Int J Semiot Law (2023) 36:1359–1369
https://doi.org/10.1007/s11196-023-09999-6

# Vulnerability. From the Paradigmatic Subject to a New Paradigm of the Human Condition? An Introduction

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Accepted: 18 March 2023 / Published online: 25 April 2023


## 1 Prologue

Despite manifesting itself as a separate, somewhat cryptic and highly specialised discourse, law is deeply rooted in socially available knowledge and shared notions. A regulatory system that differs from other social systems, law is endowed with specific operative autonomy [1]. Law is also a specialised mode of communication that is characterised by a specific set of theoretical and operative concepts leading to decision-making processes and practices. Yet, despite its separateness, the legal discourse is cognitively linked to socially available knowledge – Foucault's episteme – [2] which sets the boundaries between what can and cannot be linguistically expressed. This implies that, regardless of the constitutive distance between the legal and ordinary discourse, the legal discourse is unavoidably rooted in socially shared concepts that provide legal notions with social coherence and plausibility.

One of the cognitive and operative premises of law is its implicit anthropology, the way human beings are conceived of and located in the network of both natural and social relations. Different anthropological concepts are associated with different ways to see the law as a system of regulation, imputation, and control. The first part of this introductory paper will be devoted to summarising the development of the modern concept of the legal subject as a self-sufficient individual. Subsequently, by making reference to the papers in the issue, the new emerging concept of vulnerability as a specific characteristic of human beings, living beings, and the natural environment will be explored. By stressing the mutual relationship among the individuals and between the social and natural networks to which the individuals belong, such an

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idea of vulnerability contrasts with the concept of self-sufficiency characterising the human being in the previous paradigm.

What has been described as the vulnerability turn [3, 4] might hence radically change the way the individual is understood and conceptualised, in both broad social knowledge and specialised fields such as that of law. Already identifiable in multiple intellectual contexts, one of the effects of such a change is the dismantling of the rationalising concept of the social and legal actor, which includes the paradigmatic subject of law and the anthropocentric individualism of Western law systems.

Most of the papers in this special issue analyse the traditional concept of the subject of law, in order to suggest practical – rather than merely theoretical – alternatives to that idea, conceptual fractures, and concrete utopias [5].

## 2 The Heuristic Function of the Concept of Vulnerability

Western modern law systems rest on a specific anthropological concept. The subject of law has gradually developed from the crumbling of Latin social structures and legal culture, where law was seen as a set of principles and rules that could give meaning and stability to both the social and natural world. The Roman idea of *jus* was to be considered an ordering principle governing human matters and nature as a whole. Society was understood as a component of the natural order, which implied that natural law (*jus naturale*) did not exclusively apply to humankind, but to all the creatures that were part of an interconnected whole. As Digesto stated:

> "*Jus naturale est, quod natura omnia animalia docuit. Nam ius istud non humani generis proprium est, sed omnium animalium, quae in coelo, quae in terra, quae in mari nascuntur.*" (Digesto 1,1,1,3).

Between the 11th and 13th centuries, the Roman idea of *jus* (which was mainly regarded as objective law in the imperial period) gradually took on the meaning of subjective right, a right belonging to an individual and enabling them to act, declare possessions or vindicate a claim.[1] The medieval (natural, social, and spiritual) idea of the world lay upon hierarchy, considered both a cognitive principle, as each manifestation of nature found its place in the chain of being [6], and a socially differentiating criterion, with people seen as members of different groups or statuses, rather than as individuals. Accordingly, the social sphere manifested itself hierarchically, which meant that the position of each actor in the social ladder was determined by ascribed characteristics, such as gender, ethnicity, status, and geographical location. Law embraced the hierarchical principle, with the legal treatment of specific individuals depending on their social location [7]. The stability of the Roman order gradually gave way to a society where conflict often arose between institutions (e.g., the Empire and the Church), social positions and statuses, so that the hierarchical system became both a stabilising principle and the premise of struggle [8]. The resulting

[1] The thesis that the concept of Roman *jus* has to be mainly interpreted as objective law is debated. See Bryan Turner's paper in this issue.

order was unstable, based on a balance to be struck between conflicting forces. This led to a proliferation of *jura*, which cannot be compared to modern subjective rights, as they were rather privileges or prerogatives accorded to specific social groups or categories.

The medieval subjectivation of the term *jus* took place when concepts such as power, dominion, and will started to be included in its semantic field: *jus* was gradually understood as *potestas*, or *dominium*, associated with the will (*voluntas*) of a specific individual that belonged to a social group. Attributed to the subject as part of a group, it was a power that entitled them to vindicate a claim (e.g., over property) [9]. This connotation of *jus* was utterly at odds with the ordering function of natural law based on the ordering and moral principles of *suum cuique tribuere*, *honeste vivere*, and *alterum non ledere*. Law was no longer able to make the principles effective, and this held particularly true for the principle of *suum cuique tribuere*, since, in such a conflicting context, *what* belonged to *whom* was now disputable. Here, semantic preadaptive advances [10] may be observed that would later find their actualisation in the law of modernity, and especially in the continental codification of civil law [11]. *Jus* started to be subjectively interpreted as a right, since the term might be understood as a prerogative accorded to those who managed to succeed in a conflict. Such individuals could claim a power (*potestas*) or dominion (*dominium*) that might be actualised by their rational will (*voluntas*) to exercise a prerogative.

Yet, whereas medieval *jura* were chiefly determined by the individual's social location and ascribed characteristics, modern law, especially in the form of continental codes, subverted the reference to concrete social and ascribed characteristics by introducing an abstract, apparently equalitarian model of the human being, which gradually developed in what may now be described as the paradigmatic subject of law. The Western subject of law is an abstract, yet surreptitious, generalisation of the human being, whose semantic field is conceived of as inclusive, with all the individuals being said to fall under such an abstract, general concept. It has been pointed out that this gross generalisation has been functional to the evolution of capitalist economies, thanks to the formalisation of property and business rights [12, 13] and the legitimation of democratic systems, which were based on the consent of the individual, now relevant regardless of their social status (one man, one vote) [14]. Critical analyses of the paradigmatic subject have shown that this apparently abstract and neutral semantic construction is indeed deeply socially rooted, built as it is on the model of a rational Western middle-class male. Up to the 20th century, civil codes described the subject of law as a good family man, and the right to vote was solely guaranteed – at least in its early days – to (white) men, based on their social status [11]. The cultural connotation of subjective rights is particularly evident in human rights theory, which has only recently thematised the issue of the Western nature of human rights and the questions that their alleged generalisability and universality may raise [15].

Semantically evolving from the medieval concept of *jus* as a subjective right, the legal capacity of the paradigmatic subject of law is still interpreted as a form of power, including the power to control specific aspects of the world, to take part in social relations with specific claims, and to take possession of, or exploit, the natural environment. The subject of law is represented as a titanic conceptualisation that

can translate Western individualism into legal terms. Conversely, the 'vulnerability turn' is an attempt to substitute the self-sufficiency of the paradigmatic subject of law (hence its power, dominion, rationality, and will) with the concrete weakness of situated individuals. Semantically, the Latin word *vulnus* refers to the less resistant part of an object or living being that may determine the frailty of its structure or cause its eventual collapse [16]. Therefore, the adjective vulnerable (Latin *vulnerabĭlis*) refers to an individual who may be easily wounded, attacked, or offended. Consequently, vulnerability is the condition of being exposed to any kind of risk[2].

Analytically, the condition of vulnerability is characterised by three factors: the possibility for an individual or group to be exposed to risk and suffer harm; the lack of subjective and objective resources to avoid the harm; the lack of resources to react to harm once the risk has materialised [18: 13]. It is the connection between risk and vulnerability that may explain why the concept can identify specific characteristics of the individual, the social sphere, and the natural environment in late modernity.

Following Beck's work [19], risk has been described as the unintended consequence of modernisation, especially in connection with economic, technical, and industrial processes. Two are the main consequences of contemporary risk. The first one is the globalisation of its effects, which may no longer be limited to the local or national dimension, as it has been shown by global warming and the recent Covid-19 pandemic. The second is the social symmetrisation of risk, which implies that any human being is susceptible to risk, regardless of their social position, status, and income. The reference to risk emphasises the inadequacy of instrumental rationality (Weber) to describe late modernity. Instrumental rationality entails the capacity to control both the environment and the consequences of human and social activities. It may be conceived of as the higher-level equivalent of the individual capacity of control that characterises the paradigmatic subject of law.

The centrality of risk in late modernity involved a decline in the social confidence in reason as an instrument of control [19], while showing that the riskiness of social, economic, and production processes makes any living creature and the environment vulnerable. Vulnerability is hence an ontological condition that equates all the human beings and living creatures, due to their being fragile and transient. Yet, specific groups of people, or specific individuals with unique characteristics, or even the natural environment, may lack resources to protect themselves from the harm caused by the materialisation of risk. Therefore, vulnerability is both universal, as anybody is vulnerable, and distinctive, as it varies according to one's circumstances and resources, which leads to identifying different levels of vulnerability [3, 20].

[2] In order to trace the historical roots of the concept of vulnerability in the Western philosophical-legal tradition, reference should be made to a non-mainstream set of legal and political theories – German natural law theories, and especially Samuel Pufendorf's work. According to Pufendorf, the individual is to be seen as a vulnerable subject whose main characteristic is weakness (*imbecillitas*, in Puferdorf's Latin) [17]. If the individual is weak, the state is to be regarded as an institutional structure whose aim is not social control (as Hobbes claimed, conceiving of the individual as being dangerous and potentially lethal) but the support and protection of vulnerable human beings. Samuel Pufendorf's conceptualisation of *imbecillitas* was an attempt to make the new enlightened idea of a rational and self-sufficient human being compatible with absolutism as a form of government and the social structure of the Ancien Régime. Reference may also be made to Arnold Gehlen's philosophical approach to anthropology. See Turner in this issue.

The contemporary concept of vulnerability has acquired a progressive function, and it is often employed as a tool for semantic, political, and operational changes. Reference to vulnerability is made to criticise neoliberalism and the consequent deregulation and dismantling of welfare state structures and institutions. By stressing the relevance of vulnerability, some authors advocate the adoption of public policies in favour of marginalised and excluded individuals and groups. Even when compared to 20th-century social rights, the concept of vulnerability sets a theoretical turning point, since the introduction of social rights [21] did not put the paradigmatic subject of law into question. On the contrary, the intervention of the state could be seen as a way to guarantee autonomy to those who were not self-sufficient, in order to make them conform to a certain model, which confirmed the implicit anthropological paradigm of the subject of law. As welfare policies were meant to foster social inclusion and integration, marginalised groups were helped to conform to the model of the middle-class (white) man, with his values, attitudes, and instrumental rationality. On the other hand, when vulnerability is interpreted as being both a universal and specific condition, it questions the ideological character of the paradigmatic subject. If considered vulnerable, the subject is entitled to receive support, both in the communitarian form of reciprocity and in the institutional mode of the intervention of a responsive state [3: 19, 20]. A new anthropological perspective is gradually evolving that is at odds with the specific features of the Western philosophical and juridical subject of law. Within this new framework, autonomy is replaced by mutuality, separateness by relationality, rationality by emotionality. The individual is gradually perceived as a component of both the social and natural environment, hence linked to other individuals (mutuality) and dependent on nature, rather than ruling over it.

The debate about vulnerability has initially developed in the fields of philosophy and theory of law, where a strong influence has been exerted by feminist thinkers, and especially Martha A. Fineman. The concept has been gradually introduced in supranational jurisprudence [22] and within the European [23–28] and Inter-American conventional systems [29–32]. Yet, the reference to vulnerability at a normative and decision-making level is still occasional and underexplored. Nonetheless, two elements seem to be undeniable: (a) the connection between vulnerability and human rights [7, 33], and (b) the reference, both in the few normative sources and in the available international jurisprudence, to group or categorical vulnerability, which disregards the heuristic productivity of the notion of ontological or universal vulnerability [34, 155–156]. The concept of vulnerability may question the ideological component of the paradigmatic subject of law only if vulnerability is conceived of as both a universal character of the human being (or even of the natural environment) and a specific (transitory or permanent) feature of groups of individuals. If people are all vulnerable *qua* human beings (or, more radically, *qua* living beings), this should entitle them to forms of protection insofar as they are ontologically exposed to a variety of risks. Metaphorically, the ontological *condition* of vulnerability may be conceived of as a lens that allows human beings to magnify *situations* of high or extreme vulnerability. Once the condition of vulnerability shared by any human being has been accepted, this might make specific conditions of vulnerability politically and socially relevant, resulting in adequate forms of intervention [35].

The recurring (economic, migration, environmental, climate, war and healthcare) crises determined by the risk permeating contemporary society [19] may help to clarify the aforementioned strong connection between situational and ontological vulnerability. For instance, Western countries often perceive migration as a crisis, with migrants being seen as persons to control or repatriate. Yet, if vulnerability is considered an ontological *condition*, the migrants' transitory *situation* of vulnerability may be interpreted as a situation that might affect any individual, regardless of their ethnic origins or nationality. The existence of a global chain of vulnerability has also been shown by the recent Covid-19 crisis, which has impacted both individuals and social systems, including the political, economic, and healthcare systems of allegedly well-organised Western societies. Environmental crises (often connected with migration) may affect both Western and non-Western countries, and the condition of vulnerability shared by all the individuals should entitle any of them – regardless of their origins – to some forms of protection. Such crises also emphasise that human beings are strongly connected with the natural environment, whose frailty should be considered a specific form of vulnerability, affecting both individuals and society on a global scale.

## 3 Our Issue

This special issue is an attempt to verify whether the concept of vulnerability may lead to a break with traditional theories and semantics in the fields of philosophy and sociology of law, international law, private and public law. Despite adopting different perspectives, all the papers in this issue interpret the concept of vulnerability as a premise of further developments, innovative ideas, and conceptual changes. The theoretical dimension of vulnerability is explored, that is, its capability to foster new forms of legal representation of the individual, no longer conceived of as an isolated, self-sufficient subject, but involved in networks of dependencies. Vulnerability is also seen as a tool to adjust legal concepts and decision-making processes to the new challenges of risk society. The papers in this issue emphasise both the theoretical and operative dimension of vulnerability, providing a complex, although non-exhaustive, analysis of its semantic and practical relevance.

Martha Fineman, the founder of vulnerability theory, opens this special issue. According to Fineman, Western legal tradition is characterised by a decontextualised, abstract subject of law: legal discourse describes it as autonomous and self-sufficient, thus neglecting the ontological condition of vulnerability and dependency characterising the human condition. The semantics of self-sufficiency has political consequences, as such a concept may imply a limitation in the state's responsibility for individual and collective well-being. Conversely, if one assumes that human beings are constitutively vulnerable, a new anthropological conception may emerge, by which individuals are seen not only as rational beings driven by self-interest, but as situated, vulnerable bodies, always developing and mutating, potentially affected by risky situations, hence ontologically dependent on one another. On the one hand, this more realistic conception of the human being entails that vulnerability may no longer be conceived of as a stigmatising label for specific groups of individuals. On

the other hand, it means that the state and social institutions should take into account the condition of vulnerability and dependency shared by all the human beings, in order to undertake appropriate measures to address it.

Bryan Turner locates the question of vulnerability in the biological nature of the human organism: the human body develops, decays, and eventually dies, which means that any human being is ontologically exposed to time and risk. In his elegant paper, Turner distinguishes between citizenship and human rights. Citizenship is based on an exclusive principle, the national belonging of an individual, which entitles them to claim civil, political, and social rights. Yet, contemporary neoliberalism has caused a decline in those welfare-state institutions and programs that, in the 20th century, had aimed at including those who had been marginalised by capitalist economies. Despite their alleged universality, human rights are a cultural product of Western philosophical reflection, as they are based on the Christian concept of dignity. Being universal rather than based on one's nationality, they are often ineffective, requiring the active intervention of reluctant national structures, as it happens within the context of migration as a global phenomenon. Turner roots his arguments in Gehlen's anthropological conception, which describes humans as "deficient beings", constitutively needing social protective structures. As deficient, vulnerable beings, humans need social institutions, such as social and human rights, whose legitimation is to be found, in the last instance, in the individual's embodied, constitutive vulnerability.

From a different perspective, Elena Pariotti tries to establish a connection between the notion of vulnerability and the theory of human rights: the concept of vulnerability may contribute to connecting the too-often abstract idea of human rights with the concreteness of the human condition. According to Pariotti, vulnerability is to be interpreted as a condition rather than a principle, which implies that it may help enforce human rights in those situations where individuals or groups manifest their neediness. Since vulnerability is a chameleon concept, Pariotti describes her definition as a social ontology: vulnerability is specific to human beings as such, although its concrete manifestations are determined by the situational and relational contexts in which embodied subjects happen to find themselves. This approach should help to prevent both the stigmatisation of specific vulnerable groups and the neutralisation of the concept, by which no public intervention is needed since human beings are all vulnerable.

Maria Giulia Bernardini explores the relevance of the vulnerability turn as a conceptual tool to overcome the old-fashioned idea of legal capacity as an aspect of the rationality of the legal subject. Throughout Western legal history, vulnerability – in its manifold manifestations – has been considered a reason to deprive specific groups of individuals of their legal capacity. Bernardini summarises the debate about vulnerability by referring to both theoretical sources and international jurisprudence. A well-structured discussion of Article 12 of the Convention on the Rights of Persons with Disabilities allows the author to underline the complex relation between vulnerability and legal capacity. By questioning the paradigmatic legal subject, vulnerability may produce a redefinition of legal capacity, to be guaranteed also to those who were previously deemed to be not entitled to it. By guaranteeing legal capacity to vulnerable persons with disabilities, Article 12 may provide a legal premise to foster

access to legal capacity to a variety of vulnerable persons, thus breaking with the monolithic semantics of the subject of law.

The complex relationship between disability, vulnerability, and autonomy is also dealt with by Maija Mustaniemi-Laakso, Hisayo Katsui, and Mikaela Heikkilä. The authors analyse the Finnish legislation on disabilities, underlining its implicit anthropological binarism: persons with disabilities are conceived of as vulnerable when compared to the rational, self-sufficient, paradigmatic subject of law. This binary model converges into a legal representation of persons with disabilities as lacking autonomy and agency. The objectifying and de-agencifying idea of disability often results in paternalistic approaches in welfare policies, public discourse, and the law. According to the authors, an ontological conception of vulnerability may lead to the overcoming of said binary approach, since human beings are all vulnerable. The paper makes reference to both international law sources and domestic legislation, so as to show the need for a legal discourse that may foster empowering strategies and non-stereotyping representations, in order to support persons with disabilities in decision-making and agency processes.

Johnathan Herring proposes a legal concept of children based – paradoxical as it may seem – on the vulnerability of adulthood. Law traditionally considers children to be vulnerable, while adults are usually described as being self-sufficient and rational. Such a dichotomy has led to a restriction of children's rights: children do have rights, but these are either fewer or partially different from the rights of adults. Vulnerability as an ontological condition may help to change the different legal treatment of children and adults that is currently based on the assumed natural differences characterising these two stages of life (for instance, in terms of autonomy and rational choices). Considering human beings vulnerable regardless of their age may result in a radical change in the child-parent relationship and the way in which children are considered by law. Herring criticises hyper-parenting, the approach adopted by parents who seek to shape their children's future. The relationship between children and parents should take into account the fallibility of both, emphasising mutuality and the importance of being open to the unexpected that any social relationship is likely to create.

Using normative, government, and qualitative empirical data, Titti Mattsson and Sofia Enell deal with the topic of resilience in compulsory care institutions for children, presenting Swedish compulsory care as a case study. The international legal definition of children's rights provided by the UN Convention on the Rights of the Child has been embraced by the Swedish national legislation. However, the authors wonder to what extent physical restraint, which is still allowed in Swedish compulsory care, may be compatible with the public discourse about the implementation of children's rights. By making reference to the empirical material derived from qualitative interviews with children in compulsory care facilities, the authors show how physical constraints result in children becoming dependent on the facility staff, which prevents vulnerable individuals from achieving resilience. A new institutional approach based on cooperation is therefore advocated, in order to foster the resilience of vulnerable subjects.

Ulrika Elisabeth Andersson analyses a case of migration and family reunification, underlining the importance of mobile commons in the overcoming of the administrative obstacles to reunification. The case concerns a very young child who was sent

back to his home country, being separated from his family who had managed to cross the border to Sweden. Although family reunification is guaranteed by international and national law, in this case the process was hindered by several administrative obstacles. According to Andersson, mobile commons – informal networks of resources – may represent a relevant support for vulnerable persons, including migrant families waiting to be reunited with their loved ones.

By theoretically drawing on monster theories, feminist theory, and the concept of vulnerability, Kristina Chelberg presents a case study on the construction of vulnerable monsters, showing how the vulnerability discourse may produce paternalistic approaches and forms of institutional control. By making reference to some narratives from the *Final Report of the Royal Commission into Aged Care Quality and Safety* (RCAC), the author shows how, in public and political discourse, dementia is described as both a condition of vulnerability and a monstrous condition, which legitimises the staff of residential facilities for dementia patients to use physical and chemical restraints. The condition of vulnerability is not sufficient to prevent the use of restrictive measures against dementia patients, who are often perceived as monsters, due to their abject behaviour and lack of bodily control. In the discourse of the RCAC, two elements combine: the need to provide care to dementia patients *qua* vulnerable persons and the possibility of recurring to (physical and chemical) restraints to control their disruptive behaviour.

Lorna Fox O'Mahony and Marc L. Roark carry out an analysis of property interpreted as an asset of resilience. The expression "assets of resilience" may help to distinguish between vulnerability as an ontological feature and the different degrees of actual vulnerability. The concept refers to the set of economic, symbolic or relational resources that may alleviate the individual condition of vulnerability. By examining the fundamental right to property and making specific reference to land and housing, the authors show the dual character of property as an asset of resilience. On the one hand, it implies the protection of property as a symbolic and social process, involving the individual and the social networks in which it is located – the neighbourhood in particular. On the other hand, it legitimises the claims of those who are excluded from property. Once property is analysed as an asset of resilience, both inclusion and exclusion may be understood as institutional mechanisms for securing against vulnerability.

Aniceto Masferrer describes freedom of expression as an antidote to vulnerability. The author supports his argument by making reference to political theory, constitutional law and jurisprudence, trying to show the intrinsic relationship between democracy and freedom of expression. Part of the paper is devoted to a discussion on the need to guarantee vulnerable groups the right to express themselves freely. A tendency of modern society is then criticized, that is, the legal restriction of the freedom of speech when it comes to certain social categories (e.g., LGBT), due to their alleged vulnerability. Masferrer fosters freedom of speech, deeming any restriction as a *vulnus* that may result in the development of further vulnerabilities affecting society as a whole.

Mariano Longo and Vincenzo Lorubbio deal with the need to include nature in the semantic area of vulnerability. Indeed, human vulnerability is determined by the natural environment. Once the myth of human control over nature has been

debunked, human well-being appears strongly interconnected with the wholesomeness of the natural environment. A new concept of vulnerability – ecosystem vulnerability – should consider both the frailty of nature and the human dependence on the natural environment. Ecosystem vulnerability should lead to the overcoming of the traditional idea of the subject as being necessarily human. A new concept should be developed by which the legal subjectivity of nature would entitle everyone to protect it, aiming at both human and environmental well-being. By making reference to both international norms and jurisprudence, the authors underline how the contemporary debate leads to a double option: on the one hand, the acknowledgement of the human right to a healthy environment; on the other hand, the long and challenging process of actualisation of the rights of nature. It is too early to say which option will be preferred. What is clear is that the very concept of "human" is undergoing a revision process. The human being should no longer be considered the paradigmatic subject of law, but rather an "*homme situé*" who is part of society but also of a broader ecosystem, sharing a condition of vulnerability with the other biotic and abiotic components of the ecosystem itself. This new concept may result in the overcoming of extractive attitudes, which should be replaced by a caring approach, thus determining a transition from a representation of the human being as the owner of nature to an idea of the human being as its custodian.

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