the University of Ferrara Department of Law, organized by the Inter-University Working Group on women's political subjectivity.

discussion and our attention would shift from replacing or rearticulating this principle to considering the concept of "violence/force", a concept that has been shown to lie at the foundations of modern philosophical-political and philosophical-legal scholarship.

Thanks to this alternative perspective, in fact, we would be able to recover the "classic" positioning of the notion of vulnerability: namely, a key element of political and legal thought by virtue of its being an intrinsic feature of all human beings and, as such, highly relevant for the establishment of political institutions and the production of legislation, which in turn makes it an implicit "assumption" in contractarian and utilitarian philosophies. Indeed, thinkers as early as Thomas Hobbes

(1651)[9] and, considerably later, Herbert Hart[10] recognized our common condition of vulnerability as the main factor driving the state's establishment of a political and legal monopoly on the use of force, resulting in the prohibition against the use of violence/force by individual citizens.

And yet these analyses have always understood the condition of common vulnerability as an "*implicit* assumption", never as the "*explicit* foundation" of political and legal institutions. Violence and force, in contrast, have always been considered constitutive elements of the law[11], politics and power[12].

Overturning the paradigm would therefore serve to make explicit the fact that political and legal institutions are necessary

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[9] The notion of vulnerability as it appears in Hobbes' work is extremely complex: it comprises the approximate equality of human beings as well as their physical characteristics and exposure of violence performed by others, their aggressive and passionate natures, and the survival instinct. For a detailed reconstruction of these many aspects see Guaraldo, 2012.

[10] Hart writes that human vulnerability (by which he means only *physical* vulnerability) is an obvious truth that determines the most typical precept of all law: the prohibition against killing (Hart, 1961).

[11] See for example, the arguments made by legal philosophers who support the theory of law as a rule of force, according to which it is the punishment, and so the use of force, that confers the status of legality on rules. Regarding this point, see Kelsen, 1960, 1966; Bobbio, 1970, 1994. See also Barberis' review of this discussion in Barberis, 2011.

[12] See the exemplary arguments made by Max Weber and, later, Norberto Bobbio on this issue. Regarding the sociological definition of a state, Weber wrote that: "[u]ltimately, one can define the modern state sociologically only in terms of the specific means peculiar to it, as to every political association, namely, the use of physical force" (Weber, 1946). Concerning the link between political power and force, Bobbio wrote that "political power [...] is based on the possession of the tools by which physical force is exercised (weapons of every kind and degree): it is coercive power in the strictest sense of the word" (Bobbio, 1999:105). For a critique of the conceptualizations that have theorized, described and legitimized the constitutive relationship between violence/force and law, politics and power over time, in this case as well please see the volume by Olivia Guaraldo, 2012.

even today because we humans are vulnerable: in so doing, the political community would find renewed common ground in our shared condition of vulnerability, as Judith Butler suggests (Butler, 2004: 9; Cavarero, 2007: 31), and the direct result of this awareness would be the need to regulate violence/force (both public and private).

This change in outlook would inescapably lead to a new re-consideration of the issue of violence/force from a contemporary perspective, and therein lies what I see as the true significance of vulnerability. Indeed, it appears somewhat paradoxical that considerations of vulnerability have not yet led in any substantial way to a reworking of the concept of violence/force[13] given that violence/force is precisely the element that is primarily associated with vulnerability, on a theoretical level, and which can cause the condition of vulnerability to result in damage or violence,

on a practical level[14]. On closer inspection, bringing vulnerability to the fore as an explicit theoretical foundation of contemporary legal and political structures (seeing as contemporary political and legal institutions originate from these same philosophical-political and philosophical-legal formulations) would entail not so much, or not only, investigating the characteristics of contemporary vulnerability (what does it means to be a vulnerable individual today?) but rather reconsidering violence/force in its new, varied (and as yet unexplored) contemporary articulations as well as its undeniable relations with power[15].

It is therefore clear that the real value of vulnerability lies in its ability to push us toward a substantial reconfiguration of the statute of violence/force (public, private, legitimate, illegitimate, physical, natural, artificial, and so on), pushing legal and political philosophy in particular to examine the new subjects currently exercising forms

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[13] It should be noted that some important studies have proceeded in this direction, however. See for example Kirby, 2006; Butler, 2006. See in particular the discussion offered by Brunella Casalini in her essay published in this special issue regarding the relationship between vulnerability and power.

[14] Regarding the factors that transform vulnerability into damage, see the essay by Estelle Ferrarese in this special issue.

[15] In relation to the link between violence, force and power Hannah Arendt wrote: "violence is nothing more than the most flagrant manifestation of power. 'All politics is a struggle for power; the ultimate kind of power is violence,' said C. Wright Mills, echoing, as it were, Max Weber's definition of the state as 'the rule of men over men based on the means of legitimate, that is allegedly legitimate, violence'" (Arendt, 1970: 27).

of violence-force (with or without authorization) capable of influencing (and affecting) people's vulnerability and interrogating how these subjects are identified and framed with the aim of redefining their legitimacy or illegitimacy as well as their limitations, sources and methods of enacting violence-force or, even better, of asserting that these subjects have by now outlived their usefulness.

This would enable the theoretical discussion to escape from the current impasse in which it is lodged, an impasse which involves taking refuge in the vulnerability of the subject almost as if it were so impossible to re-consider force that we needed to instead necessary to "run for cover" by identifying who is "most vulnerable".

The re-emergence of the issue of vulnerability represents a means of recovering a reflection on the human condition that had gotten lost over the course of the centuries; the only way this re-emergence will succeed in demonstrating its true importance and fulfilling the promises inherent in it, therefore, is if it generates an epic paradigm reversal that leads to the reconfiguration of violence/force (then and now) or the even more desirable outcome of a (highly difficult) transcendence of the conceptualization that casts violence/force as a necessary and constitutive element of institutions, politics and the law.

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