

# Vulnerability between political theory and normative texts: a new language to repeat old things or a new tool to problematize differences in social power? \*

## Vulnerabilidade entre teoria política e textos normativos: uma nova linguagem para repetir coisas antigas ou uma nova ferramenta para problematizar diferenças de poder social?

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### Abstract

In this essay I try to reread the classical theories of modern political thought through the lens of vulnerability and build a bridge between classical debates and the contemporary debate on protecting socially weaker subjects and meeting their needs and interests. The article discusses in particular the difference between *inherently personal vulnerability* and *situational vulnerability*. The first notion of vulnerability is reconstructed on the basis of a series of European directives (and a decision of the CJEU) related to crime victims and asylum seekers. The second one is reconstructed on the basis of the international treaties and the European directives on trafficking in human beings. My contention is that the second notion of vulnerability can absorb the first one and represent a disruptive conceptual tool for dealing with the “Sophie’s choice” in which many workers are today entrapped.

**Keywords:** vulnerability, protection, social rights, victims, asylum seekers, trafficking of human beings.

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## Resumo

Neste ensaio, tento reler as teorias clássicas do pensamento político moderno sob as lentes da vulnerabilidade e construir uma ponte entre os debates clássicos e o debate contemporâneo sobre a proteção de sujeitos socialmente mais frágeis e a satisfação de suas necessidades e interesses. O artigo discute em particular a diferença entre *vulnerabilidade inerentemente pessoal* e *vulnerabilidade situacional*. A primeira noção de vulnerabilidade é reconstruída com base numa série de diretivas europeias (e numa decisão do TJUE) relacionadas com as vítimas de crimes e requerentes de asilo. O segundo é reconstruído com base nos tratados internacionais e nas diretivas europeias sobre o tráfico de seres humanos. Meu argumento é que a segunda noção de vulnerabilidade pode absorver a primeira e representar uma ferramenta conceitual disruptiva para lidar com a “escolha de Sofia” em que muitos trabalhadores estão hoje presos.

**Palavras-chave:** Clínicas jurídicas, realismo jurídico, construção jurídica, imaginação jurídica, acesso à justiça.

## Introduction

Through the perspective of vulnerability, it springs to mind that exposure to *vulnus* is the primary engine of the Hobbesian mechanism: it is the reason for the “mutuall Relation between Protection and Obedience” (Hobbes, 1651, p. 445). Vulnerability is the source of the Leviathan-state’s legitimacy: it is its ability to protect and guarantee physical security from assaults and to allow for its relative certainty over time, which rationally bases the relationship of subordination.

At the origin of modern political theory there is therefore a system based on the universal vulnerability of individuals. With the demise of the belief that individual lives are guaranteed as part of a providential plan (Blumenberg, 1974; Santoro, 2003), a political order based on vulnerability developed. The modern state was born by carving out a group of individuals, territorially concentrated, and giving them its protection. Thanks to individuals’ awareness of their vulnerability, the Leviathan state bases its legitimacy on the promise to protect them. If some individuals were invulnerable, they would have no reason to enter into the social contract and accept their subordination to Leviathan. On the other hand, if Leviathan were unable to protect vulnerable individuals, the object of the hypothetical contractual synallagma would disappear: the rationality of subordination and, ultimately, political obligation would cease.

## Rereading old stories through the lens of vulnerability

If, from Hobbes onwards, individuals’ vulnerability is the basis of political obligation, the path that begins with Locke’s theorization extends the range of *vulnera* from which the government must protect, but it does not change the logic of political obligation: as for

Hobbes, individuals are bound to obey the government because they are vulnerable and need to be protected. For Locke (1690, § 123, p. 159), however, individuals stipulate the social contract and agree to subordinate themselves to the government, in order to safeguard not only their life and physical integrity, but also their property, their freedom, their possibility of owning goods (the security of property) and of entering into contracts.

This extension marks a fundamental step for modern legal-political theory (Furia, p. 2020). On the one hand, the government is legitimized by protecting also from the *vulnera* that it can inflict itself: this lays the foundations for the division of powers and the rule of law. On the other hand, the shift from the idea that the *vulnus*, from which the government must protect, is only a physical wound (which can be inflicted by other individuals) to the idea that individuals can be harmed even by infringing their fundamental rights, opened a new path. This led, since the end of World War II but more fully to the present day, to maintain that the government must protect not only individuals' physicality but also their 'dignity', in the Kantian meaning, as the basis of a large and expanding basket of rights.

While Locke's theory was the basis of the classical liberal state, the 'minimum state' – which, in so far as it protects negative liberty, personal safety and civil liberties, becomes the 'night watchman state' –, it laid the seed to broaden the scope of vulnerability and, therefore, of the protection that the government must guarantee in order to legitimize itself. It opened the path, as T.H. Marshall said, to the welfare state or, as the French say, making its link with the guarantees of the pre-modern providential plan clearer, to the *État providence*.

Indeed Marshall (1963, p. 81), in order to legitimize the welfare state just established in Britain by the Labour government, created the 'progressive' narrative that the recognition of civil rights changes the basis of the social consideration of individuals "from economic substance to personal status". According to the English sociologist Lockean citizenship, albeit "partial", i.e. not including social rights, paved the way for overcoming many of the differences arising from class distinctions, by spreading the conviction of the substantial equality of individuals. More generally, it pushed towards a less formal conception of equality, a "conception of equal social worth, not merely of equal natural rights" (Marshall, 1963, p. 95). Thanks to the success of this new conception, Marshall argues, the logic that the recognition of civil rights, giving each individual "the power to engage as an independent unit in the economic struggle", made it perfectly coherent "to deny to him social protection on the ground that he was equipped with the means to protect himself" (Marshall, 1963, p. 90), in the nineteenth century began to falter. The existence of a common status took on the role of "architect of legitimate social inequality" (Marshall, 1963, p. 73). Thus, in the second half of the twentieth century, particularly in Europe, the requirement "to adjust real income to the social needs and status of the citizen and not solely to the market value of his labour" imposed itself (Marshall, 1963, p. 83).

As Michel Foucault's (2004a and 2004b) analyses have shown, Locke's theory brings out, together with the fundamental rights to be protected, a normative model of citizen or, perhaps, more generally, of 'subject': one who knows (or is disciplined to) use the rights that the state confers on him, and can adapt his or her subjectivity, or at least his actions, to the liberal political order. Individuals are really in control of themselves and their goods and

properties if they are able to manage both in a 'rational' way. The identification between the statuses of citizen and subject plays the role of "architect of legitimate social inequality", first of all, by creating the premises, at once epistemic/cognitive, moral and political, for developing a range of excluding and/or inferiorative dualisms, articulated starting from those of responsible/irresponsible, capable/incapable (Santoro, 2003). In the modern state, in order to make individuals 'governable', two different types of discourse 'objectifying' subjects are developed. On the one hand, the discourse that shapes the anthropological model of the individual capable of pursuing his or her own interests rationally, planning his or her own life. On the other hand, the discourse that gives rise to the anthropological model of the individual incapable of dealing on his or her own with problems such as health, hygiene, sexuality, education, suffering and death. The first discourse makes individuals' security dependent on their having rights; it leaves the vulnerability of human beings in the background as the ultimate ground of the contractual synallagma. In the second discourse, on the other hand, security is guaranteed by what Foucault called "biopolitics" in his studies of the late 1970s, i.e. the 'rationalization' by administrative agencies of the main problems affecting a state's population. This type of discourse 'builds' a whole range of vulnerable individuals who cannot have their security guaranteed through civil rights and need the intervention of state agencies. The latter construct the identity of individuals as vulnerable, by defining the needs and interests they take charge of. The implicit assumption is that they intervene because *those* people do not know how to overcome *those* vulnerabilities on their own. In this second discourse, government protection does not rest on a unitary basis but follows divergent criteria that differentiate the degrees of vulnerability of different people. The attribution of social rights, contrary to Marshall's hopes/predictions, does not give rise to a unitary citizenship status. Rather, it marks the resurgence of different statuses within the order of the modern state. Thus, a key role is given not to 'human dignity' but to the specific status of individuals.

The creation of different statuses based on different degrees of vulnerability and therefore of need is intertwined with the dichotomies created by the 'normative' model of the citizen-subject. Remedies for specific vulnerabilities are accompanied by the stigmatization of those relying on social rights because they cannot meet their needs and guarantee their economic security through the freedom of contract that Locke had made a natural right.<sup>2</sup> The recognition of government protection to the supposedly weaker contracting party, narrows the room normally allowed to people who use contract to pursue their interests and satisfy their needs.

As Marshall himself acknowledged, social rights arose in England not as universal citizenship rights vested in a person who is his or her own master, as was the case with civil rights, but as rights meant to compensate those excluded from citizenship, to protect

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<sup>2</sup> It is worth mentioning that Kant, the theorist par excellence of human dignity, argued that the status of citizen, characterized à la Rousseau by the right to vote, does not pertain to all members of a given community: nor should only those who have nothing be excluded, but also those who live from their work. In his view, for someone to have the right to vote he "must have some property [...] to support himself"; he must be able to earn a livelihood "by selling that which is his, and not by allowing others to make use of him" (Kant, 1970, p. 78).

members of the community who did not enjoy full citizenship status. The Poor Law of 1834 provided benefits only for workers who withdrew from the labour market because of old age, illness, or special vulnerabilities. That law “treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them – as claims which could be met only if the claimants ceased to be citizens in any true sense of the word” (Marshall, 1963, p. 83). The same logic in that period inspired the Factory Acts on working conditions and hours. Those provisions:

meticulously refrained from giving this protection directly to the adult male – the citizen *par excellence*. And they did so out of respect for his status as a citizen, on the grounds that enforced protective measures curtailed the civil right to conclude a free contract of employment. Protection was confined to women and children, and champions of women’s rights were quick to detect the implied insult. Women were protected because they were not citizens. (Marshall, 1963, p. 84)

Thus, Marshall’s narrative shows how the model originating from Locke’s theorization gradually raised the problem of the ‘individualization of vulnerability’. The latter ceases to be a characteristic that unites all people in a similar way, as it was in Hobbes’s treatment. There began to emerge ‘particularly vulnerable’ individuals and individuals who are at the same time ‘particularly vulnerable’ and dangerous for the political order: from Parsons onwards they were defined as ‘deviants’ (Santoro, 2003 and 2004). They are first of all those who are unable to self-discipline, who do not own any goods and do not even know how to own themselves: the poor, in turn divided into deserving and undeserving (i.e. undisciplined), women, slaves and the natives of the new world. This makes room for the distinction between deserving poor, whose specific vulnerability is linked to supposedly objective individual conditions – age, illness, gender (where the male is strong and the female weak) –, and undeserving poor whose inability to meet basic needs through the freedom of contract is not considered objective, but a ‘deviant’ choice. The stigmatization of the latter, as an enormous literature has shown, increases, and becomes extreme, taking the form of imprisonment accompanied by forced labour (most recently Caputo, 2020).

## **New bottles for old wine?**

The narrative reconstructed so far hinges on the idea that a specific ‘population’, as distinct from the ‘workforce’ and a delimited portion of the ‘human species’, is defined by state sovereignty: it is the policies that take care of individuals that constitute a specific population (Foucault, 2004b). In this reconstruction, the population appears at the same time as the ‘subject of needs and aspirations’ and the source of state power. Thus, it becomes the ‘ultimate goal of government’ but it is at the same time a “tool in the hands of the government” that uses it to strengthen the state’s international power. This context has been the framework in which the political and social claims of the weaker classes have found recognition and response: it has served as the valve of regulation of social conflict and as the scheme through which so

many claims have been recognized, normalized and satisfied. This is the scenario from which the process of social integration that has characterized Western Europe in particular over the last two centuries has developed. In this area, policies of inclusive citizenship have developed, in a different and not always linear way, characterized both by a progressive increase in the number of people entitled to citizenship rights and by a progressive enlargement of the basket of these rights. This process stopped quite abruptly about thirty years ago, when strategies for the governance of society began to emerge based on the reduction of guaranteed social rights and the exclusion of an increasing number of people from citizenship rights.

After the fall of the Berlin Wall, the globalisation of financial markets has gradually become an irresistible force that states need to accommodate, giving up the governance of the economy. An ideology has spread that the new world of nomadic capital, unhampered by state-created barriers, would make everyone's lives better. Freedom of trade and capital movement appeared as the humus that would allow wealth to grow as it never did. Thanks to this ideology the market seems to have achieved its ultimate victory: it broke the banks that confined it within the limits of state sovereignty, so that today it is the latter that is inscribed in the market logic. The relationship between reason of state and the market has been reversed. Until yesterday, it was state reason that defined the way the market develops in order to ensure state power. Today, it is the functioning of the market that defines the limits within which state reason can operate in order to ensure the power of the state itself. Such an inversion implies a deep change. As long as the market could develop through government interventions guided by the reason of state, its growth had been made coincident with the extent to which the population's needs and interests were protected through the different techniques of government that culminated in the policies of the welfare state. The power of the state was linked to its capacity to develop policies of inclusive citizenship, based on the progressive widening of the population groups admitted to social rights and services, themselves in steady growth.

As soon as the market becomes the frame for the operation of state reason, it no longer allows time and space to "take charge of the population". Governance of the population no longer seems possible or useful. In a complete reversal of Karl Polanyi's (1944) prediction, the belief became established that civil life itself depends on the market and that therefore society must be organized in such a way as to allow the market to function according to its own laws. It is no longer the economy that must be compatible with a certain system of social relations, but it is social relations that must be adapted to the market economy: the regulation of civil life becomes ancillary to the functioning of the market.

If, as Foucault (1994, p. 39) holds, the reversal of the legitimizing relationship between market and politics calls into question "knowledge itself, the form of knowledge, the 'subject-object' norm", knowledge "not in its true or false contents, but in its power-knowledge functions", that of vulnerability appears as the appropriate language to reformulate what has been swept away by market domination: "at the beginning of the 21st century vulnerability begins to be conceived as an *opportunity*, having a transformative potential" (Zullo, 2020).

At a time when we have completely forgotten the lesson of Polanyi, who had shown us how in the twentieth century totalitarianism was born, somehow democratically, out of states'

inability to protect individuals from the market, vulnerability seems to be the matrix of a language, endowed with conditions of assertability, capable of giving voice to the same needs. The language of vulnerability seems to be a way to repropose the protection needs of the weakest social groups at a time in history when the lexicon that made it possible to claim and represent them during the second half of the twentieth century seems to be de-legitimized. At a time when there do not seem to be the conditions of assertability to claim an extension of welfare, the language of vulnerability seems to be the tool to give voice to individuals who, because of their intrinsic weaknesses, are unable to meet their needs and pursue their interests with only civil rights, to stay in the labour market with only the freedom to contract.

Vulnerability has become established in international institutional discourse and normative texts – particularly, as we shall see, in those of the European Union – as a connotation of individuals who for some *objective* reason find it difficult “to solve their problems in the market”, to meet their needs through the freedom of contract. In a first stage, the official international (Thywissen, 2006) and European Union documents defined vulnerable individuals, respectively, as those exposed to environmental catastrophes and those who for personal characteristics need some specific protection. I believe that this objective connotation of vulnerability has made a decisive contribution to the success of the concept: in these contexts and with this connotation it seems capable of confining the ‘additional protection’ to the deserving poor or rather, according to the new language, to deserving fragile persons.

From an analysis of the European Union’s legislation, the ‘vulnerable persons’ are those characterized by an accentuated fragility with respect to the general vulnerability of all human beings which, as said, lies at the foundation of the creation of states and legal systems (in a somewhat mediated way, even of the legal system of the Union). The legitimacy of this notion is facilitated by its not being used in normative texts devoted to drawing the lines of policies tackling social fragility or precariousness. Rather, it is used in a Hobbesian way to indicate those deserving special protection when they are the object of aggression, crime and persecution. In these contexts, (particular) vulnerability is a feature that makes certain individuals more exposed to the aggression dealt with in the normative texts. In this sense the notion has an almost victimological connotation. The only small opening to the social dimension is that these normative texts assume that the same (particular) vulnerability, which exposes people to aggression, also makes them vulnerable when they have to react to the offense suffered. This passage clarifies that vulnerability, although conceived as a category of victimological origin, ends up affecting agency. In particular, vulnerability refers to that ability to organize one's life, even in adversity, which is the anthropological pivotal assumption of the liberal order. The rhetoric of merit-based liberal society hinges on this ability, which allows even those who have been pushed by adversity to live in a hut to aspire to the presidency of the republic.

This dual connotation of a fragile person, exposed to risk because of her objective location in an area prone to environmental catastrophes, or because of her inherent personal characteristics – characteristics that then make the person need help in reacting to the harmful event – has rapidly redrawn what has been perceived as an inferioritative dichotomy.

Especially when, as we shall see, alongside children, who are vulnerable by legal status, categories such as the dependent and women began to appear, it became clear that, as had happened in the nineteenth century for the first social rights, supportive interventions guided by this notion were addressed to individuals considered inferior to the rational and autonomous person, to the ‘true’ liberal citizen who solves his problems with civil rights alone.

Among the many who have criticized this inferiorative dichotomization, Martha Albertson Fineman (2008, 2013, 2015 and 2019) is the author who seems to have undertaken, in a more or less conscious and explicit way, the path of building a discursive paradigm capable of taking up the broken thread of the narrative on welfare by universalizing and socializing the notion of vulnerability.

The American author argues within the paradigm of justice theories. She basically proposes a theory of justice that assumes vulnerability as the compass orienting public policies. This operation is based on a return to Hobbes’s original idea that vulnerability is a universal given (Fineman speaks of shared vulnerability), affecting every human being (I would say every living being, but the problems of other living beings for Hobbes did not pose political complications), and the declination of this awareness in the discourse on welfare state. Physical aggression is not the only *vulnus* that can be brought to human beings: they have, and develop, many needs and interests whose failed satisfaction is a *vulnus*. Resuming this discursive thread seems to be the idea behind the proposal to make vulnerability the cornerstone of a theory of the responsive state, which supports intervention measures for anyone, and not only for specific (at least) implicitly stigmatized groups. Fineman’s theoretical move seems to be that of giving vulnerability a meaning at a time old, if we refer it to Marshall’s discursive sphere, and new, if instead we place it in the debate of the first decade of the new millennium.<sup>3</sup> A discourse premised on the centrality of vulnerability thus conceived should, according to Fineman, push towards the implementation of government policies and interventions capable of offsetting the privileges of the ‘few’ and the inequalities perpetrated throughout history, and privileging substantial equality over formal equality. It should, to use the old language, be the “architect of legitimate social inequality”.

The articulation of this proposal is intertwined with a polemic against the liberal notion of autonomy and, ultimately, against the normative model of the subject-citizen which the theories of justice themselves, thirty years ago, have rediscovered and reevaluated on a theoretical level. Clearly, such a conception of vulnerability purges the use of this notion from the negative stigma that its originating discourses tended to confer it, at least implicitly, and avoids the effects of paternalistic limitation of autonomy that stem from assuming the minor as the archetype of the vulnerable individual. A realistic conception of autonomy, maintains Fineman, cannot but start from the given that it represents a relational concept/quality and not a solipsistic characteristic: her autonomy is not that of Stirner’s Unique, as a certain liberal mythology would have it. We can only be autonomous thanks to institutions, policies and

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<sup>3</sup> Very useful for a reconstruction of this debate are Bernardini, Casalini, Giolo and Re (2018), and also Giolo, Pastore (2018).

social services, aimed at enhancing individuals' potential for self-determination,<sup>4</sup> as, I would add, the history of the welfare state has shown. This is the framework of the contrast between embodied/embedded vulnerability (Fineman, 2017), which could perhaps be developed as a contrast between two notions of autonomy: one built on the figure of the rational actor capable of controlling his passions, and the other non-individualistic, relational and contextually relative (Santoro, 1991).

We could say, aware of the brutal simplification being made, that these views, in a different theoretical context, seem to push vulnerability towards the same evolution that characterized Marshall's citizenship status, which, albeit in a different way, made social rights part of a heritage available to all (gradually also to non-citizens). Vulnerability seems to emerge as the pivot of a new language to save the essence of the welfare state discourse.

This in itself would be no small achievement. However, I believe that the lexicon of vulnerability used in legal texts concerning human trafficking allows us to go beyond this achievement and problematize power relations that the language of the welfare state, of the claim of social rights, did not allow us to problematize. In order to argue my point, I will shift focus from the use of the concept of vulnerability in social theory to what is done with it in normative texts. I refer in particular to the EU laws that have incorporated the notion of "vulnerable persons" and to international and regional texts that have made "abuse of a position of vulnerability" a constitutive element of human trafficking.

### **Inherently personal vulnerability<sup>5</sup>**

One of the first European legal texts speaking of vulnerable people, more exactly victims, is the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA). Article 2 § 2 states that "each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances". After a provision requiring special precautions for the hearing of "most vulnerable" victims (Art. 8 § 4), the Framework Decision contains a provision (Art. 14 § 1) that outlines these persons as deserving specific support measures: "1. Through its public services or by funding victim support organisations, each Member State shall encourage initiatives enabling personnel involved in proceedings or otherwise in contact with victims to receive suitable training with particular reference to the needs of the most vulnerable groups."

I emphasize that this wording seems to assume that all human beings are vulnerable and that additional protections must be provided for "most vulnerable" individuals.

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<sup>4</sup> I think the same operation underlies Judith Butler's (2004 and 2009) distinction between (ontological) precariousness and (context dependent) precarity. But this analysis, as well as an in-depth discussion of Fineman's views, would require a space and study that are beyond the scope of this essay.

<sup>5</sup> Although the contrast between "inherently personal" and "situational" vulnerability seems to take up terminologically the one developed by Mackenzie, Rogers and Dodds (2013, pp. 1-32), I elaborate and develop it on the basis of the normative texts analyzed in the continuation of the paper. So it does not coincide with that of the three authors.

The directive which, after more than ten years, replaces this Framework Decision seems to bring the notion of vulnerability back to a strictly victimological conception: the feared *vulnus* is equated with the risk of re-victimisation<sup>6</sup> as well as secondary victimisation. However, it should be noted that the Court of Justice in the Pupino judgment, still based on the Framework Decision, had decontextualized and subjectivized the notion of particularly vulnerable victims, arguing that minors, regardless of the type of crime they are victims of and the context in which the crime is committed, are “particularly vulnerable” persons. Indeed, the Court, having observed that “the Framework Decision does not define the concept of a victim’s vulnerability for the purposes of Articles 2(2) and 8(4)”, raises the question of “whether a victim’s minority is as a general rule sufficient to classify such a victim as particularly vulnerable within the meaning of the Framework Decision” and answers in the affirmative, arguing that children “are suitable for such classification having regard in particular to their age and to the nature and consequences of the offences of which they consider themselves to have been victims, with a view to benefiting from the specific protection required by the provisions of the Framework Decision”.<sup>7</sup>

Italian legislators, when transposing the Directive, did not follow the strictly victimological connotation of “particularly vulnerable victims” set out in the text, but adopted, in line with the Court of Justice, one focused primarily on inherently personal characteristics. Art. 90-*quater* of the Criminal Code, entitled “Condition of particular vulnerability”, reads in fact: “the condition of particular vulnerability of the offended person is inferred, besides from age and the state of infirmity or psychic deficiency, from the type of crime, from the modes and circumstances of the fact being prosecuted”.

This evolution and the very ruling of the Court of Justice are not surprising if one considers that *Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers in Member States* was promulgated already in 2003, so two years after the Framework Decision on the standing of victims in criminal proceedings and two years before the ruling of the Court of Justice. The Directive decisively embraced the inherently personal connotation of vulnerability by requiring, in its Article 17, Member States to “take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence”.

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<sup>6</sup> *Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA* recital 38: “Persons who are particularly vulnerable or who find themselves in situations that expose them to a particularly high risk of harm, such as persons subjected to repeat violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crime in a Member State of which they are not nationals or residents, should be provided with specialist support and legal protection”. Cf. Amalfitano 2018 16. This is not the place to discuss the recital’s definition. I shall simply highlight one element: the categories that emerge as vulnerable, beyond the politically correct and non-discriminatory language, are identified, explicitly, in foreigners and, through circumlocution, in women and children. The recital tends to refer to the latter two categories when it mentions “persons subjected to repeat violence in close relationships”, and only to women when it speaks of “gender-based violence”.

<sup>7</sup> Judgment ECJ, 16 June 2005, Pupino, C-105/03, § 53.

The ‘inherently personal’ connotation of the condition of vulnerability is proposed again one year later by Directive 2004/83/EC, the so-called “Qualification Directive”,<sup>8</sup> which in Article 20(3) calls on the Member States to take the same categories of persons defined as “vulnerable” into account. Whereas the parallel “Procedures Directive”<sup>9</sup> of the following year, in recital 14, explicitly identifies only unaccompanied minors as vulnerable.

Reaffirming the inherently personal connotation of vulnerable persons, Directive 2011/95/EU,<sup>10</sup> which recasts the “Qualification Directive” of seven years earlier, extends the categories of vulnerable persons covered by it to include “victims of human trafficking” and “persons with serious illnesses, persons with mental disorders” (Article 20). The inherently personal conception of vulnerability and this extension are reaffirmed two years later by Directive 2013/33/EU which recasts that of ten years earlier on reception (Article 21).

Whereas the inclusion of people with illnesses and mental disorders among the vulnerable groups appears to be perfectly consistent with the inherently personal connotation of vulnerability, that of trafficked persons shows a contradiction that had remained latent until then. Indeed, since 2000, when the “Palermo Protocol” on trafficking was signed, international treaties on trafficking in human beings have proposed a ‘situational’ rather than an ‘inherently personal’ conception of vulnerability. In other words, before the inherently personal conception of vulnerability began to appear, and was consolidated, in European legislation, an opposite conception of this notion had been developed at international level: a conception based not on specific characteristics of certain groups of people but on the effects of certain conditions in which anyone could find themselves.

## Situational vulnerability

Article 3 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (usually known as the Palermo Trafficking Protocol) defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a *position of vulnerability* or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (my emphasis).

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<sup>8</sup> Directive “on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted”.

<sup>9</sup> Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

<sup>10</sup> *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).*

The Protocol does not contain any definition of “a position of vulnerability”. Paradoxically, this definition only officially appeared within the United Nations system in 2006, following the publication of the interpretative notes and preparatory work. Thus, as we shall see, after the definition had been codified by the Framework Decision 2002/629/JHA of the European Community and stated by the *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* of 2005. The *Travaux Préparatoires* of the Palermo Protocol explain a well-known fact: that abuse of the position of vulnerability occurs when the person has no real and acceptable alternative but to submit to the abuse of which he or she is a victim.<sup>11</sup>

The literature (Jansson, 2015, p. 83) stresses that the intentions of the drafters of the Protocol, with regard to the abuse of the victim’s position of vulnerability, are unclear and that the concept was included in the definition of trafficking, apparently at the last minute, in October 2000, at the session in which the formulation of Article 2 of the Protocol was completed.<sup>12</sup> Anne Gallagher, who participated in the process of drafting the Protocol, in a recent paper on the abuse of the position of vulnerability written with Marika McAdam (Gallagher, McAdam, 2018, p. 187), reminds how this wording was introduced, on the one hand, because it seemed capable of encompassing the myriad means of coercion through which people are forced to accept exploitation. On the other hand, it appeared to be the point of balance to overcome the exhausting debate on trafficking for prostitution, leaving states free to regulate the phenomenon internally as they saw fit.

The genealogy of this second motivation makes it clear that the central problem was the position of some feminist movements that the discourses on trafficking risked to favour the representation of women as a group of weak, inherently vulnerable subjects. This was the logic, which we saw begin in the nineteenth century, that additional protections are needed for individuals unable to manage their lives with civil rights alone.

The introduction of the abuse of a vulnerable situation and the irrelevance of the consensus obtained through it made a compromise possible between the abolitionist movements, who wanted to make prostitution illegal in itself, and the anti-abolitionist movements, who supported the legitimacy of the free choice of prostitution and claimed the status of sex-workers for those who chose to practice it. The conflict stemmed from the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the

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<sup>11</sup> UNODC, *Travaux Préparatoires*, A/55/383/Add. 1, § 63 (<https://www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html>).

<sup>12</sup> The *Travaux Préparatoires* (A/AC.254/5/Add.19) show that its inclusion was proposed by Belgium, which suggested the following wording: “abuse of the particular vulnerability of an alien due to that person’s illegal or precarious administrative status, or through the exercise of other forms of pressure or abuse of authority such that the person has no real or acceptable choice but to submit to such pressures or abuse of authority”. Already on 14 December 1995, thus when the notion of vulnerability had not yet acquired its status in official documents, Maria Paola Colombo Svevo, in a report on trafficking in human beings by the Committee on Civil Liberties and Home Affairs, submitted to the European Parliament a motion for a resolution in which trafficking in human beings was defined as “the illegal action of someone who, directly or indirectly, encourages a citizen from a third country to enter or stay in another country in order to exploit that person by using deceit or any other form of coercion or by abusing that person’s *vulnerable situation or administrative status*” (Report on trafficking in human beings of the Committee on Civil Liberties and Internal Affairs of the European Parliament, Rapporteur Mrs Maria Paola Colombo Svevo, of 14 December 1995, A4-0326/95, p. 8, No. 1, my emphasis).

Prostitution of Others<sup>13</sup> adopted by the United Nations in 1949. The Convention seems to identify prostitution as a matter of international regulation whether voluntary or forced and regardless of the existence of a transnational displacement of the prostitute. Making no distinction between voluntary and forced prostitution, it also seems to stipulate at the international level that prostitution in itself is a form of exploitation (see Stoyanova, 2017, p. 21-22).

Since, for the first time, when dealing with prostitution, no reference is made to the sex of the people involved, the Convention covers both female and male prostitution. Despite this attention, it is perceived as stigmatizing by a large proportion of women's movements. A few years before the signing of the Palermo Protocol, Radhika Coomaraswamy, then UN Special Rapporteur on violence against women, expressed this position by saying:

The 1949 Convention has proved ineffective in protecting the rights of trafficked women and combating trafficking. The Convention does not take a human rights approach. It does not regard women as independent actors endowed with rights and reason; rather, the Convention views them as vulnerable beings in need of protection from the 'evils of prostitution'.<sup>14</sup>

It is not surprising that the debate on the Convention on Prostitution resumed in the 1990s. In fact, after the fall of the Berlin Wall and the collapse of the Soviet Union, we saw what has been described as a global diaspora: a migration movement that at the time seemed unprecedented and in which women played a significant role. These were the years in which women migrated out of the consolidated routes of family reunification and took on the role of breadwinners for the family. Women from Eastern Europe went in search of work in Western countries finding employment in the domestic and care sector, starting what has been called the "global care chain", or as sex workers.

As argued by Gallagher (2010, p. 16) and many other feminist authors, "the new female migration of the early 1990s was, in contrast with male migration, inevitably viewed in negative terms, with little thought given to the possibility of increased autonomy or economic independence". The reaction to the migratory movement of women, which certainly also had emancipatory connotations, was the construction of a narrative focused on the risks of this phenomenon. Women were described as potential victims of trafficking and the object of criminal organizations. A representation was born in which women and girls are forced to adapt to a condition of exploitation by recruiters and criminal organizations, are victims of sexual exploitation and labour exploitation in the domestic field, are forced into false marriages or false adoptions. In this context, trafficking gradually acquired an autonomous

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<sup>13</sup> UN, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, adopted by the General Assembly of the United Nations by resolution 317 (IV) of 2 December 1949, opened for signature on 21 March 1950 and entered into force on 25 July 1951, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>. The Convention was implemented in Italy by Act no. 1173 of 23 November 1966.

<sup>14</sup> *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, GE 00-11334 (E)* in <http://sakuramochi-jp.blogspot.com/2013/10/ms-radhika-coomaraswamyon-human-rights.html>.

place within the problem of irregular migration, being considered a phenomenon that, like “the white slave trade” a century before, concerned exclusively (apart from children, of course) women.

In this confrontation the battleground is not so much domestic work as prostitution, where it is easier, as shown by the position recently taken also by the Italian Constitutional Court (Judgment 141/2019), to argue that women, if they were really free, would never choose to prostitute themselves. This was the argument advocated in those years by the Coalition Against Trafficking in Women (CATW). This movement of American origin claimed that prostitution is ontologically a form of exploitation and distinguishing between voluntary and forced prostitution is a way to legitimize this exploitation. This view was opposed by various feminist movements who argued that:

Obviously, by definition, no one consents to abduction or forced labour, but an adult woman is able to consent to engage in an illicit activity (such as prostitution, where this is illegal or illegal for migrants). If no one is forcing her to engage in such an activity, then trafficking does not exist. (...) The Protocol should distinguish between adults, especially women, and children. It should also avoid adopting a patronising stance that reduces women to the level of children, in the name of ‘protecting’ women. Such a stance historically has ‘protected’ women from the ability to exercise their human rights (Human Rights Caucus, 1999, p. 5, quoted in Doezema, 2002, p. 21).

In such a framework, the introduction of the abuse of a vulnerable situation seemed an acceptable compromise to both contenders. It did not require to classify prostitution as intrinsically a form of exploitation, while at the same time leaving room to argue that it was always at least a consequence of a woman being in a vulnerable condition. In this way, signatory states were free to choose their attitude towards prostitution.

It is worth pointing out that this compromise was reached in the context of a codified distinction between smuggling, to which a special protocol parallel to that on trafficking was devoted, and trafficking. The difference between the two phenomena can be traced back to the level of initiative and conscious participation of the migrant. In smuggling, the migrant is a rational actor, a (male?) subject who collects information to make a choice about illegally undertaking the migratory route and the organization to rely on for the journey (a choice between criminal organizations but still a choice). In trafficking, the migrant (woman?) does not make any choice: its resulting from “the use or threat of use” of methods capable of coercing people’s will, rules out the active participation of the ‘victim’. In the ideal-typical representation, smuggling is a transaction between smuggler and trafficked person to which migrants give their autonomous consent. Both parties imagine that they receive benefits from the transaction: the smuggler receives economic or material benefits, the migrant manages to enter the foreign state illegally. Trafficking, instead, has nothing to do with a contractual synallagma: it is based on the control of the trafficked individual. This distinction explains why the first case is considered an offence against the state, while the second is considered an offence mainly against a person (see Jansson 2015, p. 88).

## The schizophrenia of European legislation

The definition of trafficking, including abuse of the position of vulnerability, was taken up by the *Council of Europe Convention on Action against Trafficking in Human Beings*, approved in Warsaw in 2005. The *Explanatory Report* clarifies that the term “position of vulnerability” must be given a very broad meaning:

The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim’s administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce (§ 83).

The vulnerability of the victim could, therefore, be due to a variety of reasons, including lack of economic opportunities or financial difficulties that lead to consent to exploitation.

However, the match between the two concepts of vulnerability was played out in the drafting of the legislation on trafficking in human beings adopted by the European Community/Union.

The first of these acts is *Decision 2002/629/JHA on combating trafficking in human beings*. Although in those years the legislation of the then European Community began to include the definition of inherently personal vulnerability and to speak of “vulnerable persons”, the Decision does not simply take up the Palermo Protocol’s definition of trafficking with its reference to the “situation of vulnerability” and the situational conception of this.<sup>15</sup> Since the preparatory work for the Palermo Protocol had not yet been published and the Council of Europe Convention had not yet been signed, it was (practically<sup>16</sup>) the first text to explain what should be understood by a position of vulnerability. Above all, it was the first normative text codifying this explanation. The Decision, in fact, includes an explanation of what is to be understood by “position of vulnerability” in its regulatory part: letter c) of Article 1(1) states: “there is an abuse [...] of a position of vulnerability, *which is such that the person has no real and acceptable alternative but to submit to the abuse involved*”. This choice has been confirmed by *Directive 2011/36/EU* which in turn codifies in its provisions the definition of “position of vulnerability”. Those of the European Community/Union are so far the only normative texts to codify the notion of situational vulnerability. The explanations related to the UN Protocol and

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<sup>15</sup> Article 1(1), Decision 2002/629/JHA: “Each Member State shall take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where: (a) use is made of coercion, force or threat, including abduction, or (b) use is made of deceit or fraud, or (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or (d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography”.

<sup>16</sup> In fact, the first official act that contains the definition of a position of vulnerability is the 1997 Joint Action of the Council of the European Union, which, however, remained semi-clandestine. I thank Letizia Palumbo for this information.

the Council of Europe Convention are, in fact, contained in soft law texts: the *Travaux Préparatoires* and the *Explanatory Report*.

In a context where, as said, the European Union adopts an inherently personal definition of vulnerability whenever it refers to it in non-trafficking related texts, even programmatic ones, this choice could only create a conceptual short-circuit. In fact, the situational definition of vulnerability in the 2002 Decision is often overwhelmed by references to the inherently personal concept. The first reference to vulnerability in the Decision is not to the “vulnerable situation”, but to the “vulnerable persons”. Recital 3 explains that “trafficking in human beings comprises serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of *vulnerable persons*, as well as the use of violence, threats, debt bondage and coercion” (my emphasis). Recital 5 also refers to a concept of vulnerability linked to personal characteristics, stressing that “children are more vulnerable and are therefore at greater risk of falling victim to trafficking”. If we move on to the regulatory part of the Decision, Article 3(2)(b) provides for an increased penalty when “the offence has been committed against a victim who was particularly vulnerable”, then Article 7(2) defines children, correctly I would say, not vulnerable victims, as all human beings are, but “particularly vulnerable”. But Article 3, betraying the back-thought that trafficking is committed exclusively for sexual purposes, states that “a victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography”. That is to say, in neutral terms: particularly vulnerable victims are, besides children, women.

In conclusion, the Decision contains one reference to situational vulnerability, when it has to define trafficking on the basis of the Palermo Protocol (indeed, in this case, it is more royalist than the king, by including the explanation of situational vulnerability in a provision rather than in a recital), and five references to the inherently personal conception of vulnerability, which is the normally accepted meaning of the term in other Community legislation.

## **Recomposition by absorption: inherently personal vulnerability as a component of situational vulnerability**

Of particular interest is how the two concepts of vulnerability are articulated by the aforementioned *Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*.

First, it is worth noting an antecedent: in June 2010 the Council, in Justice and Home Affairs (JHA) formation,<sup>17</sup> approved a “General approach” on the text presented by the European

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<sup>17</sup> The Council of the European Union is an autonomous legal entity but meets in different “formations” depending on the subject to be dealt with. The “Justice and Home Affairs” Council develops common and cooperation policies on various cross-border aspects with a view to establishing an area of justice at EU level.

Commission<sup>18</sup> in which it reduced the impact of the inherently personal conception, excluding that adults could be considered particularly vulnerable victims due to their health, pregnancy or disability. It should also be stressed that, when defining the condition of particular vulnerability, the Directive makes no reference to the concept of sexual maturity or the circumstance that trafficking was committed for the purpose of sexual exploitation.

The situational definition of vulnerability in this Directive even becomes an autonomous paragraph (Article 2, 2) which explains that "a position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved".

Like the Framework Decision, the Directive provides for an increased penalty when the offence is committed against a "particularly vulnerable victim" (recital 12), and Article 4 on penalties specifies that the concept of "particularly vulnerable" persons "in the context of this Directive, shall include at least child victims", without adding other categories. A careful reading reveals that minors are the only persons explicitly considered to be "particularly vulnerable". Recital 8 states that minors are a more vulnerable category than adults and are therefore at greater risk of becoming victims of trafficking in human beings, and recital 12 reiterates that "vulnerable persons should include at least all children", again without mentioning other categories of persons.

The context of the Directive's development and its explicit use of the inherently personal concept of vulnerability for minors only suggest the possible absorption of this concept into the situational one. One glimpses the idea that some personal characteristics of the trafficked person should be considered in themselves not as configuring a vulnerable person, but as factors that contribute, under certain circumstances, to the trafficked person perceiving that he or she has no other option than to submit to exploitation. In other words, by digging into the Directive, the idea can emerge that, if the position of vulnerability depends on the existence of objective situations, when determining whether the victim has a "real and acceptable alternative" to exploitation his or her subjective condition cannot be overlooked. The belief of having no other choice must be examined from the point of view not of an abstract ideal subject, the liberal actor, but of the actual trafficked person, taking not only his or her extreme situations into account, but also his or her subjective conditions and socio-cultural background.

The Directive does not go down this road decisively. It contains many statements that make the balance between the two concepts of vulnerability ambiguous. Recital 12, for example, states that besides the minor age "other factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health and disability". This statement sounds different from the definition of women, pregnant women, sick and disabled people as inherently vulnerable, but it is certainly ambiguous. Ambiguous are also Recitals 22 and 23 with reference to minors who, as said, are the only persons defined as inherently vulnerable. They speak respectively of minors as "particularly

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<sup>18</sup> Council document 10845/10 of 10 June 2010.

vulnerable” and of “their situation of particular vulnerability”, apparently painting once vulnerability as a personal characteristic and the other as a situational element.

The absorption of the inherently personal conception of vulnerability in the situational one seems to draw a legal perspective that goes in Fineman’s direction. It certainly becomes very important when we stop seeing trafficking in human beings as a phenomenon consisting exclusively of moving women from one country to another to sexually exploit them and/or induce them to prostitution. We realize instead that – as highlighted by the reports of UNODC (2016, p. 40; 2018, p. 41), the UN agency for combating organized crime – trafficking is now predominantly domestic (i.e. it does not imply moving victims from one country to another) and that a significant percentage of the people involved are victims of labour rather than sexual exploitation.<sup>19</sup>

The abuse of a situation of vulnerability by the exploiter is peculiar in that the latter need not create the precarious situation of the exploited. It is enough for him to take advantage of the situation created by the distribution of wealth, the economic structure. This aspect has been greatly valued by the ECtHR in the Chowdury case,<sup>20</sup> which has separated the crime of trafficking from those of enslavement and servitude, configuring it as a particular form of forced labour that does not require the exploiter to play an active role, forcing the exploited to submit to his power and work.

In its decision the Court reproaches the Greek judges, who had not condemned the exploiters, for having “confused servitude with human trafficking or forced labour as a form of exploitation for the purpose of trafficking” (§ 99). The Greek judges had acquitted the defendants of the charge of trafficking in human beings, finding “that the workers were not absolutely unable to protect themselves and that their freedom of movement was not compromised, on the grounds that they were free to leave their work”. The ECtHR, instead, holds that “restriction of freedom of movement is not a prerequisite for a situation to be characterised as forced labour or even human trafficking. The relevant form of restriction relates not to the provision of the work itself but rather to certain aspects of the life of the victim”. The Court therefore maintains that the Greek judges have given “a narrow interpretation of the concept of trafficking, relying on elements specific to servitude” instead of focusing on the living and working conditions of the exploited (§ 123).

The Court’s judgment is not a model of consistency and argumentative clarity (see Asta, 2018; Stoyanova, 2018). The Court seems to be proceeding somewhat tentatively in a new direction to include trafficking in a provision, Article 4 of the ECHR, which does not mention it. It configures trafficking as an autonomous violation, not characterized by the purpose of enslavement or servitude or forced labour, as it is commonly understood, which are, instead, expressly considered by the text. In this operation, the distinctive feature of trafficking, with respect to the explicitly mentioned conducts, is that this form of exploitation does not require

<sup>19</sup> Already in 2013 the International Labour Organization estimated that between 2002 and 2011 20.9 million people were victims of labour exploitation (ILO 2012, 13). UNODC data show that this number has certainly risen in the last decade.

<sup>20</sup>European Court of Human Rights, *Chowdury and Others vs Greece*, Application n° 21884/15, judgment of 30 March 2017 [https://ec.europa.eu/anti-trafficking/case-law/chowdury-and-others-v-greece-0\\_en](https://ec.europa.eu/anti-trafficking/case-law/chowdury-and-others-v-greece-0_en).

any form of coercion, but can be practiced simply by taking advantage of the situation of vulnerability of the exploited:

The Court further considers that where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily. The prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour. The question whether an individual offers himself for work voluntarily is a factual question which must be examined in the light of all the relevant circumstances of a case (§ 96).

The Court's reasoning seems similar to that of the abolitionist movements of prostitution and the aforementioned recent ruling of the Italian Constitutional Court on prostitution. There are things, such as prostitution – but, says the ECtHR, also certain working conditions – which are unacceptable. If someone accepts them, then someone else is abusing of his or her vulnerable situation. Only in order to alleviate one's condition of vulnerability can such conditions be endured, so their acceptance is not free.

## **A disruptive conceptual tool**

The ECtHR's approach, together with the shift from an inherently personal to a situational conception of vulnerability, which also takes in the problems arising from the personal characteristics of the exploited, has consequences that end up calling into question the operation of the labour market as we know it in modernity. To realize this, we need only re-read the father of the liberalist conception, Adam Smith, and reconsider how, in his view, the market makes the rich richer and the poor less poor. We have to start with a famous passage from *An Inquiry into the Nature and the Causes of the Wealth of Nations*: "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages" (Smith, 1904, p. 16).

Goods are produced because "the greater part of men propose and wish to better their condition" (Smith, 1904, p. 324). The general utility is achieved through the greed of the rich and the desire of the poor to get out of their condition.

It is striking how the elaboration of the crime of trafficking makes Smith's "wish to better their condition" an engine of human progress to be viewed with suspicion. Already the report on trafficking in human beings presented by the UNODC in 2016 (UNODC, 2016, p. 41) pointed out that most traffickers, in order to attract victims, exploit the element of vulnerability most often consisting of their socio-economic condition and their hope for a better life. From this observation, the Report comes to a conclusion that sounds like a condemnation of the Smithian approach and therefore of the logic that has governed the labour market throughout modernity: "Criminals exploit the human desire to improve one's lot in life" (UNODC, 2016, p. 57).

The situational notion of vulnerability sweeps away the possibility, apparently guaranteed by the inherently personal notion, of limiting support interventions to people intrinsically in need of help, because they are objectively unable to stay in the labour market, the ancient deserving poor. We are basically back to the starting point, to Marshall's view of the need for an "architect of legitimate social inequality". Marshall was aware that entitlement to civil and political rights could not guarantee the substantive equality of citizens. He knew that social differences "are not established and defined by the laws [...], but emerge from the interplay of a variety of factors related to the institutions of property and education and the structure of the national economy" (Marshall, 1963, p. 89).

In essence, this conception of vulnerability seems to call into question the cornerstone of liberal theory: the idea that the contract is, à la Hayek, the device that allows one to achieve autonomy, to realize one's life project. It reminds us that, without substantial equality, contract is often an instrument of coercion and exploitation. These seemingly disruptive considerations had in fact already been made a century ago by Max Weber in his insightful, and not surprisingly forgotten, analysis of contractual freedom (Santoro, 2008, p. 29).

Weber points out that liberalism, as we have said since Locke, tends to present the development of contractual freedom "as signifying a decrease of constraint and an increase of individual freedom", but disputes that this operation "is formally correct". It reminds us that the attribution of "rights of freedom" is operated to give the individual "a certain sphere of freedom". By attributing a right of freedom, the legal system confers an autonomous "source of power". A person is not recognized a power that she already has, but is attributed a power "by virtue of the existence of the relative legal principle". A right of freedom often empowers "a hitherto entirely powerless person" (Weber, 1954, p. 167). It follows from this difference that when a legal system recognizes a right of freedom, its effect on overall freedom in a given social context can be assessed. However, this automatism is not applicable in the case of contractual freedom: when the spaces of free bargaining are widened, one must carefully evaluate, case by case, "the extent to which this trend has brought about an actual increase of the individual's freedom to shape the condition of his own life or the extent to which, on the contrary, life has become more stereotyped in spite, *or, perhaps, just because of this trend*" (Weber, 1954, p. 189 my emphasis). Weber points out, in fact, that, by committing fundamental spheres of people's lives to free bargaining, there is a real risk of eroding significant spheres of freedom. Although the increase in contractual freedom and legal empowerments may lead to a reduction in the sphere of coercion, such a reduction would only benefit those who are economically able to make use of these freedoms and empowerments (cf. Weber, 1954, p. 190).

It is no coincidence that at the origin of these reflections lie the dramatic conditions of early twentieth century workers. It is these that lead the German sociologist to stress that freedom of contract always allows "the more powerful party in the market, i.e., normally the employer, [...] to set the terms, to offer the job 'take it or leave it,' and, given the normally more pressing economic need of the worker, to impose his terms upon him". The real conditions of workers, Weber argues, imply that "the formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the

employment seeker even the slightest freedom in the determination of his own conditions of work”.<sup>21</sup> The sphere left to free bargaining allows the “statement *coactus voluit*” to deploy all its perverse effects “with peculiar force”. Because, in fact, this sphere rules out all forms of “authoritarian” intervention, “it is left to the ‘free’ discretion of the parties to accept the conditions imposed by those who are economically stronger by virtue of the legal guaranty of their property” (Weber, 1954, p. 189-90). Since Smith, we have entrusted the satisfaction of needs and the pursuit of interests to a method ultimately based, as Weber writes, on the *coactus voluit*. The production of goods and services works also because workers are forced to accept any working conditions offered to them, regardless of the humiliation, marginalization and exploitation that they entail. During the twentieth century the protection of the worker from the blackmail of necessity has been committed to collective bargaining and the strict regulation of intermediation in the labour world. But the Welfarist tradition has never questioned, as Weber somehow suggests, the Smithian approach that it is the “wish to better one’s condition” that drives the labour market. As Jacques Donzelot (1984, p. 156) remarked, it thought that protecting the party deemed weaker in a contractual relationship would act as a compensatory element of contract and limit the manoeuvring margins it allows. Situational vulnerability, instead, enables us to change our perspective and see that we need to circumscribe the conditions of contractual freedom. We need to prevent that the choice of improving one’s own conditions is made on the basis of conditions of vulnerability. Only in this way will we avoid that the acceptance of certain working conditions is a “wilful coercion”.

Stefano Rodotà (2015, p. 209), in his *Il diritto di avere diritti*, argued that the life a person builds as worth living can only be taken as such if everyone’s power of self-determination is expressed in a context in which those responsible for ensuring the necessary conditions of free and responsible decisions fully carry out their task. Only when the choice to submit to certain working conditions can be considered free will there be no conflict with personal dignity. On the contrary, dignity will have to be considered harmed when labour exploitation becomes the only viable choice in the face of a worse alternative.

Eva F. Kittay (2008 and 2009) compares the choice that migrant women have to make, the choice to abandon their affections, their family, their children, to look for a job that allows those who stay at home to have a ‘decent’ life, to “Sophie’s choice”. This metaphor refers to the protagonist of a famous novel (Styron, 1976) (on which an even more famous film was based<sup>22</sup>) who, deported to Auschwitz together with her two children, a boy and a girl, on arrival at the concentration camp was forced by a tormented Nazi officer to choose which of her two children to save, and decided to abandon the girl to death. The evocativeness of this metaphor aptly illustrates the choice made in a condition of vulnerability, a choice between two goods (including legal ones) that we consider equally fundamental (in the case of exploitation, the dignity of work and the life, sometimes even of one’s own family, earned from that work), but which we cannot guarantee at the same time: a choice that no one should ever be in a position to make.

<sup>21</sup> Weber adds that this “is prevented above all by the differences in the distribution of property as guaranteed by law”.

<sup>22</sup> *Sophie’s Choice* directed by Alan J. Pakula in 1982.

Perhaps it is time to say that “a democratic society”, to borrow the notion used in the ECtHR judgments to connote societies that comply with the European Convention on Human Rights, is a society in which no one should be forced to make this kind of choice.

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