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VULNERABILITY AND SLAVERY. A GENDERED APPROACH TO HUMAN TRAFFICKING

di Valeria Giordano*

SUMMARY: 1. Bodies as Disposable Articles. – 2. Differential Inclusions. – 3. “*Vulnera*”. – 4. Leading Cases. – 5.

1. Bodies as Disposable Articles

The legal abolition of slavery represents, as is well known, an essential moment in the process of constitutionalisation of legal systems. It found its formal recognition in the new political order outlined in the Congress of Vienna in 1815 with *the Declaration on the Universal Abolition of the Slave Trade* and later, in 1865, in the *13th Amendment of the American Constitution*, to be embodied in the 1948 *Declaration of Human Rights*.

In spite of its declaratory formulations, it has by no means disappeared in the contemporary world and its persistence takes clandestine and invisible forms within the processes of globalisation, where it is difficult to bring into focus, concealed in complex, multiform practices that are increasingly difficult to penetrate.

Useful in this sense is the sociological analysis on the new slaves conducted by Kevin Bales¹, in which he points out how the new slaves are capital to be used and disposed of in the short term: nothing more than *disposable* and *zero-cost items* in a representation of the body as a commodity.

If, in fact, the process of democratic civilisation begins with *the habeas corpus*, the principle of personal inviolability against the arbitrariness of power, the configurations of global arrangements bring to light practices of subjection and domination over the body of the other, enslaved through violence and coercion, ranging from the *exploitation of child labour and prostitution* to *human trafficking*.

A continuist reading identifies in the total control of one person over another, for the purpose of economic exploitation, the element of conjunction with ancient slavery, placing the *discrimen* in the absence of the claim of the other as an object of property and in the weakening of ethnic-racial differentiation: here otherness seems to be played out more on the terrain of racial discrimination than on that of a hierarchical subordination² dictated by misery and extreme poverty.

In most cases, these are invisible, polyform phenomena with blurred contours, which make the possibility of a sociological description of them extremely problematic, just as they are difficult to fit into formal categories and offences on the level of legal qualification.

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This contribution takes up the speech given at the Conference on “*Human Trafficking: Legal Framework and Critical Application Issues*”, held at the University of Salerno on 9 May 2025, as part of the activities of the third edition of the Jean Monnet Chair “*Promoting Public Awareness on Enlargement, EU Values and the Western Balkans’ Accession*” (EUVALWEB).

¹ K. BALES, *Disposable People. New Slavery in the Global Economy*, Berkeley-Los Angeles-London, 1999.

² See T. CASADEI, *Il rovescio dei diritti umani. Race, discrimination, slavery*, Rome, 2016.

*Trafficking in human beings*³ and smuggling, the crime of illegal immigration, in fact refer to different criminal offences. An essential point is the element of consent and active participation of subjects: deception, violence, subjugation, abuse of the position of vulnerability, are integral parts of the crime of *trafficking in human beings*, in which the exploitation of the migrant takes on different modalities, including prostitution, forced labour, organ trafficking, etc.. These different offences in practice, however, often tend to overlap in a networked system dedicated to the commodification of the person.

In fact, a very close relationship emerges between poverty and the vulnerability of subjects, between global demand and the exploitation of bodies, which gives us an extreme sense of social marginalisation and discrimination and tells us disturbing stories. Stories of coercion and violence record the existence of criminal organisations that certainly do not leave the West unscathed, showing, on the contrary, a transnational structure, in which *trafficking in human beings*⁴ is integrated into the illegal network of managing the transit of migratory flows: “*There are increasing numbers of migrants worldwide, many of whom are at risk of being trafficked and exploited. These growing ‘mixed-migration flows’ are comprised of economic migrants, displaced persons, asylum-seekers and refugees, either on a voluntary or involuntary basis, and in both regular and irregular situations. Jobless and in desperation, they become easy targets for those who exploit and abuse them in this high profit low risk industry, operating where overly restrictive migration policies can create*”⁵. It is precisely the latter that allow this transnational crime to be differentiated from smuggling, a crime defined in international law as “*the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State of which the person is not a national or a permanent resident*”⁶, which therefore exhausts its criminal conduct in the organisation of the transport, without providing for further benefits in the migrant’s illegal immigration.

If trafficking in human beings therefore constitutes a global phenomenon of various proportions, ranging from the exploitation of child labour, to induction into prostitution, to outright trafficking, it is clear that we are in the presence of new slavery that lurks in the branches of the clandestine migrant market, often concealed by the restrictive policies of the destination countries and all united by the commodification of the person, deprived of his or her human dignity and reduced to an object of exchange.

³ Trafficking in persons can be conceptualised in different ways. According to the definition of the UN Protocol on Trafficking in Persons, adopted by the 160 UN member states that have ratified Protocol 5, there are three ‘distinctive’ elements of trafficking in persons: the act, the means and the ends. All three elements must be present for a case to be defined as a trafficking in persons offence. However, each element has a number of manifestations. The Protocol on Trafficking in Persons specifies that ‘the act’ means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force, deception, coercion, abduction, fraud, abuse of power or of a position of vulnerability, or the giving of payments or benefits (*i.e.*, means), for the purpose of obtaining the consent of a person having authority over another for the purpose of exploitation. On these issues, S. TAHER, *Moral and Ethical Issues in Liver and Kidney Transplantation*, in *Saudi Journal of Kidney Diseases and Transplantation*, Vol. 16, No. 3, 2005; N. LARSEN, R. SMANDYCH (eds.), *Global Criminology and Criminal Justice: Current Issues and Perspectives*, Toronto, 2007. See on the topic, at least J. ESTEBAN, PÉREZ ALONSO (dir.), *El Derecho ante las formas contemporáneas de esclavitud*, Valencia, 2017 as well as ID., *Tráfico de personas e inmigración clandestina. Un estudio sociológico, internacional y jurídico-penal*, Valencia, 2008; J. O’ CONNELL DAVIDSON, *Modern Slavery. The Margins of Freedoms*, Basingstoke-Nueva York, 2015.

⁵ As the Report of the Special Representative and Coordinator for Combating Trafficking in Human Beings, OSCE 2014-15 and the UN Office on Drugs and Crime’s (UNODC) 2014 show, one in three victims is a child.

⁶ Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. United Nations, Treaty Series, Vol. 2241, No. 39574.

Saskia Sassen, in her book on exploitation in advanced neo-liberal societies, states that today's “*expulsions from home, land, and job have also had the effect of giving expanded operational space to criminal networks and to the trafficking of people*”⁷.

Far beyond Bauman's depiction of *discarded* or *surplus* lives⁸, these are lives that even before being destined for the *dump*, the *garbage dump*, are fed into a circuit of further and continuous forms of exploitation, perhaps displaced from the centre to the periphery.

2. Differential Inclusions

The Global Report on Trafficking in Persons 2024⁹, records an alarming 25% increase in the number of trafficking victims in 2022 compared to 2019, with a 31% increase in child trafficking in 2022 compared to 2019.

The statistics highlight the disproportionate impact of trafficking on women and girls, with 61% of victims in 2022 being women who are mainly sexually exploited. Trafficked women and girls suffer multiple forms of exploitation, as vulnerable individuals already exposed to gender discrimination, domestic and sexual violence and, often, socio-economic marginalisation.

In this sense, a gender approach is essential to raise awareness of how social forms of gender further contribute to the inequalities and multiple discriminations experienced in the various systems during each trafficking story¹⁰. Stories of exploitation that become even more radicalised at the intersection of multiple elements of social exclusion and therefore make them increasingly vulnerable to trafficking.

Here then, vulnerability becomes a word, a category, acted against the risk of discrimination that may concern subjects, groups, in particular conditions and exposed to the risk of very strong social and economic inequalities also on the basis of belonging to some traditionally excluding categories, such as race, class, gender.

The emergence of a series of factors of oppression and subordination is in fact at the origin of a differential inclusion¹¹ that redefines the lexicon of citizenship in an exclusionary key, requiring an approach that takes into account conditions of vulnerability as highlighted by the Human Rights Council (HRC) and the European Court of Human Rights. Indeed, it has recognised special protection for groups with needs rooted in a history of marginalisation, such as migrants and asylum seekers, gender, minors, and the disabled.

Moreover, there is no lack of national or international legislative sources that make explicit reference to the notion, such as the 2005 Legislative Decree No. 140 on the reception of asylum seekers in the Member States, which provides for protection to be granted in relation to specific conditions of vulnerability, and the very important 2011

⁷ S. SASSEN, *Expulsions. Brutality and Complexity in the Global Economy*, Cambridge-London, 2014, p. 89.

⁸ Z. BAUMAN, *Wasted Lives. Modernity and its Outcasts*, Polity Press, Cambridge 2003. The essay by T. CASADEI, *Human Wastes? Contemporary Forms of Slavery and New Abolitionism*, in *Soft Power, Revista euro-americana de teoría e historia de la política y del derecho*, Vol. 2, 2016, pp.109-124.

⁹ Available at https://www.unodc.org/documents/data-and-analysis/glotip/2024/GLOTIP2024_BOOK.pdf.

¹⁰ On these aspects the guide elaborated by N. KOZHOUHAROVA, G. BRUNO, V. BUFFON, A. FERRANTINI, G. FIORAVANTI, M. LAHI, C. SPAMPINATI, M. ELLI DOUFEXI KAPLANI, E. DANNER, K. HEIN, B. NYAMEKYE, A. WELLS, M. WÜRFEL, available at <https://www.differenzadonna.org/wp-content/uploads/2022/12/Guida-alle-discriminazioni-multiple-nel-contesto-della-tratta.pdf>.

¹¹ The concept of differential inclusion is at the core of the analysis in S. MEZZADRA, B. NELSON, *Boundaries and Frontiers. The Multiplication of Labour in the Global World*, Bologna, 2014.

Directive No. 36 on trafficking in human beings, which precisely identifies the vulnerable position of those who are victims and who therefore have no other effective and acceptable choice but to give in to the abuse.

The increasing use of the terms vulnerability, vulnerable groups, both in the policies of the European Union and in the jurisprudence of the European Court of Human Rights therefore shows how it has become an essential argumentative criterion for recomposing a multiplicity of subjective figures that require protection open to the specificities emerging from time to time. Specificities that call for legal responses that intersect in the precarious boundaries of international legality or that are located in those complex and thorny relationships that structure *decision making*: they assign to the qualification of “vulnerable”, of a subject or a group, the provision of multilevel protections, between private techniques and public instruments, in the application of an elastic category, that is, without a homogeneous connotation, which does not give back the sense of a contextual application.

The ontology of vulnerability therefore presents a complex and variegated physiognomy, susceptible to multiple interpretations within the civil and criminal process that differ from each other and that solicit a series of questions. Questions that concern its relationship with gender also with respect to the growing dimension of precarity – what in the language of Judith Butler, is defined as *precarity* – which leverages politically induced forms of social and economic differential distribution, reflecting discrimination in access to rights. A vulnerability that recalls the structures of power and domination of bodies as well as the processes of precarisation that originate from neo-liberal rationality and the factors of gender hierarchisation and that deeply question us on the spaces of political renegotiation and our collective responsibility.

If in fact trafficking in human beings constitutes a global phenomenon of varying proportions, it is clear that we are in the presence of new forms of slavery that lurk in the branches of the clandestine market of migrants, often concealed by the restrictive policies of the destination countries and all united by the commodification of the person, deprived of his or her human dignity and reduced to an object of exchange.

We cannot but recall, then, the universal moral law according to which each individual has an intrinsic, unconditional and absolute value; the new slaves, as articles to be used and disposed of in the short term, cast a cone of shadow over the fungibility of the human body and the dynamics of dehumanisation they entail.

Integrity, inviolability, and the unavailability of the body are, in fact, principles that make it possible not to expropriate the person from the power to freely govern his or her own life, just as instrumentality and fungibility entail the reduction from a person to a thing, thus undermining the Kantian notion of human dignity, the idea that the “*recognition of the other is based on the moral value of the person understood as an end in itself*”¹².

Undoubtedly at the centre of the theoretical question is the theme of “commodification”, of the commodification of the body, which demands a problematisation in the light of the multiple forms of radical exploitation and control perpetrated on the body of others: they inevitably present, in the denial of the autonomy of the other and in its violability, “objectivising” modalities¹³ that lead us back to our *vulnera*.

¹² The concept of objectification formulated by Kant in the *Metaphysics of Costumes* (1790) to indicate the reduction of a subject into a mere sexual instrument is developed in feminist criticism by C. MACKINNON, *Toward a Feminist Theory of the State*, Harvard University Press, Cambridge, 1989.

¹³ According to Martha Nussbaum, the concept of objectification encompasses these dimensions: instrumentality, denial of autonomy, inertia (the object is an entity lacking the capacity to act and be active),

3. “Vulnera”

Vulnerability is an extremely polysemic word, susceptible to multiple meanings.

The former links the concept of vulnerability to its derivation from the Latin word *vulnus* (“wound”) and the capacity to suffer that is inherent to human embodiment. To be vulnerable is to be fragile, to be susceptible to wounds and suffering; this susceptibility is an ontological condition of our humanity, a universal aspect of the human condition. It is a condition that exposes us to constant bodily attacks and that constitutes with Thomas Hobbes the reason for the foundation of a social and legal order, without which the cessation of *bellum omnium contra omnes* would be impossible. Meaning that shows how protection is not natural but artificial, since it entails the signing of that social contract from which law originates: the only instrument capable of neutralising social conflict, making it possible to emerge from a state of unsustainable insecurity. A political-legal representation to which the modern legacy will always be indebted and that will lead Herbert Hart, starting from the analysis of the characteristics of mankind (depicted through the image of five truisms, of five obvious truths, in which the vulnerability of men is the first), to theorise the minimum content of natural law¹⁴, *i.e.* a hard core that links law to morality and makes law indispensable as an instrument of social regulation. A fundamental key that reworks the inescapable coercion-freedom dichotomy and puts on the scene the meaning and foundations of coexistence and social bonding, and in which the roots of legal normativity lie.

Vulnerability as *precariousness* would say Judith Butler!¹⁵ This aspect brings out the intersubjective and relational dimension of the category, which makes vulnerability a universal, intrinsic, ontological condition of humankind.

A second meaning of vulnerability is closely linked to the context in which subjects find themselves acting and can therefore include social, political, economic, environmental or health-related factors that increase exposure to risk or harm. In this sense, the *Vulnerable Turn*, of which Marta Fineman is one of the essential references, emphasises the need to unmask the myth of the single subject, starting with rethinking the role of the state and institutions in the distribution of privileges and opportunities within society, since human reality encompasses a wide range of different and interdependent abilities throughout life¹⁶.

This is a category regulated at the European level by the *Warsaw Convention* (2005) and *Lanzarote Convention* (2007) that looks at the context in which the conduct takes place and ultimately revolves around the paradigm of the victim. This paradigm, which obviously overcomes the depersonalisation of criminal law, tends to shape the legal responses with respect to the involvement of interests considered pre-eminent and which place in the forefront, as we shall see in the next section, the subjective qualification also of those who integrate the criminal offence.

fungibility, violability, ownership. M. NUSSBAUM, *Sex and Social Justice*, in M. NUSSBAUM (ed. by), *Objectification*, Oxford University Press, Oxford, 2000, pp. 213-239.

¹⁴ H.L.A. HART, *The Concept of Law*, Oxford, 1961.

¹⁵ J. BUTLER, *Precariousness Life. The Power of Mourning and Violence*, London 2004.

¹⁶ M.A. FINEMAN, *The Vulnerable Subject and the Responsible State*, in M.G. BERNARDINI, B. CASALINI, O. GIOLO, L. RE (eds.), *Vulnerability, Ethics, Politics, Law*, Rome, 2018, pp. 141-178. On the risks of a homogeneous and hierarchical reconstruction, F. LUNA, *Elucidating the Concept of Vulnerability: Layers Not Labels*, in *The International Journal of Feminist Approaches to Bioethics*, Vol 2(1), 2009, pp. 121-139; K. BROWN, *Vulnerability: Handle with Care*, in *Ethics and Social Welfare*, Vol. 5(3), 2011, pp. 313-321.

An explicit reference to situational vulnerability is also found in the 2011 Directive No. 36 and in the Additional Protocol to the United Nations Convention, *i.e.* the *Palermo Protocol*, in which the abuse of the position of vulnerability is introduced, which inevitably expresses all the ambivalence and the lability of the lemmas on which the consensus between freedom, will, coercion, asymmetry, exploitation and violence is structured.

In particular, the introduction of the abuse of the position of vulnerability and the irrelevance of consent represent an attempt to mediate between the different options in the field: on the one hand, discourses on trafficking risk favouring the paternalist representation of women as necessarily vulnerable subjects, the idea that the introduction of specific measures implies a patriarchal conception and therefore some form of incapacity, on the other hand, the need to include the wide range of hypotheses that cannot be clearly ascribed to a free and self-determined will¹⁷.

4. Leading Cases

According to the gradually emerging jurisprudence, trafficking in human beings is an increasingly widespread cross-border practice to be opposed both in the country of origin and in the country of destination, as it is substantiated in a power corresponding to that of ownership and therefore in slavery. With respect to it, however, there is an uneven use within legal arguments, which undoubtedly shows the difficulty on the level of criminal policy to differentiate it from the countless forms of exploitation and subjugation linked to the often inhuman conditions reserved for migrants, without hiding behind the bulwark of the autonomy of the subjects.

In this sense, then, vulnerability can turn into a strategic politico-legal category because it allows us to redefine the contexts within which rights are placed and sometimes even redesign their destiny.

The analysis of the judges' arguments shows precisely how situational vulnerability – which is specific to the context – allows the device of formal equality to be subverted in the face of multiple and differentiated situations requiring specific protection.

Suffice it to think of the uses of the category by the European Court of Human Rights, which has ruled on several occasions since 2005 on violations of art. 4 of the *European Convention on Human Rights* concerning the prohibition of slavery and forced labour¹⁸, many of them concerning the severe exploitation and trafficking of foreigners in prostitution (decisions *Rantsev v. Cyprus and Russia*¹⁹; *S.M. v. Croatia*²⁰).

¹⁷ For an analysis of these issues see E. SANTORO, *Vulnerability between political theory and normative texts: a new language to say old things or a new theoretical tool?*, in A. FURIA, S. ZULLO (A CURA DI), *La vulnerabilità come metodo*, Rome, 2020, p. 145 ff.

¹⁸ “1. No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour. 3. For the purpose of this Article the term “forced or compulsory labour” shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations”.

¹⁹ European Court of Human Rights, First Section, Judgement of 7 January 2010, Application No. 25965/04, *Rantsev v. Cyprus and Russia*.

²⁰ European Court of Human Rights, Grand Chamber, Judgement of 25 June 2020, Application No. 60561/14, *S.M. v. Croatia*.

A particularly significant *leading case* in terms of the prohibition of forced labour is the *Chowdury* judgment²¹ of 2023 in which the European Court of Human Rights placed the ambivalence of consent at centre stage also with specific regard to the abuse of the position of vulnerability within the constituent elements of the crime of trafficking and moving towards an increasingly broad interpretation of the standards of protection of the victim in fulfilment of the obligations under art. 4 of the Council of Europe Convention. In this sense, evaluating how the reconstruction of consent must be carried out in relation to the specific circumstances, the Court has emphasised the need for member states to adopt strategies to prevent the increasingly pervasive phenomenon at a global level, while dissociating trafficking in human beings from the category of slavery to which it had repeatedly been linked.

More recently, the judgment in *V.C.L. and A.N. v. United Kingdom*²², which concerned two Vietnamese minors who had arrived irregularly in the United Kingdom and were both subject to criminal proceedings for the offence of drug production because they had been discovered working as gardeners on cannabis plantations. In fact, for the first time, the Court expresses the need to introduce a specific provision of non-punishment for victims of trafficking, also reinforcing the emergence of the principle of non-criminalisation at the international level.

This principle reinforces that trend in criminal law mentioned earlier, albeit within heterogeneous practices and legislation among the various domestic and international legal systems.

The Italian jurisprudence, in fact, appears congruent with this argumentative core; in particular, with sentence No. 2319 of 2024 the Supreme Court confirmed the non-applicability of the criminal hypothesis with respect to victims of trafficking, reinterpreting the state of necessity, art. 54 of the Criminal Code in accordance with the EU plan. A choice that confirms the opportunity, also on the level of criminal policy, to activate the device of vulnerability, so as not to be limited to a sterile and formalist reading of universalism and mere expression of consent. A decision that rereads, therefore, the conditions of vulnerability in terms of differential exclusions in access to rights.

In such an interpretative key, then, an ethics of vulnerability cannot fail to take seriously the “*contingent susceptibility of particular persons or groups to specific types of harm or threat*”²³, though without giving it an assessment that crystallises the properties or characteristics of such subjects and thereby engendering paternalistic responses and forms of extended control.

It is then necessary to presuppose a *situated* decision-making model: through a gender-sensitive approach that overcomes that long-standing grey area between two possible ways

²¹ The case of *Chowdury and Others v. Greece* (European Court of Human Rights, First Section, Judgment of 30 March 2017, Application No. 21884/15, *Chowdury and Others v. Greece*) concerns 42 Bangladeshi migrants recruited without work permits to pick strawberries on a farm located in Peloponnese who were housed in degrading conditions and worked 12 hours a day under the supervision of armed guards without receiving their due pay. When, following a riot, a group of workers went to their employer to claim their wages, the vigilantes opened fire, seriously injuring thirty workers. The employers and the armed guard were arrested and tried for attempted murder and human trafficking, at the end of the proceedings they were acquitted of both charges and forced to pay a small fine. The workers appealed to the European Court of Human Rights for violation of the prohibition of trafficking.

²² European Court of Human Rights, Fourth Section, Judgement of 16 February 2021, Applications Nos. 77587/12 and 74603/12, *V.C.L. and A.N. v. United Kingdom*.

²³ C. MACKENZIE, W. ROGERS, S. DODDS, *Vulnerability: New Essays in Ethics and Feminist Philosophy*, New York, 2014.

of understanding vulnerability, one subjective and the other objective, placing the specificity of the context²⁴ on the scene.

Referring to vulnerability in relation to subjects, to groups, means, therefore, attempting to remove the veil of invisibility that shrouds individual existences, giving them a political and therefore public representation.

A device, therefore, that of vulnerability that precisely in relation to human trafficking shows all its heuristic charge by unveiling the interdependence between power and recognition. It, in fact, contains *in nuce* a very strong transformative potential in its inevitably placing the stories of marginalisation at the centre of the stage: thus, opening up forms of agency and practices of resistance²⁵.

²⁴ Cfr. on this point A. DE MARTINO, *State of Need or Condition of Vulnerability Between Labour Exploitation, Trafficking and Slavery. Contents and Methods Between National Law and International Horizons*, in *Archivio penale*, No.1, 2019.

²⁵ Stresses how vulnerability can turn into the site of resistance to oppression F. MACIOCE, *Group Vulnerability. Funzione e limiti di un concetto controverso*, Torino, 2021, p. 169.