

CAPA SOBRE ACESSO CADASTRO PESQUISA ATI
SUBMISSÃO POLÍTICA DE ÉTICA INDEXAÇÃO CONT,

USUÁRIO

Login

Senha

Lembrar usuário

Capa > Edições anteriores > **v. 11, n. 3 (2019)**

v. 11, n. 3 (2019)

Setembro/Dezembro

Sumário

Apresentação
Anderson Vichinkeski Teixeira

Artigos

Vulnerability, Care and the Constitutional State
Lucia Re

The "Basic Structure" of the Constitution as an Enforceable Yardstick
Adjudication
Sabrina Ragone

Self-Determination of Peoples in the Charter of the United Nations
Petr Kilian

Legal being and its attributes in Presocratic philosophy
Roman Grynyuk, Yurii Hotsuliak

El concepto de verdad en Gadamer y Brandom: presupuestos para la cons-
ciencia del Derecho.

Ana Maria Giraldo Giraldo, Liliana Ortiz Bolaños

Direito adquirido na Constituição e sua repercussão nos direitos individuais d
Tercio Sampaio Ferraz Jr;

Civil disobedience as a constituent/dis-instituting power
Andityas Soares de Moura Costa Matos

São os direitos sociais "direitos públicos subjetivos"? Mitos e confusões na te
Daniel Wunder Hachem

A via da democracia
Paulo Marcio Cruz

O problema da superinterpretação no Direito brasileiro
André Karam Trindade

Originalismo democrático como modelo interpretativo da Constituição brasile
José Rodrigo Rodriguez

A Teoria da Constituição como Teoria Crítica: Marcelo Cattoni, democracia se
vir
David F. L. Gomes

Sobre la naturaleza de la responsabilidad extracontractual por los actos practicados en el ámbito de la PDF (ESPAÑOL
Unión Europea por sus instituciones (ESPAÑA))
Carlos Francisco Molina del Pozo, Jamile Bergamaschine Mata Diz, Roberto Correia da Silva Gomes 502-522
Caldas

Retos del estado de derecho frente al proceso de paz la Habana: análisis sobre la creación de campos de PDF
excepción, producto de las negociaciones de la Habana entre el Gobierno Colombiano y las Fuerzas Armadas (ESPAÑOL
Revolucionarias de Colombia - Farc (ESPAÑA))
Carlos Andrés Ruiz Soto 523-535

CONTEÚDO DA REVISTA

Pesquisa

Escopo da Busca
Todos

Procurar

- Por Edição
- Por Autor
- Por título
- Outras revistas

SH)
40

TAMANHO DE FONTE

SPAÑOL

INFORMAÇÕES

- Para leitores
- Para Autores
- Para Bibliotecários

-394

F
15-436

OPEN JOURNAL SYSTEMS

Ajuda do sistema

479

JF
480-501

ISSN: 2175-2168 - **Melhor visualizado no Mozilla Firefox**



Este trabalho está licenciado sob uma [Licença Creative Commons Attribution 3.0](https://creativecommons.org/licenses/by/3.0/)

São Leopoldo, RS. Av. Unisinos, 950. Bairro Cristo Rei, CEP: 93.022-000. Atendimento Unisinos +55 (51) 3591 1122

Projeto gráfico: Jully Rodrigues

The graphic is composed of three main parts. On the left, a white box contains journal metrics: 'Revista de Estudos Constitucionais...' at the top, 'Q4' in a red box, 'Law' in a grey box, 'best quartile' in a grey box, 'SJR 2019 0.11' with a line graph, and 'powered by scimagojr.com' at the bottom. In the center is a dark grey badge with the text 'We are Crossref Member' in white and multi-colored fonts. On the right is the 'Crossref Similarity Check' logo, which includes a stylized 'C' icon and the text 'Crossref Similarity Check Powered by iThenticate'.

Vulnerability, Care and the Constitutional State

Vulnerabilidade, Cuidado e Estado Constitucional

Lucia Re¹

Università degli studi di Firenze (UNIFI/Italia)
lucia.re@unifi.it

Resumo

A chamada “virada da vulnerabilidade” envolvia principalmente ética. Essa linha de pensamento encontrou análises feministas, especialmente aquelas que desenvolviam uma “ética do cuidado”. Nas páginas seguintes, descrevo os principais estágios da reflexão filosófica contemporânea sobre vulnerabilidade, enfocando as relações entre a teoria da vulnerabilidade e algumas versões da ética do cuidado. Tento, então, mostrar como as teses sobre vulnerabilidade (e cuidados), hoje mantidas predominantemente por estudiosos da América do Norte, podem ser empregadas na Europa à luz da evolução do “Estado constitucional”.

Palavras-chave: Vulnerabilidade, cuidados, igualdade, teoria feminista, Estado constitucional.

Abstract

The so called “vulnerability turn” mainly involved ethics. This line of thought encountered feminist analyses, especially those developing an “ethics of care”. In the following pages I outline the main stages of contemporary philosophical reflection on vulnerability, focusing on the relationships between vulnerability theory and some versions of the ethics of care. I then try to show how the theses about vulnerability (and care), today held predominantly by North American scholars, can be employed in Europe in light of the evolution of the “constitutional state”.

Keywords: Vulnerability, Care, Equality, Feminist theory, Constitutional State.

¹ Professora Associada de Filosofia do Direito da Università degli Studi di Firenze, Via delle Pandette, 32, Edificio 4, Dipartimento di Scienze Giuridiche, 3 andar, CEP 50127, Florença, Toscana, Itália.

Introduction: Vulnerability and Care

In contemporary times, thinking about vulnerability has developed mainly in the field of ethics. Feminist analyses have contributed to this development, in particular theses formulated by authors who theorized an "ethics of care". In the following pages I briefly review some of the stages of contemporary philosophical thinking about vulnerability, focusing specifically on the links between this and some versions of the ethics of care. I then proffer some insights for evaluating how the outcome of thinking about vulnerability (and care), currently mainly addressed in US scholarship, can be used in continental Europe in light of the evolution of the constitutional state.

Contemporary thinking on vulnerability draws on the work of a number of twentieth-century philosophers such as Simone Weil, Hannah Arendt, Emmanuel Lévinas and Paul Ricoeur,² who focused mainly on "ontological vulnerability", understood as a universal condition that unites all human beings by virtue of their being "susceptible to injury". (See Cavarero, 2013) This condition of exposure is due both to the fragility of human nature and to the fact that we relate to others. According to this perspective, analysing vulnerability also involves thinking about social ties and violence.

Beginning in the 2000s, Judith Butler and, in Italy, Adriana Cavarero, grew and expanded on this line of thought. Butler in particular took the pioneering step of combining an analysis of universal ontological vulnerability, linked to our being "body" - which Butler calls "precariousness" - with an emphasis on particular, socially produced vulnerabilities - what the author calls "precarity".³ While Butler stresses the idea of exposure to the other (not only and perhaps not so much in the physical sense, but in the sense that from birth we are "impinged upon", marked by relationships), Cavarero underlines the fact that, historically, interpersonal relationships have intentionally been represented as necessarily conflictual and violent, wherein being exposed to injury and being rendered helpless, often makes us the recipients not of others' violence but of their care.⁴ Butler and Cavarero, therefore, both set off from ethics to imagine a politics in which violence might be shifted from centre stage to the margins.⁵ For Butler (2009 and 2015), however, not only is thinking on ontological vulnerability combined with an analysis of socially produced and unequally distributed vulnerability, but ontological vulnerability is necessarily experienced by individuals in socially and economically differentially distributed forms.⁶ The vulnerability we experience thus depends on the webs of protection that we can or cannot use. Our experience of vulnerability is connected to the power relations that exist in a society.

As Butler points out, neoliberalism places us in a paradoxical position. Its ethical imperative is, indeed, individual responsibility: the neoliberal subject is the "entrepreneur of themselves". The precarity generated by the market and progressive divestiture of the welfare state makes it impossible for most people to invert this ethical-social model, however. (Butler, 2015) In today's "performance society" (Chicchi and Simone, 2017), the individual is thus deprived of social bonds, increasingly exposed to precarity by the disappearance of state (and social) systems of protection, caught up in biopolitical mechanisms aimed at dismantling subjectivity: the body, personality, and

²Some scholars have referred to a Jewish thread of thinking on vulnerability (see for example Rossetti, 2018, p. 83-108), although perhaps it would be more appropriate to call it Jewish-Christian. On the notion of vulnerability in Lévinas's thought see Ciaramelli, 2018.

³ See Butler, 2004 and Cavarero, 2007. For a comparison of the two philosophers, see Bernini and Guaraldo, 2009.

⁴ Regarding this issue, see for instance Pinto, 2018, p. 49-82.

⁵ Guaraldo, 2012 moves in the same direction.

⁶ On this topic, see the analysis by Casalini, 2018, p. 27-48.

social relations are “turned into value” or “discarded”. (See Bauman, 2004) In light of this point, vulnerability, care, and protection are all connected and raise the question of the role of the state.

A theory of ethics focused on identifying particular forms of vulnerability had already been developed during the 1980s, previous to Butler’s and Cavarero’s analyses. Such theory draws ethical-normative guidelines from the “vulnerability principle”. It was mainly Robert Goodin (1985) who argued, in *Protecting the Vulnerable: A Reanalysis of our Social Responsibilities*, that the majority of our moral responsibilities (“special responsibilities”) derive from the fact that some subjects are in a position of dependence in relation to us, that is, they depend on our actions and choices. This fact gives rise to family and emotional responsibilities, for example, but also a number of responsibilities towards other social actors and the community in general. According to this perspective, vulnerability is thus the primary source of moral obligations and derives from relationships which, in many cases, the subjects involved do not “choose”.

For Goodin, vulnerability is a relational concept: we are vulnerable to other people’s actions and choices. This idea of ethics, rooted in vulnerability, closely references the feminist theories of contemporary ethics of care from the same period, in particular theses by Virginia Held (1987, p. 111-137). This strand of feminist critique addresses contractualism – and even more so, neo-contractualism – with the aim of bringing to light the bonds of dependence that the paradigm of democratic citizenship tends to conceal. (See also Pateman, 1988)

In the 1990s, another feminist philosopher, Eva Feder Kittay, expanded on the analysis of dependency relationships and their implications. In both *Love’s Labor* (Kittay, 1999) and the essay *Dependency* (Kittay, 2015), the author argues that the liberal conception of equality as theorized by Rawls is false because it conceals the fact that many people in society exist in a state of dependence. There is, in fact, an “inevitable dependence” uniting everyone at different stages of life (childhood, old age, illness), and there are particular situations of dependence, such as the relationship between disabled people and their care givers. Traditionally, adult (white) males have been represented as “independent” because the task of caring for “dependents” was confined to the private sphere and assigned to women.

Kittay’s work combines disability studies and feminist disability studies⁷ to show that care and dependence are a public problem. For Kittay, institutions should consider the management of dependency a priority objective. From this perspective, both universal vulnerability and particular vulnerabilities must be addressed not as a source of insecurity, but as a permanent feature of any human society. It is therefore not a question of paternalistically protecting vulnerable individuals, but rather of ensuring social justice.⁸

Kittay’s analysis of dependence was then expanded and developed by Martha Fineman. In the work of Kittay, and even more so Fineman, thinking on vulnerability shifts away from the field of ethics to extend into political philosophy and the philosophy of law. According to Fineman, not only is protection from various forms of vulnerability – both universal and particular – a public issue, but the state exists precisely to respond to the vulnerability of its citizens. The “paradigm of vulnerability” proposed by Fineman thus aims to redesign institutional action.

Two essays Fineman wrote on this subject had a particular impact on the debate over the idea of the state taking responsibility for dealing with vulnerability: *The Vulnerable Subject: anchoring equality in the human condition* (Fineman, 2008) and *The Vulnerable Subject and the Responsive State* (Fineman, 2010), which develops the theses presented in the previous essay. In *The*

⁷ On this topic, see Bernardini, 2016.

⁸ On this topic see also Dodds, 2007, p. 500-510.

Vulnerable Subject, Fineman (2008, p. 20) argues that the reference to universal ontological vulnerability may help us to overcome the narrow boundaries of anti-discrimination law in the direction of a more substantive conception of equality. Redefining a subject beginning from their ontological vulnerability (vulnerable subject vs. the autonomous and independent subject of a certain liberal tradition) enables us to “expand current ideas about state responsibility toward individuals and institutions”. It also makes it possible to expose the deception behind the myth of autonomy inherent in mainstream US liberalism, i.e. the concealment of the fact that “societal institutions play a significant role in maintaining and extending inequality”. (Fineman, 2008, p. 2)

The vulnerability approach thus appears to be a post-identity approach which moves beyond the theory of intersectionality: “it is not multiple identities” – Fineman (2008, p. 16) writes – “that intersect to produce compounded inequalities ... but rather systems of power and privilege that interact to produce webs of advantages and disadvantages”. Both identities and inequalities are, in fact, first and foremost a product of institutional practices. Based on these premises, the vulnerability approach allows Fineman to build broad coalitions to oppose social inequalities.

The author seems to draw closer to Nancy Fraser (Fraser und Honneth, 2003) in some ways when she argues that mere recognition is insufficient and that there is a need to distribute resources more effectively. While Fraser's lexicon is more European, however, referencing the notions of “social justice” and redistribution of material resources rather than forms of recognition, Fineman's lexicon is rooted in the political theory and law of the United States. She describes resources as “assets” through which the state confers privileges on some and allocates disadvantages to others. The vulnerability approach is aimed at unveiling this dynamic – one that cannot be identified using the perspective of formal equality – in order to demand that the state use substantive equality as the guiding light for its action and play an active role in combating social inequalities, both through public institutions (taxation policies, welfare, etc.) and by overseeing the operation of institutions which are considered private (family, corporations, associations, etc.). Through vulnerability theory, therefore, Fineman calls for a return to the regulatory authority of the state to favour substantive equality and insists that legislation should prevail over jurisdictional law.

In *The Vulnerable Subject and the Responsive State*, the author underlines the tension – typical of the US system like any liberal-democracy – between autonomy and equality; in so doing, however, she argues that “we must reverse the positioning of equality as the dependent value in American politics, one that is shaped through the dominant lens of autonomy”. (Fineman, 2010, p. 20)

The target of Fineman's critique is a “libertarian” conception of autonomy. The philosopher argues against theories of minimum state responsibility, but also against a mainstream culture that guides the American legal system and is inspired by a radical interpretation of liberalism. A critique of the “myth of autonomy” was, after all, at the centre of her work prior to the “vulnerability turn” - *The Autonomy Myth. A Theory of Dependency* - in which Fineman (2004) denounced the role that the myth of autonomy plays in American political rhetoric and popular discourse. It is a myth that interprets autonomy in very narrow terms, linking it to economic self-sufficiency and “a sense of separation from others in society”. (Fineman, 2004, p. XVI) Autonomy, understood in this way, is opposed to vulnerability. The state must become “responsible” towards all forms (both ontological and socially produced) of vulnerability.

The aim of Fineman, like Kittay and Joan Tronto, another important theorist of “ethics of care”, is to politicise care, to show that it is not a “private matter”. Such politicization is key not only because, if left to the private sector, care weighs mainly on the shoulders of certain subjects –

and in particular women, who have historically been entrusted with caretaking tasks – but also because care (the work of “reproduction” in the lexicon of Marxist feminist economists) is the cornerstone on which all of society is built.

Fineman and Kittay emphasize the need to reformulate the action of the state in line with the needs of citizens, moving the promotion of individual autonomy into the background. Joan Tronto, on the other hand, first in *Moral Boundaries* (1993) and later in *Caring Democracy* (2013), positions the theme of care within a clearly liberal-democratic framework. In responding to people's needs – in taking responsibility for people's vulnerability, to use Fineman's vocabulary – the state must not adopt a charitable, welfare or paternalistic approach. On the contrary, institutional action must be organized by involving the recipients of care in planning and implementing policies. In other words, according to Tronto (1993) practices of care are practices of democracy that must strengthen the agency of the subjects. As she argues, thinking of people as interdependent allows us to understand both the elements of human life depending on autonomy and those depending on the relationships in which we are involved. The value of care is not opposed to liberal values, therefore; rather, it integrates them or, we might also say, it corrects them. Care also makes it possible to denounce social injustices by bringing to light power relationships that have long remained invisible. Care, vulnerability and social justice are therefore linked.

Tronto clearly identifies the risk of paternalism (or maternalism) involved in the enhancement of care as a political ideal⁹ and also points out the risk of particularism: anyone, committed to valuing the care relationships in which they are immersed, can lose sight of the wider social framework (they can close themselves off, as Tocqueville had already warned us, in the circle of small domestic interests). However, care can also strengthen democratic participation. In fact, Tronto describes democracy as “caring with”. Democracy can be redefined beginning from care. This does not imply an irenic vision of care: care is the object of conflict, concerning the unequal distribution of care responsibilities at the social level. It also leads to the establishment of power relationships (first and foremost, between care givers and receivers) and is also guided by interests. Tronto's objective is thus to bring to light the injustices linked to the distribution of care tasks and to work towards a shift that simultaneously democratizes care and redirects social and institutional democratic action on the basis of valorizing (and redistributing) care-taking tasks. Care is a state's duty; it does not spring naturally from human feelings and behaviours. Rather, it must be shaped and enhanced.

The Role of the State

Tronto, Kittay and Fineman raise the question of state responsibility in opposition to an exclusively private model of care, dependence and vulnerability management. These authors, however, do not limit themselves to condemning the lack of a state responsive to citizens' needs, or ready to take on the vulnerabilities of individuals and certain social groups. Both Tronto and Fineman, in particular, are aware of the fact that care was confined to the private sphere as a result of a deliberate choice made by the state: on the one hand, the state frames care as a female issue that must be managed primarily by the family; on the other hand, especially following the

⁹ A risk that Butler and other authors pointed out as well, in reference to some currents of thinking on the ethics of care and vulnerability (see for example Butler, Gambetti and Sabsay (eds), 2016)

feminist revolution of the 1970s and '80s, it treats care as a good that can be purchased on the market.

Privatizing care, however, does not mean *laissez-faire*. In reality, the state has repeatedly taken an active role in shaping the family and constructing gender roles, as well as in orienting the care market. Tronto and Fineman do not neglect the fact that the state played a role in this sense. However, in my opinion, these authors fail to emphasise this fact sufficiently.¹⁰ They mainly frame it as a problem of culture and political choices, without linking this culture and these choices to a more complex development of the state on patriarchal and (today) neo-patriarchal bases.¹¹

The current care market is a global market in which international migration plays a central role.¹² This does not mean that in many cases – such as the Italian case, for example – it is not a deregulated market. In fact, the state does intervene in this market, even intensely, through labour policies and, even more so, migration policies. Often, however, the practices of institutional actors on both of these fronts deliberately leaves ample room for “creative” forms of management on the part of social actors. In many cases, it is precisely restrictive regulations and bureaucratic complicatedness, together with an insufficient enforcement of the rules, that favour the spread of irregular and/or illegal practices.¹³ Vulnerability and care are not neglected. The state is not disregarding them. Rather, it manages them according to a logic that was once disciplinary (see Foucault, 1975) but has, in the neoliberal era, become biopolitical (Foucault, 2004a and 2004b), a logic which strengthens social hierarchies and provides for the production of “wasted lives”. (Bauman, 2004) The circuit of exclusion is thus managed through the combination of increasingly scarce welfare services - which retain a disciplinary approach in their rhetoric and management models, but in reality have been redirected towards the exclusion of an increasingly “ethnically marked” population – and institutions of the prison state and penal-migratory circuit; these latter, and at times even explicitly, are aimed at neutralizing the “undeserving poor”, mostly “foreigners” or members of “ethnic minorities” – the “prison industrial complex” in the United States; (see Re, 2006; Alexander, 2019) in Europe, a penal-migratory circuit managed in part by the state and in part by the third sector, in which repressive logics, charitable and welfare logics and economic interests often blur. (See Avallone, 2019)

In this context, the reference to vulnerability – especially when ascribed to certain categories of subjects – can take on an ambivalent meaning if it is not connected, as in Fineman’s work, to an “old” notion such as that of equality, in particular in its substantive sense.¹⁴

Vulnerability and Equality

Highlighting relationships of dependence, the paradigm of vulnerability and the ethics of care can enrich our understanding of substantive equality, but it cannot replace it. In *The Vulnerable Subject and the Responsive State*, Fineman (2010) immediately makes clear that a “more responsive” state corresponds to a more equal society. On one hand her critique targets equality

¹⁰ Fineman, however, extensively focused on the role of the family as an institution both in *The Autonomy Myth* and in the previous *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, 1995.

¹¹ Regarding “neo-patriarchy” see, for example, the special issue of *Soft Power* (2, 2017) titled *(Un)domesticated Feminism*, edited by Ida Dominijanni. For an historical analysis using a materialist framework, in addition to the famous Federici, 2004 and 2018, see Roberts, 2017.

¹² See for instance Yeats, 2009.

¹³ For a discussion of the problem of the privatization of care and exploitation of migrant women in Italy, see Sciarba, 2015.

¹⁴ Regarding the ambivalence of the notion of vulnerability, see Butler, Gambetti and Sabsay (eds), 2016. See also Bernardini, Casalini, Giolo and Re (eds), 2018.

understood in a merely formal sense, while on the other hand she takes issue with US anti-discrimination law according to which “every gain by a minority individual becomes a justification for abandoning the pursuit of substantive equality”. (Fineman, 2008, p. 20) Fineman calls for greater involvement on the part of the state in policies aimed at achieving substantive equality and, clearly looking at the European model, calls for a change in US political, legal and institutional culture that would enable legislative and executive powers to become the driving force and implementation centre of equality policies. In this context, judicial power plays a supervisory role. It has the task of responding to the demands of individuals, putting an end to what the author calls the “jurisprudence of identity and discrimination” (Fineman, 2008, p. 23), since “the promise of equality must not be conditioned upon belonging to any identity category”. (Fineman, 2008, p. 23) Equality must be understood as universal. The reference to vulnerability thus serves, especially for Fineman, to justify the state’s commitment to substantive equality. The need to respond to vulnerability thus becomes the basis of equality policies. For Fineman, the state’s commitment to fostering equality “is rooted in an understanding of vulnerability and dependence”. Additionally, the precondition for such a commitment is the recognition that “autonomy is not a naturally occurring characteristic of the human condition, but a product of social policy”. (Fineman, 2008, p. 23)

Similarly, according to Tronto, the foundation of democracy is not only formal but also substantive equality. Democratic institutions have the duty to achieve such equality despite the fact that the market-based economy is constantly producing inequalities. It could be argued that Tronto's position is similar to that expressed by Luigi Ferrajoli when he argues that “equality is revealed (...) as the legal condition of both the formal and substantive dimensions of democracy”.¹⁵ In the European context – and Italy in particular – substantive equality has long been the fundamental value underlying the constitutional state,¹⁶ which, as Geminello Preterossi has pointed out, is necessarily also the welfare state since the functioning of welfare ensures “the ‘material’ constitutional framework”.¹⁷ The crisis of the welfare state thus translates into a crisis of democracy. During this crisis, European social sciences and law began to look to the US debate on vulnerability. The risk is then that this paradigm will be used not to renew the constitutional state in a feminist and post-identity direction, but rather to contribute to its erosion. This risk is especially evident when vulnerability is referenced in order to designate the “vulnerable groups” deserving protection, as if protecting such groups was a “moral duty” of the state. Such rhetoric expresses a paternalistic and stigmatising logic, which, moreover, can give rise to a form of socially constructed “vulnerability” (what Catriona Mackenzie, Wendy Rogers and Susan Dodds (2014, p. 1-29) have defined as “pathogenic vulnerability”). Furthermore, such a rhetoric of “vulnerability” often aims to suppress, or overshadow, references to social rights. As Ferrajoli has argued, today the problem of democracy is precisely the ineffectiveness of these rights, linked to the inadequacy of the guarantees provided for their implementation. Equality is the basis of social cohesion. It is the disintegration caused by inequalities that is responsible for the “decline of the public sphere” and the very idea of “general interest”. This condition erodes civic sense and social solidarity.

I would tend to agree with Ferrajoli when, especially thinking of Europe and Italy, he states that “the process of reconstituting national constitutional democracies does not require any

¹⁵ Ferrajoli, 2018, kindle edition, chap. 1, par. 2.2 (translated from Italian). See also Ferrajoli, 2013.

¹⁶ See Ferrajoli, 2002b. For an analysis of Art. 3 of the Italian Constitution, highlighting that the notion of equality is central to the Italian legal system and, in general, to the systems of democratic countries, see Mazzaresse, 2006. According to the author, the two paragraphs of Art. 3 must necessarily be read together, in light of a complex and plural conception of the notion of legal equality.

¹⁷ Preterossi, 2015, kindle edition, chap. 2 (translated from Italian).

invention, simply the implementation, legally due, of the normative plans formulated in constitutions. Therefore, in the first place, it requires refounding the public sphere through the reaffirmation and development of social rights guarantees and their associated enforcement functions and institutions".¹⁸ Similarly, Ferrajoli is right in distinguishing between the "constitutional state", based precisely on citizens' entitlement to social rights, and the "bureaucratic welfare state", i.e. the welfare state that offers social benefits. The latter, far from being an outdated model, seems to come back into style whenever complex bureaucratic mediation is established to limit universal welfare according to neoliberal governance (think of the university or healthcare system).¹⁹ As Fabio Ciaramelli (2013, p. 256) has noted, constitutional democracies are characterised by having overcome the formalism of legal rationality and having tied the law to the creation of concrete content. According to Ferrajoli, the welfare state is based on "a network of obligations imposed to guarantee social rights".²⁰ Referencing his theory of the constitutional state – and the political project driving it – does not entail, however, ignoring either the role of interpretation or that of politics. As Ferrajoli himself acknowledges, the role of politics is not only relevant, it also has to do with the very construction of democracy as well as the "constant refounding (...) of the constitutional agreement through the representation of the social struggles and demands for reform expressed by society".²¹ As far as the role of interpretation is concerned, while adhering to a legal positivist point of view, Ferrajoli once again acknowledges that interpretation is an inescapable step. The norms formulated in constitutions are, in fact, necessarily implemented through interpretative processes – first and foremost, through the judicial review by the constitutional court – and over the years such interpretation has gradually led this legislation to be adjusted to face to new challenges.²² Further, it is precisely on the interpretative level that theories of vulnerability and care appear to pose the most significant challenge. As scholars have noted, in fact, both national and European jurisprudence make reference to vulnerability.²³ In some cases, it appears functional to augmenting the proactive obligations of states in the protection of human rights and to strengthening substantive equality;²⁴ in other cases, instead, it appears to undermine guarantees, operating as a restrictive standard (rights are protected only if the subject claiming them is shown to be in a condition of particular vulnerability). The bottom-up construction of an emancipatory notion of vulnerability²⁵ might thus help us in refining the interpretation of the principle of equality.

¹⁸ Ferrajoli, 2018, kindle edition, chap. 3, par. 5 (translated from Italian).

¹⁹ Regarding healthcare, see in Italy Geddes, 2018. Regarding the university, see, for example, Berg and Seeber, 2016. The pamphlet published by Rosso, 2018, is also interesting in relation to the transformations that the Italian university have undergone.

²⁰ Ferrajoli, 2007, p. 43 (translated from Italian). Regarding social rights as fundamental rights, see also Ferrajoli, 2002a.

²¹ Ferrajoli, 2012, p. 120 (translated from Italian).

²² In his critical analysis of *Principia iuris* (2007), a work in which Ferrajoli engaged in the construction of an axiomatized theory of constitutional law, Riccardo Guastini noted the impossibility of distinguishing the "law" from the concepts and doctrines that jurists employ, see Guastini, 2008. For a discussion of *Principia iuris*, please see Mazzaresse, 2008a and Catania, 2009. Others, including Costa, 2009, Preterossi, 2009 and Baccelli, 2012 authoritatively recognized the possibility of drawing, in some respects, on Ferrajoli's theory, despite having very different orientations and criticizing some basic lines of his theoretical construct. The essays by Catania, Costa and Preterossi were later collected in Baccelli (ed), 2012. The volume also contains an essay by Giuseppe Palmisano and Ferrajoli's reply to the critical remarks directed at his work.

²³ See Ruet, 2015, Burguorgue-Larsen (éd.), 2014 and Timmer, 2013, in particular regarding the case-law of European courts.

²⁴ Elena Pariotti underlined this aspect in her report on "Vulnerability and subject of human rights" presented during the Conference "The semantics of vulnerability" (University of Ferrara, 15 September 2017). See also Pariotti, 2018.

²⁵ Gianfrancesco Zanetti used this term in his introductory presentation of the "Day of Dialogue on denied rights. Protected rights. Children's rights, trajectories of analysis and good Practices", at the University of Modena and Reggio Emilia, Modena, October 6th 2016. See also Zanetti, 2019.

In other words, thinking on vulnerability and care may be significant, in the direction authors such as Fineman, Tronto and Kittay suggest, if it serves to strengthen the “political and legal project” of substantive equality, operating, as Fineman writes, as a “heuristic tool” for unveiling forms of inequality long removed from the public (and doctrinal and jurisprudential) debate, beginning with inequalities stemming from the unfair distribution of care. In the contemporary world, such inequalities are mainly associated with gender, but other factors such as citizenship and class also participate. They cannot be tackled without granting care work a social value. This shift is by no means certain, as it implies questioning, on a political, social and legal level, the main cornerstone of the patriarchal system.

At the same time, the model of the “welfare state”, which is at the same time a “constitutional state” gives us the instrument to curb the risk of paternalistic/maternalistic and illiberal tendencies that some interpretations of the paradigm of vulnerability (and care) might lead us towards. As Ferrajoli has pointed out, in fact, within the model of the constitutional state both formal and substantive equality is to be understood as an equality of rights. (On this issue, see also Mazzaresse, 2006) Equality is not *octroyée*. It is won, though never definitively, through struggles for rights and must therefore be combined with autonomy. Freedom rights and social rights are actually linked under the banner of equality, and they are also connected to the right to acknowledge “difference” within the framework of a pluralist state.²⁶ Feminist thinking on vulnerability can take a position on this point as well that is synergistic rather than oppositional when it reminds us that autonomy should not be understood as a fortress in which the individual is imprisoned, an “inner citadel”. (See Christman, 1999) Rather, it should be seen as a relational concept, “in the twin senses that its development and exercise requires extensive social scaffolding and support and that its development and exercise can be thwarted by exploitative or oppressive interpersonal relationships and by repressive or unjust social and political institutions”.²⁷ From this perspective, while on one hand being autonomous means exposing oneself to social relations – and therefore being vulnerable – on the other hand, protecting oneself from vulnerability means promoting autonomy to the greatest possible extent. (Mackenzie, 2014)²⁸ Not to mention that, as Butler pointed out, in some cases the claim/exposure of vulnerability in and of itself can be an act of political agency, a strategy of resistance. (See Butler, 2016, p. 12-27 and 2017)

Conclusions

The vulnerability and care perspectives can therefore help us to redesign social policies, involving the relevant actors (and, first of all, those who receive and give care) in their design to ensure the efficacy of fundamental rights. They also point to the importance of building a gendered democracy²⁹ and the need to address the challenges arising from new forms of precariousness. Finally, they can guide the interpretation of laws (and rights). I am thinking, for example, of the issue of gender-based violence, an issue in which recognizing that vulnerability is a constant element of intimate relationships could help in both establishing prevention policies that

²⁶ Regarding this topic, in addition to Ferrajoli, 2018, see also Mazzaresse, 2008b and 2013.

²⁷ Mackenzie, Rogers and Dodds, 2014, p. 17. Regarding the notion of “relational autonomy”, see also Mackenzie and Stoljar (eds), 2000.

²⁸ For Mackenzie, who draws on the capability approach by Sen and Nussbaum, autonomy is both “the capacity to lead a self-determining life” and “the status of being recognized as an autonomous agent by others” (ibid., p. 41). See also Anderson, 2014.

²⁹ I will not discuss here the different perspectives from which the issue has been addressed, I simply refer, in addition to the aforementioned book by Joan Tronto, *Caring Democracy*, to Casadei, 2017.

deconstruct the rigid boundaries between gender identities, and in designing models of intervention aimed at the specific contexts of violence. In relation to gender violence, for example, taking vulnerability into account entails giving space and value to victims, building adequate networks for listening, providing protection and economic support,³⁰ offering abusive men the opportunity to change their behaviour,³¹ and recognising and adequately supporting children victims of domestic violence and orphans of femicide in the knowledge that the traumas they have suffered may emerge even many years later. That is, it entails enacting a series of strategies that go beyond the rigid logic of the trial that often turns victims into defendants, leaving them without protection.

There are various strategies states might adopt, involving as much as possible the relevant non-institutional actors (feminist groups, anti-violence centres, etc.), combating stigmatization, and adopting wide-ranging prevention policies as well as targeted protection and empowerment policies. Such measures would be fertile grounds for the emergence of the figure Fineman calls the “responsive state”; quite unlike the current state in Italy that was recently condemned by the European Court of Human Rights precisely for its inability to protect the victims of gender-based violence. (European Court of Human Rights, *Talpis c. Italia*, March 2nd 2017)

References

- ALEXANDER, M. 2019. *The New Jim Crow. Mass incarceration in the age of colourblindness*. London Penguin, new edition.
- ANDERSON, J. 2014. Autonomy and Vulnerability Entwined. In: C. Mackenzie; W. Rogers; S. Dodds (eds). *Vulnerability. New essays in ethics and feminist philosophy*. Oxford, Oxford University Press, p. 134-161.
- AVALLONE, G. (ed). 2019. *Il sistema di accoglienza in Italia. Esperienze, resistenze, segregazione*. Nocera inferiore (SA), Orthotes.
- BACCELLI, L. 2012. Assiomatizzare i diritti? In: L. Baccelli (ed), *More geometrico. La teoria assiomaticizzata del diritto e la filosofia della democrazia di Luigi Ferrajoli*. Torino, Giappichelli, p. 37-83.
- ____ (ed). 2012. *More geometrico. La teoria assiomaticizzata del diritto e la filosofia della democrazia di Luigi Ferrajoli*. Torino, Giappichelli.
- BAUMAN, Z. 2004. *Wasted lives. Modernity and its outcasts*. Cambridge: Polity.
- BERG, M.; SEEBER, B. K. 2016. *The Slow Professor. Challenging the culture of speed in the academy*. Toronto, Toronto University Press.
- BERNARDINI, M. G. 2016. *Disabilità, giustizia, diritto. Itinerari fra filosofia del diritto e disability studies*. Torino, Giappichelli.
- BERNINI, L.; GUARALDO, O. (ed) 2009. *Differenza e relazione. L'ontologia dell'umano nel pensiero di Judith Butler e Adriana Cavarero*. Verona, Ombre corte.

³⁰ This is also in line with both the Istanbul Convention and the EU Directive on the protection of crime victims 2012/29/EU by the European Parliament and Council of October 25th 2012 (OJEU 14.11.2012), which promoted the creation of networks and services to support crime victims at the national level (in Italy, see Rete Dafne, <http://retedafne.it>).

³¹ As occurs in listening centres for abusive men, which are unfortunately still scarce in Italy (see for example <http://www.centrouominimaltrattanti.org/>).

- BURGORGUE-LARSEN, L. (éd.) 2014. *La vulnérabilité saisie par les juges en Europe*. Paris, Pedone.
- BUTLER, J. 2004. *Precarious life. The powers of mourning and violence*. London, Verso.
- _____. 2009. *Frames of War. When is life grievable?* London, Verso.
- _____. 2015. *Notes toward a Performative Theory of Assembly*. Cambridge (MA.): Harvard University Press.
- _____. 2016. Rethinking Vulnerability and Resistance. In: J. Butler; Z. Gambetti; L. Sabsay (eds), *Vulnerability in Resistance*. Durham (NC), Duke University Press, p. 12-27.
- _____; GAMBETTI, Z.; SABSAY, L. (eds) 2016. *Vulnerability in Resistance*. Durham (NC), Duke University Press.
- CASADEI, T. 2017. *Diritto e (dis)parità. Dalla discriminazione di genere alla democrazia paritaria*. Roma, Aracne.
- CASALINI, B. 2018. Le teorie femministe contemporanee, dal paradigma della sovranità al paradigma della vulnerabilità. In: M.G. Bernardini, B. Casalini, O. Giolo e L. Re (ed), *Vulnerabilità: etica, politica, diritto*. Roma, IF Press, p. 27-48.
- CATANIA, A. 2009. Formalizzazione del diritto e 'disordine' della politica: i Principia iuris di Luigi Ferrajoli. *Iride*, Principia iuris di Luigi Ferrajoli, numero speciale a cura di A. Catania, P. Costa, G. Preterossi, **1**:207-211.
- CAVARERO, A. 2007. *Orrorismo, ovvero la violenza sull'inerte*. Milano, Feltrinelli.
- _____. 2013. *Inclinazioni. Critica della rettitudine*. Milano, Cortina.
- CHICCHI, F.; SIMONE, A. 2017. *La società della prestazione*. Roma, Ediesse.
- CHRISTMAN, J. (ed). 1999. *The Inner Citadel. Essays on individual autonomy*. Oxford, Oxford University Press.
- CIARAMELLI, F. 2013. *Consenso sociale e legittimazione giuridica. Lezioni di filosofia del diritto*. Torino, Giappichelli.
- _____. 2018. La vulnerabilità: da caratteristica dei soggetti a carattere del diritto. In: O. Giolo; B. Pastore (eds), *Vulnerabilità. Analisi multidisciplinare di un concetto*. Roma, Carocci, p. 171-182.
- COSTA, P. 2009. Principia iuris di Luigi Ferrajoli. Un invito alla lettura. *Iride*, Principia iuris di Luigi Ferrajoli, numero speciale a cura di A. Catania, P. Costa, G. Preterossi, **1**:211-217.
- DODDS, S. 2007. Depending on Care. Recognition of vulnerability and the social contribution of care provision. *Bioethics*, **9**:500-510.
- FEDERICI, S. 2004. *Women, the Body and Primitive Accumulation*. New York, Autonomedia.
- _____. 2018. *Witches, Witch-Hunting and Women*. Oakland (CA), PM Press.
- FERRAJOLI, L. 2002a. *Diritti fondamentali. Un dibattito teorico*. A cura di E. Vitale. Roma-Bari, Laterza.
- _____. 2002b. Lo Stato di diritto fra passato e futuro. In: P. Costa; D. Zolo (a cura di), *Lo Stato di diritto. Storia, teoria, critica*. Milano, Feltrinelli, p. 349-386.
- _____. 2007. *Principia iuris. Teoria del diritto e della democrazia*. 3 voll. Roma-Bari, Laterza.
- _____. 2012. La logica nel diritto e nella teoria del diritto. In: L. Baccelli (ed), *More geometrico. La teoria assiomatizzata del diritto e la filosofia della democrazia di Luigi Ferrajoli*. Torino, Giappichelli, p. 113-151.

- _____. 2013. *La democrazia attraverso i diritti*. Roma-Bari, Laterza.
- _____. 2018. *Manifesto per l'uguaglianza*. Roma-Bari, Laterza.
- FINEMAN, M.A. 1995. *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*. New York, Routledge.
- _____. 2004. *The Autonomy Myth. A theory of dependency*. New York, The New Press.
- _____. 2008. *The Vulnerable Subject. Anchoring equality in the human condition*. *Yale Journal of Law & Feminism*, 1:1-23.
- _____. 2010. *The Vulnerable Subject and the Responsive State*. *Emory Law Journal*, 2:251-275.
- FOUCAULT, M. 1975. *Surveiller et punir. Naissance de la prison*. Paris, Gallimard.
- _____. 2004a. *Sécurité, territoire, population. Cours au Collège de France (1977-1978)*. Paris, Gallimard, Seuil.
- _____. 2004b. *Naissance de la biopolitique. Cours au Collège de France (1978-1979)*. Paris, Gallimard, Seuil.
- FRASER, N.; HONNETH, A. 2003. *Umverteilung oder Anerkennung? Eine politisch-philosophische Kontroverse*. Frankfurt a.M., Suhrkamp.
- GEDDES, M. 2018. *La salute sostenibile. Perché possiamo permetterci un servizio sanitario equo ed efficace*. Roma, Il pensiero scientifico.
- GOODIN, R. 1985. *Protecting the Vulnerable. A reanalysis of our social responsibilities*. Chicago, University of Chicago Press.
- GUARALDO, O. 2012. *Comunità e vulnerabilità. Per una critica politica della violenza*. Pisa, ETS.
- GUASTINI, R. 2008. Algunos aspectos de la metateoría de Principia iuris. *Doxa. Cuadernos de Filosofía del Derecho*, 31:253-260.
- HELD, V. 1987. Non Contractual Society. In: M. Hanen; K. Nielsen (eds), *Science, Morality and Feminist Theory*. Calgary, University of Calgary Press, p. 111-137.
- KITTAY, E.F. 1999. *Love's Labor. Essays on women, equality and dependency*. New York, Routledge.
- _____. 2015. Dependency. In: R. Adams; B. Reiss; D. Serlin (eds), *Keywords for Disability Studies*. New York, New York University Press.
- MACKENZIE, C. 2014. The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability. In: C. Mackenzie, W. Rogers and S. Dodds (eds), *Vulnerability. New essays in ethics and feminist philosophy*. Oxford, Oxford University Press, p. 33-59.
- _____; Rogers, W.; Dodds, S. 2014. Introduction: what is vulnerability, and why does it matter for moral theory. In: C. Mackenzie, W. Rogers and S. Dodds (eds), *Vulnerability. New essays in ethics and feminist philosophy*. Oxford, Oxford University Press, p. 1-29.
- MACKENZIE, C.; STOLJAR, N. (eds). 2000. *Relational Autonomy. Feminist perspectives on autonomy, agency, and the social self*. Oxford, Oxford University Press.
- MAZZARESE, T. 2006. Principio d'eguaglianza e diritti fondamentali: una (ri) lettura dell'articolo 3 della Costituzione. In: G. Maniaci (ed), *Eguaglianza, ragionevolezza e logica giuridica*. Milano, Giuffrè, p. 329-360.
- _____. 2008a. Principia iuris: optimismo metodológico y reafirmación de la cultura de los derechos. *Doxa. Cuadernos de Filosofía del Derecho*, 31:261-278.

- _____. 2008b. Eguaglianza, differenze e tutela dei diritti fondamentali. Nuove sfide e crisi dello Stato costituzionale di diritto. In: T. Casadei (ed). *Lessico delle discriminazioni tra società, diritto e istituzioni*. Reggio Emilia, Diabasis, p. 207-231.
- _____. (ed) 2013. *Diritto, tradizioni, traduzioni. La tutela dei diritti nelle società multiculturali*. Torino, Giappichelli.
- PARIOTTI, E. 2018. Vulnerabilità e qualificazione del soggetto: implicazioni per il paradigma dei diritti umani. In: O. Giolo, B. Pastore (eds). *Vulnerabilità. Analisi multidisciplinare di un concetto*. Roma, Carocci, p. 147-160.
- PATEMAN, C. 1988. *The Sexual Contract*. Stanford (Ca.), Stanford University Press.
- PINTO, A. 2018. Vulnerabilità: come trasformare il dato ontologico in categoria politica? Un confronto tra Adriana Cavarero e Judith Butler. In: M.G. Bernardini, B. Casalini, O. Giolo e L. Re (eds). *Vulnerabilità: etica, politica, diritto*. Roma, IF Press, p. 49-82.
- PRETEROSSO, G. 2009. Principia iuris tra normatività e potere: sullo Stato costituzionale di diritto nella teoria di Luigi Ferrajoli. *Iride*, Principia iuris di Luigi Ferrajoli, numero speciale a cura di A. Catania, P. Costa, G. Preterossi, **1**:217-224.
- _____. 2015. *Ciò che resta della democrazia*. Roma-Bari, Laterza.
- RE, L. 2006. *Carcere e globalizzazione. Il boom penitenziario negli Stati Uniti e in Europa*. Roma-Bari, Laterza.
- ROBERTS, A. 2017. *Gendered States of Punishment and Welfare. Feminist political economy, primitive accumulation and the law*. London, Routledge.
- ROSSETTI, S. 2018. La vulnerabilità tra umanesimo e post-umanesimo antispecista. In: M.G. Bernardini, B. Casalini, O. Giolo e L. Re (eds), *Vulnerabilità: etica, politica, diritto*. Roma, IF Press, p. 83-108.
- ROSSO, R. 2018. *Morte e resurrezione delle università. Dalle università del Grande Fratello alla Slow University*. Kindle Direct Publishing, edizione kindle.
- RUET, C. 2015. La vulnérabilité dans la jurisprudence de la Cour européenne des droits de l'homme. *Revue trimestrielle des droits de l'homme*, **102**:317-340.
- SCIURBA, A. 2015. *La cura servile. La cura che serve*. Pisa, Pacini.
- TIMMER, A. 2013. A Quiet Revolution: Vulnerability in the European Court of Human Rights. In: M.A. Fineman; A. Grear (eds), *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics*. Farnham and Burlington, Ashgate, p. 147-170.
- TRONTO, J. 1993. *Moral Boundaries. A political argument for an ethic of care*. New York, Routledge.
- _____. 2013. *Caring Democracy. Markets, equality and justice*. New York, NY University Press.
- YEATS, N. 2009. *Globalizing Care Economies and Migrant Workers. Explorations in global care chains*. New York, Palgrave Macmillan.
- ZANETTI, G. 2019. *Filosofia della vulnerabilità. Percezione, discriminazione, diritto*. Roma, Carocci.

Submetido: 27/11/2019

Aceito: 10/02/2020