

UNCOVERING THE HUMAN RIGHTS OF THE VULNERABLE SUBJECT AND CORRELATED STATE DUTIES UNDER LIBERALISM

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Abstract: Vulnerability is an emerging notion that has contributed to refine judgments made by regional human rights courts and thereby increase State accountability. Similarly, recent developments in the vulnerability theory pose interesting challenges to the core premises underlying liberalism and especially the notion of legal subjectivity, an arguably inaccurate portrayal of the real-life individual. Moreover, the vulnerability theory suggests a promising intertwining with the theoretical framework underpinning human rights. In this paper, I advocate for a paradigm shift from the traditional legal subject to the vulnerable subject in the liberal human rights order. To support my case, I argue that vulnerability's ethical-normative implications for the realm of human rights are twofold. First, vulnerability consists of an alternative conceptual underpinning for human rights theory, supplementing the so-called capabilities approach to human rights. Second, it can be used as a conceptual device for human rights adjudication by shedding light on how to better delineate the scope of State duties. I aim to demonstrate how vulnerability highlights the importance of ensuring the equality of opportunities and capabilities of individuals under the State's jurisdiction, widening State responsibility to encompass social conditions which allow vulnerability to be mitigated and human agency to flourish.

A. INTRODUCTION

Vulnerability is a concept that has recently gained momentum in scholarly research on ethics, law and human rights.¹ Recent vulnerability theories are a response arising from the illusory myth of the invulnerable, disembodied, and de-contextualised subject of classical liberal law.² According to the liberal paradigm of legal subjectivity, there is a rational, free-choosing, autonomous, and able-bodied person who supposedly has equal standing in society in relation to others.³ The critique instead affirms that the liberal subject ignores the normative relevance of embodied vulnerability and the ensuing inequalities deriving from distinct individual

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¹ Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Fineman and others (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law And Politics* (Ashgate 2013).

² Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', (2008) 20(1) *Yale Journal of Law and Feminism* 1; Martha Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251.

³ Anna Grear, 'Vulnerability, Advanced Global Capitalism and Co-Symptomatic Injustice: Locating the Vulnerable Subject' in Martha Fineman and others (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law And Politics* (Ashgate 2013).

embodied experiences.⁴ As a consequence of adopting the archetypical liberal subject as norm, vulnerability and dependency are confined to the private sphere, away from the public sphere, where legitimate State interference is accepted.⁵ In this context, situations of grave vulnerability that are tantamount to actual or imminent human rights violations are hidden by the veil of the private/public divide, hindering State action or justifying State inaction where responsiveness by the latter is necessary.⁶ To address this issue, the vulnerability theory is premised upon the acknowledgment that the reality of human embodiment entails dependence on the surrounding socio-material environment.⁷ Moreover, it proposes accumulation of resilience, that is, resources such as physical, human, social, and environmental assets which constitute sine qua non conditions for the individual to be able to confront the implications of vulnerability and exercise agency. Accumulating resilience would thus consist of gradually remedying situations of exacerbated vulnerability.⁸ I suggest herein that vulnerability is a concept that enables a promising twist towards a new theoretical framework. The proposed novelty is twofold: first, it presents a more accurate depiction of the complex reality involving human rights and corresponding State duties; second, it reveals the promotion of positive obligations and socio-economic rights.

In this paper, I argue that vulnerability has ethical-normative implications in the understanding of core values underlying human rights protection in two ways. First, vulnerability consists of a transversal concept which provides a starting point to an enhanced understanding of foundational principles in human rights theory, namely freedom, autonomy and capabilities.⁹ Second, vulnerability can be used as conceptual device for human rights adjudication,¹⁰ by shedding light on how to better delineate the scope of State duties. Intertwined with the capabilities approach to human rights,¹¹ vulnerability highlights the importance of ensuring equality of opportunities and capabilities of individuals under the State's jurisdiction. These arguments lead to an understanding of State responsibility as

⁴ *ibid* 44-46.

⁵ Martha Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha Fineman and others (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law And Politics* (Ashgate 2013) 17-18.

⁶ *ibid* 24-26.

⁷ Grear (n 3) 49-50.

⁸ Fineman (n 5) 19-22.

⁹ Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Catriona Mackenzie and others (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2013) 49-52.

¹⁰ Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) *IJCL* 1059.

¹¹ Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy & Public Affairs* 330-335.

comprising the promotion of social conditions to mitigate vulnerability and allow human agency to flourish.¹²

In this way, vulnerability as a conceptual underpinning for human rights theory, or as a heuristic device that assigns human rights obligations, sheds an ethical light on interpretation by the courts. It challenges common presuppositions and brings to light essential aspects of human nature that call for the reimagining of the liberal subject by embracing his bare vulnerability as a normatively relevant feature. In this sense, rather than only ‘fitting and justifying’ current practices,¹³ vulnerability analysis paves the way for a welcome improvement to present-day human rights interpretation under the traditional liberal matrix. It compels us to reconsider certain liberal assumptions, namely liberal subjectivity, formal equality, and Cartesian watertight binaries (including public/private and autonomy/dependency), by underscoring how these concepts and the oppositional values ascribed to each side of the binaries may obscure the ascertainment of rights and duties and institutionally ratify pre-existing social inequities.¹⁴

The problem surrounding the legal subject exists in the gap between this abstract archetype and real-life concrete individuals, whose humanity lies in their embodied vulnerability and dependency.¹⁵ By enclosing dependency in the private sphere, where State interference is not deemed legitimate, the law neglects to contemplate the most dependent and vulnerable subjects. This is of particular concern due to the abhorrent human rights violations that might occur in power relations, unravelling in the context of care, dependency and private relations between individuals – for example, domestic violence. To remedy this, I argue that the legal subject must be exposed through the lens of vulnerability: a disruptive, yet harmonising concept that invites a holistic approach towards human rights protection, eschewing the separation between the liberty-maximising autonomous individual and the socio-materiality upon which his embodied existence depends.¹⁶

Mindful of this prelude, I will firstly examine the notion of vulnerability as a theoretical foundation for human rights. I will then analyse vulnerability’s connection to certain philosophical concepts, namely freedom, autonomy, and agency.¹⁷ A section will then delineate the scope of the State’s ethical responsibility to address the effects of vulnerability

¹² Mackenzie (n 9) 55-57.

¹³ Ronald Dworkin, *Law’s Empire* (Hart 1988) 45.

¹⁴ Fineman (n 5) 16.

¹⁵ Costas Douzinas, *The End of Human Rights* (Hart 2000) 237.

¹⁶ Grear (n 3) 41.

¹⁷ James Griffin, *On Human Rights* (OUP 2008) 149-158.

by tackling the unfair social distribution of privileges and disadvantages.¹⁸ In this paper, I shall focus on the central role of the State in responding to vulnerability and human rights.¹⁹ I will further discuss how vulnerability supplements the capabilities approach to human rights,²⁰ the latter being an account of how to measure equality of rights. Finally, I will delve into the normative implications of adopting vulnerability as a heuristic device in the jurisprudence of regional human rights courts. I will contend that vulnerability sophisticates the human rights project insofar as it enables a context-sensitive and nuanced assessment of rights violations, ethically strengthening the argument in favour of justiciable socio-economic rights, positive obligations of the State, substantive equality, and social justice.

B. CRITIQUE OF IDEALISED ASSUMPTIONS IN LIBERAL LAW

In this section I will describe the critique posed against the liberal standpoint on legal subjectivity, formal equality and antidiscrimination law.²¹ I will further examine how adopting vulnerability as a conceptual pillar may have an edifying effect on human rights interpretation by uncovering structural patterns of oppression and societal disadvantage,²² inviting a more enhanced analysis of the ethical duties of the State in respecting and showing concern to individuals under an egalitarian ethos.²³

1. The Liberal Subject

Firstly, vulnerability theorists claim that liberal law fails to duly account for both vulnerability and its normative implications, due in particular to the idealised conceptualization of the legal subject as essentially invulnerable. It is contended that liberal theory neglects to endow socio-material needs with normative relevance by privatising relationships of care and ascribing them the status of secondary importance.²⁴ Moreover, it is argued that the liberal archetype is constructed upon the premises of liberty and autonomy, central tenets of contractarianism. Contractarianism posits that social relationships are built under the logic of consensual contractual relations whereby individuals intentionally enter into agreements of mutual rights and duties.²⁵ This model paves the way for the ascription of personal responsibility to

¹⁸ Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age' (1995) 212 1 *New Left Review* 70-74.

¹⁹ Fineman (n 2); Fineman (n 5).

²⁰ Sen (n 11) 330-335.

²¹ Fineman (n 5) 14.

²² *ibid* 20.

²³ Ronald Dworkin, *Taking Rights Seriously* (new edn, Bloomsbury 1997) 223.

²⁴ Fineman (n 5) 16.

²⁵ Jean-Jacques Rousseau, *The Social Contract* (new edn, Wordsworth 1998) 14-25.

individuals for their free choices under State-ensured realms of meritocratic achievement as well as encircling the minimal sphere of acceptable State intervention by drawing the private/public divide.²⁶ Overemphasis on individual autonomy is argued in order to hide the fact that free and autonomous individuals necessarily need access to social, institutional, and legal means to exercise their freedom. Moreover, it is emphasised that autonomy is not a given premise; it rather depends on an aggregate of resources to be internalised, developed and accumulated by individuals over time, building the necessary resilience to face adversities such as a lack of material resources to survive.²⁷ The critique continues on to assert that accumulation of resources and access to a dependable network of social relationships and institutions should not be regarded as a given premise for all, as individuals have distinct experiences and therefore, different degrees of accumulated resilience.²⁸

In sum, the critique submits that liberal law preaches formal equality as an assumption of the contractarian model of creating rights and duties,²⁹ a metaphorical abstraction that is adopted to prop up not only the ascription of responsibilities in interpersonal relations under consensual, contractual and proprietary juridical regimes, but also in the relationship between citizens and States.³⁰ According to this critique, the problem lies on the fact that the liberal paradigm ignores how subjects are unequally positioned in the intricate social fabric of power imbalance and unequal distribution of privilege and disadvantage.³¹ It argues that liberalism overvalues the rational free-choosing mind whilst forgetting to acknowledge how humans are dependent on their emotions, affective relations, and embodied needs.³² The vulnerability critique questions the goal of maximising liberty to the detriment of the need to reduce inequalities and mitigate human vulnerabilities.³³ Moreover, it emphasises how liberalism might entail unequal distribution of vulnerability-aggravating and resilience-fostering factors, thereby perpetuating cycles of marginalisation and exclusion that lead to human rights violations.³⁴ The sources of these violations are pointed out to be structural biases such as the

²⁶ John Stuart Mill, *On Liberty* (2nd edn, Boston Ticknor and Fields 1863) 144-170.

²⁷ Martha Fineman, 'Equality and Difference - The Restrained State' (2015) Emory Legal Studies Research Paper 15-348, 113 <<http://ssrn.com/abstract=2591689>> accessed 25 January 2016.

²⁸ Fineman (n 5) 19.

²⁹ Gear (n 3) 44-48.

³⁰ Rousseau (n 25) 14-25.

³¹ Gear (n 29).

³² *ibid* 47.

³³ Fineman (n 5) 13.

³⁴ Peroni and others (n 10) 1061-1062.

harms of misrecognition and mal-distribution,³⁵ which allegedly remain hidden in institutional and legal neutrality under liberalism.

2. Dichotomies

Secondly, the critique against liberal legal theory is targeted at the over-reliance placed upon dichotomous categories (for example, public/private, reason/emotion, mind/body, agency/dependency).³⁶ Binary constructions are not per se pernicious to legal analysis; in fact, the problem lies in how theorists engage with these categories, overvaluing one end of the continuum to the detriment of the other, reflecting and corroborating the uneven assignment of privileges and disadvantages in society.³⁷ Bearing this dual dynamic in mind, the critique implies that law perpetuates social inequalities by emphasising certain values whilst ignoring or devaluing others. With regard to the private/public divide in liberal theory, the presupposed independent, rational, disembodied, and unencumbered legal subject,³⁸ who actively partakes in the public life of the community whilst having his private sphere immunised against State interference, is considered to be the norm. By contrast, the exception is concomitantly constituted by those whose independence and autonomy are compromised, presented as the vulnerable 'other' against which the allegedly invulnerable one is created. According to this reasoning, as the protection of human rights law is targeted to the latter, the former is thus excluded from due protection, which is especially alarming for the most vulnerable individuals. As a result, the critique suggests changes in human rights law, particularly to accommodate and cater for the needs of the excluded.³⁹

This critique brings to the fore the issue of equality. Challenging the private/ public divide and endowing it with more fluidity and permeability may thus be a starting point to deconstruct other forms of embedded societal disadvantage that are concealed and ratified by liberal Cartesian dichotomies. The autonomy/dependency binary, which is intertwined with the public/private divide, must also be addressed, as real individuals are concomitantly autonomous and dependent to varying degrees. Liberal law fosters the value of autonomy whilst stigmatising and privatising dependency,⁴⁰ hiding the primordial nature of human embedded sociality and, as a consequence, veiling human dependency on the surrounding

³⁵ *ibid* 1063-1065.

³⁶ Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and Human Rights* (OUP 2004) 23-24.

³⁷ *ibid*.

³⁸ Douzinas (n 15) 106.

³⁹ Peroni and others (n 10) 1085.

⁴⁰ Fineman (n 28).

socio-materiality as a condition for resource accumulation that allows one's autonomy to be enjoyed.⁴¹ It follows from overvaluing autonomy as independence and devaluing dependency and care, that entitlements of socio-economic rights are also perceived below the acceptability threshold,⁴² being placed at a hierarchically inferior position in relation to civil and political rights. In both national and international courts, the primacy of civil and political rights is instantiated by their unobjectionable status of justiciable rights, whilst struggles still remain to find consensus over the justiciability boundaries of socio-economic rights.⁴³

3. Formal Equality

Particularly vulnerable subjects are the ones who are less resilient to negative externalities, ie they have accumulated less socio-material resources such as high levels of education, training for decently-paying jobs or social networks of support, having less influence in the public sphere and weaker protection in the private sphere. The high threshold for State intervention in the private sphere often allows unequal power relations to unfold in an unbridled way, leading to abuses and harm. In addition to unequal distribution of socio-material resources, other sources of vulnerability-aggravating circumstances come into play, such as insidious forms of discrimination on the basis of group membership (based on inter alia gender, race, poverty, nationality, age and religion). Antidiscrimination laws have been a welcome development in this regard, particularly recent efforts of positive action. Nevertheless, there is still margin to expand human rights protection towards including individuals who do not belong to any of the recognised 'special groups' deserving of protection, but face actual disadvantages that exacerbate their vulnerability to a high level of concern. Hence, more context-sensitive State responsiveness is required in human rights interpretation, supplementing antidiscrimination legal frameworks.

Formal equality entails, as a principle of social justice, sameness of treatment by law as a requirement for fairness.⁴⁴ In the case of differently placed individuals with respect to social privilege and disadvantage, formal equality may result in the indifference towards structural patterns of discrimination, oppression and marginalisation as well as mechanisms that perpetuate material inequality.⁴⁵ This might aggravate the disadvantaged position of some

⁴¹ *ibid.*

⁴² *ibid* 17.

⁴³ Colm O'Conneide, 'The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review' in Liora Lazarus and others (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014) 299-301.

⁴⁴ Sandra Fredman, 'Equality: a New Generation?' (2001) 30(2) *Industrial Law Journal* 154.

⁴⁵ Fineman (n 5) 14.

whilst contributing to sustaining the pre-existing privilege of others.⁴⁶ The ill-fitting model of formal equality may thus exacerbate significant de facto inequalities in society under the guise of prima facie formal equality. As a result, the situation of extremely vulnerable individuals may be worsened, burdening the disadvantaged by being complicit in furthering hidden social and institutional mechanisms of exclusion. Thus, the application of human rights under formal equality may lead to scenarios of increasing vulnerability of marginalised individuals or groups, heightening their susceptibility to different kinds of harms, including structural patterns of human rights violations.

Albeit acknowledging that antidiscrimination laws have played an extremely important role, it is argued that the status of special category deserving legal protection is only ascribed to certain groups on the basis of their identity, thus neglecting exclusionary social mechanisms that affect individuals based on their status.⁴⁷ In this respect, a problematic issue is labelling individuals into fixed watertight categories,⁴⁸ victimising members of protected groups and categorising them as deviant exceptions to an otherwise portrayed neutral and fair system, whilst concomitantly excluding those who are disadvantaged but do not fit any of the existing reified special groups meriting protection.⁴⁹ In addition to that, this remedial approach is said to cast a shadow upon the structural allocation of disadvantage and privilege, leaving the root causes of the problem intact.⁵⁰

4. Rethinking Legal Subjectivity

I concede that the above described critique seems to exaggerate by equating formal equality and liberal binaries to a much wider and complex range of theories that constitute the whole of liberalism, while neglecting for instance the different stance taken by liberal-egalitarianism.⁵¹ Liberal-egalitarian theories are concerned with equality of material resources and fair distribution of individual wellbeing.⁵² Although the critique proposed by the vulnerability theory is generally addressed to liberalism, it is reasonable to suggest that it is mainly libertarian ideas that are confronted here. Libertarianism, similarly to classical liberalism, views the right to private property as of paramount value, going so far as to equate liberty and property. It relies on the principle that ‘each agent has a right to maximum equal empirical negative liberty’,

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ On categorising, see Cressida Hayes, ‘Identity Politics’ *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/identity-politics/>> accessed 19 January 2016.

⁴⁹ Fineman (n 5) 15.

⁵⁰ Grear (n 3) 46.

⁵¹ Will Kymlicka, *Contemporary Political Philosophy: an Introduction* (2nd edn, OUP 2002) 53-101.

⁵² Jonathan Wolff, ‘Equality: the Recent History of an Idea’ (2007) 4(1) *Journal of Moral Philosophy* 125-136.

in that this liberty is set forth as absence of coercive interference from others, promoting a critical stance against the welfare state.⁵³ This line of reasoning seems to bear intimate identity with the defence of the private/public divide and an emphasis on liberty to the detriment of material equality concerns. Conversely liberalism encompasses, but is not limited to, the narrow viewpoint of libertarianism. The vulnerability theory critique however leads towards a finer focus on unveiling structural disadvantages and building a more inclusive and protective framework for human rights protection of marginalised individuals, strengthening the case for experimenting with different heuristics and alternative theories. This endeavour attempts to complement rather than reject existing liberal-egalitarian theories, as will be further demonstrated. Within the boundaries of this theoretical invitation, vulnerability theorists propose that the concept of vulnerability might clarify the courts' interpretation of human rights, and provide an alluring reassessment of the human rights project under a fairer notion of equality. This critique ultimately suggests the replacement of the idealised invulnerable subject with the vulnerable embodied subject, embracing all the ethical-normative implications that this concept implies.

C. VULNERABILITY, HUMAN RIGHTS AND SUBSTANTIVE EQUALITY

Substantive equality may be identified with four ideas: redistribution (seeking to redress social disadvantages); recognition (bolstering equal dignity and worth for all); participation (in the decision-making spheres of the political community); and transformation (in the sense of abandoning an idea of equality as conformity, while fostering a society that accommodates human diversity).⁵⁴ In addition to positive duties imposed on the State, enhancing welfare-state policies by setting redistribution of resources and goods illustrates State policy aimed at substantive equality. This also fulfils the goal of redistributive justice under an egalitarian mindset of reducing social inequalities.⁵⁵ To address the flaws pinpointed by the vulnerability critique, recent efforts to build a stronger concept of equality have culminated in positive obligations by the State such as affirmative action schemes, in which special protection groups are created by law in order to rectify social disadvantages and create actual opportunities for the excluded and bolster equality of outcomes in society.⁵⁶ Contentions arising from the clashing goals set forth by incrementing positive obligations of the State against the libertarian

⁵³ Peter Vallentyne, Bas Van der Vossen, 'Libertarianism', *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/libertarianism/>> accessed 19 January 2016.

⁵⁴ Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 25-33.

⁵⁵ Fredman (n 44) 165.

⁵⁶ *ibid* 154-157.

framework, imply the need for an alternative theoretical foundation that is capable of sustaining the move towards substantive equality.

Based on the premise that a philosophy of human rights is pluralistic, hence accommodating alternative grounding theories,⁵⁷ and that its ideology lies at the intersection of ideas and sentiments requiring a ‘distinctive ethical sensibility’,⁵⁸ I advocate for a theory of vulnerability that sheds an ethical light upon inequality while illuminating liberal theory and human rights interpretation. Bearing in mind the explicit State-centric approach of this paper, another theoretical starting point is the Dworkinian notion of rights as aspects pertaining to the equal status of individuals inside a moral community, and thus demanding equal respect and concern by the State.⁵⁹ Given these assumptions, I underscore that this undertaking does not intend to move away from liberalism, but is aimed at refining the latter theoretical framework by evaluating recent critical and socio-legal advancements on vulnerability in human rights theory and practice. Vulnerability reasoning brings to the fore structural mechanisms of inequality that are implicitly condoned by law. This approach specifically deals with social exclusion by virtue of structural misrecognition of certain individuals and their rights, and maldistribution of resources,⁶⁰ which represent hindrances to substantive equality and social justice.⁶¹ Thus, vulnerability strengthens the case in favour of substantive equality under the goal of tackling social exclusion and marginalisation, which remain hidden beneath present-day institutions based on liberal subjectivity, formal equality and strict liberal binaries.

1. The Vulnerable Subject

It is imperative to draw a distinction between traditional notions of vulnerability and the concept of vulnerability deriving from the ‘vulnerability thesis’,⁶² for which I advocate herein. Traditional notions of vulnerability in social policy offer an over-simplistic viewpoint in their depiction of reality. These fit within the misleading either/or rationale that guides binary distinctions in law and present day antidiscrimination policies under formal equality. Under the traditional approach, vulnerable individuals are victimised as part of a particular disadvantaged group, with a high risk of suffering harm and little capacity to protect their own interests, while the rest of the population is portrayed as virtually invulnerable.⁶³ Moreover, the only salient

⁵⁷ John Tasioulas, ‘Towards a Philosophy of Human Rights’ (2012) 65 *Current Legal Problems* 29.

⁵⁸ *ibid* 4.

⁵⁹ Dworkin (n 23).

⁶⁰ Fraser (n 18).

⁶¹ Peroni and others (n 10) 1063-1065.

⁶² Grear (n 3) 42-43.

⁶³ Mackenzie (n 9) 34.

connotation of vulnerability in its traditional sense is negative, associated with helplessness, victimhood, and passivity as well as opposed to the positive value of autonomy.⁶⁴ As a result of this vulnerable/invulnerable categorisation, State responsiveness may unfold in dangerously paternalistic or coercive ways.⁶⁵

An ethics of vulnerability must necessarily transcend liberal stereotypes. Instead of setting vulnerable individuals as a separate category, it presents universality as embedded in the corporeal vulnerability shared by humanity, asserting that all human beings are vulnerable. According to the vulnerability theory, we are vulnerable by virtue of our embodiment, which leaves us susceptible to different kinds of harms. Furthermore, vulnerability underscores common susceptibility to pain and suffering as a compelling reason to create a social and institutional apparatus aimed at reducing harms in the form of systems of human rights protection which seek to increase collective human security.⁶⁶ As States are often the primary source of systematic human rights abuses, they are also paradigmatic duty-holders with an obligation to respect and protect human rights.⁶⁷ Thus, it becomes desirable to enhance State responsiveness to vulnerability.⁶⁸ This may occur by increasing its duties and enlarging the scope of its human rights obligations, especially (though not solely) with respect to socio-economic rights,⁶⁹ the latter remaining in philosophical and juridical debates regarding their status as compared to civil and political rights.⁷⁰

The idea of replacing the liberal legal subject with the vulnerable one means challenging the assumption that we are a priori equally positioned and that thereby law should treat us as *prima facie* equals. This endeavour also challenges the extent to which a liberty-maximising goal prevails over substantive equality in liberal democracies, a claim made by vulnerability theorists.⁷¹ Specifically in the realm of legal analysis and human rights interpretation, embracing the concept of vulnerability has three relevant purposes. First, it fulfils a heuristic role, bringing to the fore aspects of normative relevance that remain largely hidden or underestimated (such as societal and institutional structures that perpetuate unequal patterns of privilege and disadvantage), compromising the equal fulfillment of rights and, in many cases, worsening pre-existing inequalities. Second, it elucidates the reexamination of

⁶⁴ Timmer (n 1) 149.

⁶⁵ Mackenzie (n 9) 47-49.

⁶⁶ Bryan Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press 2006) 28.

⁶⁷ *ibid* 33.

⁶⁸ Fineman (n 5) 24-26.

⁶⁹ Turner (n 66) 36-37.

⁷⁰ Sen (n 11) 318-320; Conor Gearty and others, *Debating Social Rights* (Hart 2011) 57-64.

⁷¹ Fineman (n 5) 13.

foundational concepts to theories of rights and social justice, namely autonomy, equality, capabilities, and human rights. Third, the conceptualisation of the rights-bearer as a vulnerable subject, results in two normative implications regarding the State's ethical responsibility. On the one hand, differently situated individuals from a vulnerability standpoint entail distinct moral obligations by the State, as increased vulnerability might be deemed as decisive for some claims over others.⁷² On the other hand, the overall scope of ethical duties by the State to protect human rights is subject to a more complex and context-sensitive analysis, that considers structural patterns of social injustice and inequality which permeate legal and societal institutions, and bolsters positive obligations by the State and the enforcement of socio-economic rights as linked indissolubly to civil and political rights under a substantive egalitarian ethos.⁷³

2. *Vulnerability as transversal concept*

Human vulnerability stems from our embodied existence, which creates a range of needs, whilst making us susceptible to different kinds of physical, emotional, or psychological harms.⁷⁴ Harm may stem from different sources ranging from disease and disability to violence, poverty, discrimination, financial crisis or environmental disaster, and leads to social exclusion and precarious states of deprivation of socio-economic resources, possibly culminating in health deterioration and early death.⁷⁵ It seems intuitive that our human needs combined with our natural susceptibility to injury or harm logically entail our dependence on means and on societal support to fulfil them (ie resources, relationships and legal and social institutions that provide a minimum threshold of security).⁷⁶ Thus, it is not a stretch to assert that because we are vulnerable to others, two ethical obligations ensue in society: on the one hand, the obligation not to commit abuse or exploitation by taking advantage of one's vulnerability; on the other, the duty to cater for the needs of others, especially those in situations of severe vulnerability who are either suffering unjustifiably grave harms or in danger of facing predicaments which derive from deprivation of resources and care.⁷⁷ Moreover, aggravated vulnerability leads to loss of agency, meaning increased dependency. This may prevent individuals from leading a thriving life with autonomy, liberty, and freedom, important liberal values that are nonetheless subject to different interpretations by virtue of their open-

⁷² Timmer (n 1) 163-164.

⁷³ *ibid* 165-167.

⁷⁴ Turner (n 66) 25-29.

⁷⁵ Grear (n 3) 49-52.

⁷⁶ Fineman (n 5) 21-24.

⁷⁷ Mackenzie (n 9) 41.

endedness. In this context, two salient features of vulnerability stand out as constituting an apparent paradox: at one end, its universality and its enduring nature, as all human beings are vulnerable to suffering harm; on the other end, a particularity of ways in which individuals experience vulnerability, varying in inversely proportionate intensity to the resilience one has accumulated throughout life.⁷⁸ One example of accumulated resilience is a person who has not suffered undernourishment and continuously enjoyed health-related resources throughout life, becoming a healthy adult. Another illustration is an individual with more educational opportunities that as a consequence had an expanded range of work prospects.

The State, representing organised political society as a moral community, is responsible for tackling domination and exploitation and mitigating vulnerability as to avoid grave human rights violations. Furthermore, the State also ought to foster resilience and agency to enable individuals to thrive and lead meaningful and dignified lives. It is vital to notice that how the State fulfils its duty of ensuring human rights is as ethically relevant as bringing about the fulfillment itself, in that an egalitarian ethos must be followed.⁷⁹ In this sense, unequal distribution of resilience-fostering resources must be prevented, to avoid the discriminatory allocation of elements which increase the vulnerability of certain individuals, placing a disproportionate burden and institutionally ratifying social patterns of privilege and disadvantage.

Adopting as a starting point human rights as ‘ethical claims’ (which entitle individuals to a treatment conveying ‘equal respect and concern’ by the State)⁸⁰ vulnerability might act as the conceptual cornerstone of an intellectually appealing human rights theory that displays the required ethical sensibility to engage in such a hard endeavour.⁸¹ To this end, I argue that the capability-based theory is suited to supply theoretical bulkiness to this theoretical human rights framework that sits at the intersection of substantive equality and social justice.

a) Vulnerability and its dual ambivalence

Vulnerability is a multifaceted phenomenon which shelters inherent conceptual ambivalences. If on the one hand, vulnerability exists as a constant and universal condition viscerally inherent in human beings, on the other, it can be experienced in particular ways, as some individuals have their vulnerability increased while others have theirs mitigated due to the power dynamic inserted within social, legal and institutional frameworks.⁸² The universal/particular dualistic

⁷⁸ Fineman (n 5) 13.

⁷⁹ Erinn Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* (Routledge 2014) 4.

⁸⁰ Sen (n 11) 319-320; Dworkin (n 23).

⁸¹ Tasioulas (n 57) 4.

⁸² Gilson (n 79) 32-38.

aspects embedded in the notion of vulnerability are dialectically reconcilable. On the one hand, universality relates to the universal human condition of dependence on the surrounding sociality and materiality required for sustaining human life, a built-in need imbued from birth and thus, generally and equally possessed by all individuals. On the other hand, particularity refers to the diversity of human experience, in light of the interaction of embodied beings with social, legal and other normative institutions that selectively ascribe different values to distinct embodied lives, construing social privilege and thereby often corroborating societal structures of inequality.⁸³ In this context, specific forms of harm may affect in a disproportionate manner certain individuals compared to others who benefit from extant institutional structures and norms.

The negative or positive consequences deriving from vulnerability constitute the second indissoluble ambiguity. Vulnerability is intertwined with the body because the latter is not only the mouldable surface on which social meanings are inscribed,⁸⁴ but it is also what allows humans to be dependent upon others, susceptible to different forms of harm as well as to respond to the world in different ways by feelings of joy, pleasure, suffering, rage, and so forth, which derive from the connectedness of social interdependency.⁸⁵ Although vulnerability is undeniably a permanent condition that allows humans to have meaningful relationships and develop affection, empathy, intimacy, and care, exacerbated vulnerability deriving from social inequality and structural patterns of marginalisation may lead to embodied harms, grave suffering, deprivation, and as a result loss of agency and autonomy as well as serious human rights violations. Lack of recognition (a flawed perception by society that all lives are equally valuable) combined to inequality of resilience-sustaining resources may be seen as foundations of selective exacerbated vulnerability.⁸⁶ What I mean is that social inequalities, exemplified by discrimination and poverty, stem both from a perception in its deviant form of misrecognition as well as unequal material distribution, and call for the State to address the root causes of these issues which might lead to systematic breaches of human rights.

b) Vulnerability as magnifying ethical lens

The normative implications arising from vulnerability can be better perceived by acknowledging that vulnerable subjects are essentially precarious lives. Vulnerable subjects ought to be regarded as precarious lives insofar as life is imbued with fragility and destined

⁸³ Judith Butler, *Frames of War: When is Life Grievable?* (Verso 2009) 13-20.

⁸⁴ Judith Butler, *Gender Trouble* (2nd edn, Routledge 1990) 12-18.

⁸⁵ Butler (n 84) 3.

⁸⁶ *ibid* 25.

ultimately to death, either due to wilful action or fortuitous cause.⁸⁷ ‘Precariousness’ is therefore the specific vulnerability relating to the frailty of life in light of its inescapable ultimate destruction.⁸⁸ Precariousness may be minimised or maximised according to normative and institutional settings in which the embodied existence unravels,⁸⁹ in that social and political forces create normative constructions of the subject entailing different degrees of recognition as precarious lives. Individuals hence experience different degrees of precariousness by virtue of discrepant levels of societal recognition. If precariousness is perceived differently and valued in different subjects, this means that the State does not demonstrate ‘equal respect and concern’ for equally precarious lives.⁹⁰ Recognising equally vulnerable lives as precarious implies acknowledging their loss as equally grievable and their sustaining as equally worthwhile, which suggests the normative obligation of fostering their ‘persistence and flourishing’.⁹¹ This is deeply conditioned by availability of social and material resources and thus harmed by its unequal distribution.

Although no reasonable ethical imperative would suggest for instance that the right to life entitles to protection against mortality, recognising precariousness as normatively relevant is extremely important. Moreover, acknowledging the obligation to minimise vulnerability under an egalitarian ethos, while taking into account the need to mitigate differential allocation of aggravated forms of vulnerability is of equal importance.⁹² Reducing precariousness and rectifying its arbitrary allocation among embodied beings thus become ethical and normative obligations that favour increased societal responsiveness to vulnerability together with a conception of human beings as essentially social, relational, and interdependent. In addition to that, the ability to exercise freedom and agency cannot be conceived apart from socio-material reality, which strengthens the normative stance of socio-economic rights such as ‘food, shelter and other conditions for persisting and flourishing’.⁹³ This endeavour entails addressing vulnerability by reformulating social and institutional mechanisms that enable and impact modes of thriving, by adopting a notion of State responsiveness that comprises enlarged responsibility to implement concrete measures. Taking socio-economic rights seriously involves strengthening human rights adjudication to take them into account, broadening the

⁸⁷ *ibid* 22-23; Gilson (n 79) 3.

⁸⁸ Butler (n 84) 13.

⁸⁹ *ibid* 23.

⁹⁰ Dworkin (n 23).

⁹¹ Butler (n 84) 2.

⁹² Gilson (n 79) 42-50.

⁹³ Butler (n 84) 21-23.

scope of moral duties owed by the State with regard to ‘positive social obligations of food, shelter, medical care, education, mobility and expression’.⁹⁴

c) Vulnerability, relational autonomy and agency

Autonomy is often conceived as an *erga omnes* freedom, a liberty to choose independently, free from constraints deriving from intervention by others or the State.⁹⁵ By contrast, dependency is associated with a devalued notion of caretaking and stigmatised as pertinent solely to the private sphere of the family, beyond the acceptability threshold for State interference. As a result, embracing these oppositional notions equates, in principle, to refuting just entitlements to socio-economic provisions by the State.⁹⁶ Notwithstanding, vulnerability is essentially a relational notion,⁹⁷ which harnesses the concept of ‘relational autonomy’: a different notion of autonomy that harmonises with the reality of dependency.⁹⁸ In this context, relational autonomy is the result of rethinking positive and negative values ascribed to autonomy and dependency in liberal theory.

According to the relational approach, autonomy mainly presupposes the following premises. First, eschewal of individualistic approaches to autonomy, such as upholding the prevalence of negative liberties and maximising as utmost priority the minimally-constrained individual freedom of choice. Second, recognising the indispensable value of social interdependency in the development of autonomy-related competencies.⁹⁹ Autonomy stems from a permanent socially-driven process, ie social relationships both allow for its flourishing and impose boundaries on its manifestation and subsequent consolidation into one’s individual autonomous identity. Hinging on vulnerability as the universal factor enabling one’s relationships with others, relational autonomy not only comprises individual capacity, but also social status. The status aspect of autonomy is constituted relationally by means of the recognition ascribed to the individual in the family, at work, by social and legal institutions and by the State. On the contrary, misrecognition negatively impacts self-esteem and self-respect and hinders one’s process of developing autonomy-related capacity, thereby compromising one’s ability to achieve satisfactory levels of socio-material conditions that allow the exercise of autonomy.¹⁰⁰ Insidious forms of misrecognition such as historical discrimination may lead

⁹⁴ *ibid.*

⁹⁵ Mill (n 26).

⁹⁶ Fineman (n 5) 17.

⁹⁷ Peroni and others (n 10) 1059-1060.

⁹⁸ Mackenzie (n 9) 42-48.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

not only to the undermining of autonomy but also to intensifying vulnerability to exploitation and abuse, creating oppressive patterns of social relationships.

Not only is it reasonable to assert that vulnerability underpins relational autonomy but it can be suggested that a relational approach to autonomy is the central tenet upon which to carry out vulnerability-targeted State action. Thus, addressing vulnerability through the lens of relational autonomy calls upon the promotion of agency-enabling socio-economic and institutional environments in which all vulnerable beings may equally flourish according to their particular views of what constitutes a meaningful life. In this context, a simple and alluring framework of ethical State duties emerges, involving the duties of mitigating vulnerability by countering context-proneness to harm, suffering and loss of agency, as well as providing socio-material resources to allow for autonomy-hinged resilience, so as to allow individuals to cope with their particular experiences of vulnerability.

In order to engage in a constructive account of vulnerability and State responsiveness, the notion of relational autonomy and a robust egalitarian ethos play important roles. One may infer that, by intertwining vulnerability and relational autonomy, the State's response to vulnerability involves an agency-fostering stance that commits to resilience-building action with a view to mitigating inherent vulnerabilities. In addition, due to issues of misrecognition such as prejudice, discrimination and social exclusion, the State must commit to concomitantly reduce the unequal burden placed on disadvantaged individuals due to vulnerabilities resulting from social, legal and political normative and institutional inequalities. Therefore, regarding the ethical duties of the State, responsibility for protecting and promoting fundamental rights under substantive equality becomes salient.¹⁰¹ In this regard, the capabilities theory of rights seems suited to chime with vulnerability as a justificatory basis for human rights protection and promotion in liberal democracies, providing an account of equality of capabilities as substantive equality.¹⁰² By the same token, I argue that vulnerability provides a conceptual underpinning that supplements the capabilities theory.

3. Vulnerability, capabilities and freedom

The capabilities theory posits that individuals exercise substantive freedom by developing capabilities to achieve functionings: ie to be self-determined human beings.¹⁰³ Capabilities are hence a measurement of the scope of free choices within a range of possible functionings. Thus,

¹⁰¹ Peroni and others (n 10) 1074-1075.

¹⁰² Mackenzie (n 9) 49-50.

¹⁰³ Martha Nussbaum, *Creating Capabilities: the Human Development Approach* (Harvard University Press 2011) 24-25.

capabilities indicate the extent of choice on what and who to be in the pursuit of a valuable life.¹⁰⁴ The capabilities theory was developed as a comparator for social justice, in an attempt to offer a more sophisticated and complex understanding of human wellbeing and life quality than single-metric indicators such as income.¹⁰⁵ Pursuant to this theory, ‘basic capabilities’ refer to primordial innate characteristics, which may evolve to become ‘internal capabilities’ by development of emotional and intellectual skills through external stimuli and interpersonal exchanges with the surrounding socio-material environment. ‘Combined capabilities’ consist of the measurement of the actual freedoms one possesses, which can be inferred by evaluating the entire set of available choices with respect to how to act and build one’s identity under surrounding social, economic, legal and political circumstances.

Capabilities may be regarded as metrics for substantive equality that focus on the width of human freedom to choose ‘functionings’ to the extent that they are actually achieved through the exercise of human agency under a notion of human development, an essentially dynamic and relational process.¹⁰⁶ Hence, capabilities reasoning shifts the focus from means to achieve functionings (ie material resources), to capabilities that realistically measure the actual opportunities available to each individual. In this way, it presents not only a measurement of substantive equality but also a more accurate assessment of societal privileges and disadvantages.¹⁰⁷

Furthermore, the capability-based approach to human rights is premised upon freedoms as descriptive aspects of the human condition, ie distinctive human features from which a prescriptive human rights theory may stem.¹⁰⁸ The theory further posits that the particular freedoms that underlie human rights have to meet two thresholds to be considered as such: the significance threshold and the social impact threshold.¹⁰⁹ First, these freedoms must attain a satisfactory degree of significance in relation to other freedoms, which justifies giving them normative priority. Second, these freedoms must meet the social impact threshold (ie their capacity to be affected by society whether in the form of curtailment or protection), which would justify endowing these freedoms of normative salience by creating human rights as ethical claims to protect them.

¹⁰⁴ *ibid* 18-20.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid* 20-25.

¹⁰⁷ Sen (n 11) 333.

¹⁰⁸ *ibid* 328.

¹⁰⁹ *ibid* 329.

In this context, the capabilities sphere would reflect the scope of freedom one possesses regarding one's actual opportunities. Under this framework, human rights represent ethical articulations to ensure that a minimum threshold of fundamental freedoms are equally enjoyed by all individuals. Central capabilities may be posited as both essential freedoms and premises for a thriving and dignified existence – a threshold level which should be guaranteed to all individuals by a moral political community.¹¹⁰ Defining precisely which central capabilities might mirror fundamental freedoms and corresponding human rights might be contentious. Nevertheless, the general idea that capabilities are crucial for ensuring agency in the form of relational autonomy emphasises the important role of socio-material conditions and social relationships. In this sense, it is reasonable to suggest that ensuring a threshold level of central capabilities for all persons is not only an ethical duty of the State, but also a prerequisite for guaranteeing coherence within a human rights-respecting culture.

It is noteworthy that the notion of vulnerability begs for an egalitarian ethos to be applied in relation to its sources. In this sense, equality is an important principle to bear in mind when suggesting the attenuation of vulnerability that is worsened by structural problems such as misrecognition or mal-distribution. These vulnerability-aggravating issues underscore how actual opportunities and freedoms might be encumbered by social inequalities, ultimately leading to disregard of such freedoms and corresponding human rights violations.

Given this overview, I argue that the convergences between vulnerability and capability theories stem from their common understanding of human beings as subjects who build resilience over time, in a context-sensitive approach that rejects the understanding of the liberal legal subject as a priori invulnerable. It follows that both of these theories endorse eschewing the simplistic idea that finding human rights violations is merely capturing one situational frame in time and disregarding the broader context and structural elements. As a result, both vulnerability and capabilities theories tip the scales in favour of a context-sensitive approach to human rights interpretation.¹¹¹

I further argue that vulnerability supplements the capabilities approach to human rights. First, vulnerability offers a more convincing conceptual grounding to the foundational universality that underlies human rights theory. In line with a consequence-based approach, Amartya Sen posits that the universality of human rights is justified by the widespread acceptability of human rights discourse across the globe, which supposedly points to its

¹¹⁰ Nussbaum (n 105) 32-34.

¹¹¹ Mackenzie (n 9) 39, 51-53.

universal character. Under this reasoning, resistance to uncurbed democratic debates involving divergent viewpoints is pinpointed as evidence of universality.¹¹² Conversely, I argue that vulnerability consists in a more compelling conceptual basis to the universality of human rights. The vulnerability theory places focus on an undeniable truth about human nature: our inevitably shared material embodiment.¹¹³ Rather than focusing on how the idea has managed to resist through time and across different geographical locations, vulnerability is better-suited to justify universality insofar as its underlying rationale is both understandable by emotional empathy as well as intelligible by sensible rationality.

Second, Sen advocates for human rights duties as reasons for action that do not require a high threshold of concreteness, ie duties that may plausibly be less concrete than performing a specific action. His theory submits that these duties might consist in a more vaguely circumscribed responsibility to take sensible steps to address the situation. This would entail either avoiding or redressing the human rights breach, whilst assessing other relevant priorities which may vary from case to case.¹¹⁴ The high level of abstractness of these obligations may be contended as an argument against them, as it would place a burden on the duty-bearer; nonetheless, endowing State duties with more concreteness might be attained through human rights practice, for example context-sensitive interpretation by human rights courts through heuristics such as vulnerability. This position disputes the argument that the alleged indeterminacy of socio-economic rights and correlated duties weakens their legalisation and justiciability,¹¹⁵ which is convergent with the human rights courts' practice on vulnerability. State duties with respect to socio-economic rights and positive obligations might not be as straightforward as those corresponding to civil and political rights and negative obligations of non-interference. Nevertheless, the mere acknowledgment of an ethical imperative calling for State responsibility to actively respond to vulnerability and human rights, is an important step towards strengthening the ethical and juridical framework for State accountability. In this sense, State responsiveness should generally address the necessity of an equal minimum threshold of material opportunities in a capability-developing environment for all individuals.

Sen also acknowledges that human rights duties may arise regardless of any causality from the duty-bearer's past action regarding the rights infringement, focusing rather on the potentiality of the duty-bearer's future action to effectively contribute to the protection of

¹¹² Sen (n 11) 353-355.

¹¹³ Turner (n 66) 1-3.

¹¹⁴ Sen (n 11) 339.

¹¹⁵ Virginia Mantouvalou, 'In Support of Legalisation' in Conor Gearty and others, *Debating Social Rights* (Hart 2011) 107.

human rights.¹¹⁶ This ethical starting point of duty-ascertainment in relation to human rights chimes with the call for State responsiveness to address human vulnerability, as the responsibility-assignment shifts from those who have provoked harm to those who are in a position to effectively prevent or redress it. In the case of human rights violations where ascribing individual responsibility is a hard task (for example cases involving social injustices such as misrecognition and maldistribution whose responsibility is diluted within the social corpus), the State is advantageously positioned to carry out positive interventions.

4. *State responsiveness to vulnerability*

Given the capability and vulnerability-underpinned framework, the ethical framework of State responsibility to human rights is enhanced in two ways. First, this framework favours a more holistic approach to human rights interpretation by blurring the divide between civil and political, and socio-economic rights. In this way, it bolsters the idea of all human rights as intrinsically interdependent insofar as it evidences the fact that one's liberties, freedoms and even the right to life cannot be separated from one's ability to enjoy social and economic conditions to survive and thrive. Developing capabilities and achieving meaningful functionings (ie having one's vulnerability mitigated and one's agency fostered), necessarily require that a threshold of socio-economic rights is guaranteed. Second, this framework encourages the inclusion of positive obligations in the State sphere of human rights duties by guiding the State's efforts towards beneficial non-paternalistic intervention, disrupting the private/public divide and effectively responding to the unequal distribution of vulnerability and resilience factors dictated by the pace of social inequalities and injustices.

Acknowledging the dual ambivalence of the concept of vulnerability means exploring a non-libertarian notion of agency, freedom and autonomy as congruent with dependency and care. Contrary to notions of group vulnerability which ascribe them the negative connotations of victimhood, passivity and pathology, an ethics of vulnerability paves the way for a more accurate depiction of human nature in its vulnerable ambivalence. As a consequence, it enhances the delimitation of the State duty to respond to the needs of human vulnerability and fostering agency as relational autonomy, whilst avoiding the pitfalls of a simplistic notion of vulnerability that leads either to paternalistic or coercive interventions.¹¹⁷

¹¹⁶ Sen (n 11) 338-342.

¹¹⁷ Mackenzie (n 9) 3.

D. STATE RESPONSES TO VULNERABILITY: HUMAN RIGHTS DUTIES

With the aim of building a strong theoretical framework of human rights obligations by the State, two justificatory theories will be set forth as starting point. An evaluation will follow on the pitfalls to be avoided and the duties to be comprised by this framework. Finally, I will conclude with a critical assessment of the concept of vulnerability as adopted by the European and the Inter-American human rights courts.

1. Ethical Justifications

a) Convergences of an ethics of vulnerability and an ethics of needs

An ethics of needs supports a justification that a perception of vulnerability is intimately connected with the emergence of correlated State duties.¹¹⁸ The justification of this ethics of needs is two-pronged. First, vulnerability is associated to its negative aspect of susceptibility to harm. In order to prevent the occurrence of harm, a moral obligation arises of protecting individuals from such threats by attending to their basic needs. Second, vulnerability derives from human nature and hence gives rise to fundamental needs. These fundamental needs consist in the source of the moral obligation to care, provided that the reality of interdependency logically entails that these needs cannot be fulfilled without having others to cater for them. Catering for one's needs through an anti-paternalistic standpoint may be conceptualised as 'dignifying care', having as central aim to restore one's agency by supporting the achievement of the person's 'self-determined ends'.¹¹⁹ This ethical starting point provides guidance in prescribing the scope of moral obligations owed by the State in addressing vulnerability, highlighting the fundamental importance of the duty to care with the ultimate purpose of restoring and advancing agency. This chimes with the proposition of a vulnerability-mitigating and resilience-building State duty, under a relational notion of autonomy that duly accounts for the reality of dependency, while considering that accumulation of resilience varies according to particular experiences of vulnerability that shape societal recognition and individual capacity to exercise agency.

b) Vulnerability-triggered empathy

Mitigating vulnerability to tackle the negative effects of its aggravation in particular cases must be carried out concomitantly with the commitment to foster its positive effects of inclusion in a community and in social, institutional and legal networks. The ethical blueprint of this

¹¹⁸ Catriona Mackenzie and others, 'What Is Vulnerability, and Why Does It Matter for Moral Theory?' in Catriona Mackenzie and others (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2013) 13-14.

¹¹⁹ *ibid.*

reasoning is to annihilate unfair entrenched social inequalities and promote human agency under an egalitarian ethos that fosters equal concern and protection for all human lives. The normative concern of tackling and preventing vulnerability-deriving harms surfaces insofar as vulnerability also allows us to refine human sensitivity in the form of empathy. In this way, we are able to build the conviction that it is ethically unacceptable that individuals, whose particular experience of aggravated vulnerability is owed to social inequalities, suffer extreme disadvantages, loss of agency and deprivation of necessary resources to fulfil essential needs.

It is argued that the essential moral core of the human rights discourse lies in the need to recognise other human beings as equally worthy and deserving not only of respect and concern but also care.¹²⁰ Simply bringing up vulnerability and asking one to reflect upon it invites an automatic reaction. The invitation elicits the memory of a person in a vulnerable state whose agency cannot be restored independently from other people, urgently demanding remedial action. If someone living in Europe were to think about a vulnerable person, his mind would plausibly call forth the image of a refugee, asylum-seeker, or a member of the Roma minority; if a person living in Latin America were given the same task, his memory would possibly elicit the image of a member of a land-dispossessed indigenous tribe or a poor homeless person living in the streets. The feeling of empathy and apprehension of moral wrongness emerging in both cases can be inferred as similar and constituting, intuitively and rationally, a reason for societal or State action. One must nonetheless be wary of this hypothetical illustration. Different vulnerability-aggravating factors contribute to the creation of distinct particularly vulnerable groups across the globe. Notwithstanding the stigma that the very acknowledgment of certain groups as vulnerable creates, the identification of sources increasing the vulnerability of certain individuals in particular contexts is useful as far as it points to patterns of increased vulnerability and possibly human rights breaches. In this sense, it contributes to identity politics and human rights activism in different regions.

In this context, I argue that the positive aspect of vulnerability, relating to human connectedness and the ability to build meaningful relationships, enables the triggering of empathy. This contributes not only to an intelligible call for action but also to a compelling normative claim for mitigating the harm-enabling aspect of vulnerability, particularly in situations that may result in grave human rights violation. This justificatory reason for responding to vulnerability has as underlying rationale: the combination of compassionate feeling of indignation with rational apprehension of the fact that there exists a structurally-

¹²⁰ Turner (n 66) 41.

endorsed breach in the core human value of equality. Due to our acknowledgment of vulnerability and precariousness to the socio-materiality around us, we can relate, empathetically, to the predicament of those who have their vulnerability unfairly increased and their agency compromised, being more susceptible to facing exploitation and abuse (for example being enslaved in the context of extreme economic vulnerability amounting to poverty and deprivation, suffering physical violence due to the vulnerable status of being a member of a historically-discriminated group, suffering domestic violence due to economic and social vulnerabilities arising from a gender-oppressive environment). These situations characterise paradigmatic cases of human rights violations through the lens of vulnerability. If the State has a moral duty to take human rights seriously by providing equal concern to individuals, preventing and protecting particularly vulnerable individuals from harm and structural patterns of oppression is of utmost importance. This entails mitigating vulnerability by providing care and fostering agency, as well as tackling the unequal allocation of vulnerability by remedying pre-existing inequalities of opportunities.

2. State responsibility for the human rights of the vulnerable subject

In light of the vulnerability-based justifications for State responsibility, I argue that vulnerability shores up the idea of a universal condition shared by humanity and serves as conceptual underpinning for a more robust analysis of State duties. Furthermore, refining the notion of the liberal subject in law through the ‘vulnerable subject’ notion sheds an alluring light onto human rights interpretation, by endowing theory with a more realistic apprehension of the human being than the archetypical legal subject.¹²¹

a) Avoiding paternalistic and coercive State Interventions

The notion of vulnerability put forward in this paper brings to the fore a more complex and holistic perspective on human beings, human rights, and State duties, hence rejecting the traditional notion of vulnerability, which merely categorises individuals and groups. Thus, it is necessary to be wary and not fall prey of the pitfall of adopting vulnerability as a stigmatising label, which ends up justifying paternalistic interferences by the State. By paternalism I mean a ‘pathogenic source of vulnerability’,¹²² namely State action that aggravates pre-existing vulnerabilities through governmental interventions which fail to recognise vulnerable individuals as autonomous agents and neglect to prioritize the goal of fostering their autonomy, focusing instead on minimising risks to society. Paternalistic interferences categorise

¹²¹ Timmer (n 1) 148.

¹²² Mackenzie (n 9) 47-49.

individuals and restrict them rather than promoting their autonomy, circumscribing them in a category of incompetence or deviance which further contributes to their marginalisation.¹²³ Moreover, paternalistic policy-makers do not take into account the views of vulnerable individuals either in formulating or implementing State interventions. This exclusionary logic is hidden behind the inadequacy and failure of institutions to reduce vulnerabilities and help create security, perpetuating patterns of inequality instead. This creates a vulnerability-aggravating mechanism of institutional precariousness.¹²⁴ Hence, to avoid the pitfall of creating paternalistic State practices to human rights and vulnerabilities, an agency-fostering State under the notion of relational autonomy must be fostered at all times, recognising the reality of social interdependency.

b) Uncovering socio-economic rights and positive obligations

Enhancing socio-economic rights and corresponding State duties as well as positive obligations by the State, involves ensuring that social conditions and resources allow for substantive equality with respect to access and opportunities, rejecting the libertarian notion of the ideal State as ‘noninterventionist, antiregulatory and minimal’.¹²⁵ Although it is crucial to recognise that ‘inherent vulnerabilities’, such as those stemming from factors like age and disability, cannot be entirely remedied, ‘situational vulnerabilities’ that are context-specific sources that increase vulnerability (eg environmental or financial crises) trigger the State duty to engage in the necessary measures to stop their nefarious effects.¹²⁶ Among ‘situational vulnerabilities’, ‘pathogenic vulnerabilities’ constitute the most morally deplorable and pressing ones, characterised as socially created vulnerability-aggravating mechanisms either in the private sphere of interpersonal relationships, or in the public sphere of legal and political institutions that explicitly or implicitly condone systematic patterns of oppression and social domination. Addressing pathogenic vulnerabilities calls for remedying underlying inequalities that remain structurally hidden, bolstering substantive equality that is essential for the concrete attainment of ethical State goals.

Presently, the most fundamental of these ethical goals are translated into human rights law, hinging on the liberal private/public divide. This watertight private/public division is disrupted by the apprehension of vulnerability and social interdependency, triggering an ethics of care that impacts directly the ascription of State duties as more than negative obligations not

¹²³ *ibid.*

¹²⁴ Turner (n 66) 28.

¹²⁵ Mackenzie (n 9) 37.

¹²⁶ *ibid* 39-42.

to intervene in the private sphere, but rather to rectify unequal allocation of social burdens deriving from societal misrecognition and mal-distribution. This additional duty may be fulfilled through agency-fostering positive measures of allocating available resources that help individuals who suffer unfair disadvantages to recover their agency by accumulating resilience. In this sense, defending positive obligations necessarily requires revisiting the private/public divide. The idea that the State should keep away from private relationships disregards the fact that abusive and exploitative relationships take place in private interpersonal relationships,¹²⁷ which may hide oppression and grave human rights violations. Hence, human rights cannot be effectively protected by erecting a wall hindering the State from interfering with one's private sphere. The libertarian claim for a noninterventionist State presents a major flaw insofar as it conflates the State's oppressive encroachment upon individual rights with the State's constructive engagement in ensuring minimal security to all individuals by tackling harmful consequences from their equally permanent, though differently felt, human vulnerability.

On the one hand, providing social and economic rights such as welfare is an expression of the duty to care, meeting the basic human needs of those who face exacerbated vulnerability and precariousness in order to ensure their survivability and to prevent them from deprivation, thereby protecting them from serious human rights infringements. On the other hand, positive duties of the State to foster recognition, such as affirmative action, and to redistribute resources, such as redistributive taxation, may provide a substantive equality framework that corrects grave structural injustices and promotes an agency-fostering culture.¹²⁸ This framework encourages the State to treat all individuals under its jurisdiction with equal concern and care. Furthermore, it also leads the State to mitigate inequalities and remedy social disadvantages, in consonance with social justice. Mindful of that, I argue that the strong State commitment to addressing vulnerability is not only desirable as a matter of social justice but it also constitutes a moral duty to implement the respect, protection and promotion of human rights under an ethics of vulnerability.

3. Vulnerability in the practice of human rights courts

The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have developed interesting case law premised upon the adoption of group vulnerability as heuristic device. Despite being contextually inserted within different cultural scenarios and thereby facing distinct factual and legal issues, both courts share key structural

¹²⁷ *ibid* 52-53.

¹²⁸ *ibid*.

characteristics and commonalities which invite the joint critical assessment of their jurisprudence.

Hinging on the notion of vulnerability, Contracting States in the Inter-American system have entered into a wide array of special treaties and conventions, and issued declarations targeting vulnerable groups, broadening and specifying the jurisdictional scope of the IACtHR (regarding, for example, women, children, indigenous peoples, peoples with disabilities, sexual orientation and gender identity, nationality, asylum, refuge and internally displaced persons, and families of victims of enforced disappearances). Furthermore, an implicit argument of vulnerability can be highlighted in the reasoning of the IACtHR's decisions, characterised as contextual and relational, as well as targeted at identifying and transforming situations of vulnerability that exist because of structural inequalities.¹²⁹ To illustrate, in *Yakye Axa Indigenous Community v Paraguay*,¹³⁰ the IACtHR found violations of the rights to property, access to court and right to life of the Yakye Axa indigenous community, acknowledging that it dealt with a high-risk vulnerable group and setting the State's positive obligation to ensure a dignified life for its members, guaranteeing the protection of civil as well as of socio-economic rights, pursuant to the San Salvador Protocol.¹³¹

Despite considerable progress carried out by the IACtHR, greater doctrinal sophistication on the topic of discrimination and vulnerable groups has found its breeding ground in the European context, particularly in the case law of the ECtHR.¹³² According to recent doctrine, vulnerability is used both as a descriptive and prescriptive tool in legal reasoning and interpretation.¹³³ Academics have revealed a tendency in the ECtHR to enhance its use of nondiscrimination standards through the conceptual evolution of equality from formal to substantive equality, asserting that neutral-based rules might have a 'disproportionately burdening effect on vulnerable social groups'.¹³⁴ It is further argued that the ECtHR has been

¹²⁹ Laura Clerico and Mary Beloff 'Derecho a condiciones de existencia digna y situación de vulnerabilidad en la jurisprudencia de la Corte Interamericana' (Seminario de Latinoamérica de Teoría Constitucional y Política SELA, Lima, 21 June 2014)

<https://www.law.yale.edu/system/files/documents/pdf/SELA14_BeloffClerico_CV_Eng.pdf> accessed 9 January 2016.

¹³⁰ I/A Court HR, *Yakye Axa Indigenous Community Case* (Judgment of February 01, 2006, Series C, No. 125).

¹³¹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 19 November 1999) 69 OAS (San Salvador Protocol).

¹³² Peroni and others (n 10) 1056-1085.

¹³³ *ibid* 1059.

¹³⁴ Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11(4) *Human Rights Law Review* 711-714.

Uncovering the Human Rights of the Vulnerable Subject and Correlated State Duties Under Liberalism

responsive to the issue of indirect discrimination by setting forth a notion of substantive equality and socio-economic rights.¹³⁵

As illustration, in *MSS v Belgium and Greece*,¹³⁶ the ECtHR recognised the particular vulnerability of an asylum-seeker from Afghanistan who had endured terrible predicaments while migrating, being detained and subsequently living in the streets. The decision emphasised the State's inaction against the conspicuous deprivation of essential needs of MSS, mirrored in socio-economic rights, and the vulnerable status of the applicant. The Court finally decided to hold the State accountable for violating the applicant's human rights under Article 3 of the European Convention on Human Rights, which prohibits torture as well as cruel and inhumane treatment. Inferring socio-economic rights (and corresponding duties) from the civil right of freedom from torture, and boosting positive obligations from the State, are important enhancements in human rights interpretation which, in this case, may be attributed to the adoption of vulnerability as heuristic device.¹³⁷ Notwithstanding, the Court has not given proper normative relevance to vulnerability in all cases involving individuals whose vulnerability was particularly high. In the case of *N v UK*,¹³⁸ for instance, the Court decided that removing a Ugandan HIV-positive woman back to her home country after her asylum application had been denied did not amount to cruel and inhumane treatment or torture. The decision disregarded considerations about the vulnerability of the applicant – which only appeared in dissenting opinions – and highlighted her medically-induced stable condition, in stark contrast to the vulnerability assessment carried out in *MSS*. In the Court's analysis, the applicant's embodied vulnerability was dissociated from the contextual intricacies with respect to her medication-dependent health, soon to deteriorate without appropriate healthcare. The likelihood of government-induced oppression in her home country was also ignored as a vulnerability-aggravating factor.¹³⁹

In addition to the coherence flaws pointed out in the case law, it is important to note that the ECtHR did not entirely embrace the concept of vulnerable subject as per vulnerability theory,¹⁴⁰ and the same applies to the IACtHR. Both courts generally look at vulnerable groups instead of acknowledging vulnerable individuals. Rather than eschewing the archetypical legal

¹³⁵ Rory O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 2 Legal Studies 19-20.

¹³⁶ *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

¹³⁷ Timmer (n 1) 159-161.

¹³⁸ *N v UK* App no 26565/05 (ECtHR, 27 May 2008).

¹³⁹ Timmer (n 1) 159.

¹⁴⁰ *ibid* 162.

subject and positing the universality and constancy of vulnerability, the adoption of group vulnerability still falls into the pitfall of labelling only certain groups as vulnerable. This leaves room for perpetuating the stigmatising prejudice that those who are part of these groups lack agency and are incapable of catering for their own needs, whereas those who are not are, on the contrary, fully-fledged liberal agents capable of making their own choices. As a result, vulnerability is not fully applied and individuals who are not part of reified groups might end up excluded from having their vulnerability recognised and taken into due account.

Thus, owing to lack of conceptual stringency in the adoption of vulnerability, there still seems to be room for its conflation with the traditional notion of vulnerability. This notion is undesirable as it allows for paternalistic interventions which do not envisage agency-fostering decisions. It is reasonable to conclude that this challenge is yet to be overcome. Notwithstanding, the Courts' acknowledgment of vulnerability as heuristic device has already marked a starting point to a more context-sensitive assessment of human rights violations and to a more holistic understanding of interdependent human rights,¹⁴¹ transcending positivistic readings of rights in the conventions to a complex interpretation that draws socio-economic rights from civil and political rights.

In this context, paving the way for conceptual soundness and theoretical coherence by undertaking a capabilities and vulnerability-underpinned approach to human rights seems to constructively supplement the current practice, providing the tools to shore up systematic decisions to enhance the framework of State duties regarding human rights. The State has a responsibility for ensuring a minimum threshold of social and economic conditions for all. Moreover, it must recognize aggravated vulnerability and precarious agency-undermining contexts whilst avoiding categorising groups. A theoretically sound framework for State duties would avoid incoherent and inconsistent decision-making, settling conclusively that States have the ethical and normative obligation to avoid and redress human rights violations, which encompasses fostering agency and mitigating vulnerability. This is of special concern in cases of individuals whose vulnerability is particularly aggravated by deep-seated social injustice (for example prejudice, violence and deprivation) which has hindered resilience-accumulation and development of capabilities to achieve meaningful functioning and live autonomous lives.

4. Rethinking human rights interpretation

In contrast with traditional modes of liberal interpretation, I argue that human rights guided by vulnerability and the capabilities doctrines is premised upon a more refined notion of

¹⁴¹ *ibid.*

substantive equality, and conducts the legal rationale to a context-sensitive interpretation which brings to the fore structural power dynamics of subordination and domination, and oppressive backgrounds against which many human rights violations occur. Adopting this theoretical framework could provide valuable guidance for human rights decisions that show genuine commitment to universal human rights as ethical claims based on our shared vulnerability. Two practical results ensue. On the one hand, the divide between civil and political versus socio-economic rights is ruptured and the justiciability of socio-economic rights by the State becomes not only plausible but also a strong ethical imperative to ensure the coherent application of human rights.¹⁴² On the other hand, the State's sphere of positive obligations is widened.¹⁴³

E. CONCLUSION

Under the aegis of substantive equality, State responsibility is called upon when individuals are found in situations of intense precariousness, either facing or in risk of facing grave harm. Mitigating vulnerability and fostering agency and resilience are required especially when this precariousness stems from structural power inequalities that have led to politically-induced, socio-material disadvantage. This rationale challenges claims that individuals are personally responsible for their socio-economic wellbeing and should endure the consequences of the formally equal meritocratic logic even when it entails deprivation of functioning-enabling resources and consequent susceptibility to serious kinds of capability-curtailling and life-threatening harms. By means of a vulnerability analysis, human rights violations and the rise of State responsibility are not primarily assessed by merit or causality, but rather by identifying a pressing need that triggers States responsiveness as an imperative for justice, a rationale that can be comprehended both intellectually as well as empathetically, harmonising reason and emotion.

Vulnerability allows for the reconciliation of the apparently paradoxical dualisms of universality versus particularity and public versus private. Moreover, under a capabilities and vulnerability-underpinned approach, I suggest that yet another binary is disrupted: the clear-cut division of civil and political rights versus economic and social rights. Surpassing the strictness of Cartesian binaries and static analysis allows us to get a glimpse at the potentially disruptive nature of vulnerability in traditional legal thinking. Vulnerability analysis is an interesting attempt to overcome these challenges by implying context-sensitive interpretation

¹⁴² *ibid* 165-167.

¹⁴³ *ibid*.

to human rights, focusing on the dynamic interplay formed by vulnerable subjects, their needs and the correlated ethical demands within contingent situations. Furthermore, vulnerability is an alternative theoretical response to enhance human rights interpretation, paving the way for enhanced institutional responses of law and politics to current human rights challenges concerning inequality, disadvantage and oppression.