



FOCUS HUMAN RIGHTS
22 SETTEMBRE 2021

Vulnerability as universal ecosystem condition: a European comparative perspective

di Vincenzo Lorubbio

Assistant Professor in Comparative International Law
University of Salento



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University of Salento

Abstract [En]: This article provides the framework relating to the use of the legal concept of vulnerability in the EU and CoE regulations, and in the Court of Justice of the EU and European Court of Human Rights case law. The use of the comparative method will allow to grasp the similarities and differences at both the regulatory and jurisprudential levels, helping to identify the different kinds of vulnerabilities more effectively. The comparative findings will further show that a new vulnerability approach may prove to be the trump card to rethink the function of Law not only in regulating the relations between human beings, but also those between human beings and the rest of the ecosystem.

Abstract [It]: Questo articolo fornisce un quadro relativo all'uso del concetto giuridico di vulnerabilità sia all'interno delle principali normative dell'U.E. e del Consiglio d'Europa, sia nei casi analizzati dalla Corte di giustizia dell'UE e dalla Corte europea dei diritti dell'uomo. L'uso del metodo comparativo consente di cogliere analogie e differenze a livello normativo e giurisprudenziale, aiutando ad identificare più efficacemente le diverse tipologie di vulnerabilità. Le risultanze della comparazione dimostrano in maniera evidente come una rinnovata considerazione del fattore relativo alla vulnerabilità possa rivelarsi la carta vincente per ripensare il ruolo stesso del diritto, non solo nel regolare i rapporti tra gli esseri umani, ma anche quelli tra gli esseri umani e il resto dell'ecosistema.

Keywords: Vulnerability, Vulnerable Persons, Human Rights, Rights of Nature, Court of Justice of the European Union, European Court of Human Rights

Parole chiave: Vulnerabilità, persone vulnerabili, diritti umani, diritti della natura, Corte di Giustizia UE, Corte EDU

Summary: **1.** Introduction. Vulnerability from a Legal Perspective. **2.** “Vulnerability” in European Regulations and Jurisprudence. **2.1.** Regulatory Framework of the Council of Europe. **2.2.** Regulatory Framework of the European Union. **2.3.** European Court of Human Rights Case Law. **2.4.** European Court of Justice Case Law. **3.** From a Particular Human Trait to a Universal Ecosystem Condition: Vulnerability as an “Ordinary” Emergency and its Potentially “Subversive” Value.

1. Introduction. Vulnerability from a Legal Perspective

The Latin word *vulnus* refers to the weakest or the least resistant point of a whole that may determine a consequent vulnerability or even undermine the stability of the whole itself.¹ As a result, the term ‘vulnerable’, derived from the Latin adjective *vulnerabilis*, may be used to describe a person who can be easily wounded, attacked, hurt or harmed. This means that a condition of vulnerability implies potential exposure to any kind of risk. It has been correctly pointed out that, from a subject’s perspective, vulnerability entails a combination of at least three factors: potential exposure to the risk of being hurt,

* Articolo sottoposto a referaggio.

¹ A. Grompi, *V come Vulnerabilità* (Cittadella Editrice, 2017), p. 16.

lack of – either subjective or objective – resources to prevent the damage from happening, and lack of resources to counteract the damage when it occurs.²

The concept of vulnerability has recently been theoretically investigated not only in natural sciences, but also in other scientific fields including sociology,³ psychology,⁴ pedagogy,⁵ philosophy,⁶ economics,⁷ geopolitics,⁸ and even history⁹ and theology.¹⁰

In the legal field, the reflection on vulnerability has interested scholars in general theory and philosophy of law, under the influence of US feminist thought, and especially Fineman's work.¹¹ Some limited, but significant, jurisprudential analyses have been carried out at a supranational¹² and Interamerican level,¹³ as well as within the European Convention framework.¹⁴

² J. Herring, *Vulnerability, Childhood and the Law* (Springer, 2018), p. 13.

³ See, for instance, H. Forbes-Mewett, *Vulnerability in a Mobile World* (Emerald Publishing Limited, 2020). See also G. Vera-Cortés and J. M. Macías-Medrano (eds.), *Disasters and Neoliberalism Different Expressions of Social Vulnerability* (Springer, 2020).

⁴ See, inter alia, J. H. Riskind and N. A. Rector, *Looming Vulnerability. Theory, Research and Practice in Anxiety* (Springer, 2018).

⁵ E. J. Brantmeier and M. K. McKenna (eds.), *Pedagogy of Vulnerability* (IAP, 2020).

⁶ M. R. McLennan, *Philosophy and Vulnerability. Catherine Breillat, Joan Didion, and Audre Lorde* (Bloomsbury Academic, 2019).

⁷ OECD – ILO, *Tackling Vulnerability in the Informal Economy* (OECD Publishing, 2019).

⁸ M. Aaltola, *Democratic Vulnerability and Autocratic Meddling. The "Thucydidean Brink" in Regressive Geopolitical Competition* (Palgrave MacMillan, 2021).

⁹ B. van Bavel, C. Bas, R. Daniel, J. Dijkman, M. Hannaford, M. de Keyzer, Maïka, E. van Onacker and T. Soens (eds.), *Disasters and History: The Vulnerability and Resilience of Past Societies* (Cambridge: Cambridge University Press, 2020).

¹⁰ L. Capantini and M. Gronchi, *La Vulnerabilità* (San Paolo, 2018).

¹¹ Martha Albertson Fineman focused her research interests on the relationship between universal dependency and vulnerability in a socio-legal perspective. M. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', 1 *Yale Journal of Law & Feminism Article* (2008), p. 1 holds that: [V]ulnerability is - and should be understood to be - universal and constant, inherent in the human condition. The vulnerability approach I propose is an alternative to traditional equal protection analysis; it is a "post-identity" inquiry in that it is not focused only on discrimination against defined groups but concerned with privilege and favor conferred on limited segments of the population by the state and broader society through their institutions. As such, vulnerability analysis concentrates on the structures our society has and will establish to manage our common vulnerabilities. This approach has the potential to move us beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality (...).

¹² See J. Mulder, 'Comparing vulnerability? How can EU Comparative Law methods shed light on the concept of the vulnerable consumer?', 2 *Journal of International and Comparative Law* (2019), p. 209-223.

¹³ See, for instance, R. Estupiñán-Silva, 'La Vulnerabilidad en la jurisprudencia de la Corte Interamericana de Derechos Humanos: esbozo de una tipología', in J. F. Beltrão, J. C. Monteiro de Brito Filho, I. Gómez, E. Pajares, F. Paredes, Y. Zúñiga (eds.), *Derechos Humanos de los Grupos Vulnerables. Manual* (Red de Derechos Humanos y Educación Superior, 2014), p. 193-231. See also J. M. Lopes Saldanha and C. Rossatto Bohrz, 'A vulnerabilidade nas decisões da Corte Interamericana de Direitos Humanos (Corte IDH): impacto nas políticas públicas e no modelo econômico dos Estados', *Anuario de Derecho Constitucional Latinoamericano Año XXIII* (Konrad Adenauer Stiftung, 2017), p. 481-502. S. García Ramírez, 'Los sujetos vulnerables en la jurisprudencia "transformadora" de la Corte Interamericana de Derechos Humanos', 41 *Revista Mexicana de Derecho Constitucional* (2019), p. 1-34. M. Catanzariti, 'I volti della vulnerabilità: l'esempio della Corte Interamericana dei Diritti Umani', 2 *Ars interpretandi* (2019), p. 95-113.

¹⁴ L. Peroni and A. Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', 11 *International Journal of Constitutional Law* (2013), p. 1056-1085. S. Besson, 'La vulnérabilité et la structure des droits de l'homme: l'exemple de la jurisprudence de la Cour européenne des droits de l'homme' in L. Burgorgue-Larsen, *La vulnérabilité saisie par les juges en Europe*, (Editions Pedone, 2014), p. 59-85. C. Ruet, 'La vulnérabilité dans la jurisprudence de la Cour européenne des droits de l'homme', 102 *Revue trimestrielle des droits de l'homme*, (2015), p. 317-340. E. Diciotti, 'La vulnerabilità nelle sentenze della Corte europea dei diritti dell'uomo', 2 *Ars interpretandi* (2018),

When compared to the theoretical reflection, the regulatory and jurisprudential analysis of vulnerability seems to be rather inadequate. Nevertheless, two valuable starting points have been established. The first is represented by the connection between the concept of vulnerability and human rights. Although the relations between these two categories may be complex, the legal space of vulnerability concerns, first of all, the theory and practice of human rights.¹⁵ The second starting point refers to the tension between two characteristic dimensions of vulnerability that can be found in both the (few) regulatory sources available and the case law. The first dimension seems to be ‘group-based’ and focuses on the existence of a category of particular ‘vulnerable subjects’, in relation to a *weakness or frailty or deficiency* caused by structural or contingent factors. The second dimension, which may be described as ‘universal’ or ‘ontological’, considers vulnerability a signature feature and common trait of the human condition.¹⁶ Therefore, in order to understand the regulatory concept of vulnerability, the protection of human rights needs to be considered first. This will allow to verify if, and how, the coexistence of the abovementioned dimensions of vulnerability may contribute to actualizing, or limiting, said protection of human rights, in an increasingly complex and emergency-driven global context.

At a methodological level, focusing on the European context (with reference to the European Union and the Council of Europe) and using the vulnerability parameter as *tertium comparationis*,¹⁷ the common traits and differences in the use of this concept will be shown, at both a regulatory and case-law level. The analysis will be carried out in relation to the *genus* of emerging vulnerabilities and the categories of vulnerability identified. The main European regulations including direct or indirect definitions of vulnerability and – more or less precise – descriptions of ‘vulnerable’ subjects will be examined. At a second stage, a jurisprudential analysis will be conducted, in order to verify if, and how, the two most influential European courts (the European Court of Human Rights and the Court of Justice of the European Union) have contributed to implementing the construction of the concept, facing and solving particular practical cases connected with different conditions of vulnerability. Once defined the terms of comparison, it will be easier to highlight the traits and limitations of the ‘European’ approach to vulnerability, while fully understanding some theoretical and practical suggestions derived from legal formants.

p.13-34. R. Chenal, ‘La definizione della nozione di vulnerabilità e la tutela dei diritti fondamentali’, 2 *Ars interpretandi* (2018), p. 35-55. M.G. Bernardini, ‘Vulnerabilità e disabilità a Strasburgo: il vulnerable groups approach in pratica’, 2 *Ars interpretandi* (2018), p. 77-94.

¹⁵ B. Pastore, ‘Introduzione - Vulnerabilità e interpretazione giudiziale’, 2 *Ars Interpretandi* (2018), p. 7.

¹⁶ E. Pariotti, ‘Vulnerabilità ontologica e linguaggio dei diritti’, 2 *Ars Interpretandi* (2019), p. 155-156.

¹⁷ M. Cappelletti ‘Comparative Law teaching and scholarship: method and objectives’ in VV. AA. *Scritti in onore di Rodolfo Sacco*, (Giuffrè, 1994), p.178.

This contribution, however, does not aim to elaborate a regulatory *theory* on vulnerability, which would certainly be ambitious and probably necessary. The aim of this paper is rather to verify if the protection of vulnerability *practically* considers the existence of – either structural or contingent – emergency situations, and to what extent vulnerability may be considered an ‘emergency situation’ itself.

2. “Vulnerability” in European Regulations and Jurisprudence

The main international conventions and regulations of both the EU and the Council of Europe usually fail to explicitly define the concept of vulnerability or clearly mention which subjects should be considered vulnerable. Without claiming to be exhaustive, the following sections will briefly explore the regulatory framework of these two European organisations and analyse the most representative case studies.

2.1. Regulatory Framework of the Council of Europe

The most authoritative tool in the regulatory framework of the Council of Europe (CoE) is the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It is the only Convention to have been ratified by all of the 47 member states, which have agreed to ensure the respect of its provisions within their jurisdiction and to accept the jurisdiction of the European Court of Human Rights (ECtHR). It could be argued that the ECHR substantially ensures the protection of any form of human vulnerability and protects the interests of a number of vulnerable subjects, as it will be shown at a jurisprudential level. However, paradoxical as it may seem, the provisions of the ECHR do not make any explicit mention of vulnerability.¹⁸ At a regulatory level, it took the CoE over fifty years to pay more continuous attention to the issue. Then, from 2005 to 2011, the concept of vulnerability clearly emerged in three Conventions.

Such an attitude was first adopted in the Council of Europe Convention on Action against Trafficking in Human Beings (2005). The latter points out the need for national measures to prevent human trafficking even through political, social, economic and educational initiatives particularly aimed at “persons vulnerable to trafficking” (art. 5 § 2). It requires States to “take specific measures to reduce children’s vulnerability to trafficking” (art. 5 § 5) and provide victims with assistance “on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position” (art. 12 § 7). This clearly shows the connection between emergency situations (human trafficking) and protection of vulnerable positions in relation to such a context (the Convention explicitly mentions minors, but it

¹⁸ R. Chenal, ‘La definizione della nozione di vulnerabilità e la tutela dei diritti fondamentali’, 2 *Ars interpretandi* (2018), p. 35.

also allows for the identification of other types of vulnerability), besides highlighting the link between protection of vulnerability and respect of human rights.

The provisions of other two European conventions seem to be similar. The Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, 2011) requires that, at a precautionary level, States “shall take into account and address the specific needs of persons made vulnerable by particular circumstances and shall place the human rights of all victims at their centre” (art. 12 § 3). According to this Convention, States shall ensure the protection of victims from new acts of violence, trying to “address the specific needs of vulnerable persons, including child victims” (art. 18 § 3). Also, in this case, it is not the subject per se (the woman) to be described as ‘vulnerable’, but rather the subject in relation to a certain context (domestic violence). As a result, this definition even includes other vulnerable positions directly or indirectly involved in the dynamic, such as minors.

Another tool aimed at minors is the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention, 2007). It provides for the necessary legislative, or other, measures to be taken in order to criminalise sexual activities “where abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence” (art. 3 § 4ii). Although a minor is considered a vulnerable subject by definition,¹⁹ here special attention is paid not to a vulnerable/underage status *ex se*, but to a status determined by contextual factors, both structural (physical or psychological disability) and contingent (psychological dependence).

The European Social Charter²⁰ also needs to be mentioned among the significant tools of the CoE. Despite not making explicit reference to vulnerability, the Social Charter includes specific provisions for the protection of children and adolescents (arts. 7 and 17), employed women (art. 8), persons with disabilities (art. 15), migrants (art. 19), elderly persons (art. 23), workers (arts. 24 to 27), and persons who live in a situation of social exclusion or poverty (art. 30).

In order to provide a complete picture, the Convention on the Conservation of European Wildlife and Natural Habitats (1979) needs to be considered. This less recent treaty is not directly aimed at the protection of human rights, but it is significantly connected with the protection of vulnerability. If its article 1 states that the Convention aims to “ensure conservation of wild flora and fauna species and their habitats”, article 3 clarifies that “particular attention” is to be paid “to endangered and vulnerable species, especially endemic ones”. On the one hand, this may seem a marginal aspect of vulnerability, since this is the only

¹⁹ J. Herring, *Vulnerability, Childhood and the Law*, p. 4. D. Haydon, ‘Children’s Rights. The Effective Implementation of Rights-based Standards’ in R. Sheehan, H. Rhoades and N. Stanley (eds.), *Vulnerable Children and the Law*, (Jessica Kingsley Publishers, 2012), p. 34

²⁰ Adopted in Turin in 1961 and revised in Strasbourg in 1966, the Charter was ratified by Italy with Law No. 30 of 1999.

Convention in which the concept is mentioned in a context not closely related to that of the ‘individual’. On the other hand, the same aspect is widely investigated in the EU regulations that will be examined later on, and it will even lead to a more organic reflection following the analysis carried out in this contribution.

2.2. Regulatory Framework of the European Union

Within the supranational context of the European Union, no explicit reference to the concepts of ‘vulnerability’ and ‘vulnerable subjects’ is made in the Treaty on European Union, the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union (Nice Charter).

However, Title III of the Nice Charter (Equality) mentions specific rights granted to some categories, including children (art. 24), the elderly (art. 25), and persons with disabilities (art. 26). These specific rights are aimed at achieving specific objectives, such as children’s well-being and freedom of expression, the elderly’s right to lead a life of dignity and independence, disabled persons’ social and occupational integration and participation in the life of the community. Title VI (Solidarity) highlights some ‘conditions’ to protect, including workers’ conditions, with reference to the right to protection against unjustified dismissal, the prohibition of child labour, the prohibition of economic exploitation, the guarantee of working conditions appropriate to young people, the prohibition of dismissal for reasons connected with maternity. Furthermore, Article 34, Section 1 of the Charter deals with social security and social assistance, stating that the Union “recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment”. In its Section 3, the entitlement to “housing assistance” is even recognised as a tool “to combat social exclusion and poverty”.

This brief analysis of the provisions of the Charter of Fundamental Rights does not allow to build a clear picture of the EU’s concept of vulnerability. The primary legislation of the EU does not seem to provide a precise definition of vulnerability nor organic regulations describing the conditions of vulnerable subjects, due to the absence of provisions in the Treaties and the fragmentary nature of the Charter. However, secondary legislation examines the issue of vulnerability in more detail.

Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) is the first regulatory text making clear reference to persons, in this case victims, to whom the State needs to ensure benefits and protection, especially if they are “particularly vulnerable” (art. 2 § 2). The vagueness of this expression will only be reduced by Directive 2012/29/EU on victims of crime, which describes the latter as “persons subjected to repeat violence in close relationships, victims

of gender-based violence, or persons who fall victim to other types of crime in a Member State of which they are not nationals or residents” (§38). Despite not being explicitly mentioned, at least three categories of vulnerable subjects can be here easily identified, i.e.: minors, women and foreigners.

Subsequent directives seem to be more unambiguous. Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims characterises minors as persons “more vulnerable than adults” (§ preamble p. 8). However, it states that in order to assess a victim’s vulnerability also other factors need to be considered, such as “gender, pregnancy, state of health and disability” (§ preamble p. 12). Moreover, the directive clarifies that ‘position of vulnerability’ means “a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved” (art. 2 § 2).

Directive 2013/33/EU laying down standards for the reception of applicants for international protection considers the following subjects to be vulnerable: “minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation” (art. 21). In this case, an effort has been made in order to identify some vulnerable *conditions* within a specific *situation* (the application for international protection), which leads to presume that the concept of vulnerability cannot be considered per se, but in relation to a ‘context’. On the other hand, it has been pointed out that listing entire categories of subjects may damage the protected persons’ dignity and be perceived as further disempowering.²¹ After all, the European Commission itself warns not to view some specific conditions as intrinsically requiring support, since “vulnerability is not a static state of affairs attached only to particular groups but fluctuates with situations and context”.²²

As it has been previously mentioned, the EU’s idea of vulnerability is not limited to dynamics involving people, but it encompasses the whole ecosystem. One of the main regulations in this field is Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources. According to such Directive, “it is necessary for Member States to identify vulnerable zones and to establish and implement action programmes in order to reduce water pollution”. In Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, “vulnerable” natural habitats, wild flora and fauna are considered of “Community interest”. Here, ‘vulnerable’ means “believed likely to move into the endangered category in the near future if the causal factors continue operating”.

²¹ E. Santoro, ‘Vulnerabilità tra politica e testi normativi: un linguaggio nuovo per dire cose vecchie o un nuovo strumento teorico’ in A. Furia and S. Zullo (eds.), *La vulnerabilità come metodo*, (Carocci, 2020), p. 139

²² M. Mustaniemi-Laakso, M. Heikkilä, E. Del Gaudio, S. Konstantis, M. Nagore Casas, D. Morondo and V.G Hegde, G. Finlay, *The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration*, (FRAME-European Commission, 2016), <http://www.fp7-frame.eu/wp-content/uploads/2016/08/Deliverable-11.3.pdf>.

Directive 79/409/EEC on wild birds does not explicitly mention vulnerability, contrary to what the Court of Justice has done when referring to the same Directive. It provides for “the conservation of all species of naturally occurring birds in the wild state” (art. 1) “to ensure their survival and reproduction” (art. 4), taking into account, among other factors, “species in danger of extinction” (art. 4a) and “species vulnerable to specific changes in their habitat” (art. 4b).

In other words, also in the regulatory framework of the EU, the correlation between vulnerable conditions and emergency situations seems to be evident when dealing with both people (victims of gender-based violence in criminal proceedings) and nature (risk of extinction for given animal species or changes in natural habitats).

2.3. European Court of Human Rights Case Law

The lack of reference to vulnerability in the ECHR system has not prevented the Court from resorting, at an interpretative level, to the concepts of vulnerability and vulnerable person. This is particularly evident in relation to the prohibition of inhuman or degrading treatment (art. 3 ECHR), the right to respect for private and family life (art. 8 ECHR), the right to a fair trial (art. 6), the right to liberty and security and, with a lower frequency, to the right to life (art. 2) and the prohibition of discrimination (art. 14).²³

Although it is difficult to find evident consistency of interpretation of the use of both expressions,²⁴ the use of a ‘group-based’ approach may be noticed, especially in those particular cases in which the Court has associated the term ‘vulnerable’ with *persons/people* (145 occurrences), *group/groups* (161), (48), *individuals* (77), *category/categories* (40), *members* (34), *minority/minorities* (28), *population* (12), *prisoners* (11), *victims* (10), *children* (7), *women* (7), *asylum seekers* (7), *families* (5), *patients* (5), *community/communities* (5), *old people* (2). Furthermore, when the Court uses the phrase ‘vulnerable position’, it is often with reference to entire categories of subjects, such as Roma minorities,²⁵ detained persons or persons in custody,²⁶ and not in relation to a specific situation. On the other hand, greater attention to a ‘practical’ vulnerable status

²³ Up to December 2020, the word ‘vulnerable’ was explicitly mentioned 1481 times, including references to other rulings or regulations, with 191 of such occurrences being the result of rulings in the Grand Chamber, whereas the term ‘vulnerability’ is present in 523 rulings, 66 of which in the Grand Chamber.

²⁴ F. Ippolito and S. Igleasias Sánchez, *Protecting Vulnerable Groups. The European Human Rights Framework* (Hart Publishing, 2015), p. 3.

²⁵ ECtHR, *Aksu v. Turkey*, Applications nos. 4149/04 and 41029/04, Judgment of 27 July 2010, para. 75.

²⁶ ECtHR, *Kblajfia v. Italy*, Application no. 16483/12, GC, Judgment of 15 December 2016, para. 205.

is paid when the phrases ‘vulnerable situation’,²⁷ ‘vulnerable state’²⁸ and ‘vulnerable condition’²⁹ are used, a vulnerable state being associated with one or more contextual elements determining it³⁰.

As for the term ‘vulnerability’, a “vulnerable groups approach”³¹ seems to prevail when considering minors (*children/minors/juveniles/young people/young persons*), persons in custody or suspects (*persons in custody/under the control of the police/under the exclusive control of State agents/suspects*), victims of domestic violence (*victims of domestic violence*), disabled people (*persons with mental disability*), and sick people (*persons placed in mental health facilities/with alleged mental disorders/living with HIV*).

It must be said that different states of vulnerability have been distinguished. This explains the use of expressions such as ‘particular vulnerability’ and ‘particularly vulnerable’ when describing the position of a minor during an investigative stage, especially if in custody,³² or when a minor lives near an area of military activity,³³ or is a victim of rape.³⁴ The adjective ‘particular’ is also used to describe the vulnerability of institutionalised elderly persons,³⁵ detainees subjected to torture³⁶ or with mental disabilities.³⁷

The adjective “extreme” is only used when a combination of two vulnerabilities occurs. For example, irregular foreign minors are considered extremely vulnerable because they are both minors and irregular migrants,³⁸ and, if “unaccompanied”, they fall into the “category of the most vulnerable individuals in society”.³⁹

As it has been already pointed out,⁴⁰ the Court does not seem to use an accurate method nor make any justified distinctions while just alternating an identity-based or group-based approach to vulnerability with an approach focused on situational or contextual elements. On closer inspection, however, it is the occurrence of ‘emergency’ situations that determines a ‘particular’ worsening of an ‘ordinary’ state of vulnerability, such as rape for a minor, torture for a detainee, institutionalization for an elderly person.

²⁷ ECtHR, *Blokhin v. Russia*, Application no. 47152/06, Judgment of 26 March 2016, para. 148.

²⁸ ECtHR, *Center of Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Application no. 47848/08, Judgment of 2 October 2008, para. 140.

²⁹ ECtHR, *Case of Konovalova v. Russia*, Application no. 37873/04, Judgment of 9 October 2014, para. 48.

³⁰ Only in a few cases does the Court associate the adjective ‘vulnerable’ with singular, specific nouns. This happens with reference to person (48), child (12), individual (9), victim (6), prisoner (3) and woman (2).

³¹ O.M. Arnadóttir, ‘Vulnerability under Article 14 of the European Convention on Human Rights’, 3 *Oslo Law Review*, (2017), p. 150-171.

³² ECtHR, *Blokhin v. Russia*, para. 199.

³³ ECtHR, *Oruk v. Turkey*, Application no. 33647/04, Judgment of 4 February 2014, para. 64.

³⁴ ECtHR, *M.C. v. Bulgaria*, Application no. 39272/98, Judgment of 4 December 2003, para. 183.

³⁵ ECtHR, *Heinisch v. Germany*, Application no. 28274/08, Judgment of 21 July 2011, para. 71.

³⁶ ECtHR, *Gäjgen v. Germany*, Application no. 22978/05, Judgment of 1 June 2020, para. 95.

³⁷ ECtHR, *Slimani v. France*, Application no. 57671/00, Judgment of 27 July 2004, para. 28.

³⁸ ECtHR, *Khan v. France*, Application no. 12267/16, Judgment of 28 February 2019, para. 74.

³⁹ ECtHR, *Rabimi v. Greece*, Application no. 8687/08, Judgment of 5 July 2011, para. 87. The only other case in which the Court uses the expression ‘extreme vulnerability’ is that of a six-year-old girl who witnessed a shooting (ECtHR, *Abdurashidova v. Russia*, Application no. 32968/05, Judgment of 8 April 2010, para. 79).

⁴⁰ M.G. Bernardini, ‘Vulnerabilità e disabilità a Strasburgo: il *vulnerable groups approach* in pratica’, 2 *Ars interpretandi*, (2018), p. 91.

Similarly, it is the increase in the number of emergency situations (the fact of being, simultaneously, a foreigner, an irregular migrant and an unaccompanied minor) that determines a condition of ‘extreme’ vulnerability.

Therefore, at least at a theoretical level, any violation of the provisions of the ECHR may coincide with a change in a vulnerability state. From this perspective, the violation of one of the rights of the vulnerable persons previously identified may determine an actual ‘double vulnerability’, caused by the human condition they are experiencing, and the specific situation occurred, or a ‘multiple vulnerability’, with multiple forms of vulnerability being experienced by the same subject.

2.4. European Court of Justice Case Law

The most novel and interesting data is provided by the European Court of Justice case law. The Court of Justice judges have used the term ‘vulnerable’ or ‘vulnerability’ at least once in their rulings in more than 200 occasions.⁴¹ What seems particularly interesting is the fact that, in one tenth of such occasions, the expression vulnerable ‘persons’ is used in cases dealt with over the last five years (2015-2020). In addition, such disputes almost always involve the work context, especially with reference to discrimination of pregnant women,⁴² women who have recently given birth,⁴³ women dismissed on the ground of pregnancy,⁴⁴ the right to maternity leave for women having a baby through a surrogacy arrangement.⁴⁵ The other ‘vulnerable’ category identified is that of beneficiaries of international protection, in relation to asylum application or subsidiary protection,⁴⁶ even when there is fear of persecution on grounds of sexual orientation,⁴⁷ or in the case of unaccompanied minors attaining the age of majority between the submission of the application for family reunification and the final ruling.⁴⁸ The Court also includes the free market in the sources of potential vulnerability, using the adjective ‘vulnerable’ to describe consumers.⁴⁹

All things considered, the approach of the Court of Justice, unlike that of the Strasbourg Court, seems to focus on situational vulnerability. Following this approach, it is not a person per se nor a particular

⁴¹ Data updated to 31.12.2020.

⁴² Case C-544/18 *Daknevičiute*, EU:C:2019:761.

⁴³ Case C-41/17 *González Castro*, ECLI:EU:C:2018:736. See also Case C-531/15 *Otero Ramos*, ECLI:EU:C:2017:789.

⁴⁴ Case C-109/00 *Tele Danmark*, ECLI:EU:C:2001:513.

⁴⁵ Case C-167/12 *D.*, ECLI:EU:C:2014:169.

⁴⁶ Case C-163/17 *Jawo*, ECLI:EU:C:2019:218. See also Case C-297/17 *Ibrahim, Sharqawi e.a. et Magamadov* - Joined Cases C-297/17, C-318/17, C-319/17, C-438/17, ECLI:EU:C:2019:219. See also Case C-353/16 *MP*, ECLI:EU:C:2018:276.

⁴⁷ Case C-473/16 *F*, ECLI:EU:C:2018:36. See also Case C-148/13 *A* Joined Case to C-15 0/13, ECLI:EU:C:2014:2406.

⁴⁸ Case C-550/16 *A and S*, ECLI:EU:C:2018:248.

⁴⁹ Case C-226/16 *Eni and Others*, ECLI:EU:C:2017:1005. See also Case C-265/08 *Federutility and Others*, ECLI:EU:C:2010:205; Case C-547/14 *Philip Morris Brands et al.*, ECLI:EU:C:2016:325; Joined Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik*, ECLI:EU:C:2015:148.

group to be characterised as ‘vulnerable’, but rather a specific subject (a woman, a migrant, a minor, a consumer) in relation to a specific situation (pregnancy, asylum seeking, application for family reunification, free market).

Despite tending to adopt a different approach, both Courts have identified situations of increased vulnerability. However, the Luxembourg Court uses the expression ‘particularly’ vulnerable only to describe minors who have been the victims of crimes for which “specific treatment best suited to their circumstances”⁵⁰ needs to be ensured.

The adjective ‘vulnerable’ is not only used with reference to people, but also to the environment and natural world, which are therefore entitled to special protection. According to Directive 91/676/EEC, polluted groundwater aquifers determine the vulnerability of an area. Such a vulnerability may be caused by nitrates from agricultural sources,⁵¹ nitrogen compounds from fertilisers,⁵² the discharge of hydrocarbons⁵³ and hazardous waste,⁵⁴ with those determining or contributing to an increase in the vulnerability of the land being deemed responsible, in the light of “the polluter pays principle”.⁵⁵ In addition, pollution from oil spills causes an increase in the level of vulnerability of a coastal State, as it results in “hazards to human health”.⁵⁶ Furthermore, following Directive 92/43/EEC, the presence of endangered species requires States to “establish and implement an effective system of strict protection” to reduce their vulnerability,⁵⁷ “particularly during the period of breeding, rearing, hibernation and migration”.⁵⁸

The Court of Justice has dealt with the vulnerability of animal species on different occasions. Starting from Directive 79/409/EEC, it has expressed its view on the vulnerable condition of specific birds, restating the prohibition of hunting and disturbance of these animals which, during the period of nesting, the mating season and the various stages of reproduction, are “particularly exposed and vulnerable”.⁵⁹ Making further reference to said Directive, the Court has reminded that an effective protection of such species “is typically a transfrontier environment problem entailing common responsibilities for the Member States”.⁶⁰

⁵⁰ Case C-105/03 *Maria Pupino*, ECLI:EU:C:2005:386, para. 54.

⁵¹ Case C-221/03 *Commission v Belgium*, ECLI:EU:C:2005:573. See also Case C-293/97 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Standley and Others*, ECLI:EU:C:1999:215; Case C-258/00 *Commission v France*, ECLI:EU:C:2002:400.

⁵² Case C-322/00 *Commission v Netherlands*, ECLI:EU:C:2003:532.

⁵³ Case C-15/17 *Bosphorus Queen Shipping*, ECLI:EU:C:2018:557.

⁵⁴ Case C-121/03 *Commission v Spain*, ECLI:EU:C:2005:512.

⁵⁵ Case C-293/97 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Standley and Others*.

⁵⁶ Case C-15/17 *Bosphorus Queen Shipping*, para. 99.

⁵⁷ Case C-103/00 *Commission v Greece*, ECLI:EU:C:2002:60, para. 40.

⁵⁸ Case C-103/00 *Commission v Greece*, para. 26.

⁵⁹ Case C-507/04 *Commission v Austria*, ECLI:EU:C:2007:427, para. 192-194.

⁶⁰ Case C-507/04 *Commission v Austria*, para. 87.

Two significant issues seem to emerge from the previous analysis. To begin with, similarly to people, other organisms may be characterised by both an ‘ordinary’ state of vulnerability, determined by a specific feature or a structural predisposition, and a condition of vulnerability increased by an emergency situation, caused by human (pollution of protected areas) or natural factors (the various stages of reproduction and migration of animal species). Secondly, a strong correlation can be observed between different vulnerable ‘groups’, i.e., the human group and the environmental group (for example with reference to pollution of coastal areas), the human group and the animal species group (prohibition of hunting), and, finally, the human group, the animal species group and the environmental group (human beings having to preserve a natural habitat in order to protect the vulnerability of the environment and endangered animal species).

3. From a Particular Human Trait to a Universal Ecosystem Condition: Vulnerability as an “Ordinary” Emergency and its Potentially “Subversive” Value

Both the case law and the related regulatory framework previously examined fail to provide an unambiguous interpretation that could lead to a clearer legal definition of vulnerability. Conversely, the analysis has highlighted the blurred and undefined⁶¹ character of vulnerability, which seems to have an inherently variable structure.⁶²

Nevertheless, if it is true that a homogeneous category of vulnerability is difficult to identify in the legal context,⁶³ it is also true that the law has to deal with a condition characterising a wide range of items that, despite having almost nothing in common, may be equally damaged and hurt.⁶⁴

The fact that both European Courts make frequent reference to situations of “particular” – and sometimes “extreme” – vulnerability leads to think that human beings and other animal species are characterised by a state of ‘ordinary’ vulnerability. Therefore, vulnerability may be considered a “universal and constant” trait,⁶⁵ an ontological data,⁶⁶ an existential condition⁶⁷ shared not only by every person but also by the entire ecosystem, in its biotic (animals and plants) and abiotic (soil, air and water) components.

⁶¹ M. Melchior, ‘Notions vagues ou indéterminées et lacune dans la Convention européenne des droits de l’homme’ in F. Matscher and H. Petzold (eds.), *Protecting Human Rights Protecting human rights: the european dimension. Mélanges G.J. Wiarda*. (Carl Heymas Verlag, 1989), p. 411.

⁶² H. Hardy and C. Boiteux-Picheral, ‘La portée transversale de vulnérabilité dans la jurisprudence de la Cour européenne des droits de l’homme’ in C. Boiteux-Picheral (ed.), *La vulnérabilité dans le droit européenne des droits de l’homme*, (Limal: Anthemis, 2019), p. 120.

⁶³ H. Biggs, and C. Jones, ‘Legally Vulnerable: What is Vulnerability and Who is Vulnerable?’ in M. Freeman, S. Hawkes and B. Bennett (eds.), *Law and Global Health*, (Oxford University Press, 2014), p.139.

⁶⁴ A. Grompi, *V come Vulnerabilità*, p.19.

⁶⁵ M. Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20 *Yale J.L. & Feminism*, (2008), p. 1-23.

⁶⁶ M.G. Bernardini, B. Casalini, O. Giolo and L. Re (eds.), *Vulnerabilità: etica, politica, diritto*, (IF Press, 2018), p. 12.

⁶⁷ B. Pastore, ‘Introduzione - Vulnerabilità e interpretazione giudiziale’, p. 11.

Although it can be said that nature as a whole is originally and incurably vulnerable, being limited, mortal, and liable to decay,⁶⁸ it is undeniable that not all the people, or the other components of the ecosystem, are equally vulnerable. This is due to the fact that specific conditions may increase or worsen the universal state of human and natural vulnerability. Such – either contingent or permanent – conditions might even become a source of further vulnerability.

The analysis of the regulations and case law has allowed to identify a number of situations connected with the individual that require particular protection, in spite of their differences in terms of form and level. These may be physiological situations (when dealing with minors, elderly persons, pregnant women or persons with disabilities), pathological situations of a clinical nature (diseases, physical and psychological pain), but also “pathogenic” situations⁶⁹ of a socio-political (poverty, unemployment, migration, political persecution, detention), environmental (exposure to pollution), cultural (religious, ethnic or linguistic minorities, gender or sexual orientation), and family nature (domestic violence). The vulnerability of animal species is caused by particular physiological conditions, both natural (reproduction, migration) and connected with human activities (hunting). Finally, as for the other components of the natural world, the consequences of natural phenomena (earthquakes, floods, tsunamis) and the potentially devastating impact of human presence (pollution) need to be considered. The analysis of the European context shows a heterogeneous character of vulnerability, which can be simultaneously described as universal and particular, structural and contingent, original and derived. However, it seems clear that, unlike animal species and other natural elements, human beings are able to exert an extremely destructive power over the habitat in which they live and, hence, they should be primarily responsible for its protection.⁷⁰

This global context suggests that contemporary emergency situations may provide an interpretation to better understand the features of an ‘ecosystem’ vulnerability, showing the great potential of a new ‘vulnerability approach’ in the legal field. An example of contemporary emergency situation is provided by the recent Covid-19 pandemic crisis, which has been described as “a powerful reminder of our interconnectedness and vulnerabilities”⁷¹. The phenomenon of climate change also needs to be taken into

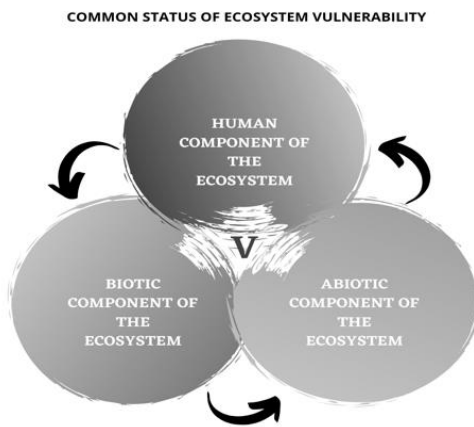
⁶⁸ A. Grompi, *V come Vulnerabilità*, p. 20.

⁶⁹ C. Mackenzie, W. Rogers, and S. Dodds (eds.), *Vulnerability. New Essays in Ethics and Feminist Philosophy*, (Oxford University Press, 2014), p. 9.

⁷⁰ A. Grompi, *V come Vulnerabilità*, p. 20.

⁷¹ G20 Leaders’ Statement on Covid-19. Extraordinary G20 Leaders’ Summit. 27-03-2020, [https://g20.org/en/media/Documents/G20_Extraordinary%20G20%20Leaders%E2%80%99%20Summit_State ment_EN%20\[3\].pdf](https://g20.org/en/media/Documents/G20_Extraordinary%20G20%20Leaders%E2%80%99%20Summit_State ment_EN%20[3].pdf).

account, as an ecosystem and climate emergency “not only affects vulnerable "persons" or "groups", but also puts life of all living beings in an unprecedented "situation" of vulnerability” (see figure below).⁷²



A new, ‘practical’ perception of the universal character of vulnerability, stemming from contemporary global emergencies, may prove to be an incredible opportunity to rethink the (established) relations between human beings and the law, as well as the (unprecedented) relations between nature and the law. Over the centuries, following the establishment of the Hobbesian theory of the law as the only “sovereign” able to protect the vulnerability of the human condition⁷³ in exchange for every form of freedom and autonomy, a new and opposite concept, facilitated by the liberal model, has developed in western societies. This has led to the theorizing and introduction of an ideal, invulnerable and disembodied⁷⁴ human being, for whom vulnerability is an accidental, disadvantageous and limiting condition similar to incapability.⁷⁵

On the other hand, the approach that considers vulnerability a ‘universal condition’ challenges the prevailing concept of the universal legal subject as an “autonomous, independent and fully-functioning adult”,⁷⁶ reasserting the subject’s relational identity. Therefore, the paradigm of vulnerability appears to

⁷² M. Carducci, S. Bagni, M. Montini, I. Mumta, V. Lorubbio, A. Barreca, C. Di Francesco Maesa, E. Musarò, L. Spinks, P. Powlesland, *Towards an EU Charter of the Fundamental Rights of Nature. Study* (European Economic and Social Committee, 2020), p.12.

⁷³ E. Santoro, ‘Vulnerabilità tra politica e testi normativi: un linguaggio nuovo per dire cose vecchie o un nuovo strumento’, p. 132. See also L. Corso, ‘Vulnerabilità e concetto di diritto’ in L. Corso and G. Talamo (eds.), *Vulnerabilità di fronte alle istituzioni e vulnerabilità delle istituzioni*, (Giappichelli, 2019), p.4.

⁷⁴ E. Pariotti, ‘Vulnerabilità e qualificazione del soggetto’ in O. Giolo and B. Pastore (eds.), *Vulnerabilità. Analisi multidisciplinare di un concetto*, (Carocci, 2018).

⁷⁵ D. Bedford, ‘Vulnerability refigured’ in D. Bedford and J. Herring (eds.), *Embracing Vulnerability. The Challenges and Implications for Law*, (Routledge, 2020), p.1-4.

⁷⁶ M. Fineman, ‘Vulnerability and Inevitable Inequality’, 3 *Oslo Law Review*, (2017), p. 133-149.

be compatible with the language of rights, provided that it enhances their relational character, freeing them from any individualistic interpretations.⁷⁷

One of the advantages and potentialities of the vulnerability approach is its contribution to the redefinition of the concept of ‘individual’. By restoring the relational nature of the human being, such an approach re-establishes the significance of relations of mutual care and dependence. Although the importance of these relations has been downplayed for millennia by jurisprudence⁷⁸, they define one of the fundamental aspects of the law itself, i.e. its tending to social justice and substantive equality.⁷⁹

The recognition of this shared state of vulnerability also suggests the introduction of a new model of the relations between the law and nature. In this new model, nature is the holder of environmental rights that, far from being opposed to human rights, are strictly connected with them,⁸⁰ leading to a process of greening of human rights.⁸¹ This would allow to free nature from that paternalistic approach that has reduced it to a mere object of – rather questionable – protection, simultaneously helping to avoid a (false and misleading) classification of individual rights of nature that, despite being theoretically intrinsic, would not be actually actionable. Both the anthropocentric perspective, through an imposition, and the naturocentric view, through a pretence, see nature as ‘external’ to the subject, and not as a (necessary) part of a relation. Conversely, the model of the rights of nature should be based on “ecological methods of inclusion of Nature in human rights for the interpretation and application of the law”.⁸²

In light of the current environmental, climate and healthcare crises, the idea of a condition shared by human beings and nature, together with the profound interrelation between all the elements of the ecosystem, highlights the irrevocable necessity for human beings to undertake an innovative path of environmental ‘care’. In that sense, vulnerability may act as a “heuristic device”,⁸³ a real opportunity having a transformative power⁸⁴ that requires States to reconsider their premises⁸⁵, fostering critical perspectives on political and social institutions.⁸⁶

⁷⁷ E. Pariotti, ‘Vulnerabilità ontologica e linguaggio dei diritti’, p. 168.

⁷⁸ L. Corso, ‘Vulnerabilità e concetto di diritto’, p. 12.

⁷⁹ M. Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, p. 19-20.

⁸⁰ M. Carducci, S. Bagni, M. Montini, I. Mumta, V. Lorubbio, A. Barreca, C. Di Francesco Maesa, E. Musarò, L. Spinks, P. Powlesland, *Towards an EU Charter of the Fundamental Rights of Nature. Study*, p. 112.

⁸¹ F. de Salles Cavedon-Capdeville, ‘L’écologisation des juridictions régionales de protection des droits de l’homme: des nouveaux espaces d’accès à la justice en matière d’environnement.’, *2 Rev. Roumaine Dr. Environ.*, (2010), p. 51-65.

⁸² M. Carducci, S. Bagni, M. Montini, I. Mumta, V. Lorubbio, A. Barreca, C. Di Francesco Maesa, E. Musarò, L. Spinks, P. Powlesland, *Towards an EU Charter of the Fundamental Rights of Nature. Study*, p. 113.

⁸³ M. Fineman, ‘The Vulnerable Subject and the Responsive State’, *60 Emory L.J.* (2010), p. 260.

⁸⁴ A. Furia and S. Zullo (eds.) *La vulnerabilità come metodo*, (Carocci, 2020), p. 49.

⁸⁵ G. Zanetti, *Filosofia della vulnerabilità*, (Carocci, 2020), p. 26.

⁸⁶ A. Grompi, *V come Vulnerabilità*, p. 48.

Ultimately, by considering ecosystem vulnerability an ‘ordinary’ emergency rather than a mere possibility, it will not be difficult to imagine European Union and Council of Europe effectively “responsive”⁸⁷, fully respecting their respective functions and responsibilities, but trying to “sing with a one voice” within the scope of the protection of fundamental rights⁸⁸.

This would facilitate the bottom-up identification of situations of ‘extraordinary’ vulnerability, in a continuous, productive and subsidiary dialogue with state entities.

⁸⁷ M. Fineman, ‘The Vulnerable Subject and the Responsive State’, p. 19-22.

⁸⁸ It is well known that Opinion 2/13 of the European Court of Justice stopped the European Union from signing the European Convention on Human Rights (ECHR). However, it would now be appropriate to resume this interrupted process, not least in order to fight complex problems, such as climate change and pandemics, in a more effective and holistic way. In this sense, see T. Roes and B. Petkova, ‘Fundamental Rights in Europe after Opinion 2/13. The Hidden Promise of Mutual Trust’ in C. Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press, 2019), p. 229: “[U]ltimately, the most intuitive argument for genuine mutual cooperation between the CJEU and the ECtHR does not involve abstract notions of overlapping jurisdiction or systemic coherence but derives from the historical links and shared mission of both institutions. The Council of Europe and the European Union were established to serve the same general aim of securing peace on a war-torn continent. While it is often assumed that the latter focused on economic goals and deliberately outsourced human rights protection to the former, De Búrca has shown that the 1950s framers saw the omission of human rights from the 1957 treaties as a “pragmatic and strategic interim step,” not as a “deliberate decision to consign matters of human rights in the Community henceforth to the Council of Europe.” Indeed, they specifically envisaged a robust human rights regime and a closely entwined constitutional relationship between the communities and the ECHR. In other words, these sister organizations, which today share the European flag and anthem, were meant jointly to create a sort of European public order that would prevent member states from backsliding into fascism or totalitarianism. Fidelity to this idea ultimately provides the most basic and compelling reason for avoiding unproductive judicial skirmishes and encouraging good faith cooperation between the Luxembourg and Strasbourg court (...).