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INTRODUCTORY ESSAY

Vulnerability's Legal Life: An Ambivalent Force of Migration Governance

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1. Introduction: The role of vulnerability in migration governance

This Special Issue takes stock of current debates across different disciplines and problematises the concept of vulnerability in the field of migration and its relationship to law, building on discussions held during the MAPS Project Conference of December 2020.[1] The Conference considered the treatment that migrants are facing in Europe and elsewhere, focusing on the difficulties they encounter in accessing their rights and interrogating the law's ambiguous position in their regard: exacerbating vulnerability, while, at the same time, also providing a possible source of protection that can unravel restrictive policies of deterrence and control (Moreno-Lax, 2017; Moreno-Lax and Giuffré, 2019). This dual role of the law vis-à-vis migration, as simultaneously a generator of vulnerability and its potential antidote, is what contributions to this Special Issue grapple with and aim to elucidate.

Vulnerability is gaining traction as an explanatory paradigm in (human rights) law (e.g. Shue, 1996; Turner, 2006; Del Mar, 2012; Heri, 2021) and other areas in the social sciences (e.g. Kirby, 2006; Oliviero, 2016), in medical ethics (e.g. Hurst, 2008; Macklin, 2012), environmental studies (e.g. Cutter, 1996; Adger, 2006), and disaster research (e.g. Bankoff, Frerks and Hilhorst, 2004; Levine, 2004). Some even speak of a 'vulnerability zeitgeist' taking hold across academic disciplines, drawing on vulnerability as 'an entry point for discussing inequalities and adversities' of different kinds (Brown, Ecclestone and Emmel, 2017, p. 497). Yet, the concept is rarely defined and has no single agreed meaning. Its use is contentious – evoking notions of victimhood, othering, and marginalisation. Furthermore, it is also contested – vulnerability is paradoxical, described as both universal and particular, individual and categorical, inherent and situational, and as contributing to the normalisation of oppression, while also offering a means of liberation. The concept, and the tension lying at its core, have made their way into legal and policy instruments of migration governance in incoherent fashion, whether as part of administrative detention regimes (Pétin, 2016) or asylum reception and qualification systems (Leboeuf, 2022), also providing a basis for recent decisions of international Courts and Treaty bodies (Peroni and Timmer, 2013; and, respectively, Hudson, Baumgärtel and Ganty, and Ippolito, in this issue) as well as domestic judgments (Wallbank and Herring, 2014; and, respectively, Benslama-Dabdoub, Grundler, and Ippolito, in this issue). However, the crucial role of migration law and policy structures in creating or exacerbating vulnerability is often overlooked (for notable exceptions: Sözer, 2020; Da Lomba and Vermeylen,

[1]*Conflicting Responses to Refugees and Migrants in Covid-19 Europe*, Queen Mary Law School, 11 December 2020: https://www.qmul.ac.uk/law/events/items/maps-conference-conflicting-responses-to-refugees-and-migrants-in-covid-19-europe.html, Panel 1: *Vulnerability in refugee and migration law – examining a contested concept*.

2023). This gives rise to the need to disentangle the elusive meaning of vulnerability as applied in the migration and asylum domain and to interrogate the extent to which existing frameworks, rather than providing a remedy, are implicated in the generation and perpetuation of vulnerability.

Since being deemed (not) vulnerable has real-life consequences for refugees and migrants, contributions to this Special Issue examine the use of the vulnerability concept in different contexts, including with regard to asylum seekers and unauthorised migrants (Hudson), human trafficking and migrant smuggling (Grundler), environmentally induced and climate change related displacement (Ippolito), and women and the refugee status determination process (Benslama-Dabdoub), asking who is conceived of as vulnerable, to which end, and with which effects, engaging also with the law's position in compounding or palliating vulnerability in each case. A novel approach to equality and non-discrimination is proposed at the end, as a means to unleash the potential of 'migratory vulnerability' (Baumgärtel, 2020) as an alternative, emancipatory paradigm, addressing the shortcomings of prevailing approaches, particularly in the case law of the European Court of Human Rights (ECtHR) (Baumgärtel and Ganty).

Overall, the main preoccupation of this Special Issue is with the synergies that exist between law, migration, and vulnerability, unpacking their ambiguous relationship and charting new terrain for a productive interplay that places the 'vulnerable subject' (Fineman, 2008) at the centre of the discussion. The effects are multiple and performative. They entail momentous consequences, determinative of the legal status, position, and rights of those concerned. Accordingly, in this introduction we lay the bases for a critical inquiry into the origins of vulnerability theory and its multiple dimensions, tracking its transformation into a new form of practice; a new approach that guides research, ethics, and policy-making in different fields, in Section 2. In Section 3, we turn our attention to the ambivalent nature of conceptualisations and applications of vulnerability, emphasising the role of law in this context. What we note is how vulnerability may be produced or worsened *by* or *through* law, while it may, conversely, also be acknowledged *in* law and judicial interpretation, modulating the implementation of the relevant norms for the delivery of (more effective) protection. Centring on the interaction between law and 'vulnerability reasoning' as applied to migration and asylum allows contributors to this Special Issue to unearth the complexities of their relationship. We summarise, in Section 4, the many ways in which this interconnection is productive, by focusing on the individual articles in this Special Issue and how they add value to the existing literatures and persisting debates on vulnerability that pervade them. Our conclusion, in Section 5, is that law- and policy-makers of migration governance need to pay attention to the contradictory character of vulnerability, specially at its intersection with the regulation of (im)mobility, to avoid (re)victimising, othering, or validating approaches that aggravate needs and worsen real-world inequities, leaving the persons concerned under- or un-protected.

2. From vulnerability theory to vulnerability as practice

Theorising human vulnerability is anything but a straightforward exercise. Notwithstanding efforts to explore the nature of vulnerability and its consequences for policy, law, and ethics, the conceptualisation of vulnerability is disputed, with myriad approaches from different disciplines, including political philosophy, gender studies, legal theory, and critical sociology. Some early definitions and understandings of vulnerability highlighted its connections to fragility, harm, and the susceptibility of being wounded, as suggested by its etymology: 'vulnus' in Latin means wound (Mackenzie, Rogers and Dodds, 2014). The term has been used as almost a synonym of dependency, helplessness, pain, and weakness (Malgieri and Niklas, 2020). That said, vulnerability does not necessarily concern *actual* harms caused or endured, but rather refers to the *potential* of harm (Gilson, 2016, pp. 7-8). And, as noted by Goodin (1985), 'vulnerability implies more than susceptibility to certain sorts of harm ... it also implies that the harm is not predetermined' and,

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therefore, that it may be avoided or minimised by 'responsive state' interventions (Fineman, 2008, p. 1) and other resilience-enhancing means.

Yet, the term remains questioned and deemed vague, complex, and equivocal (Peroni and Timmer, 2013, p. 1058; Fineman, 2008, p. 9), impacted by several challenging dichotomies that affect its application. The common-sense familiarity it evokes conceals varied uses with manifold implications, according to the theoretical underpinnings and contextual conditions of its deployment (Brown, Eccleston and Emmel, 2017, p. 505). With regard to the universal versus the particular character of vulnerability, for instance, in more traditional approaches, vulnerability is construed as a distinctive feature of particular, 'weaker' individuals and groups, framed on the basis of the helpless situations or precarious socio-economic conditions facing them (Fineman, 2012). Paradigmatic examples in this respect are the ways in which racial minorities, children, individuals living with disabilities, or women have been apprehended in public policy (Knowles, 1996), as passive objects of care and paternalistic forms of social regulation. Whereas this approach enables a practical use of the concept, it has attracted criticism as entailing a 'labelling' exercise with essentialising and stigmatising effects (Cole, 2016). Vulnerability becomes thereby reified in fixed categories taken as paradigmatic of individual experience (Phillips, 2010). It adopts 'master status' as 'the defining attribute [that] eclipses all other aspects' of individual identity within the related groups (Lenhardt, 2004, p. 819 fn 63). In response, more recent accounts have reconceived vulnerability in 'post-identity' terms (Fineman, 2008, p. 1), expanding the focus: from outright discrimination to broader forms of disadvantage, looking into the structures that sustain privilege by favouring some to the detriment of others.

Fineman (2008) has been amongst the first to propose an analysis of vulnerability as a universal human condition, apprehending it as a general trait of mankind. To free vulnerability from its limitative and negative connotations, Fineman highlights the commonality of human embodiment and the ever-present possibility of injury and dependency that is a constant throughout the course of life. On the other hand, to avoid the risk of excessive abstraction, the individual experience of vulnerability, as unique and particular to each of us, is also considered. Though universal, vulnerability can indeed alter and adjust in different situations, periods, and spaces, depending on each person's access to variable resources, systems of power and networks of support (Fineman, 2022; Nussbaum, 2006). Thus conceptualised, vulnerability emerges as a 'heuristic device' (Fineman, 2008, p. 9) that allows for the 'discovery' of hidden biases and the contestation of (mis)assumptions about specific 'populations', enabling analyses that look 'behind' the institutional practices that generate inequality, pointing towards a more holistic vision of real-life needs. Unlike conventional diversity policies and anti-discrimination laws, which typically propound sameness of treatment and centre on *formal* equality, a vulnerability-mediated approach facilitates a focus on *substantive* justice and its concrete realisation on the ground.

However, the emphasis on the universality of vulnerability and its 'inevitability' (Fineman, 2017) has also been criticised as distracting attention from the structural violence, injustice and exploitation that are in fact experienced in the everyday by particular groups (Cooper, 2014). Stigma and disadvantage are embedded in social relations and the institutions that produce stereotyping and perpetuate discrimination. Highlighting vulnerability as an 'enduring aspect of the human condition' and as 'an inherent feature of being human' (Fineman 2008, p. 8ff) may obscure the systemic roots of vulnerability, generating the impression that it is 'naturally occurring', somehow predetermined or even unavoidable. There is thereby a risk of normalising (the acceptability of) vulnerability, rendering the notion otiose and incapable of flagging up unjust situations of exclusion or oppression.

To overcome the limitations of too broad and too narrow definitions, that either normalise or pathologise vulnerability (Formosa, 2014, p. 91), Luna (2009; 2019) conceptualises it in terms of 'layers' of disadvantage, which are not caused by fixed and static attributes of certain individuals or groups that become the basis of essentialised identities (or 'labels'). They are instead understood as

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the result of malleable intersecting features, moulded by time, location, and socio-political positionings, including access to varying cultural and material resources. This alternative, open-textured conception of vulnerability enables flexibility in the identification of different strata of inequality, fostering a nuanced understanding of related necessities and disparities.

Building on this perspective, several scholars, like Macklin (2012), speak of 'relational vulnerability', accentuating the importance of the contextual and socio-structural determinants of vulnerability, which serves to highlight aspects of agency and self-determination in their definition. Also Butler (2016) underscores the intersubjective and fundamentally political nature of vulnerability as 'a way of being' with others (in a politically relevant sense), rather than as an existential condition. From this perspective, vulnerability is not (solely or primarily) ontological, but above all socially and politically constructed. It is discursively produced (Oliviero, 2016). And it is not only relational but also performative. It generates needs and dependencies due to inequalities in the distribution of political capital, so that being vulnerable is being exposed to power differentials and the risk of domination in the lived/real world. To be vulnerable is to be susceptible to harmful wrongs, abuse, and threats to one's own autonomy (by others). Under this optic, autonomy and vulnerability are co-constituted and dialectically entwined.[2]

Understood as a matter of agency and self-determination, vulnerability becomes 'a function of the relative balance of power between the person in question and the forces that can influence her' (Anderson, 2014, p. 135). Attention hence shifts towards remedies and responsibility, transforming vulnerability into 'a claim to special protection' (Hurst, 2008, p. 192). Instead of the potential threat of abstract harms, being at risk of identifiable (socio-political) wrongs (inscribed in unequal power relations) is what renders vulnerability usable in practice as a tool to determine needs and allocate correlative duties to meet them to specific actors (including, especially, the state). While there may be intrinsic elements that impact vulnerability inherent in our corporality, such as age or health, it is the extrinsic factors that are of utmost concern. A focus on bodily suffering can, in fact, be confusing. It engenders a narrative about precariousness as if it could somehow exist outside historically shifting conditions and beyond socio-political positionings (Oliviero, 2016, p. 19). Consequently, starting from its structural and systemic determinants, responding to vulnerability by promoting autonomy – to (re)equilibrate power and relative political influence – becomes a matter of social justice (Mackenzie, 2014, p. 35). Promoting *capabilities* (per Nussbaum, 2011) and equal opportunity hence represents the ultimate goal of any reparatory interventions bridging the vulnerability-autonomy gap. These should offer mitigation strategies toward vulnerability with a view to fostering resilience.

This latter approach carries certain advantages, as it avoids the over-expansiveness of universalist accounts of vulnerability as well as the temptation of categorical thinking characteristic of particularist stances. It represents a sort of middle ground that enables finer-grained assessments of the individual (physical/mental), structural, and circumstantial bases of vulnerability as well as their interrelation, opening up to a richer understanding that (aims to and hopefully) escapes hierarchisation.

Against this backdrop, Mackenzie, Rogers and Dodds (2014) propose a taxonomy of the different sources and states of vulnerability with an impact on autonomy. In terms of sources, vulnerability can be *inherent*, stemming from ontological factors arising from our embodiment and dependence on others. But vulnerability can also be *situational* and context-specific, deriving from the social, political, environmental, or economic circumstances facing us. In addition, depending on whether the harms/wrongs encapsulated in the notion of vulnerability have materialised or not, vulnerability can be in an *occurrent* (actual) or *dispositional* (potential) state. These distinctions allow for the allocation of moral/political obligations to provide support,

[2]Autonomy here is not understood in a 'libertarian' way, but in a Kantian sense, as the individual capacity for agency and self-determination free from oppression or subordination, treating persons as 'ends' rather than 'means' i.e. as rights-bearers recognised as autonomous subjects with equal dignity. See further Formosa (2014).

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respond to needs, and foster resilience depending on the specific constellations making up the vulnerability position of each individual. The final aim of vulnerability-inspired interventions should indeed be to enable agency or restore autonomy. When the opposite occurs, Mackenzie, Rogers and Dodds speak of *pathogenic* vulnerability, that is, a kind of supervening vulnerability that is created or exacerbated by ill-targeted or deficient institutional action, arising from measures designed to ameliorate it, but which instead compound it. Such measures entail the misrecognition or maladministration of vulnerability factors. They paradoxically cement the dysfunctional social relationships and power imbalances they were supposed to redress – like well-meaning anti-racism programmes that, nevertheless, end up perpetuating the very social attitudes they originally intended to eradicate.

Vulnerability-inspired (agency/autonomy enhancing) measures can take many forms. They can be a long-term policy, a one-off programme, or even a set of legal norms. Law, as the next section explores, plays a key role in the entrenchment or amelioration of vulnerability.

3. Vulnerability *through* law and vulnerability *in* law

Vulnerability-alleviating measures constitute a valuable tool to redress social injustices. By conceiving of the individual as the 'vulnerable subject' of the law (Fineman, 2008), the concept acquires a promising capacity to counter situations of inequality, challenging liberal (or libertarian) individualism (Grear, 2010), and restructuring certain existing frames about dependency and privilege that impede the full realisation of social justice. These law-mediated interventions have a (re)distributive character, potentially enhancing the welfare of those worse off and assisting in addressing the lack of access to essential goods and services. Putting the 'vulnerable subject' at the centre of legal-institutional responses, taking account of the political structures that allow or impede individuals from leading a dignified, rights-enjoying life, invites consideration of the factors that affect available options and sustain existing barriers to substantive equality.

Law, in this framework and as a response to (the structures that generate, aggravate, or prolong) vulnerability, has a very important role to play. It is part of the political forces that constitute (and may palliate) power asymmetries and the mechanisms of oppression at the heart of real-world/lived vulnerabilities. It is part of the systemic apparatus of the state and constitutes its main instrument of societal regulation. It is key to the process of institutional creation and represents the principal source and vehicle of expression of public authority. In democratic systems based on the rule of law, law is envisaged as the main guarantor of equality and social justice. Legal norms (adopted through the constitutionally approved conduits of political deliberation) generate an *a priori* sense of legitimacy of the decisions they entrench. Reconciling different interests in society, they strike a balance of power that becomes normalised – quite literally, in that such a balance is premised on and constituted by legal norms; as a result, certain vulnerabilities may become 'legalised'.

Moreover, besides institutional and interpersonal, legal rules have a powerful normative and representational force, too. Law works as the primordial marker of boundaries and the key maker of public recognition. It has both a descriptive and a prescriptive force. It is what serves to define what counts as a (legally) cognisable need involving a (legal) obligation to respond to it that may provide protection or compound harm. It generates a normative understanding of what makes individuals vulnerable, establishing which vulnerabilities are (legally) significant, whether they entitle groups or persons to special kinds of (legal) protection or to individual exceptions from general norms, possibly introducing an order of priority that may (inadvertently or purposely) entail certain exclusions. Legal rules make some vulnerabilities matter *more* than others, thereby ranking different levels of (de)merit and deservingness. They create the very legal subjectivities whose vulnerability is considered (legally) relevant, dictating the related consequences that may

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ensue, including the boundaries of potential solutions. Within the state, law establishes the vulnerabilities to be addressed, typically in categorical terms, and allocates the public/institutional resources to invest in addressing them. It defines the 'vulnerable subject' (Fineman, 2008), identifies the means necessary to meet her needs, apportions them in various scales and degrees, and (re)organises the forces that determine the extent to which vulnerability is to be countered, maintained, dismissed, or ignored within the legal system, repairing (old) and creating (new) hierarchies of precariousness within the socio-legal order.

The power of law is, therefore, paramount. It constitutes the authoritative (and hegemonic) means through which the state 'sees' and recognises vulnerability and seeks to repair it. It is the official language through which gender, race, class, disability, age, or nationality divisions are defined and constituted, demarcating the (legal) confines of privilege and disadvantage. It is law that maps the elements of a 'valid' vulnerability claim, establishes the meanings of (the social/political determinants of) vulnerability and enables its regulation. It is by and through law that vulnerability may be relieved or, to the contrary, that certain forms of violence may become sanctioned and rationalised by the state.

In this context, human rights (laws) emerge as the prime vehicle of expression of vulnerability-palliating protection. By some accounts, vulnerability constitutes the 'presuppositional' basis of human rights (Grear, 2010, pp. 196-198); the whole system is seen as premised on a concern for vulnerability. Vulnerability pertains to the 'basic structure' of human rights (Besson, 2014, p. 63ff), whose function is to minimise and counter threats to the individual and collective interests the legal regime intends to safeguard. Consequently, legal norms and legal reforms, when (openly/consciously) rendered vulnerability sensitive – or 'vulnerabilised', borrowing from Engström, Heikkilä and Mustaniemi-Laakso (2022) – hold the promise of chief vulnerability-reducing/autonomy-enhancing outcomes.

Insofar as vulnerability becomes recognised *in* law, it may offer a means of emancipation. Acknowledging the specific impacts of 'ecological vulnerability' in the context of environmentally induced and climate change related displacement (Ippolito, in this issue) or of 'consequential vulnerabilities' emerging during the 'irregularised' journeys of smuggled or trafficked individuals (Grundler, in this issue) constitute examples of agency-promoting legal interventions. As interpretative tools, they give rise to a more contextualised assessment of individual needs in the specific circumstances, possibly triggering novel forms of protection, if not providing the basis for new statuses and special regimes of tailored rights that respond to real-world necessities. Being recognised as *de jure* vulnerable may indeed elicit an enriched understanding of already recognised rights, which may involve (additional) obligations by extending or specifying the scope of existing duties. It may also lower the required thresholds to access or effectively exercise certain legal entitlements, reverse the burden of proof, and/or reduce the margin of appreciation of the state concerned when taking decisions that may interfere with individual freedoms (*cf*. Besson, 2014; Heri, 2021). It may equally serve to prioritise certain caseloads on a principled basis, guide proportionality assessments by heightening the need for justification, and function as an asset conferring/resource channelling device (Timmer, 2013, p. 162ff).

However, vulnerability can also be generated or aggravated *through* law in situations where the equal standing of individuals within the legal system is questioned or undone. In this sense, migration status *as such* can and should be construed as a legally-induced form of vulnerability; vulnerability that is created by the law in the form of a legally subordinate status. Here, the law plays the role of a pathogenic, vulnerability-inducing intervention in the configuration of the migrant/non-citizen status as precarious. Indeed, the inferiority of migrant status to citizenship is not a necessity, it does not stem from 'nature' but from the political choices made by the state and that it enshrines in its legal order. Migration law thus arises as a key 'producer' of vulnerability (Carlier, 2017, p. 185) by constituting 'both a formal system of differentiated rights … as well as a vehicle for the exercise of control' (Morris, 2003, p. 96). By all means, once configured as legally

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inferior, migrant status needs to be enforced (in law and in the real world), which legitimises (legally-constituted) state polices and mechanisms of control that, in turn, may generate additional 'consequential vulnerabilities' (Grundler, in this issue), including exposure to racial discrimination and xenophobic violence.

As a result, insofar as distinctions of (legal) treatment on grounds of nationality are not considered a form of prohibited discrimination (in the legal sense), as Baumgärtel and Ganty argue in their contribution to this Special Issue, 'migratory vulnerability' will go unheeded in judicial reasoning and legal practice. This allows for instances of regressive vulnerability reasoning by courts, which constitute a form of 'vulnerability backsliding' (Hudson, in this issue) that aggravates the situation (and legal treatment) of those affected. This occurs, for example, when, once recognised experiences of vulnerability, like those endured by asylum seekers due to their (legally) inferior status to that of citizens and other migrants, become progressively minimised or even ignored. In addition, law is also the primary maker of categorisations, including on grounds of gender, race, or ethnic origin. But the interpretation of rules intended to accommodate and reduce vulnerabilities along those axes of difference can instead backfire and lead to disempowerment, loss of agency, and victimisation (Benslama-Dabdoub, in this issue). In that regard, the law *itself* becomes a pathological vulnerability-exacerbating intervention, given that it causes or intensifies the vulnerability confronting migrants as non-citizens.

Sometimes, vulnerability can function as a screening device, as a filter and a threshold to access (legal) protection, so that unless perceived to be vulnerable (according to law) rights become unattainable (respectively, Grundler and Benslama-Dabdoub, in this issue). If individuals cannot 'prove' themselves as vulnerable, they will not be able to access their legal entitlements (respectively, Hudson and Ippolito, in this issue). In consequence, law may trigger a 'vulnerability contest' (Howden and Kodalak, 2018) among and within specific groups that risks downplaying or dismantling pre-existing standards. With legal safeguards treated as a scarce and finite commodity, this prompts a competition to access rights by the individuals concerned, which may precipitate a devaluation of the general level of protection available to the entire class (of asylum seekers, trafficked individuals, or iregularised migrants). When used in this way, critics consider (legal) vulnerability as being co-opted and instrumentalised, turned into a governmentality tool – we start caring for 'vulnerable' migrants (rather than for migrants in situations of vulnerability or for migrants *tout court*) as the main (or only) recipients of protection, excluding 'non-vulnerable' others (Sözer, 2020). 'Governing through vulnerability' (Tazzioli, 2020, pp. 52-54) thus entails the (mis)use of the notion as a vehicle of othering, precarisation, and selection of certain sub-sets of 'unwanted' non-citizens (Moreno-Lax and Vavoula, 2022).

The legal life of vulnerability is, therefore, ambivalent. Law can be both empowering and dehumanising, by embedding or undoing systemic forms of precarity. It is a 'double-edged' sword (Timmer *et al.*, 2021, p. 194) that can operate as a tool for exclusion as much as a means of protection. As a result, legally-mediated and legally-constituted vulnerabilities co-exist in the legal order, in particular in relation to migration. This is why, recentring the debate on law, migration, and vulnerability as well as their interplay (e.g. Moreno-Lax, 2021), as proposed in the next section, is crucial.

4. Law, migration and vulnerability: (re)centring the debate

Reflecting the aforementioned controversies, vulnerability has made its way into the main legal and policy instruments of migration governance, but in an incoherent way, providing also an anchor for recent judgments (analysing the stance of the ECtHR and its evolution: Timmer, 2013; Peroni and Timmer, 2013; Al Tamimi, 2016; Baumgärtel, 2020; Heri, 2021; as well as, respectively, Hudson and Baumgärtel and Ganty, in this issue). The specific role of migration law and policy

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frameworks not only in creating and entrenching vulnerability but also in recognising that refugees and migrants may be (particularly) vulnerable is the common task of contributions to this Special Issue. Collectively the contributions demonstrate the incongruities of vulnerability in the field of migration and asylum: vulnerability is not only legally recognised but is also legally caused.

On the one hand, vulnerability, in its various shapes and conceptualisations, may provide new ways forward regarding existing dead ends. In particular, the concept may unlock the potential of Article 14 ECHR on non-discrimination, which remains of very limited application in migration cases (Baumgärtel and Ganty, in this issue). Furthermore, as argued by Ippolito (in this issue), vulnerability may also be the key in providing international protection to environmentally displaced persons, an issue which is particularly thorny under current international refugee law. Similarly, the underlying vulnerability-based rationale in providing refugee protection to victims of trafficking may be transplanted to smuggling cases, as submitted by Grundler (in this issue). These contributions thus show how vulnerability acknowledgment regarding individual migrants may occur *in* law (typically case law), highlighting its protective function.

On the other hand, since making its first appearance in *Dudgeon v. the United Kingdom*,[3] the use of vulnerability reasoning by the Strasbourg Court has seen an exponential increase (Heri, 2021), albeit without ever providing a definition. Vulnerability has been used to refer to the circumstances of certain groups, including ethnic minorities (especially Roma), persons in detention, children, persons living with HIV, victims of crime, the accused in criminal proceedings, and, more recently, asylum seekers (Peroni and Timmer, 2013), fomenting the emergence of a by and large categorical approach that reifies individual experiences into sorts of vulnerabilities that are essentially 'group-based' (Baumgärtel, 2020, p. 17). The reasons why these groups have been considered 'vulnerable', 'particularly vulnerable' or even 'extremely vulnerable', are connected with historical prejudice or long-standing social disadvantage, state control, or characteristics considered inherent or typically representative of the common experience of the members of the group (Timmer, 2013) – sometimes captured in EU law or in international regulations (Pétin, 2016; Leboeuf, 2022). This has led the Court to introduce distinctions between objective and subjective circumstances, and individual versus group conditions (Al Tamimi, 2016). Nonetheless, the reasoning has not always been straightforward or helpful in recognising differences in need and entitlement – specially from an intersectional perspective (*cf. Abdulaziz, Cabales & Balkandali*,[4] as noted by Benslama-Dabdoub, in this issue).

Accordingly, other authors in this Special Issue reveal how vulnerability can be created or exacerbated *through* law. As stressed by Hudson (in this issue), its unclear meaning has led to inconsistent applications by the ECtHR on various occasions, resulting in the concept nearly becoming a dead letter under the logic that 'if everyone is vulnerable, then no one is truly vulnerable'. The outcome of this is not only the (undue) inattention to the (previously judicially recognised and legally relevant forms of) vulnerability of asylum seekers and irregular migrants but also a trivialisation of the real-world vulnerability to which they are exposed. Benslama-Dabdoub (in this issue), from her part, demonstrates that the recognition of women as (by definition) vulnerable subjects marginalises their political agency and misrepresents their experience. Whether by excess or by default, on the whole, the judicial treatment of vulnerability in migration and asylum cases confirms the duality of its nature and uncovers the need for more clarity in its definition and understanding. Recentring the debate to closely analyse the relationship between law, migration, and vulnerability becomes, therefore, necessary.

Looking at the individual contributions in more detail, in '*Asylum Marginalisation Renewed: "Vulnerability Backsliding" at the European Court of Human Rights*', Ben Hudson analyses how vulnerability, as employed by the Strasbourg Court, specifically in its asylum cases, ultimately

[3]*Dudgeon v. UK*, Application No 7525/76, 22 October 1981 [GC].
[4]*Abdulaziz, Cabales and Balkandali v. UK*, Application Nos 9214/80, 9473/81 and 9474/81, 28 May 1985 [GC].

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paradoxically results in the exclusion of vulnerable individuals from protection. The concept's use has been highly controversial, with the meaning ascribed to it remaining equivocal and contested, even from within the Court itself and in relation to the same judgments (via separate and dissenting opinions). Hudson takes *M.S.S v. Belgium and Greece* as the starting point,[5] where the ECtHR identified asylum seekers as 'a particularly underprivileged and vulnerable population group in need of special protection'.[6] It advanced a two-pronged test of vulnerability determined by migratory experience and prior trauma – rather than by the *legal* configuration of asylum seeker status *per se* – grounded in the situation in which an individual finds herself, permitting (at least, at first sight) an inclusive approach to vulnerability. Nonetheless, in the post-*M.S.S.* era, Hudson tracks the evolution of the Court's reasoning and categorises the asylum-related jurisprudence into three groups, revealing that, overall, the Court has engaged in 'vulnerability backsliding' by surreptitiously reversing the principle of 'asylum vulnerability'. This has led to a situation of 'renewed marginalisation' inflicted by judicial reasoning on asylum seekers and other 'unwanted' migrants (Moreno-Lax and Vavoula, 2022).

In the first group of cases, the 'comparison caveat cases', which include *Mahamed Jama v. Malta*[7] as well as *Ilias and Ahmed v. Hungary*,[8] concerning the deprivation of liberty of asylum seekers, the ECtHR introduces the caveat that the applicants before the Court are 'no more vulnerable' than any other of the asylum seekers in their same position. This ultimately banalises and downplays the vulnerability of *all* asylum seekers by, *in casu*, normalising the acceptance of suffering while in detention. The 'absence cases' from their part, such as *Mohammed v. Austria*[9] and *Mohammadi v. Austria*,[10] are paradigmatic examples of judgments where the ECtHR has abandoned *M.S.S.* by failing to recognise the vulnerability of asylum seekers entirely. The Court's resistance to employ its own vulnerability reasoning in these instances takes place either by omitting to link vulnerability and asylum seeker status or by forgetting to feature vulnerability altogether in its assessment. Finally, cases like *K.I. v. France*,[11] in the so-called 'linguistic alteration cases', display linguistic departures from *M.S.S.* that modify the meaning of vulnerability in connection with asylum seeker status, with the risk that these departures become incorporated within the ECtHR's asylum jurisprudence going forward. On the whole, through a painstaking examination of the relevant ECtHR case law, Hudson demonstrates the exclusionary effect of vulnerability reasoning and the progressive 'undoing' of the *M.S.S.* paradigm.

However, the concept of vulnerability is not only used to exclude individuals from protection. In *'"Route Causes" and Consequences of Irregular (Re-)Migration: Vulnerability as an Indicator of Future Risk in Refugee Law*', Grundler shows how this concept facilitates an understanding of how past experiences of harm impact the risk of being subjected to similar kinds of harm in the future. Grundler analyses trafficking-based asylum claims from the United Kingdom and Germany to challenge the distinction between trafficked and smuggled persons within the asylum procedure and argue that smuggled persons, just like trafficked individuals, should be entitled to refugee status. In an analogous application of the reasoning deployed by Courts in trafficking cases, the smuggling experience and future fear related to it should serve as a basis to access international protection. Conceptualising vulnerability as situational and socially induced, the author demonstrates that both the United Kingdom and German Courts take into consideration previous trafficking experience, which contributes to trafficked persons' susceptibility to being re-trafficked, as part of the assessment of future risk of harm within the refugee status determination procedure. In evaluating the future risk of re-trafficking, the individual's personal circumstances

[5] *M.S.S. v. Belgium and Greece*, Application No 30696/09, 21 January 2011 [GC].
[6] *Ibid*., para. 251.
[7] *Mahamed Jama v. Malta*, Application No 10290/13, 26 November 2015.
[8] *Ilias and Ahmed v. Hungary*, Application No 47287/15, 14 March 2017 [C], 21 November 2019 [GC].
[9] *Mohammed v. Austria*, Application No 2283/12, 6 June 2013.
[10] *Mohammadi v. Austria*, Application No 71932/12, 3 July 2014.
[11] *K.I. v. France*, Application No 5560/19, 15 April 2021.

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as well as the potential inability or difficulties in re-integration and making a livelihood following expulsion to the country of origin are taken into account. They are viewed as 'vulnerability indicators', which converge and result in the individual's incapability of meeting their most fundamental socio-economic needs, leaving them no choice but to submit to re-trafficking. Vulnerability therefore serves to challenge the idea that the initial and subsequent harmful journeys undertaken by trafficked as well as smuggled migrants are 'voluntary', instead positing that they (should) inform the analysis of an asylum claim.

The author advances the argument that this vulnerability-infused, individualised approach can be transplanted to other contexts, particularly that of irregular(ised) migrants more broadly, whose past experiences may equally create 'consequential vulnerabilities'. Because of these vulnerabilities, she argues, they may be in need of international protection based on the harm they will (most likely) experience during the dangerous migratory journey they may undertake *again* (since basic needs are not and cannot foreseeably be met in their countries of origin in line with basic human rights standards). In this way, her contribution not only unbridles new potential avenues for basing asylum claims, but also exposes states' responsibility in this context; by employing restrictive migration policies, they chiefly contribute to the creation or exacerbation of existing as well as 'consequential vulnerabilities' – named by Grundler as the 'route causes' of forced displacement – which can lead to irregular re-migration in very precarious conditions. The concept of 'route causes' indeed encapsulates factors that push irregular(ised) migrants to 'choose' a dangerous migratory route, with this dangerous route simultaneously causing migrants to acquire new/additional vulnerabilities that, in turn, intensify the risk of irregular re-migration hence warranting international protection.

However, in relation to both sets of case law that Grundler analyses, which in their majority concern female claimants, she stresses how female gender *per se* has been taken as a vulnerability indicator. Conversely, male gender has been considered a factor countering vulnerability, subscribing to disempowering and stereotypical narratives about the role of genders in this framework.

The equation of female gender with vulnerability is more closely looked at in *'Epistemic Violence and Colonial Legacies in the Representation of Refugee Women: Contesting Narratives of Vulnerability and Victimhood'*. In her article, Benslama-Dabdoub focuses on a law-induced exacerbation of vulnerability through the presentation of refugee Muslim women as helpless victims in need of rescue, rather than as active rights-holders with their own political agency. Her analysis is grounded in the premise that refugee law is not only 'structurally constructed against or, at least, in disregard of women', but deeply racialised, too. She submits that patriarchal and 'white saviour' narratives are even reproduced by the United Nations High Commissioner for Refugees (UNHCR) in policy guidelines and advocacy materials by suggesting that refugee women (mostly from formerly colonised territories) are perceived as necessarily dependent on men's protection, thus equalling vulnerability with gender and failing to factor in a person's complex and multifaceted experiences. Through an epistemological analysis, informed by decolonial and feminist theories, primarily Spivak's concept of 'epistemic violence' (Spivak, 1993), Benslama-Dabdoub unearths the colonial legacies present in Western refugee case law. She argues that portraying refugee women as vulnerable victims is not only a form of epistemic violence, but also endangers the asylum claims of women who do not fit into persisting postcolonial vocabularies.

Her article examines judicial decisions relating to Muslim refugee women from Iran, Syria, Turkey, and Saudi Arabia who sought asylum from 1987 to 2019 in various Western countries, namely France, the United Kingdom, Canada, Greece, and the United States. The author explains how the experiences of refugee women are depoliticised in the case law by (re)producing certain discourses to the effect that women are not fully-fledged political actors, both because of their gender and their ethnicity or national origin and because of the 'backwardness' of the prevailing culture and social mores in their countries of origin. Refugee women's agency is hence denied under the view that their actions or beliefs are not 'truly' feminist, nor do they constitute a valid

form of political opinion. This involves, in particular, cases where refugee women have attempted to rely on the 'political opinion' ground of the 1951 Refugee Convention and, instead, their claims have been channelled via the 'particular social group' category. Benslama-Dabdoub attributes this tendency to historical factors in the making of the Convention, the male-centric understanding of persecution, and common tropes in the Courts' apprehension of female claimants' character and experiences. As a result, vulnerability reasoning, whether explicitly or implicitly, is used in a way that reifies identities and prolongs perceptions of non-white, non-Western women as oppressed, powerless victims without autonomy.

Ippolito's article *'Environmentally Induced Displacement: When (Ecological) Vulnerability Turns into Resilience (and Asylum)'* offers a more positive view of the concept of vulnerability in the context of environmentally induced migration. As 'climate refugees' do not fall within the realm of international refugee law instruments, their protection has instead relied on an evolutionary interpretation of human rights standards, strengthened by the concept of vulnerability. Building on this approach, Ippolito employs the concept of 'ecological vulnerability', coined by Harris (2014), to refer to the dependence of people on the natural environment and the various ecosystems that sustain their existence. The term serves to highlight the interaction between the human being/body and the environment/non-human world. Through this concept, Ippolito explores whether human rights law has the revolutionary potential to offer additional protection by extending the positive obligations attached to the principle of *non-refoulement* to displaced individuals who have crossed an international border due to environmental degradation or climate change. In particular, drawing from case law of the UN Human Rights Committee, she explores how 'ecological vulnerability' could assist in recentring the assessment of individual cases. The concept has the benefit of requiring an intersectional evaluation of all relevant risk factors as they interact together to generate (human rights-cognisable) harm. This approach takes account of the specific vulnerabilities of applicants due to the overall conditions obtaining in their countries of origin, in particular by looking into the level of an adequate standard of living, which is heavily impacted by both environmental degradation and climate change. Such a vulnerability-infused reading of the principle of *non-refoulement*, Ippolito posits, would be useful at regional level (specially at EU level) as well. Relying on 'ecological vulnerability' could serve as a tool to interpret in an extensive manner existing complementary protection regimes, such as humanitarian forms of national protection and the subsidiary protection system embedded in the EU Qualification Directive.[12]

To back up her proposal, Ippolito explores recent domestic case law from Italy, Germany, and France, whereby the situational vulnerability of applicants has been key in extending the recognition of humanitarian *non-refoulement* in cases where adverse climatic conditions may expose the applicants, upon removal, to the risk of a standard of living that does not respect core fundamental rights. Although the author also shows how the law, as currently applied in most cases, is a generator and exacerbator of vulnerability, the introduction of 'ecological vulnerability' reasoning offers a key way for ensuring the resilience of both environmentally displaced migrants as well as the law itself when applied in this domain. The notion assists in attaining a principled conceptualisation of the circumstances facing 'climate refugees', helping in properly framing the spatial and temporal patterns of climate change-related movements, their determinants, and their consequences for individual and societal well-being.

Finally, the potential use of the concept of vulnerability, in the form of 'migratory vulnerability', in a resilience-enhancing way, as informing the discrimination analysis under Article 14 ECHR to achieve substantive equality, is proposed by Baumgärtel and Ganty in their article *'On the Basis of*

[12]Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9.

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Migratory Vulnerability: Augmenting Article 14 of the European Convention in the Context of Migration'. The authors unpack and problematise the Strasbourg Court's reluctance to consider migration cases as instances of discrimination, except in narrowly defined situations of settled and less vulnerable migrants and with reference to specific migration-status related grounds, namely grounds of nationality, residence and, more rarely, race and ethnic origin. Due to these shortcomings in the Article 14 ECHR case law of the ECtHR, the authors build on previous work on the conceptualisation of 'migratory vulnerability' (Baumgärtel, 2020) to demonstrate that the Court's current position is neither inevitable nor justified. 'Migratory vulnerability' stresses the situational and structural disadvantages incurred by migrants in different contexts and serves to remedy the pitfalls of both individualistic and group-based understandings of vulnerability; it is defined as 'a cluster of objective, socially induced, and temporary characteristics' that originates in migration control but that affects vulnerable migrants 'to varying extents and in different forms' (Baumgärtel, 2020, pp. 12). In calling for 'migratory vulnerability' to be recognised as a prohibited ground under Article 14 ECHR, Baumgärtel and Ganty explain how the concept brings to the fore the lived experiences and socio-political processes related to the regulation of migration. It 'goes beyond the[ir] legal status [as non-citizens] to encompass different kinds of migratory realities and does not denote a particularly vulnerable sub-group within a larger identity group'. In this way, the notion propounds a sort of 'middle ground' approach that considers particularly 'situational experiences', without losing of sight the general and individual determinants of vulnerability concerning migrants as non-citizens.

Even if, according to the authors, 'migratory vulnerability' does not represent an 'inherently suspect' ground of differentiation, like sex or race, which would be *a priori* banned by Article 14 ECHR, it can be used as a means of identifying instances of discrimination, understood as 'a measurable disadvantage that is disproportionate or arbitrary and cannot, therefore, be reasonably justified on the basis of the Convention'. This requires a shift from applying the (very problematic) 'comparator' test, prevailing in discrimination law and grounded in notions of formal equality, to a 'disadvantage test', as developed by Gerards (2013), to encompass personal, political, social and/or historical considerations. The authors further offer two concrete examples, namely the denial of COVID-19 vaccines to migrants during the pandemic and the discriminatory 'right to rent' scheme, operating in the United Kingdom as part of its 'hostile environment' system, that outsources migration control to private persons, such as landlords. This is to demonstrate that re-focusing on 'migratory vulnerability' holds the promise of reframing migration injustices as discriminatory treatment, bringing them within the realm of Article 14 ECHR. Their proposal would enable the Court to detect violations that currently go unheeded on a principled and workable basis, in a way that would add considerable value to the analysis of (non) discrimination situations under the Convention. If adopted, the migratory vulnerability test would require a proportionality assessment and a duty of justification.

5. Conclusion: an ambivalent force – legal vulnerability and the regulation of migration

Jointly, the contributions to this Special Issue reveal that the concept of vulnerability is applied in variegated ways by domestic Courts as well as regional and international judicial and Treaty bodies in different contexts. Perspectives are often inconsistent (even within the same Court), fraught with misconceptions and stereotypical views on gender, migration status, or the political agency of non-citizens, and overall inadequate to capture the intricacies of forced and irregular movements across borders. As such, the authors unveil the multiple ways in which it is the law *itself* that generates or exacerbates vulnerabilities by misconstruing vulnerable individuals and their experiences or by undoing their protection when failing to recognise the full depth of their vulnerable positions. Law- and policy-makers of migration governance, therefore, need to pay

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attention to the ambivalent force of vulnerability, to avoid stereotyping and stigmatising trends that may become normalised when entrenched in law and judicial reasoning (for a detailed proposal for a holistic, intersectional approach, see Moreno-Lax, 2021). The misuse of vulnerability as a legal and policy device may validate approaches that, rather than remedying, end up aggravating protection needs with exclusionary effects.

There is, nonetheless, counterbalancing potential as well; the contributions to this Special Issue collectively offer insights into how different forms of legally-defined or legally-mediated vulnerability can be conceptualised and more readily employed in migration governance and asylum enquiries, be it in relation to irregular migrants/smuggled persons, climate induced displacement, or generally non-citizens without long-term or settled status in the country of destination. Emphasising lived experiences and considering vulnerability as not 'naturally occurring' but politically created/compounded, the authors of this Special Issue critically engage with the concept (as/when embedded in law) in a nuanced and constructive manner. Legal vulnerability – that is, the vulnerability that is recognised and regulated in and by law – provides an opportunity to apprehend the richness of individual/situational positions, incorporating real-world empirics into the interpretation of migration norms (Leboeuf, 2022).

What is crucial is to understand the significant and contradictory role of law in the regulation of vulnerability, both in general but specifically when concerning migration. Legal vulnerability and vulnerability-infused (legal/judicial) reasoning can be used to address current and ongoing injustices or to prolong them. They can provide solutions or extend and normalise protection needs. Distorted conceptions of legal vulnerability, shaped by categorical thinking, misguided group approaches, or incompatible policy objectives, participate in and may perpetuate the violence facing migrants. A more radical (and ethical) approach (Da Lomba and Vermeylen, 2023, pp. 271 and 282), like the one proposed by the contributions to this Special Issue, is necessary to humanise institutional responses to (unwanted) migration. If employed in the principled, situational, and comprehensive manner suggested by the authors herein, legal vulnerability when related to migration offers a powerful diagnostic tool as well as an effective remedy to challenge oppression, marginalisation, and exclusion. It can serve to 'denationalise the vulnerable subject' (Da Lomba and Vermeylen, 2023, p. 270), decoupling notions of entitlement/deservingness from migration status. This would recover the universal core of human rights and bring non-citizens from the margins to the centre of attention in decisions affecting them.

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