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The juridification of vulnerability in the European legal culture

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Abstract

Although not being a codified legal concept, vulnerability has been increasingly used over the past years in the reasoning of the European Court of Human Rights. Some relevant cases dealing with the multi-faceted notion of vulnerability are retrospectively presented to exemplify this trend, considering two aspects. First, the paper explores the process of juridification of vulnerability in the ECtHR's case law from the perspective of the sociology of law. Through the emerging uncodified notion of vulnerability, it seeks to inquire the relationship of juridification and legal culture focusing on the legal response to social needs arising from the use of vulnerability. Second, the paper conceptualizes vulnerability looking at its interplay with different human rights' violations. The paper ultimately aims to re-theorize the role of legal culture as a catalyst for juridification, taking vulnerable conditions and their relevance to the law as a paradigmatic example of social change.

Key words

Legal Culture; vulnerability; juridification; nondiscrimination; human rights

Resumen

Pese a no ser un concepto jurídico codificado, la vulnerabilidad ha sido cada vez más utilizada en los últimos años en el razonamiento del Tribunal Europeo de Derechos Humanos. Para ejemplificar esta tendencia, se presentan retrospectivamente algunos casos relevantes que abordan la multifacética noción de vulnerabilidad, considerando dos aspectos. En primer lugar, el artículo explora el proceso de juridificación de la vulnerabilidad en la jurisprudencia del TEDH desde la perspectiva de la sociología del derecho. A través de la noción emergente de vulnerabilidad no codificada, se pretende indagar en la relación de la juridificación y la cultura jurídica centrándonos en la respuesta legal a las necesidades sociales que surgen del uso de la vulnerabilidad. En segundo lugar, el documento conceptualiza la vulnerabilidad examinando su

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interacción con diferentes violaciones de los derechos humanos. En última instancia, el documento pretende volver a teorizar el papel de la cultura jurídica como catalizador de la juridificación, tomando las condiciones de vulnerabilidad y su relevancia para el derecho como ejemplo paradigmático del cambio social.

Palabras clave

Cultura jurídica; vulnerabilidad; juridificación; no discriminación; derechos humanos

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1. Introduction: setting a vocabulary

This paper reflects upon the ways by which the law tackles the concept of vulnerability and how the results can vary depending on the societal structures as well as from the institutional mechanisms surrounding the rise, the use and the relevance of this concept. It aims to explore which is the impact of the juridification of vulnerability on legal culture, and to what extent juridification is related with law-making or legal culture in a broader sense. By juridification we refer to a broader process than regulation and judicial interpretation, identifying those practices through which the legal sphere incorporates social facts at various level and with different forms producing law-driven integration.[1]

The notion of vulnerability is inherently ambivalent. The Oxford English Dictionary defines as *vulnerable* a subject exposed to the possibility of being attacked or harmed, either physically or emotionally. The tension between the exposure to be harmed and the effective production of a harm puts vulnerability at the crossroads of a multi-sectoral application but at the same time of a fleeting interpretation that is pervaded by a multiple set of reasons (Arnardottir 2017, 150). Especially in the legal field, where interpretations are precisely performative as far as they bring to a decision that is authoritative (Searle 1975), vulnerability is deployed by interpreters revolving around its multifaceted character (Fuchs and Thaler 2018). Individuals can be vulnerable by nature and by law, and this ambivalence is akin to change over the time transforming the way by which the law looks at the nature of human conditions. What nature in fact? Being vulnerable by nature depends on inherent individual situations, whereas being vulnerable by law shows a legal gap whose recognition advocates for legal protection restoring a detrimental situation. Vulnerability identifies the level of acceptability emerging from situations, facts or persons within institutional structures or individual experiences (Carlier 2017, 186).

In the perspective of the sociology of law, the concept of vulnerability may open up to different social experiences depending on how its interpretation as a means of social change is framed: as the susceptibility to be injured (Goodin 1985, 775); as an ontological condition of the human being that takes on different forms and different intensities depending on individuals (Pariotti 2013, 150 and 2019, 160); as a threat to self-determination due to the unstable insertion of people into social integration and resource distribution systems (Ranci 2002, 521); as a characteristic that puts us in relation to each other as human beings and also suggests a relationship of responsibility between states and individuals (Fineman 2010, 251). In the context of human rights' protection under the European Convention of Human Rights (ECHR), we rely on Heri's definition of dependency-based vulnerability related either to a risk that requires intervention or to an individual experience (Heri 2021, 32). Although the author limits her detailed analysis

[1] See some interesting definitions of juridification: "First, constitutive juridification is a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system. Second, juridification is a process through which law comes to regulate an increasing number of different activities. Third, juridification is a process whereby conflicts increasingly are being solved by or with reference to law. Fourth, juridification is a process by which the legal system and the legal profession get more power as contrasted with formal authority. Finally, juridification as legal framing is the process by which people increasingly tend to think of themselves and others as legal subjects", see Blichner and Molander 2005, 5. Our definition relies on a cross-cutting phenomenon that presents some elements of all these definitions and looks towards the legal sphere as a term of reference.

of vulnerability to the study of the violation of art. 3 and refers its definition to a specific type of group vulnerability, we believe that this definition broadly encompasses the meaning of vulnerability – even with slightly semantic differences that are functional to specific uses – in the broader reasoning of the ECtHR.

Starting from the common meaning of the term vulnerability, the idea of wound, as suggested by the Latin term *vulnus*, assumes a definitional value in the legal language, which is often associated with the actual occurrence of prejudicial situations. Reflecting on the relationship between equality and vulnerability, namely on the condition of disadvantage or prejudice that the differentiated treatment of certain situations may increase, the contribution attempts to explore some findings related to the ECtHR case law in different legal areas with respect to the use of the uncodified notion of vulnerability. This analysis helps to draw some conclusions on the emerging impact of vulnerability for the transformation of the legal culture.

The methodology of this paper is based on an integrated approach that explores how the theoretical implications of the use of vulnerability interplay with the interpretation of the notion of vulnerability. This approach is justified by the fact that the Strasbourg Court's assessment is profoundly affected by procedural conditions that also determine specific forms of juridification. In light of the above, the handling of the case law is presented on an exemplificatory basis and not on a systematic one, for two reasons: judgements and decisions of the ECtHR in which the terms "vulnerable" is used are currently 2053;[2] there is not a strict correlation between the applicability of a particular provision of the Convention or of its Protocol and the use of the term "vulnerable", although there are many studies focused on the relevance of vulnerability in specific legal fields of application of the ECHR, such as the right not to be subject to inhuman treatments, children's rights, the right to housing, asylum and migration (Herring 2018, Baumgärtel 2020, Heri 2021, Romano 2021). Therefore, the choice of presenting some cases is carried out by the author based on a personal assessment of the relevance of vulnerability in the judicial reasoning where the process of juridification appears more paradigmatic. This process has a wide scope of application and the choice for showing the results in different areas of the law – such as migration, housing, health for example – does not aim to provide a comparative analysis, rather to show the potential of vulnerability as a trigger for the possibility of a better rights' protection. In order to prove the adopted methodology be functional to answering the research questions – how the uncodified notion of vulnerability has been "juridified" by the ECtHR, why on a general scale and what is its broader impact on legal culture – the paper is structured as follows.

The paper is divided in two parts: the first part (sections 2 and 3) sheds light on the procedural steps for juridification of vulnerability in the system of the European Convention of Human Rights and on the compatibility of the proposed theoretical approach on vulnerability with these limits, reflected in the analysis of how the Court usually performs; the second part (sections 4 and 5) shows how the judicial reasoning has contributed in practice to develop the juridification of the uncodified notion of vulnerability in the context of human rights' protection. Finally, the paper seeks to draw some conclusions that explain how the theory and practice of juridification may be

[2] This assessment has been based on the access to hudoc.echr.coe.int through a search by word "vulnerable" on 24 January 2022.

considered in a bilateral relationship with the development of legal culture. The first claim is that the new chances of protection stemming from evolutive judicial interpretations are limited and therefore structured in a certain way by the same procedural rules of legal systems – as it is the case of procedural conditions of the access to the ECtHR or the admissibility criteria. The second claim is that the factual situations where vulnerability is assumed as a relevant factor need to be aligned as much as possible to the theoretical development of the notion of vulnerability. The conclusion is that an overall assessment of emerging concepts within the frame of a process of juridification depends on how the existing institutional and social structures are able to welcome new concepts. This observation proves to be true regardless of the theoretical understanding of some concepts, based on the fact that once judicial reasoning elaborates on an uncodified notion such as vulnerability, the performativity of the result is in any event taken for granted and produces effects. The theoretical use of concepts may be then arguably different from their theoretical understanding depending on how the legal sphere shapes its communicative forms. Along this conceptual trajectory, this paper aims to offer a new contribution to reconceptualize the legal and sociological take on vulnerability, ultimately focusing on how juridification and legal culture may be related to each other.

2. Juridification in search of its object

The judicial approach of the Strasbourg Court presents vulnerability as a shifting notion, which assumes relevance depending on the persistence over time of a violation or of a state of subjection and/or dependence on external events or others' conduct (Chenal 2018, 39, Kittay 2018, 201).

The normative function of juridification has been referred to the expropriation of social conflict, as it has been pointed out by Teubner in relation to the emergence of new structures of law during and because of the growth of the welfare state (Teubner 1987, 7 ff.).[3] The conflict generally arises between "the social function of the law, namely to produce from conflicts social expectations in which it then specializes more and more, and the regulatory performance which the social environment demands from law" (Teubner 1987, 19). In the case of vulnerability, this is utterly true, because the conflict lies in-between the social or individual conditions that expose a person not to be adequately protected by the law in the enjoyment of human rights and the lack of a legal basis to address those vulnerable conditions (Friedman 1990, 517). With Teubner's words, this is an example of how "law, by being posited as autonomous in its function – formality – becomes increasingly dependent in the demands for performance from its social environment – materiality" (Teubner 1987, 20).

This formal function is very productive in the case of vulnerability, as it may determine two effects: either narrowing the scope of human rights in relation to factual situations or expanding their reach by strengthening some existing safeguards. Both effects may determine effective mechanisms of judicial protection by which the violation of one of the rights established by the Convention acts either as the causal antecedent or as the

[3] The author states that "[s]ociologists of law describe juridification as a process in which human conflicts are torn through formalization out of their living context and distorted by being subjected to legal processes".

consequence of the violation (Ruet 2014, 317, 324). In fact, according to the procedural and substantive rules of the Convention, vulnerability can be an ancillary notion to the violation human rights. This is reflected by the procedural constraints enshrined in art. 34 ECHR pursuant to which being "victim of a violation" is the basic requirement in order to submit the application (Carlier 2017, 187). As far as one individual, group of individuals or non-governmental organization is considered victim of a violation, it can be also vulnerable, but the condition of vulnerability not necessarily implies itself a violation of human rights nor legitimizes common instances through a legal action brought by an individual in the public interest (*actio popularis*). However, the communicative process of decision-making is very influential on the dynamics of juridification, which cannot be understood as a universal phenomenon, rather as a form of reproduction of normatively inner elements of the related legal system (Luhmann 1986, 120) – in this case the system of the ECHR.

In other words, definitions of vulnerability that do not consider the distinction between concrete conditions of vulnerability based on human rights' violation – such as for example inhuman treatment or discrimination produced by the lack of enjoyment of human rights – and a mere susceptibility to harm – vulnerability as a condition of threat, hardly find space in the conventional model. Very often, in fact, as we will see, the ECtHR reasons starting from the concrete case but not from a fixed taxonomy of individuals or situations as vulnerable. An apparent categorization of vulnerable subjects as persons belonging to groups at risk of social exclusion can be based on an investigation aimed at identifying the reasons for the persistence of specific conditions arising in the long run an easier susceptibility to be subject of a violation of certain rights. This means, therefore, that referring the vulnerable character to some groups may be helpful to ascertain the structural profiles of the vulnerability that affects certain individuals as well as the external factors that place them in a situation of dependence (Peroni and Timmer 2013, 1056, Heri 2021, 32). On closer inspection, the multifaceted carachter of vulnerability and its applicability to different subjects not sharing the same specific characteristics theoretically should prevent from stigmatizing operations. However, as we will see in sections 4 and 5, the cases where the notion of vulnerability is used are heterogeneous and embrace different types of violations that it is not always possible to identify depending on recurring tendencies. Cyclical crises that exacerbate the conditions of risk of social exclusion imply that many legal categories related to the interpretation of human rights – such as the notion of legitimate interference by the state or the balance of opposing interests and rights based on the principle of proportionality – are concretely subject to an evolutionary interpretation.

In this context, very often the principle of non-discrimination enshrined in art. 14 ECHR paves the path to the use of vulnerability as a facilitating condition of discrimination (Fredman 2011, 25–33), although it has to be noted how this principle does not have an autonomous existence, since it has an exclusive effect in relation to the "enjoyment of rights and freedoms" that are safeguarded and to the extent that it constitutes a violation of the other substantive provisions of the Convention and its protocols. Although the application of art. 14 does not presuppose a violation of these provisions, it is not applicable unless the facts in question fall within the scope of one or more violations of the rights provided for by the Convention. In most cases, the ECtHR uses the notion of vulnerability as an aggravating factor of violations where the burden of proof for

applying non-discrimination is especially high, but vulnerability may also represent the limit of non-discrimination – especially in cases of vulnerable groups – if its requirements are not met (Kim 2021, 622).[4] For example, in some cases the abuse of the notion of vulnerability – often in relation to the reiteration of vulnerable factors as well as of predetermined categories of vulnerable subjects in relation to their subjective features – can in fact produce stigmatization itself and therefore a risk of discrimination of minorities (Bossuyt 2016, 742). However, as far as vulnerability can aggravate the risk of discrimination, it can be also understood as a mitigating factor of the principle of equality in the enjoyment of human rights – that equally ensures a specific assessment for unequal situations. This interesting although not consistent approach shows the shortcomings of the law as an instrument of social change but at the same time the potential for the law to juridify uncodified notions in order to expand the scope of legal norms or interpretations. The rise of vulnerability in the legal discourse obviously represents a social phenomenon if we consider that the law takes its legitimacy from the reality of social facts that are largely spread or commonly perceived. From this perspective, the law is certainly an insufficient instrument to align factual detrimental situations with better protection. However, the reflexive character of the law elaborates solutions that only emerge from the law itself (Teubner 1983, 252): in other words, the weakness and shortcomings of legal norms are not simply overcome by the effectiveness of social norms, rather by the fact that the law itself recognizes the effectiveness of social instances throughout its own mechanisms. This well explains why the use of vulnerability and the related case law of the ECtHR is not surprisingly non-consistent. However, this assumption if far from being exempted by critiques, especially if the random approach highlights an inconsistent standard of protection in situations that are apparently similar, depending on a different interpretation of vulnerability. There is also another factor to be considered regarding the logical reasoning which is based on the use of vulnerability as a factor to be considered in the assessment of a human rights' violation. Once vulnerability is recognized as a facilitator of a violation and it triggers special protection, this catalyzes the whole reasoning into the effect of reducing the state's margin of appreciation (Cole 2016, 260). In other words, it may polarize the judgement on a logical binary alternative: violation due to vulnerability or no violation. In this sense, vulnerability proves to be a powerful means of social change as far as it enlarges the legal scope of application. More deeply, although the visible result of the law is its impact on the balance between powers and rights, the production of legal culture has a more extensive and complex scope. In particular, vulnerability offers the opportunity to enlarge the possibilities of individual emancipation paving the path for institutional responses.[5] Looking at the ECtHR case law, this may be possible even regardless of the recognition of a specific duty of protection by states, through the presence of some elements such as: mentioning precedent cases where the notion of vulnerability plays a role; including vulnerability within the relevant factors considered by the Court in the assessment of the state's interference; drawing the judicial reasoning

[4] This author extensively comments upon the parasitic nature of art. 14 ECHR.

[5] Here we contend the position hold by Fineman regarding the fact that law would be less flexible than political theory as it "operates as a dominant structural paradigm co-opting the experiences of nondominant groups". This paper claims for a positive role of legal culture in preparing those responses in the way by which the law can be applied depending on several factors, such as the expertise of jurists, the awareness of the social instances.

towards the consideration of additional facts; applying the notion of vulnerability in different situations and according to different interpretations. The case law presented in parr. 4 and 5 will give account of these elements.

3. Only law says what the law is

To understand the composite nature of cases where the notion of vulnerability is interpreted and used differently by the Court, even apparently in a non-consistent way (Heri 2021, 205), it is necessary to frame the relationship between human rights and vulnerability. According to Besson's reconstruction, the essential elements of the analytical structure of human rights are three: a fundamental objective interest; a threat of violation; an obligation of protection (Besson 2014, 63). According to the Author, vulnerability considered as an inherent quality of the individual or of a group, i.e. being susceptible to a threat to one's interests, cannot exceed or replace any of these components. However, this reconstruction does not explain the relationship between vulnerability and the structure of human rights. It rather focuses on their mere compatibility, in the sense that the recognition of vulnerability requires in any event the strengthening of State positive obligations regardless the fact that vulnerability is inherent to the individual nature or depends on some omissive conducts of the State determining detrimental effects for some individuals. To this end, the analysis of the three material functions used by the Court with regard to vulnerability appears useful: the first is represented by the activation of special anti-discrimination measures through the use of vulnerability, as a dynamic criterion that expands the non-exhaustive list of discriminated subjects; the second consists in the use of vulnerability as the ground for substantial and procedural positive obligations of states, such as those of investigation and prevention; the third specifically concerns lowering the threshold of the burden of proof for human rights violations in presence of vulnerable situations recognized as potentially relevant to increase the threat of human rights' violation of some subjects. Among the procedural functions, however, the Court would use vulnerability as an indicator to assess the admissibility of an application as well as to allow the reversal of the burden of proof from the applicant to the state (Diciotti 2018, 26).

It is then clear enough that even at the level of case law practice, vulnerability perfectly fits into the assessment whether there has been a state's interference: the requirement of the legal basis provided by law; the proportionality of the interference under a legitimate aim with urgent social need; the necessity in a democratic society of the state's interference. Far from representing an empty formulation, vulnerability is structurally part of the nature of human rights, in its constant evolution.

Thus, if it is true that the ECHR's interpretation of vulnerability is overarching contents wise, this is due neither to the structure of human rights nor to a more significant relevance of vulnerability for certain violations but to historical-cultural reasons that have favored a precise development of the notion of vulnerability within the conceptualization of individual autonomy in the Western paradigm. The so-called "vulnerability paradigm" developed by Fineman (Fineman 2014, 209) is hardly applicable to the model of European multi-level constitutionalism whereas vulnerability is considered a detrimental human position and not a linking factor between individual and society.

This helps to clarify why certain decision-making processes and institutional architectures come into play, rather than the technical way in which a certain decision is taken. The traditional distinction between internal legal culture, describing the way by which lawyers and judges reflect upon the law, and external legal culture identifying the reactions of civil society towards the law (Friedman 1975) is made visible in the case of vulnerability. Those who feel like vulnerable have an expectation towards the change of the way in which the law is implemented. Vulnerability clearly shows these dynamics for the following reasons. First, an approach based on the enhancement of differences operates a conceptual deconstruction of equality as a starting factor for civil coexistence, polarizing the sharp contrast between the individual and the state (Fineman 2018, 60).[6] In such a context, the development of differences must necessarily be an complementary element with respect to the principle of equality, in the sense that individuals are all equal as far as they have the right to be all different (Fineman 2017, 142–143). In this context, equality can indeed be entirely realized as long as it is supplemented by a "tailored" and "on demand" mechanism of positive obligations (Callegari 2018, 13). Second, vulnerability performs the function of being "supplement or complement" of non-discrimination principle, even if the distinction between natural and social differences is not necessarily in a causality relationship with this assessment (Pastore 2018, 134).

The unifying element of the Western system of human rights is the centrality of the dignity of the person as a prerequisite for the development of individual autonomy, autonomy which in the Western legal culture, can hopefully be defined as "relational autonomy" if related to the paradigm of vulnerability as opposed to the tradition of the liberal legal subject (Anderson and Honneth 2009, 127, Coyle 2013, 61, Pariotti 2019, 160, Gordon-Bouvier 2020). According to this premise, it is understandable that vulnerability cannot be interpreted by the European Court of Human Rights as a universal human attribute but rather as a differential factor that fills the gap.[7]

Dignity is the essential way of being of individuals within society as far as they can self-determine themselves and gain recognition for this, but it can be either improved by external action or undermined by it. In a broader sense, the evolution of the notion of individual autonomy needs to be contextualized within the process related to the bourgeois codification that aimed to unify the composite nature of individuals as entitled to certain rights through a limited number of specifications (i.e. owner, man, father etc.) (Tarello 1976, 37) and gradually transform these rights into principles (principle of equality between citizens). The idea of individual vulnerability cannot be understood in the Western legal culture departing, on the one hand, from the principle of equality, on the other hand, from the principle of dignity, as heuristic and interpretative foundations

[6] As pointed out by the author: "A consideration of resources and capabilities highlights one of the paradoxes of a vulnerability approach: while initially it is theoretically important to understand vulnerability as universal, constant, and arising from embodiment, vulnerability must simultaneously be understood as particular, varied, and unique on the individual level (Fineman 2014, 317). It is in the consideration of such differences that the real promise of the theory is evident; it brings to the fore the social and institutional dimensions of human vulnerability".

[7] Here we disagree with Heri's position when she quotes Fineman to support her argument about the universal character of vulnerability.

of violations' thresholds (Resta 2019, 71).[8] It is related to the respect of identity and of the role of the individual in society, how she presents herself towards the others and how this representation may be preserved throughout adverse events. With Heri's words, "vulnerability means ensuring equal protection of dignity" (Heri 2021, 168) and "can be used to identify elements of individuals' identities and situations that entitle them to special protection" (Heri 2021, 171).

Vulnerability can then be correctly understood as an instrument of social change as far as the structural foundations of the law ensure the aim of emancipation from prejudice, injustice and oppression. With respect to this goal, the protection of vulnerable subjects towards the state represents an intermediate result.

More than individual vulnerability, the idea of group vulnerability identifies stigmatizing factors – ethnicity, disability, minor age, migrants' status[9] – as well as stories of prejudice that lead to social exclusion bringing the narrative of vulnerability back to a context analysis. In fact, as highlighted by some authors, the mere notion of group vulnerability risks lending itself easily to essentialism, that is, the tendency to reduce the characteristics of a social group to only the distinctive features of vulnerability; to stigmatization, that is to say the obfuscation of other qualities of the group in the face of the absorbing nature of vulnerability; paternalism, consisting in the systematic attitude of considering vulnerability as an irreversible characteristic for which the interested parties themselves cannot provide (Besson 2014, 75 and 80, Kim 2021, 628–629, Heri 2021, 229).

The Court does not provide a taxonomy of vulnerable factors, but it refers it to individuals or groups, situations and risk factors that may vary over the time and social contexts, and are not reducible to a specific quality of an individual but instead refer to the bond of solidarity between human beings because of their similar susceptibility to being hurt (Ruet 2014, 321). Certainly, in the analysis of cases the time factor, which makes a subject or a group of subjects more vulnerable as much as a violation or in any case a prejudicial conduct is perpetrated to their detriment over time, is recurring.

First of all, it should be noted that the European Court of Human Rights follows a case-based approach, referring individual cases of vulnerability to specific individual conditions, sometimes exemplified and potentiated by the group factor. According to Peroni and Timmer, this may be due to social circumstances, degrees of vulnerability (i.g. special vulnerability) and harm of misrecognition and misredistribution (Peroni and Timmer 2013, 1064–1069). In this regard, one of the criticisms pointed out to individual vulnerability consists in the fact that it would be not easy to distinguish individual vulnerability from group vulnerability, if some groups could be excluded from the entitlement of human rights in the absence of specific exercise of a right, or a protected interest or their active legitimacy (Besson 2014, 69).

However tackling differently individual and group vulnerability can be understood if one considers the form of protection of art. 14 of the ECHR, which can be enforced only as an accessory measure to the violation of other provisions of the Convention or as an

[8] It is interesting to compare Fineman's thesis on state inaction in US as "non constituting injury or harm" and how it and "hierarchy of liberty over inequality", see Fineman 2018.

[9] See the classification of vulnerable groups provided by Peroni and Timmer (2013, 151–54).

interpretative tool used in complex situations that deserve enhanced protection. The vulnerable condition of a group is, for example, generally connected to historical and environmental factors that have favored over time the onset of a prejudice sometimes resulting in forms of social exclusion. The pre-existence of wounds that have been hidden over time within social behaviours and attitudes[10] determine a condition of weakness in the face of which it is more likely that further aggressions can take place.

This may also depend on legislative stereotypes that can prevent the individualized assessment of needs and capacities (Diciotti 2018, 28). In fact, if, on the one hand, the group factor makes a violation more evident, on the other hand, it can increase the degree of vulnerability by structurally crystallizing the persistence of violations through the resistance of vulnerable groups (Pellizzoni 2017, 28).

The emerging interpretation of vulnerability leaves space to a coexistence between a group and an individual perspective in the sense that the protected interest can be collective – hence the vulnerability shared by different subjects – as far as the human right to which the specific situation of vulnerability may rely on, must reside individually (Besson 2014, 74 and 79).

4. What the law cannot say (unless stigmatizing individuals)

There are structural and material aspects that hinder the enjoyment of rights for vulnerable persons – for example, state control, dependency, victimization, prejudice. The variety of these factors highlight the open-ended approach of the ECtHR to vulnerability (O'Boyle 2016, 2).

Sometimes, with regard to some vulnerable individuals, and in particular to groups, the attribution of the adjective "vulnerable" can integrate the violation of the principle of non-discrimination pursuant to art. 14 without making it necessary to use the standards traditionally developed in the interpretation of this provision, such as actual differentiation, legitimate purpose, proportionality and the margin of appreciation. However, the prejudice deriving from vulnerability needs to be distinguished from the notion of disadvantage deriving from the principle of non-discrimination. It in fact represents a more complex notion which aims to put emphasis on the intrinsic individual characteristics. The notion of vulnerability opens a breach in the interpretation of the principle of non-discrimination, in the sense that factual differences as well as the persistence of a condition of vulnerability makes it increasingly difficult for some subjects to enjoy equal or at least homogeneous treatment of different situations. In fact, the participatory dimension of substantial equality consists of two elements: a transformative one, which shall remove the detriment resulting from being different; a redistributive, which shall interrupt the cycle of disadvantage and recompose a better redistribution of resources (Peroni and Timmer 2013, 1075).

In principle, it shall be noted that the Court seems reluctant to consider hypotheses of institutional vulnerability, as the assessment must always be conducted with regard to specific facts that become relevant as vulnerable situations through the inactivity of the state. In the absence of violation, in fact, factors related to the vulnerability of individuals may not be used neither to assess a violation of a human right nor to anticipate

[10] With this expression I refer to a potential drawback to substantial rights or psychological situations.

protection. In this sense vulnerability does not alter the dynamics between entitlement to rights and entitlement to claims, because it accompanies the principle of equality as its complement (Pariotti 2019, 161).

We can then argue that the use of the notion of vulnerability does not concretely determine an enlargement of legal protection before the Strasbourg judges, except in relation, as mentioned, to the expansion of various characterizations related to the victims of a violation. The reconciliation of a personalistic meaning of vulnerability with the one of a vulnerable group can be found in various rulings, although the indicators that make it possible to consider certain subjects vulnerable in various cases refer to the specific categories involved.[11] Hereinafter, we will present some cases related to Roma.

In fact, possessing a "vulnerable" status does not always imply a violation of a right itself. In the case *D.H. and Others v Czech Republic* (2007) the Court considers vulnerable, for example, groups that have suffered social, historical and institutional conditioning over time, such as those belonging to the Roma community with particular regard to the special education of minors.

The case concerned the enrolment of Roma children in special curricula, with prejudice to educational and personal development, in violation of art. 2 of Additional Protocol 1 and art. 14 ECHR. Statistics indicated that more than half of these classes were composed of Roma children encouraged by their own parents to enroll in so-called "special" schooling programs, partly to avoid the concentration of Roma children in mainstream schools, and partly due to a relatively low level of interest in education. The case highlighted the emergence of a category of vulnerable subjects based on the repetition over time of prejudicial behaviors capable of producing further effects in the long term.

What is interesting in this case is how the Court analyzed, for example, the reasons that would plausibly have explained the formation of the disadvantaged and vulnerable minority of the Roma. They rely on their turbulent history and their constant social uprooting. Although present in Europe since the 14th century, the Roma would not have been recognized by the majority of society as a full-fledged European people and would have suffered a history of rejection and persecution. It is interesting in the Court's reasoning to pinpoint the sociological relevant of its approach in that the vulnerability of many Roma communities, who live in difficult conditions, often on the margins of society in the countries in which they are rooted, as well as their low participation in public life, would precisely derive from centuries of rejection and stigmatization. In fact, the long-term effects of stigmatization would have led the Roma being recipients of a curriculum which was qualitatively lower than the one available for children attending traditional classes, which over time decreased their opportunities for higher and professional education.

The automatic placement of Roma children in classrooms with special needs may reinforce the stigma by labelling Roma children as less intelligent and less capable (Besson 2005, 450). At the same time, separate education schooling denies both Roma and non-Roma children the opportunity to meet and learn to live together as equal and with mutual acceptance of differences. In this social dynamic, minor age represents an aggravating factor not much because the minor age can be considered in some

[11] For instance, migrants, Roma children and unaccompanied minors.

circumstances as a *minus* with respect to individual autonomy, but because the lack of enjoyment of equal opportunities and integration within composite communities, affecting such an early stage of life when the possibilities for developing personality are higher, may undermine a life project of personal development.

In a different case, *Oršuš and Others v Croatia* (2010), the Grand Chamber makes a further step concerning the obligations of special protection for states. In particular, the Court emphasized how, due to its troubled history, the Roma community has become a disadvantaged and vulnerable group, which therefore requires special protection, even in the field of education. Although there was not any automatic placement policy for Roma children in separate classes in Croatia at the time, in reality only Roma children were placed in separate classes. In presence of a clear practice of differentiation that indirectly discriminated Roma children against other children, the state should have demonstrated that the practice of segregating Roma children was objectively justified, appropriate and necessary.

Consequently, although the temporary placement of children in a separate class due to a language deficit is not automatically contrary to the principle of non-discrimination established by art. 14, if such practices concern exclusively members of an ethnic group, it becomes necessary to provide special guarantees.

Some protection measures have been adopted in Croatia to face possible vulnerable situations. In particular, the amendments to the law on primary and secondary education entered into force in July 2010 providing a legal basis for access to traditional education schemes for Roma children, who have been included in a regular program of studies. The test on the proficiency of the Croatian language among children was introduced before their enrollment in elementary school. Teaching assistance has been strengthened in primary education to address the high school dropout rate. Ministerial funds have been allocated for the purchase of textbooks and free meals for children from families receiving social benefits starting from 2014. The Ministry of Social Security and Family has started the development of training activities to raise awareness of services on their crucial role in tackling the problem of low school attendance. In 2011, a family center was established in Medimurje County to raise awareness among the Roma population about the importance of education.

We may conclude that if, *prima facie,* the Court's operation may appear stigmatizing at times, albeit positively in order to provide greater protection, it does not seem, however, that the definition of Roma as a vulnerable group can be generalized with regard to their treatment. Emblematic in this sense is the famous case *Chapman v United Kingdom* (2001), where the qualification of Gypsy as a vulnerable category was not sufficient for the purpose of ascertaining the violation of the right to housing and the right to property. The case concerned a lady belonging to gypsy ethnicity who owned a land, where she had permanently settled with a caravan without, however, having the planning permission. Although in this case the Court held that the vulnerable position of the Gypsy ethnicity as a minority implied the need to pay particular attention to different needs and lifestyles, in particular to their identity as travelers, nevertheless the qualification of that ethnicity as a vulnerable group was not sufficient to find that the state's interference was not proportionate. On the contrary, the itinerant lifestyle has proven to be false with respect to the fact that the applicant, willing to take residence on

that land, did not want to pursue an itinerant life. The Court upheld that the applicant's conduct was in any case contrary to national environmental and urban planning legislation because the planning permission was the requirement for the occupation to be lawful. Therefore, neither violation of the right to housing nor property was sought in this case.

In a similar case *Winterstein v France* (2013) the Court sought the violation of art. 8 applying, first of all, the concept of "domicile" pursuant to art. 8 not only to premises that are legally occupied or that have been built on the basis of a legal title, but also as an autonomous concept that does not depend on the legal definitions of domestic law. The fact that a particular site constitutes a "home" or not for the purposes of configuring the violation of art. 8 depends on factual circumstances as well as on the presence of stable and continuous connections over time with a specific place. As in the previous case, the Court considers that applicants belonging to the gypsy ethnicity have sufficiently stable connections with the caravans, cabins and bungalows on the land occupied by them such that this configures their right to housing, regardless of the lawful occupation. The Court reiterates that the occupation of a caravan is an integral part of the identity of travelers, even when it regards individuals who no longer live a completely nomadic existence. Any measure affecting the positioning of caravans affect the ability to maintain individual identity in conducting a private and family life according to the cultural tradition. Furthermore, the obligation imposed on the applicants to remove their caravans and vehicles and to eliminate any artifacts built on the land constitutes an interference with their right of respecting their private and family life and the inviolability of their home.

However here the Court takes into account their minoritarian identity as Gypsies and travellers as deserving special consideration in relation to the proportionality of the interference. In fact, the applicants were not relocated by the authorities and have lived under the threat of eviction's measures that had inevitable repercussions on their lifestyle and on their social and family relationships. Here it is interesting how the vulnerable character comes into question as a general principle (§ 148) and in consideration of other relevant facts to the case (§ 159–166) in the assessment of the necessity of the state's interference.

The enjoyment of human living conditions for Roma subjects under Article 8 is also object of another case, *Hudorovič and others v Slovenia* (2020) where the Court hold that the scope of the State's positive obligation includes providing access to utilities, in particular access to drinking public water-distribution system and sanitization. In this case as municipal authorities set-up a water tank for Roma, providing them with the opportunity to access drinking water, although in proximity of precarious settlements thus having an irregular status, the Court hold that there has not been a violation of Article 8 notwithstanding the vulnerable status of the applicants.

5. What "juridification" stands for in the practice of vulnerability

The risk that the judicial use of the term "vulnerability" may provoke over-juridification without legal basis should not be overestimated (Re 2018, 24). The multiple character of vulnerability makes this term permeable to various usages in various contexts much depending on the procedural rules provided by the conventional system. For example,

we already have discussed how the notion of group vulnerability is the result of a complex legal qualification which, when ascertaining a violation of human rights, makes it possible to provide enhanced protection by virtue of belonging to a certain group at risk of social exclusion because subject to prejudice.

This is, for example, the case of individuals suffering from disabilities against whom some measures can be highly detrimental, imposing additional protection for those subjects. The leading case in this area is the case *Zehentner v Austria* (2009), where the applicant, in reason of her legal incapacity was considered vulnerable because had been deprived of her home following to a judicial sale, in violation of her right to respect for private life and the right to property. In this case the vulnerable character of legal incapacity is strictly connected to the strength of the protection measures prompted by the internal law. In particular, the Court considers that neither the protection of the buyer in good faith nor the general interest of preserving legal certainty are sufficient to justify the fact that the applicant, without legal capacity,[12] was expropriated from her home without being able to participate in the procedure and without having any guarantee that the measure in question has been subject to a proportionality assessment. Due to the vulnerable condition of the applicant, the positive obligation of the state would have consisted in ensuring specific justification for an extension of the time-limit for lodging an appeal against a judicial sale of real estate. The reason for this approach, which calls into question some classifications, is understandable if we consider that some subjects have traditionally been subject to prejudice, with long lasting consequences. Such biases can sometimes also lead to legislative stereotypes that prohibit the individualized assessment of individual abilities and needs, as in the case of legal capacity.

On another note, in the field of immigration, the case *M.S.S. v Belgium and Greece* (2011) represented a turning point in the application by the Court of Article 3 of the ECHR to cases of violations of economic, social and cultural rights due to the extreme vulnerability of the victim. Indeed, the Court held the Greek and Belgian authorities were responsible for failing to take account of the applicant's vulnerability, an Afghan citizen who fled from Kabul in 2008 and entered Europe from Greece, living for months in a state of extreme poverty that rendered him unable to provide for its basic needs: food, hygiene and housing. In this case, the Court held that vulnerability stemmed from living conditions, together with the prolonged uncertainty in which he remained and the total lack of prospects for improvement of his situation, reaching such a serious level to fall within the scope of application of Article 3 of the ECHR. In particular, the applicant was the victim of humiliating treatment which showed a lack of respect for his dignity and this situation undoubtedly produced feelings of fear, anxiety and inferiority (Flegar 2016, 157). Another interesting perspective on vulnerability is represented by the case of *Tarakhel v Switzerland* (2014) that had a significant impact on the Dublin system and on the rejection's decisions for families with minor children. The Court in this case considered the applicability of art. 3 ECHR a necessary protection in presence of the decisive factor of the extreme vulnerability of minors due to the minor age and their lack

[12] On the vulnerability of mentally ill persons, see *Renolde* (2008), § 84; *Fernandes de Oliveira v Portugal* (2019), § 124.

of independence, regardless of whether they were unaccompanied minors, which must be assessed prior that any other evaluation on the status of illegal migrant.

The vulnerable character of unaccompanied foreign minors in an irregular situation has also been stated by the Court more recently in the case *H.A. and others v Greece* (2019). It is the case of nine minors who irregularly entered Greece and were arrested by the police. The Court found that the State failed to undertake an individual assessment based on the particular situation of applicants that reconciles migration policies and human rights' protection, e.g. the fact that irregular migrant children are much dependent upon state protection and therefore need special protection. It is interesting to note here that the Court singles out the child status as indicator of vulnerability that prevails on others, such as the illegal position, the fact of being in an un-known country, the migrant status,

A similar approach was followed by the Court in the *Kiyutin v Russia* (2011) case concerning the denial of a residence permit for HIV-positive subjects, in violation of Articles 8 and 14 of the ECHR. The Court here entered the margin of appreciation of the states seeking that it must be reduced when it involves a differential treatment towards a vulnerable group due to health conditions. The exclusion of HIV-positive people from entering and / or from the possibility of staying in a country in order to prevent the transmission of HIV is based on the prejudice that these subjects may adopt specific unsafe behaviors against which citizens will not be able to adequately protect themselves. This hypothesis amounts to a generalization that is not based on objective grounds and does not take into account the individual situation, such as that of the applicant. Furthermore, under Russian law, any form of behavior undertaken by an HIV-positive person who would be aware of its HIV status and then exposing someone else to the risk of HIV infection, is in itself a crime punishable by deprivation of liberty. The differentiated treatment of HIV-positive long-term residents compared to short-term visitors has been justified by the risk that the health demand of the former constitutes an excessive public burden on the national health system, while visitors would still have the possibility to request health treatment elsewhere. However, economic considerations that justify the exclusion of HIV-positive potential residents are only applicable within jurisdictions where foreign residents can benefit from the national health scheme at a reduced rate or free of charge. This was not the case of Russia at the time of the facts: those who were not Russian citizens were not entitled to free medical care, except for emergency care. The Court noted that restrictions on the freedom of movement and residence for HIV-positive individuals may not only be ineffective in preventing the spread of the disease, but also actually be harmful to the country's public health. First, there is a high risk that migrants would remain illegally in the country to avoid HIV screening, and their HIV status would remain unknown to both themselves and health authorities. This would prevent them from taking the necessary precautions, avoiding unsafe behavior and accessing information and prevention services. Second, the exclusion of HIV-positive foreigners could create a false sense of security by inducing the local population to view HIV/AIDS as a problem that affects only foreigners and which can be solved by expelling infected foreigners and not allowing them to permanently settle in the country, consequently developing the attitude that the local population does not need to engage in safe behavior. Finally, the Court considers the

broad international consensus that the restrictions on the entry and stay of people living with HIV cannot be objectively justified with reference to the risk to public health.

The reasoning on vulnerability has been also developed in the context of procedural rights of accused vulnerable persons under Article 6 ECHR for instance in the case *Hasáliková v Slovakia* (2021), where the applicant – convicted for murder and sentenced to imprisonment – claimed that the State did not make reasonable adjustments to account for her vulnerability and that her confession made before the police had served as the basis for her conviction even though she had later retracted it. The vulnerable character of the applicant should have emerged from various indicators, such as her attendance of a "special school", her entitlement to disability benefits, her attendance at a psychiatrist, her physical and slight intellectual disability. However, the Court surprisingly hold that the applicant was not vulnerable being her adult and able to recognize the dangerousness of her actions. Therefore, her pre-trial statements have been deemed to be released by a reliable person and therefore there has not been a violation of the right to fair trial under Article 6 ECHR. The dissenting opinion instead examined very carefully the degree of vulnerability emerging from intellectual disability that affects the capacity of the applicant to understand the full implications of procedures involving arrest and detention including evidence and her role in the participation to the offense, her rights and her capacity to communicate effectively. For this, the State should have provided additional safeguards at pre-trial and trial stage, paying particular attention to the voluntariness of confession in the plea-bargaining, such as the presence of a counsel (appropriate adult) or a lawyer with training in intellectual disabilities, videotaping of interviews to allow the judge to better determine the credibility and voluntariness of confessions made by suspects with intellectual disabilities, limits on plea-bargaining.

On the different topic of domestic violence, the case *Talpis v Italy* (2017) was brought before the Court by an Italian citizen who was a victim of violent acts by her spouse repeatedly since 1992. The total inactivity by the Italian authorities who have not adopted due diligence in order to protect the victim's right to life ex art. 2 of the ECHR thus avoiding inhuman and degrading treatments pursuant to art. 3 of the ECHR, in conjunction with the prohibition of discrimination pursuant to art. 14 ECHR, determined a multiple violation of the Convention. Precisely because of the repetition over time of violent acts suffered by the victim, the latter could have been considered a vulnerable subject.

The court argued that the state's failure to protect women victims of domestic violence violates their right to equal protection under the law and therefore this cannot be intentional. Previously, the Court had already held that institutional inactivity against violence had created an escalation amounted to a violation of Article 14 of the Convention. The Court also held that discriminatory treatments occurred precisely when it was found that the actions of law enforcement authorities did not simply constitute a failure or delay in dealing with the violence in question, but amounted to repeatedly condoning such violent behaviors, reflecting a discriminatory attitude against female victims. However, the measures that the state should have taken in practice in order to prevent the violation of the victim's right to life remained unclear, and in particular: the existence of a real and imminent risk; the identification of measures aimed at preventing

the realization of the threat; the identification of positive behaviors resulting from the violation of art. 14 ECHR.

Recently, another case in the field of inhuman treatment under Article 3 ECHR, *Volodina v Russia* (2019) has been brought before the European Court. The applicant, a woman, has been repeatedly assaulted, kidnapped, stalked, threatened, robbed, and intimidated by her partner until the point that led to the termination of her pregnancy because of a punch to her stomach. The authorities of the respondent State have never taken any preventive measure, failing to comply with the obligation to establish a legal framework, the obligation to prevent the known risk of ill-treatment and the obligation to carry out an effective investigation against systemic violence as well as the obligation to provide policy measures aimed at substantive gender equality.

The vulnerable character of women has also been used Court in a case of rape under threat, *E.B. v Romania* (2019), also to hold that the positive obligation of the State consists in adopting a context-sensitive approach also based on a psychological assessment and not in relying entirely on the absence of proof of resistance of a woman who is victim of violence. In the lack of proper investigation, the State failed to comply with the positive obligation to enact and apply domestic criminal law provisions punishing rape.

6. Conclusions: new paths for the sociology of law?

The juridification of vulnerability in the case law of the European Court of Human Rights presents a composite nature, both procedural and substantial. This twofold carachter does not only refer to the fact that vulnerability can only be triggered by a violation of a human right, but also to a different treatment that is reserved to vulnerability depending on whether and how the vulnerable condition is strictly related to the violation of a right. We have seen that this model of juridification may lead to different results in terms of individual protection. However, its potential proves to be broader and more complex than rights' protection, because it also intersects other dimensions such as the individual and social perception to be part of a legal community, the preparatory phase of legal recognition, the social acceptance of the legal relevance of certain issues.

This interaction takes its time and produces a set of accommodation tools setting up the cultural structures of the law and its capacity to capture the relevance of facts as a meaningful field of knowledge either in terms of social responses or social claims. This explains why indicators cannot explain (Blichner and Molander 2005, 5), but it involves all cases where the legal sphere gains relevance in relation to facts either as social response or as social claim.

The case of vulnerability is paradigmatic in this sense because, on the one hand, it broadens the number of violations of the rights provided for by the ECHR, on the other hand it also enhances the possibilities of protection through corrective or complementary means of codified legal notions (Zimmermann 2015, 539). This is important if we consider that the introduction of the codified notion of vulnerability would not necessarily imply better protection. The latent effects of prejudice – should it be initial disadvantage, lack of chances, structural weakness – can often be masked behind a psychological or material consequence that disconnects the vulnerable status from the enjoyment of rights. When the detrimental effects become visible through

recognition mechanisms, they can also substantially impact on the responsibility of states as well as on the improvement of individual well-being.

This paper has tried to show the impact of vulnerability on the judicial protection of human rights, namely to what extent the law acts with its own tools as a catalyst for social needs both with respect to factual situations and personal and social factors. In this sense, the evolution of the ECtHR's case law witnesses the rise of recurring variables in the definition of vulnerability. The repeated history of prejudices leading to the stigmatization of certain subjects requires the expansion of the positive obligations of states and the reduction of their margin of appreciation.

The ECtHR favors an idea of rights' protection that can be integrated by the juridification of the notion of vulnerability in various ways: through the model of discriminatory and non-discriminatory factors; through the choice of non-categorization ex ante but of the qualification of vulnerable situations ex post; through the analysis of the personal or social nature of vulnerability. The aim of vulnerability's protection is to make the composite and multiform individual existence gradually filtered throughout the mutual exchange of different life experiences (Ferrarese 2016, 168). In this context, vulnerability as a human condition represents a dimension that the law tries to juridify according to its contextual legal culture as better as it can do, but that is inherently extraneous to the law-making. The theoretical advantage of vulnerability is to spot partial but at the same time unique experiences where different types of wounds can be collected into histories and therefore transformed into opportunities of recovery and transformation.

The complementary role of vulnerability, which is functional and instrumental to ensure the effectiveness of human rights, reveals its cognitive – rather than normative – peculiarity with respect to the individual and the social sphere. Of course, the cognitive carachter of vulnerability is filtered by the legal system in a selective way.[13] As correctly observed by Teubner "normative elements in law as representatives of the self-reference of law in which legal decisions are produced, and cognitive elements as representatives of the openness of law, in which law adapts to its environment (…) are necessary but they stand in precariously tense relation to one another" (Teubner 1987, 26).

Legal creativity plays an important role in expanding the dynamic relationship between human beings and their social environment (Wieacker 1990, 23, Friedman 1994, 125). Looking at the impact of law-making on the way in which individuals identify themselves as vulnerable subjects, we can draw the conclusion that this much depends on the way in which law-making has been intellectually prepared and institutionally implemented and then able to connect itself to societal expectations. As corrected commented by Nelken, "Like culture itself, legal culture is about who we are not just what we do" (Nelken 2004, 1). It's then important to distinguish technicalities that are inherent and peculiar to law-making – such as, for instance, the conventional system of the ECHR – from the complexity and implications of social change. Juridification can contribute to the evolution of the law within society if it looks at the social change that the law operates besides the action of legislators and interpreters (Michaels 2012, 1066).

[13] On the elaboration of the idea of background information and of the concept of Vorverständnis, meaning the contextual knowledge where some practices develop, see Teubner (1983), where he writes: "The legal system develops certain specific 'social construction of reality' (…) in order to decide social conflicts under the guidance of social norms".

The sources of the law and its implications on the environment are strictly interwoven in the sense that social change does not automatically produce changes in the legal system, rather in the way to look at it and use it (Friedman 1994, 119). This integrated perspective looks at the way by which judges elaborate on procedural requirements in a patient and not necessarily cost-effective way. Legal culture needs its time to make the mechanisms of juridification settle. The challenge for the contemporary sociology of law is to distinguish the proper time of the law to be incorporated into legal culture and the different time of social change, which increasingly depends on complexity and its variables. This may happen reconciling the individual perception of social needs – such as the need to specifically address vulnerable situations – and the legal recognition of vulnerability as a reflexive modality that expands the procedural possibilities for individuals to be protected (Ricoeur 2004, 22). If the process of juridification is understood along this pathway, the potential for the sociology of law – and of the legal culture to be one of its observatories – is enormous for preparing structures and spaces of social change. In such a context the multifaceted semantics of vulnerability can be reconciled with its multiple forms of recognition as well as its failures.

What are the lessons learned from the model of juridification of vulnerability adopted by the ECtHR?

The narrative of vulnerability is overarching based on the assumption that often the quantity is a decisive factor that supplements the quality of the assessment. The juridification of vulnerability through the customization of its use presents potential as far as it is clear that juridification cannot work in any event. I refer to the aptitude to consider the use of a concept such as vulnerability as the extrema ratio to fill the gap of the system of human rights protection. As well known, the law is the strongest legitimate way a society can use to ask for obedience, but the law socially fails if it shows its weak side.

This reflection warns legal sociologists to look at the vulnerability as the triumph of a non-formalistic juridification. Once vulnerability is part of the legal sphere – its codified or uncodified nature loses relevance, simply because this is replaced in any event by the performative use of the law. This implies, in other words, that vulnerability can be used neither as an empty word to identify human experiences nor as a mere technicality to achieve an interpretative objective. Should it be the case, juridification of vulnerability would wrap individuals within a victimistic conception that gives protection, in the best of the hypothesis, as a form of reparation of a structural deficiency.

If instead, vulnerability complements the development of the law keeping pace with social change, not reducing itself to a technical formulation or to a rhetorical narrative of precedents, but through a responsible precise use of the term, then the process of juridification becomes essential to the development of legal culture.

This implies recognizing legal effects if applicable but also the relevance of concepts among jurists and sociologists or social resonance among stakeholders against forms of legal determinism that stop the social dynamics and give voice neither to social demands nor to social responses. This idea of legal culture, stemming from multiple reflexive forms – institutional choices, policies, doctrinal debates, case law, interpretation, administrative actions, public opinion (Friedman 1993) – works once it overlaps with the social sense.

In this regard, the analysis carried out has shown some results attributable to a form of juridification that attempts to introduce the vulnerability factor within the legal culture of human rights according to the main understanding that penetrated the social perception of the international community.

It is out of the paper's intentions to assess whether the notion of vulnerability is juridified by the Court according to a positive or negative model of juridification, because we reject the idea that the aim of juridification is only rights' protection. It is realistic to think that juridification presents cyclical phases that confirm the need to integrate at various levels and constantly the evolutive findings of legal practices with the underlying social layers as well as with the discourse about them. Sometimes we forgive that before the Court of Human Rights, there are not humans in flesh and bone, but their rights that claim to be human. The social character of the conflict before a supranational body is highly rarefied, sometimes latent but persistent, whereas the law wears its clothes for all seasons. The challenge for the sociology of law is ultimately to constantly recognize the complexity looking the mechanisms through which the social conflict can be transformed into other forms.

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