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NORMATIVITY AND VULNERABILITY: STARTING FROM LEGAL PRACTICES
GUEST EDITORS' PREFACE

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ABSTRACT
Over the last decade, the juridical-philosophical notion of vulnerability has met with considerable success, both in terms of theoretical reflection and of concrete legal application. Much of this success is due to its critical-hermeneutical use, aimed not only at identifying and protecting individuals or groups particularly exposed and vulnerable, but also and above all, at adapting and directing the legislation concerning the protection of fundamental human rights.
In this sense, the legal use of the notion of vulnerability is an integral part of the process of *constitutionalization of the human person* that characterizes the European legal systems since the second post-war period and which assumes, as its main purpose, the application of the *protective mask* of the law to the concrete individuals.

KEYWORDS
Criticism, Hermeneutics, Constitution, Human Person, Modernity.

In the last decade the notion of *vulnerability* has been tackled from multiple and different perspectives and it has become increasingly relevant not only in the legal-philosophical debate, but also in the field of economics and political theory[1]; a concrete proof of such relevance is its impact on the regulatory production of European and international institutions[2].

[1] B. Pastore, 2018, p. 7; K. Brown, K. Ecclestone, N. Emmel, 2017 and O. Giolo, B. Pastore, 2018.

[2] Y. Al Tamini, 2015; E. Diciotti, 2018, pp. 19-30; M. G. Bernardini, 2018; R. Chenal, 2018, pp. 39-52; M. Virgilio, 2018.

In some respects, this success can be attributed to the transformations of the institutions in the contemporary world, less and less inclined to express rigid and systematic models but, on the contrary, to remain open towards the processes of branching, differentiation and fragmentation of society[3]. In this context, the operational introduction of the notion of vulnerability carries out the difficult task of creating a sort of *protective network* aimed at adapting and directing the legislation concerning the protection of fundamental rights[4]. It is not simply a question of identifying and protecting individuals or groups particularly exposed and vulnerable because of physical, mental, economic or social reasons: it is rather an interpretative use of the category in order to embody the important and particular task of an *axiological-evaluative* mediation between the factual and normative plan in the sphere of legal action[5].

It is not surprising that the notion of vulnerability should assume a substantially *hermeneutical-interpretive* value. The diffusion and the use of the term in the theoretical-philosophical sphere is in fact antecedent to its juridical-normative application and refers to a more general reflection on the *fragility* of the human being, which can be attributed to the conceptual crisis of the great metaphysical constructions and represents the other side of a process of weakening and fragmentation that characterizes the political and social institutions in the contemporary world[6].

It is precisely in the area of political studies that one of the most interesting features of the notion of vulnerability can be identified. Physical, mental, economic or social vulnerability is considered in contrast to the constructions of more recent modernity which substantially aim at representing the political action according to the *myth* of individual autonomy and therefore intent on hiding, ignoring and expunging the dimension of fragility. Recognising this condition entails a *critical* review of the tasks of the law, closely intertwoven with the hermeneutical perspective[7].

The encounter between the juridical and the political level, through the reflective perspective of philosophy, thus provides a semantic of this rather complex and versatile term that branches out further if we take into consideration the recent reflections on the transition of the notion of vulnerability from a *subjective* to an *objective* and specific character of the law itself[8]. These perspectives are affected by both the transformation of the institutions in recent years and by the reflections that have taken place in the contemporary philosophical landscape[9]; as a consequence, the

[3] A. Abignente, 2018.

[4] B. Tuner, 2006; T. Casadei, 2012; S. Besson, 2014; R. Adorno, 2016; R. Chenal, 2018; E. Pariotti, 2018.

[5] B. Pastore, 2018, pp. 7-11; E. Diciotti, 2018, pp. 13-9 e 30-3; R. Chenal, 2018, pp. 52-5; L. Corso, 2018.

[6] F. Ciaramelli, 2018, pp. 171-8.

[7] Th. Casadei, 2018; A. Verza, 2018; O. Giolo, 2018.

[8] F. Ciaramelli, 2018, pp. 179-80.

[9] A. Abignente, 2018.

juridical action is particularly vulnerable, being intent on the construction and formulation of institutions and norms which are intrinsically exposed to alteration and to precariousness. With this, the semantics of the term is also enriched with a *metaphorical* meaning.

This brief survey on the juridical and conceptual notion of vulnerability may be of some use in assessing its concrete effects at the applicative and regulatory level. In order to fully grasp its meaning, a preliminary remark is necessary.

The example of societies that have developed a legal dimension, regardless of their degree of cultural complexity, shows that, in general, law arises mainly from the need to regulate social reality and individual behaviour[10]. Due to the great transformations of the modern world, the aim of this normative has acquired a particularly innovative aspect: indeed, as a consequence of the process of secularization, the law has assumed on itself an unprecedented role of mediation to guarantee the ethical-moral legitimacy to the political institutions aimed at the achievement of social integration[11]; a role that, in pre-modern societies, was substantially played by religion, through the impressive complex of philosophical constructions with a metaphysical and cosmological character[12].

The modern legal state has played this unprecedented regulatory function[13], building around the *human person* a sort of protective mask, aimed at protecting his fundamental rights[14]. And it is precisely from the second post-war period that the process of *constitutionalization of the person* became visible[15]; by such a process, the place from which an articulated *corpus* of individual rights derives is no longer from the legal system itself, understood as either a rigid and objectively autonomous structure, neither from the juridical subject in an abstract and general sense, but rather from the human person, considered in its concrete and individual dimension. The law is thus called to guarantee each individual's project of full autonomy and realization, starting from the necessities and needs of each different individuality[16].

The conceptual couple *normativity-vulnerability* is particularly useful in explaining this function: in a legal system that appears to be less and less rigid and hierarchical, and increasingly differentiated and branched, the hermeneutical use of the notion of vulnerability seems indeed capable of favouring the application of a protective mask to the different legal entities, by performing the difficult task of adapting and modulating its forms according to the needs and requirements of the different

[10] S. Cotta, 1997, pp. 51-67.
[11] J. Habermas, 2013, pp. 36-52, p. 98 ff.
[12] *Ibid*, pp. 32-5.
[13] L. Ferrajoli, 2015, pp. 3-39.
[14] J. Habermas, 2013, pp. 130-1.
[15] S. Rodotà, 2012, pp. 148-54.
[16] *Ibid.*, pp. 140-99, 250-69, 295-7; L. Ferrajoli, 2015, pp. 123-47.

personal individualities. At the same time its critical use could play the role of *unmasking* the limits of an exercise of the law which, by a surreptitious political use, could become invasive and cumbersome and therefore turn into a producer of vulnerability.

It is, as one can easily see, a use of the notion of vulnerability that must take its starting point from the concrete practices of law, i.e. it must be able to hold together the different aspects of the theoretical formulation and of the concrete application on a strictly regulatory line. The close contiguity of the theoretical reflection and of the practical application can be fully understood by referring to the metaphorical meaning of *vulnerability* as it moves from a subjective characteristic to an objective element of law, as it stated above.

Moving the level of discourse from the subjects of right to the law itself is not a simple rhetorical exercise or a vague theoretical reflection; it can, on the contrary, be very useful precisely to guarantee, in terms of concrete application, the full realization of that process of *constitutionalization of the person* which we mentioned earlier.

The concrete practices of law, in fact, if called to recognize the intrinsic vulnerability and alterability of the juridical order, are more induced to a perspective of openness towards the individuation and, above all, the alteration of the principles of the right itself; we are thus well aware that the legal form that we are called to use to protect and guarantee the free and autonomous development of the human person must lose any rigidity and immutability, in order to adhere more and more easily to the forms of the latter.

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