

THE LEGAL INTERPRETATION AND SEMANTIC INDETERMINACY OF MIGRANT VULNERABILITY: AN ANALYSIS OF CONCEPTUAL AND ARGUMENTATION PROBLEMS¹

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Abstract

In recent years, there has been a legal philosophical doctrinal debate on the taxonomy of vulnerability from both the ontological and “group approach” angles, as well as from critical relational and intersectional perspectives. However, this broad theoretical reflection has failed to fully encompass a much-needed semantic revision of the concepts of vulnerability and migrant, particularly the legal interpretation of one of their emerging collocations, *migrant vulnerability*. Specifically, the definitions provided to date lead to problems in legal interpretation, including ambiguity and vagueness. They also facilitate the construction of fallacious arguments or assumptions about how those considered vulnerable or non-vulnerable are identified in migration contexts. This paper reviews these conceptual problems and explores the limitations of the legal interpretation of the phrase *migrant vulnerability*. The aim is to show that conceptual ambiguity and vagueness have legal and political implications in terms of how exclusive categories are used to identify vulnerable people in the European immigration and asylum system.

Keywords: vulnerable; migrant vulnerability; ambiguity; vagueness; fallacies; presumptions.

LA INTERPRETACIÓ JURÍDICA I LA INDETERMINACIÓ SEMÀNTICA DE LA VULNERABILITAT DE LES PERSONES MIGRANTS: ANÀLISI DELS PROBLEMES CONCEPTUALS I D'ARGUMENTACIÓ

Resum

En els darrers anys, s'ha produït un debat jurídic, filosòfic i doctrinal sobre la taxonomia de la vulnerabilitat des de l'angle ontològic i el del “plantejament col·lectiu”, així com des de les perspectives crítica, relacional i interseccional. Això no obstant, aquesta àmplia reflexió teòrica no ha aconseguit incorporar completament la tan necessària revisió semàntica dels conceptes de vulnerabilitat i migrant, sobretot pel que fa a la interpretació jurídica d'una de les col·locacions que més s'està veient últimament: vulnerabilitat de les persones migrants. En concret, les definicions que se n'han fet fins ara han provocat problemes d'interpretació jurídica, incloent-hi ambigüitats i vaguetats. També han portat a elaborar arguments basats en fal·làcies o hipòtesis sobre com s'identifica les persones vulnerables o no vulnerables en els contextos migratoris. En aquest article s'analitzen aquests problemes conceptuals i s'exploren les limitacions de la interpretació jurídica de l'expressió vulnerabilitat de les persones migrants. L'objectiu és demostrar que l'ambigüitat i la vaguetat conceptuals tenen conseqüències jurídiques i polítiques pel que fa a l'ús de categories exclusives per identificar les persones vulnerables en el sistema europeu d'immigració i asil.

Paraules clau: vulnerable; vulnerabilitat de les persones migrants; ambigüitat; vaguetat; fal·làcies; presumpcions.

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1 Introduction

Despite the increasingly popular debate on the notion of vulnerability during the last decade, the lack of a common and systematic understanding of vulnerability has shaken the disciplines involved. This unresolved tension has been transferred to the regulatory framework without sufficient caution, as the terms *vulnerable*, *vulnerability*, and *vulnerable situation* have been used in legal instruments without being legally defined. This is the case, for instance, when these terms are used by human rights treaty bodies and, particularly, in the legal frameworks applied to traditional categories of vulnerable persons and groups.

However, the different understandings of what *vulnerable* means and which groups or individuals are vulnerable or non-vulnerable have a strong legal impact, particularly in the migration and asylum context. They have inclusionary and exclusionary effects in terms of their legal interpretation and in the political discourse on asylum and migration.

There are important gaps in scholarly research on migrant vulnerability, which has been mostly focused on the situation prior to arrival and on identity-based or static vulnerable categories (Marzocco, 2018: 310). Consequently, a major argument in this article is that general studies on vulnerability and migrant vulnerability need to pay more attention to key problems related to linguistic indeterminacy (ambiguity, vagueness) and to any argumentation that may have an impact on legal interpretation. This would lead to a better understanding of the limitations and the special protection needs involved. These conceptual problems have escaped the critical scrutiny of legal language, even though linguists and grammarians have extensively investigated this feature of language (Poscher, 2012: 13; Schane, 2002).

The fact that the instrumental role of language in Law is taken as a starting point does not render semantics unimportant. This points to the need to tackle one of the Common Law-derived problems, namely, the semantic richness of undefined, indeterminate or abstract concepts (Giolo & Pastore, 2018: 11; Pastore, 2021: 74-82; Iglesias, 2016), and the argumentative problems encountered in the interpretation phase (Atienza, 2012). In particular, although some attempts have been made to legally define or translate (Soulet, 2014; Zullo, 2020) this category in the strictest terms, they have sometimes been hasty or incautious. For instance, having groups that have been predefined as vulnerable is not the same as having clarity about the level of correspondence or assimilation with situations, characteristics, or circumstances found in both the physical or abstract world that can be denoted as being “vulnerable” or “non-vulnerable”.

Therefore, despite the descriptive potential in, and the emotional charge of, identifying an individual or a situation as “vulnerable” in the migrant context, it is essential to define both *vulnerable* and *migrant* in order to avoid legal indeterminacy, which would give rise to doubts about the relevant use of these terms and their legal effects.

The second section of this paper addresses the definitions and legal interpretations of the terms *vulnerability* and *migrant* and discusses some classic semantic problems and debates (Ramírez, 2015: 78) derived from the legal function of language, namely, ambiguity and vagueness. The third section reviews the construction of fallacies and legal assumptions used to maintain the valence of some “vulnerable” and “non-vulnerable” categories in the migration context (Barrère, 2016). To conclude, the conceptual problems of the phrase *migrant vulnerability* (Baumgärtel, 2019), a category defined using a modifier (Cole, 2016: 113), will be analysed and discussed in the context of the European migration and asylum system.

2 Defining *vulnerability* and *migrant*: conceptual problems

Vulnerability has mostly been defined as a static and interdisciplinary key concept (Nickel, 2006: 245; Wisner, 2020). The conventional understanding of *vulnerability* and *vulnerable* includes “the susceptibility to be defenceless, dependent, underprivileged, open to harm and injury or someone’s lack of ability to safeguard his/her own interest” (Zagorac, 2017: 152-158). Moreover, there are two basic understandings of vulnerability: as an ontological condition of our humanity (an essential characteristic of the human condition) and as a context-dependent condition. These different perspectives refer to the distress and fragility experienced by certain groups; to the psychological condition of vulnerability; to the levels of exposure to risk, loss of capabilities, marginality, poverty, hazards, or disasters (Alwang et al., 2001: 3; Cardona, 2004: 44-45);

and to the effects of globalisation in terms of access to rights (Brown, Ecclestone & Emnel, 2017: 11). However, there has been less consensus on the concept and scope of “vulnerability” in feminist studies, research ethics, and applied philosophy. The doctrine has captured various forms of vulnerability, namely, “universal or categorical”, “intrinsic vulnerability”, and “situational vulnerability”; as well as potential and actual vulnerability (Mackenzie, Rogers & Dodds, 2014; Fineman & Grear, 2013).

Despite its heterogeneous interpretation (Parley, 2011), the meaning of vulnerability seems at the same time too broad and too narrow in legal practice because taxonomies vary in the various disciplines, oscillating between collective and individual status, which results in different effects or associations. In fact, vulnerability has a parallel effect on resilience (Marzocco, 2018: 318-310) and sometimes requires a critical association with precariousness/precarity (Butler, 2009). Resilience is a reverse process of vulnerability, with which it shares two points of connection: risk, and opportunity for adaptation and development. The notion of resilience is linked to relational autonomy as a constitutive element of vulnerability and refers to a beneficial “general capacity to confront, absorb, withstand, accommodate, reconcile, and/or adjust to conditions of adversity, setback, and challenge in the pursuit of desired or desirable goals or states” (Lotz, 2016: 50). In some conditions of extreme vulnerability in which there is a lack of autonomy, resilience becomes a necessary and especially valuable attribute for autonomy in order to retain the freedom to choose (Ippolito, 2020: 14-15).

As the scope of vulnerability has sometimes been misinterpreted, some scholars have suggested new ways to identify the processes that cause precarity for some groups, and how this exacerbates their vulnerability. This distinction between vulnerability (an intrinsic characteristic of the human condition) and precariousness/precarity (a social construction) reveals much of the vulnerability experienced by some groups. In fact, according to Butler (2009: 2), precarity represents an “induced political condition of maximised vulnerability and an exposure suffered by populations that are arbitrarily subjected to state violence, as well as to other forms of aggression that are not state-induced but against which states do not provide adequate protection”.

Similarly, the legal definition of *migrant* reveals a misunderstanding of the term *migrant* because it covers a wide range of meanings as a condition, process and status (Bakewell, 2011: 17). It also exposes a conflict resulting from the erroneous interchangeable use of *migrant* and *refugee* within different scientific disciplines. The terms *international migrant*, *forced migrant*, and *migrant worker* have not been formally defined in international law, and are sometimes used differently by different stakeholders.² According to an inclusive and factual understanding, *migrant* is ‘any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of the person’s legal status, whether the movement is voluntary or involuntary, what the causes for the movement are or what the length of the stay is’.³ However, there is no semantic indeterminacy for specific legal categories of migrants. In fact, there is a specific legal framework to protect some categories of migrants, although only refugees are clearly defined under international and regional refugee law.⁴

2.1 Ambiguity-related problems

One of the truly fascinating aspects of language is its potential for ambiguity. Three types have been identified: semantic ambiguity (beyond the objective meaning); syntactic ambiguity (related to grammatical structures); and structural ambiguity (related to the placement of a prepositional phrase). According to Schane (2002), semantic ambiguity exists where there is lack of clarity or when there is uncertainty about the application of a term that has different interpretations. Ambiguity problems occur because words are not used to connote the same properties in various linguistic and social contexts. The concepts of vulnerability and migrant lend themselves easily to a normative problem of semantic ambiguity, but with some differences, as discussed below.

2 See <https://refugeesmigrants.un.org/definitions>, accessed 7 September 2021; IOM, [Key Migration Terms](#) (IOM), accessed 7 September 2021.

3 See [UN Migration Agency](#), accessed 18 September 2021.

4 See Convention relating to the Status of Refugees. Geneva: United Nations, 28 July 1951. *Treaty Series* vol. 189, p. 137, Art. 1.A or Common European Asylum System (CEAS).

There may be confusion about the concept of vulnerability because it can refer to different realities that can be assimilated to each other by the rules of language (Hart, 1963). The various meanings that can be attributed to it are quite close to each other, and this raises doubts as to their legal significance. In contrast, even though there are multiple conflicting understandings of the term *migrant*, there is no doubt about their legal significance.

For instance, *vulnerability* falls within the process/product category of ambiguity because it is unclear which of the several possible meanings is being used; these possible meanings sometimes refer to an activity or a process and sometimes to the product or result of that activity or process. The wording of existing regulations regarding *vulnerability*, *vulnerable persons*, *vulnerable groups*, and *vulnerable categories* in the migration and asylum context has both ambiguity problems and shortfalls.⁵ Beyond the strictly linguistic issue, the interpretations of ambiguous references to situations of vulnerability and specific needs are not always equivalent and can generate a potentially non-existent causal process/product link. Special protection needs are a *result* of the process, whereas situations of vulnerability are a *cause* of the process, and give meaning to the needs for protection; they are the purpose for making the law, but not vice versa. Despite the difference between semantic ambiguity and lexical imprecision (inappropriate use of words and expressions in accordance with their meaning), sometimes the use of *vulnerability* reflects a lack of appropriateness. For example, *vulnerability* is sometimes used in connection with dependency, helplessness, marginalisation, victimisation, discrimination, exclusion, and social disadvantage. These are some of the recurrent associations with its meaning in ordinary language, but they are not synonymous with vulnerability. Vulnerable groups or subjects are not always inherently victims or dependent, because vulnerability is also an external, context-dependent condition.

Whereas the predetermined dichotomous legal categorisation of the migrant population is epitomised by the expression “refugees are not migrants” (Feller, 2005), including asylum seekers, the multiple meanings of *migrant* are reduced in Law by building separate protection frameworks that apply accordingly. However, as Bakewell (2011: 17) pointed out, there is a level of semantic confusion between migrant status, category, and process. This confusion makes the term “dangerously” ambiguous in political debate, as it results in an exclusionary “legal protection” logic.

An additional form of ambiguity could be considered regarding vulnerability alone, that of the concrete and the abstract. In particular, it concerns the controversial issues that arise when identifying situations or categories relating to vulnerable subjects. From an abstract (or “provision-oriented”) perspective, this involves identifying the content of meaning, that is, the rule expressed by, and/or logically implicit in, regulatory provisions, without reference to any specific case. This abstract approach corresponds to the universal dimension of vulnerability in the terms defended by some scholars (Fineman, 2008; Turner, 2006). In contrast, “specific” (or “fact-oriented”) ambiguity entails subsuming a specific case into the scope of a rule previously identified “in the abstract”.⁶ While this process is more straightforward for traditional vulnerable categories or groups, this is not the case for those categories that have been identified merely in the abstract and require evaluation, or for those that may have doubtful merits, or uncertain empirical or moral consistency. For instance, the

⁵ It is worth noting the semantic ambiguity of the term *applicant with special reception needs* in Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, laying down standards for the reception of applicants for international protection, (hereinafter “2013 Reception Conditions Directive”), OJ, L 180 of 29 March 2013, pp. 96-116, Art. 2 k). “Applicant with special reception needs” means a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive. However, the reference to *vulnerable persons* made in Article 11 (according to Article 21) (“Detention of vulnerable persons and of applicants with special reception needs”) seems to have a different understanding due to syntactic ambiguity. There is doubt as to who those vulnerable persons are; it is unclear whether they are only applicants with special reception needs, both, or other persons. For instance, Article 22.3 states that “only vulnerable persons in accordance with Article 21 may be considered to have special reception needs” and Article 31.7 b) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013, on common procedures for granting and withdrawing international protection (hereinafter “2013 Asylum Procedures Directive”), affirms “where the applicant is vulnerable, within the meaning of Article 22 of Directive 2013/33 or is in need of special procedural guarantees”. The controversial use of disjunction may or may not have inclusionary effects. However, the meaning of *vulnerable persons* is provided in Article 3.9 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ, L 348/98 of 24 December 2008.

⁶ Abstract and specific ambiguity can be found in Article 11 and Article 21 of 2013 Reception Conditions Directive, *op.cit.*; in Whereas 29 of the 2013 Asylum Procedures Directive, *op.cit.*; and in Article 20.3 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on 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), OJ L 337/9, 20 December 2011.

specific need to protect some vulnerable migrants is considered a moral and humanitarian duty, but their protection is not seen as a legal obligation. Consequently, if they receive special protection, this is regarded as an abusive form of positive discrimination and too often serves to portray them as being merely helpless victims and not genuinely “vulnerable”.

2.2 Vagueness-related problems

Vagueness is not a semantic problem related to confusion but rather to the delimitation of concepts. It is a form of indeterminacy that entails lack of precision in defining or describing some terms. Vagueness relates to irresolvable doubts as to whether or not an object is covered by a given concept, and these doubts affect the extent to which it can be readily applied and interpreted. Linguists have identified a broad range of types of vagueness: actual vagueness (penumbra or borderline conceptual qualification), potential vagueness (where the necessary conditions for the use of a term cannot be exhaustively determined), gradual vagueness, combinatorial vagueness, vagueness related to categorisation membership, and denotative and connotative vagueness (or intensional and extensional indeterminacy). In this study I focus on the use of the last three types of vagueness due to their differences in terms of ambiguity.

Gradual vagueness may occur when there is an extensional gradation between two extreme poles, so it is not clear when a concept starts and ceases to be applicable. Certain qualities of objects operate by degree, which poses the challenge of drawing a line or establishing a scale. This means that the scope of application and the complexity of possible situations or “layers” (Luna, 2009) remain insufficiently clear. For instance, Diciotti (2018: 14-18), among other authors, distinguished between vulnerability in a narrow sense, vulnerability in a broad sense, and vulnerability in a very broad sense. Vulnerability in a narrow sense indicates a dispositional property that is manifested in certain circumstances but is not inherent in the subject in any of those external circumstances. Vulnerability in a broad sense depends on the narrow concept of vulnerability because it refers to when and how a subject is particularly susceptible to suffering harm; this is dispositional vulnerability exacerbated by external circumstances. The expressions “very vulnerable”, “particularly vulnerable”, or “more vulnerable than others” can be used synonymously here, thus reinforcing the probability of suffering a certain type of harm due to that vulnerability. The indeterminacy of vulnerability is a quantitative vagueness of degree, based on the observation that a subject is vulnerable in a broad sense, where only a particularly high degree of a certain type of harm is expected. When the word *vulnerable* is used in a broad sense, it typically takes on a prescriptive value or relates to a disadvantageous situation in which some people find themselves in comparison to others. It also connotes inequality as being unfair, or as requiring intervention. It is a purely evaluative term. In contrast, when *vulnerability* is used in a very broad sense, it is used to specify that subjects possess a pronounced vulnerability in some cases, and one or more forms of fragility. Obviously, this meaning is even more undetermined and contested; therefore, in order for it to be considered, the forms of harm and the causes of such harm must be made clear.

The degree of vulnerability as a vague concept is not summative or cumulative for the subject, but is rather transformative and intersectional. If the concepts of *vulnerability* and *vulnerable* share a common core of extensions and a penumbra core structure, they also have the parameters of combinatorial or qualitative vagueness. According to Rodríguez-Toubes (2017), some concepts contain a list of properties or defining characteristics, but we cannot make up our minds about which properties they need to possess in order to belong to a certain category of things (Poscher, 2012: 8). Combinatorial vagueness results from widespread disagreement over the precise meaning of a legal notion, which leads to diverging legal interpretations of these terms. As can be seen in case law, this point is more suggestive, since the interpretation of vulnerability, the reasons for affording special protection, and the identification of violations by combining one or two vectors of vulnerability imply a *de jure* presumption of certain categories. The combination of vulnerability factors, whether inherent or external to the subject, may overemphasise the vulnerability referred to the same subject. For example, this applies to elderly migrants or refugees, chronically ill migrants or minors, unaccompanied minor refugees, women victims of gender-based violence or trafficking, and women with disabilities who are refugees or asylum seekers. However, the combined or compound vulnerability mentioned by Peroni and Timmer (2013) in their jurisprudential analysis has also received criticism. This lies in the lack of an intersectional approach to assessing the causes that trigger a risk of vulnerability for the subjects involved. Intersectionality escapes the single axis of anti-discrimination policies to account for complex vulnerabilities

and conditions of epistemological, ontological, and practical invisibility (Bernardini, 2019: 21). All of these are imperceptible in the legal sphere because they are not really considered different. For the moment, except for some empirical studies (Flegar & Iedema, 2019), the accumulation of vulnerability vectors and how they interact in different political contexts and legal practices have a less elaborate critical perspective (Brown, Ecclestone & Emmel, 2017).

The vagueness related to category membership is more problematic when it refers to the category of “migrant”, because its legal definition may not be precise enough to determine whether a particular item is supposed to belong to this particular class (Schane, 2002: 19), and to establish which categories are included and which are excluded. Therefore, when further exploring the semantic uses of *vulnerability* and *migrant*, it is interesting to see how the scope of application (denotation) and the intension (connotation) of the concept are affected. These are the properties of the denoted objects (Carrió, 1990).

There have been sustained attempts to remove intensional vagueness from language when there is either insufficiently clear delimitation, or even no intention to have clarity in regulations. Some vulnerable categories have traditionally been unfairly treated, marginalised, discriminated against or socially excluded in the process of specialising human rights, despite the lack of general empirical evidence to support this. As Wisner (2020: 8) pointed out, it is too simplistic to affirm that “women”, “boys” and “girls”, and the “elderly” are vulnerable groups or that they should be considered “at risk” in an absolute sense. The patterns of vulnerability are too complex and dynamic to support these broad generalisations; unless they are critiqued, they may become *de jure* presumptions.

The denotative or extensional components in limiting the scope of application are no minor issue, although they are easier to specify because they are strongly interconnected. For instance, *migrant* and *citizen* are vague concepts, but regulations have limited their scope of application in opposition to political and sociological perspectives. Extensional definitions define a word simply by the set of traits denoted by that word (by its extension). As noted by Atienza (2000), the greater the intension of a concept, in other words, the larger the set of properties or characteristics referred to by that concept, the smaller its extension. In turn, there may be concepts with a more or less broad intension which have an empty extension, and concepts that are denotatively the same but have the same extension. While extensional vagueness is never fully achieved, it is easier to correct; however, intensional vagueness is more complex. It can only be stated that, if a concept is extensionally vague, then it is also intensionally vague, but not vice versa. This is basically due to the fact that while a concept can be intensionally vague, its extension can be very clearly determined.

Consequently, both forms of indeterminacy produce different effects to ensure legal certainty and prevent arbitrariness. Correcting the vagueness of the terms *vulnerability* and *migrant* would not have a negative impact on their respective extensional dimensions, at least at the regulatory level. Whereas including more specific or more generic cases, or qualitative assumptions of vulnerability (properties, definitions, classifications) does not correct the intension of these concepts, it excessively refines their scope of application but does not reduce the accuracy of their legal interpretation due to ambiguity.

3 Argumentation problems: fallacies and presumptions related to migrant vulnerability

The differences and convergences between ambiguity and vagueness depend less on the extent to which different concepts are well established than on the assumptions at play. Legal language is essentially rhetorical and instrumental, due to its communicative persuasion and agreement functions (Robles, 2019). Fallacious constructs and irrefutable assumptions concerning “vulnerability” and the “vulnerable” category in migrant contexts can be found in legal practice. The correct appearance of a fallacious argument in the words of Mugerza (2004: 5) “warns of its conversion into sources of confusion and deception”. Those who use fallacies do not always intend to deceive, but as noted by Atienza (2004: 107; 2012), deceit sometimes results from cognitive difficulties in our understanding, or from the inability to comprehend complexity. Ascertaining and differentiating between the different forms of migrant vulnerability is not a simple cognitive task resolved by assimilation in legal interpretation but through argumentation.

Trying to summarise the different classifications of fallacies can be an arduous task, but various pedagogical proposals (Cardenas Gracia, 2011) have identified formal, material, and pragmatic fallacies. The first and second of these lend themselves more to being combined with vulnerability in the regulatory and jurisprudential spheres due to their characteristics. Formal fallacies seek to make an invalid inference (for example, a hasty generalisation) and are difficult to identify due to semantic indeterminacy. For the non-vulnerable migrant category, a formal fallacy would involve applying to all the people or things in a class or group what is known about each of them. This is especially so when such inductive logic lacks the necessary information or cases to reach a conclusion regarding the absence of vulnerability for some categories of migrant subjects. The same deductive logic could apply when considering that every person requesting international protection is vulnerable because they are part of that legal category, and that they are equally vulnerable. In contrast, material fallacies use incorrect reasons, including ambiguity and false analogy, when attributing a feature to an object or a person for the mere fact that it resembles another that possesses that feature. An example of this would be considering all minors, women, people with disabilities, LGBTIQ⁷ population, and elderly people to be vulnerable refugees. The analogy of vulnerability maintains an alleged homogeneity between all the categories or subcategories listed in the regulatory framework or ratified by jurisprudence.⁸ Pragmatic fallacies are used when the rules of rhetoric are undermined by the argument of authority.

A different, more well-known classification of fallacies (Coppi & Cohen, 1997: 127-143) distinguishes between the fallacies of pertinence and ambiguity. The fallacy of pertinence is used when an argument rests on premises that are not relevant to knowing the truth. These include the fallacies of *ad ignorantiam* (appeal to ignorance), *ad verecundiam* (appeal to an unqualified authority), *ad baculum* (appeal to force), *ad hominem* (attack against the person, rather than addressing the argument), and *ad misericordiam* (attempt to win support for an argument by exploiting feelings⁹ of pity or guilt), among others. When attributing vulnerability to migrants based on their legal status or belonging to a particularly vulnerable group, it is argued that a proposition is true if it has not been proven to be false, and vice versa. Even regulations can resort to an authoritative argument, namely, that certain categories are recognised as being vulnerable in migration contexts, as opposed to other situations that are politically not accepted to be part of migration control. In this case, the fallacy would involve supporting the argument that they should be protected by arousing emotions of empathy or tolerance among the public or among the authorities with the power to take action. As a consequence, the weighty legal reasons that consider them subjects of law and categories that should be granted special protection would be set aside. Similarly, this would allow for the fallacy of asking a complex question to establish vulnerability in the assessment of an individual's asylum application. Applicants could be pressured to recognise themselves as being part of an especially vulnerable group. If they do, their asylum claim may be accepted; or they may obtain a favourable decision by forcing a definite "yes" or "no" in a well-founded situation or feared risk that the applicant cannot always perceive *prima facie* on arrival at the border or at their destination. In other words, the opposed, contradictory, and unfair options would be drastically reduced, identifying semantic indeterminacy and all common uses of language.

For instance, the fallacies of ambiguity contain confusing phrases or words that can be changeable: semantic equivocation or ambiguity when the word *vulnerable* is intended to be transferred to different contexts without considering that these may be innumerable. The fallacy of composition tends to reductionism or holism, as it attributes the individual properties of the parts to the whole; in this context, the features of a vulnerable categorisation could be applied to all the attributes of a vulnerable category. The fallacy of division, conversely, claims veracity about a member of the category by the mere fact of belonging to it or being a part of it, presuming that the individual shares a particular characteristic of the entire group without questioning whether or not this is actually the case. This happened in the case of *H. A. and others v. Greece*,¹⁰ in a flawed

7 LGBTIQ is an acronym for lesbian, gay, bisexual, transgender, intersex, queer or questioning. These terms are used to describe a person's sexual orientation or gender identity.

8 Regarding the meaning of extreme vulnerability of children, see *Tarakhel v. Switzerland*, application no. 29217/12, 4 November 2014, para. 119.

9 For a legal interpretation of detention conditions and the vulnerability of unaccompanied minors, see *Kanagaratnam v. Belgium* application no. 15297/09, 13 December 2011. *A. B. and others v. France*, application no. 11593/12, 12 July 2016, paras. 11-115.

10 *H. A. and others v. Greece*, application no. 19951/16, 28 February 2019, para. 112.

attempt to find an analogy with the *M. S. S.* case.¹¹ In the *M. S. S.* case it was ruled that only asylum seekers (for reasons very similar to those of irregular migrants) should be considered a vulnerable group because of the hardship they had endured during their journey and the possibly traumatic experiences they had undergone even before they migrated. Although nothing prevents undocumented migrants from being considered a vulnerable group, the Court did not clearly state this (Chenal, 2018).

From a rational point of view, there are more types of fallacies derived from the lack of reasons, the irrelevance of the reasons or a defect in the reasons (Aarnio, 1991: 151). All of them relate to identifying and legally establishing possible vulnerable categories or subjects in the migration context. Undoubtedly, there is an extensive catalogue of fallacies, the most illustrative including *a priori* fallacies, fallacies of observation with their variants of poor observation or their absence that is constructed by mere contemplation (Cardenas Gracia, 2015: 183). For example, this occurs when groups with inherent and situational vulnerability characteristics are identified as vulnerable among the vulnerable or asylum seekers among irregular entrants,¹² even though the unique features of each of these categories do not make it possible to identify these groups but, at most, to make superficial parallels between them. It is interesting to consider the point made by Weston (1998: 123-127) on the construction of the fallacies of false alternatives, when one or some causes are considered without taking into account their completeness. This can be seen when the reasoning used in court ignores the fact that the immigration process is a *continuum*.

In a different vein, the growing complexity of migration phenomena and the legal approach to vulnerability mean that there is an increasing tendency to make presumptions. The multiple meanings of the term encompass both the act of presuming and the result of the presumption, due to the differences between the ordinary concept and the technical legal concept, among other reasons. Two authors have tried to address these problematic meanings regarding the daily work of the legislator. Bobbio (1989: 188) noted that legal language must be as rigorous, complete, and orderly as possible, unlike ordinary language; and he summarised the process by dividing it into three phases: purification, integration, and ordering. According to him, these three phases exhaust the jurist's role and mark the beginning of the judicial endeavour of interpreting the laws in terms of the specific case at hand. This is a more fertile ground for presumptions or the proof of their validity than the regulatory field, in which legislators construct, complete and adapt legal language to the situations it applies to. For his part, Wróblewski (1974: 51) engaged in a conceptual review of vulnerability. He argued that each presumption derived from a legal norm is a construction of legal language. It results from a legislative decision that connects the premises and the conclusions of that presumption. In other words, the decision-making burden of the legislator in the construction of language determines the connection of premises and conclusions of possible presumptions. This regulatory background can be either promoted or made invisible by practice. The conceptual and technical controversy of legal presumptions means that they raise interesting specific issues related to the lack of consistency of concepts that are part of the environment where they are applied. This occurs with *vulnerability* in the migration sphere. If the presumption of vulnerability is not delimited or conceptually consistent, this hinders adequately recognising any presumed vulnerabilities.

However, in practice, proving the existence of the necessary presumptions for enforcing a right in a situation of vulnerability can be extremely complex. Hence, a legislator who is aware of this difficulty can make the claim of vulnerability and meet the special reception needs, with the ensuing rights. Serra Domínguez (1963: 100) held that the simplest thing to do this is “to suppress presumptions that are necessary for the existence of the law but are difficult to prove, either by replacing them with others that are easier to prove or allowing proof of the non-existence of the necessary assumption” (1963: 100). That is, substituting some presumptions for others that are easier to positively prove in order to have certain legal effects. For instance, in practice, there is a lack of specific procedures in Article 11 of Directive 2013/33 for identifying people with disabilities in reception and detention centres unless their situation has been reviewed by a qualified professional who certifies that their health, including mental health and well-being, will not significantly deteriorate as a result of detention. The presumption would be equivalent to recognising migrant vulnerability for this particular

11 *MSS v. Belgium and Greece* (GS), application no. 30696/09, 21 January 2011 para. 232 and 251, “member of a particularly underprivileged and vulnerable population group in need of special protection”.

12 *N. D. and N. T. v. Spain*, application no. 8675/15 and 8697/15, 13 February 2020, “irregular entrants who did not use the border procedures available at designated *entry points*, including asylum seekers”.

group unless proven otherwise and depending on external and internal circumstances. Thus, meeting the double criteria of security and justice in the European immigration and asylum system could provide information on how the main statistical data sources are used to meet special reception needs; and to obtain valid evidence on how to interpret the principles and turn them into practical action recommendations for especially vulnerable migrants (EASO, UNCHR).

Nevertheless, despite the need for presumptions that facilitate establishing protection mechanisms, this is not the solution widely adopted by the European legislator, except in the case of reinforced vulnerabilities. For instance, in the Proposal for a Screening Regulation¹³ the only exception to screening control within different categories of unauthorised entrants (persons seeking international protection and other migrants) are unaccompanied migrant children (after determining their age), given the risk factors at the border and in transit, according to empirical data. According to Eurostat, unaccompanied minors accounted for 10% of all underage asylum applicants in the EU in 2020. The majority (88%) were male. A total of 67% were aged 16 to 17 (9,100 individuals), while those aged 14 to 15 accounted for 22% (3,000 individuals) and those under 14 accounted for 11% (1,500 individuals). It is important to note this, because there are vested interests in not clarifying some presumptions in terms of vulnerability in the migration context that are related more to political will than to regulatory plausibility. This occurs for non-forced migrations, where a presumption of strong vulnerability cannot be automatically asserted, in contrast to those vulnerabilities that are assumed to be segmented (those of refugees or subsidiary protection); or where it may tend to stereotyping due to a lack of rigour in establishing the causes of vulnerability of the most vulnerable among the vulnerable. Among others, in the healthcare field, Directive 2011/24/EU¹⁴ on cross-border healthcare was developed for EU citizens and used neutral wording with regard to “medical needs and medical records”. As Rodríguez (2013: 14) maintained, the lack of rigour in the organisation of language prevents both the use of presumptions and the development of intersubjective knowledge that can play a protective role in its scope of application. The approach adopted is based on the understanding that it is preferable to underestimate vulnerability than to formulate excessive presumptions in this regard. This makes vulnerability marginal or invisible for some migrants and unpredictable for all of them, for fear of distorting migration control and its effects.

4 The specific ambiguity of the phrase *migrant vulnerability*

The ambiguity and vagueness problems related to *vulnerability* and *migrant vulnerability* are likely to result in a lack of precision and to convey unclear meaning in borderline cases. Moreover, when these conceptual problems co-occur, they reduce legal security. The use of *vulnerability* or *vulnerable* (especially regarding migrants) does not depend on groups or individuals, because it is policy driven (Atak, Guild & Crepeau, 2018: 10). In the legal framework, hard law and soft law omit a clear distinction between “migrants” and “dimensions of vulnerability” for two main reasons. One reason is that they sometimes modulate the legal obligation of States to provide special protection as established in the Global Compact for Safe, Orderly and Regular Migration and the New York Declaration.¹⁵ The other is that it is necessary to restrict the “vulnerable” category in legal interpretation and in asylum and migration law. For example, the vulnerability of subjects and groups regarding asylum has often been defined “open-endedly” (Jakuleviciene, 2016; Spada, 2020: 68). This renders legislators conflicted as to whether it is appropriate and relevant to establish quantitatively and qualitatively-based, specific “categories” of migrant vulnerability (Freedman, 2019). In the absence of such categories, qualitative support instruments are not so much intended to include predefined lists of possible situations, but to raise awareness of the existence of certain groups that may be classified as especially vulnerable among the vulnerable, or doubly vulnerable (De Bauche, 2008: 103). At EU level, the instruments of the so-called Common European Asylum System (CEAS) package have substantially taken

13 Proposal for a regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM/2020/612 final).

14 Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare, OJ L 88, 4.4.2011.

15 Global Compact for Safe, Orderly and Regular Migration (GCM) (UN Doc. A/RES/73/195). UN General Assembly, 11 January 2019. New York Declaration for Refugees and Migrants: Resolution adopted by the General Assembly (UN Doc. A/RES/71/1). 3 October 2016.

vulnerability into account, and different adaptation phases in this process have crystallised into different regulatory milestones (Brandl & Czech, 2015). 1) In the first phase of CEAS, vulnerability was not extensively regulated. Neither the 2005 Asylum Procedures Directive¹⁶ nor the Dublin II Regulation¹⁷ contained specific provisions or procedural consequences for situations of vulnerability, with the exception of unaccompanied minors. The 2003 Reception Conditions Directive¹⁸ alluded to vulnerability in overall terms and provided for special material conditions and health care. 2) In the second phase, the normative framework converged with and was fed by the interpretative work of the ECHR case law, which made the fragmentation of the different typologies of vulnerability inevitable and resulted in its derivations becoming blurred (for example, in the Dublin III Regulation).¹⁹ These types were vulnerable asylum seekers, applicants in need of special procedural safeguards, and vulnerable applicants with special reception needs. On the one hand, Directive 2013/33 provides a list in Article 21 of examples of vulnerability types catalogued by Rigo (2019: 851), among others; on the other hand, Whereas 29 of Directive 2013/32 refers to “applicants [for international protection] in need of special procedural guarantees” but without reference to their vulnerability. 3) In the third phase of the reform, which is currently in progress,²⁰ the legal treatment of vulnerable groups is largely referred to as “special reception needs”, regardless of whether or not recipients are vulnerable. Priority has been given to standardising both directives to refer exclusively to “applicants in need of special procedural guarantees”.

At international level, soft law instruments conclude that migrants may have their status assessed according to different understandings of vulnerability: on the one hand, situational or external vulnerability (in circumstances in which displacement occurs, in transit, at the border and at a destination);²¹ and on the other hand, individual or internal vulnerability (regarding characteristics intrinsic to the subject or linked to the country of origin).²² Due to conceptual ambiguity, individual or particular migrant vulnerability is constructed as a provisional or temporary category that is neither innate nor immovable. This status can change or become intrinsic to or inherent in the migrant subject; or it can turn into something exceptional due to contextual circumstances. The Special Rapporteur on the human rights of migrants argued that “although some migrants, such as children, older persons, women travelling alone and migrants with disabilities, are vulnerable, the majority are not intrinsically vulnerable”.²³ Whereas this statement is justified in terms of resilience, it severs the logic of the generalist consideration that certain classic categories of vulnerable migrants are “only” vulnerable due to internal factors attributable to the subject, as it allows for the possibility that they may also be vulnerable due

16 Official Journal of the European Union L 326/13, of 13 December 2005. Corrigendum in Official Journal of the European Union L 236/35, of 31 August 2006.

17 Council Regulation (EC) No. 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Official Journal of the European Union L 50 of 25.2.2003

18 Council Directive 2003/9/EC of 27 January 2003 approving minimum standards for the reception of asylum seekers in the Member States, Official Journal of the European Union, number 31, 6 February 2003. Article 17 (1) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereinafter “2003 Reception Conditions Directive”), OJ L 31/18. Minors, unaccompanied minors, disabled people, the elderly, pregnant women, single-parent families with minor children, and people who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual violence are mentioned as vulnerable people. Article 17 (2) of the 2003 Reception Conditions Directive.

19 Regulation (EU) no 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJEU no. 180, of 29 June 2013. Also see Recital (13) and Articles 6, 16, 31 and 32 on the special needs of minors and information regarding the health of dependent people.

20 Directive laying down standards for the reception of applicants for international protection (COM (2016) 465 final); a Regulation establishing a common procedure for international protection in the Union (COM(2016) 467 final); a regulation on qualification COM (2016) 466 final; and a regulation establishing a Union Resettlement Framework COM (2016) 468 final. Without prejudice to the proposed Dublin IV Regulation COM (2016) 270 final, the European Agency for Asylum Support COM (2016) 217 final and a reform of the EURODAC COM system (2016) 272 final. A new set of rules was recently presented in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the New Pact on Migration and Asylum. Brussels, 23 September 2020 COM (2020) 609 final, p. 12.

21 Examples of situational vulnerability could include groups such as homeless people, female and LGBTIQ sex workers, asylum seekers and refugees, Roma communities, women experiencing domestic violence, drug users, the poorest people, and prisoners (especially women), but could also include more general populations such as women, or black and ethnic minority groups.

22 Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations. UN Human Rights Council, Report of the United Nations High Commissioner for Human rights (A/HRC/34/31 p. 5), 24 February 2017.

23 See A/71/285, 4 August 2016, para. 59.

to a situation or position of vulnerability. Therefore, the essential nature of migrants is to be “different” from other vulnerable subjects, in opposition to solid vulnerabilities such as age, sex, ability, and health, which are timeless, static, lasting, or irreversible.

Moreover, the vulnerability or non-vulnerability of generic migrants has been reinforced by membership-based approaches and legal presumptions. This explains paragraphs 9, 11, and 12 of the Preamble to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990: vulnerability in itself is not something inherent in racial characteristics, geographical or ethnic background, or in the underdeveloped conditions of the country or region of origin. In contrast, provided that it is sufficiently proven, the vulnerability of origin of persons seeking international protection is the cause of their declaratory asylum status (Art. 14 UDHR) and *a posteriori* constitutes a territorial protection status reinforced by Article 33 of the Geneva Convention. This regulatory bivalence, based on the logical principles of identity, non-contradiction and excluded middle, is reproduced at the regional regulatory level. In this regard, it is worth noting the work of two institutions, namely, the Council of Europe and the European Committee of Social Rights. As far as the Council of Europe is concerned, the provisions of the European Convention on Human Rights do not explicitly refer to vulnerability. The Council only broadly emphasises the particularity of human beings, the contexts where they live, and the specific conditions that make them vulnerable and in need of protection by national and supranational institutions. However, referring to special vulnerability is not equivalent to recognising the rights of especially vulnerable groups and individuals; it rather involves taking measures to redress harm or grant just satisfaction to those who have suffered human rights violations. The European Committee of Social Rights, for its part, is a monitoring body for the Revised European Social Charter that aims to connect access to social rights with the vulnerability of refugees and asylum seekers (Nifosi-Sutton, 2017: 182-188). And yet, the European Social Charter (ESC) formally excludes nationals of third countries and those who are in Europe “illegally” (including those who have been denied refugee status or are stateless). The European Committee of Social Rights takes into account cases of double or multiple discrimination, given the vulnerable position of minor migrants and asylum seekers²⁴ with regard to the enjoyment of various rights. For example, foreign children who were illegal residents or asylum seekers in Belgium (either accompanied or unaccompanied) were excluded from social assistance and legal protection, in violation of Article 11 and Article 17, which provides that children requesting asylum are particularly vulnerable. According to the ESC, they have a combined vulnerability “due to their condition as children”. In fact, they “are not able to decide themselves whether to stay or to leave (...) if they are unaccompanied, their situation becomes even more vulnerable and the State (...) has a duty to care for children living within its territory and not to deprive them of the most basic protection on account of their ‘unlawful’ migration status”.

It cannot be ignored that the differential understanding of vulnerability for migrants is “forced or taken to the extreme” due to conceptual and argumentation problems. In fact, by overfocusing on legal categories, legal frameworks detract attention from semantic indeterminacy. The use of fallacies and presumptions in order to persuade about true or false vulnerability does not enable a clear legal interpretation of “migrant vulnerability”. This is the case because vulnerability within the same subject or legal category is neither easy to intuit nor clearly distinct (Spada, 2020: 68). Migrants are subject to selective control over the forms of regular admission and stay rules, while international protection applicants come under the umbrella of the subsidiary territorial protection of the State, which is subject to compliance with its international obligations. This political approach should be criticised precisely for its negative connotations, for its inaccuracy regarding the facts, and for undermining the use of language as a perfect instrumental tool to ensure legal security.

5 Final remarks

Vulnerability and migrations are border concepts because they have different meanings and explanatory uses in both their temporal and spatial dimensions. Attempting to provide a legal definition of individuals or people who are vulnerable and of non-vulnerable migrants can be artificial. Capturing a compressed version

24 Among others, the decision of the European Committee of Economic and Social Rights, 23 October 2012, case of *DCI against Belgium: Vulnerability of Asylum-Seeking and Unaccompanied Foreign Minors* (No. 69/2011) para. 36 was submitted by *Defence for Children - International (DCI) v. Belgium*. The Committee concluded that there was a violation of Article 17.7 para. 10, and Article 11 paras. 1 and 3 of the Revised Charter.

of an inherently changing identification of vulnerability hinders the establishment of a legal characterisation of specific people and groups based on societal conditions and circumstances. Obviously, there is a high risk of including, excluding, or “legally” recognising certain subjects under the same umbrella term, without critically analysing the effects of categorising each person within this vulnerable group.

The conceptual problems of ambiguity and vagueness in migration and asylum law can be observed in the link between a situation of vulnerability and the activation of special reception needs. They are also evident in the construction of a *de jure* presumption or when fallacious arguments are invoked to deny a vulnerable condition by resorting to bivalent logic. Unlike immigration status, refugee status confers international protection only if situations of manifest persecution are identified. Therefore, the vulnerability of the subject results in an additional claim for protection, which is legitimised by the circumstances or causes susceptible to vulnerability. This is in addition to the generic international protection that asylum seekers receive as opposed to other migrant groups. Consequently, when legislators and authorities examine applications, they are obliged to heighten their degree of care and to properly regulate the double binary lens that evaluates such causes or circumstances, avoiding “abuses”. This is not only intended to identify indicators of situations of vulnerability, but also to exclude from international protection those applicants who do not have this status recognised or are simply classified under other categories of vulnerable infra-individuals.

It can be concluded that the individual vulnerability of migrants positively results from the combination of individual vulnerable categories, but not from being migrants; provided that the summative requirement is identified and proven, it is only mostly favourable for asylum applicants. Recognising this vulnerability as a group or as an individual in terms analogous to other “vulnerable groups” opens the door to an exception; it does not reaffirm individual vulnerability, or at most, it qualifies it open-endedly. The desired differences are largely seen in the construction of this category. For example, if someone migrates for work or family reasons, vulnerability is clearly or preferably situational, because it has specifically materialised in the receiving country and is developed through social relations with other individuals, namely, other newly arrived immigrants, migrants who have already settled and the host society. In contrast, vulnerability takes shape mainly remotely for international protection applicants. Once the asylum application has been filed, vulnerability is solely linked to causes in the country of origin. This can sometimes aggravate the primary vulnerability and become a secondary form of vulnerability, due to situations that occur in transit or at the destination, given the importance of secondary movements and the collapse of the protection system. These situations include deficient, inhuman or degrading conditions for asylum seekers in reception or detention centres, the transit area or upon first arrival at the border, as well as restrictions of free movement, among other issues.

For these reasons, it is important to break away from the free subject and recognise that the vulnerable subject has a different impact on the migration context that is clearly ambiguous and vague: denial for some and compassion for others. Only individual vulnerability is an orderly, regular, and safe category, provided that it is evident. However, this is not the case for situational vulnerability, because this category is exponential, chaotic, and plural, so its exact contours are difficult to define and control. This is why it is the most strictly monitored type of vulnerability, both in regulatory and interpretive terms. Furthermore, it is also the most transversal, transformational, and complex form of vulnerability, and compels the relevant authorities to rationalise what is reasonable. There is clearly an urgent need to find a point of balance and coherence in the legal language on “migrant vulnerability”.

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