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BOOK REVIEW

Corina Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR*, Hart Publishing, 2021, ISBN 9781509941230, £85.00 (hb), 264pp
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How do forms of violence and victimhood come into the law's vision? How are certain harms made (il-)legible and (dis-)qualified? How are those tasked with extending and expanding the protection of human rights to assess their societal and structural dimensions? Human rights adjudicators have long been grappling with and responding to these questions – deploying various concepts in differentiating, sorting, and prioritizing claims brought before them. Scholars too have played an important supporting role here to those manning and maintaining boundaries between inclusion and exclusion. In adding to this scholarship, Corina Heri explicates and advances the (potentially 'revolutionary') role of vulnerability in the European Court of Human Rights' (ECtHR, the Court) case law on its prohibition of torture and other ill-treatment (under Article 3 of the European Convention on Human Rights). Through eight chapters, Heri systematically guides the reader through a multilayered treatment of vulnerability, its ends and entanglements, its reality and rhetoric. The Court's case law in this respect is autonomous and voluminous yet scattered, hesitant, and selective.

In the first two chapters, readers are presented with primers of the prohibition (as absolute, evolutive, adoptive and context-sensitive, and as evoking both negative and positive duties) as well as the outlines of vulnerability theory. Heri adopts Martha Fineman's theoretical conception,[1] as it 'permits the user to identify hidden biases, inequalities and assumptions, requires a more responsive state and responds to "the exclusions of human rights law" [and helps identify] whether a victim was particularly impacted by a given treatment'.[2] In outlining her methodology, Heri notes her critical point of departure:

> The Court's intentional ambiguity about the meaning of vulnerability is perplexing, especially given that vulnerability is a term in common use and not per se a legal concept. As a result, understanding the concept of vulnerability requires a closer look at *regarding whom*, *how*, and *why* the Court resorts to vulnerability reasoning.[3]

Heri plots the grounds of what follows particularly in the Court's 'minimum level of severity' (*de minimis*) reasoning: the functionality of victim-relativity (gender, age, health, and more); fixation on flexibility; balance between objectivity-subjectivity-contextuality; and anxieties about triviality (or 'floodgate'-like over-inclusivity). This is certainly a broad, arguably untameable territory. Much of it would be familiar for those involved in anti-torture practice and scholarship. Much of this is geared towards a fundamentally theoretical inquiry: how does the complex subject

[1] See M. Fineman and A. Grear (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (2013).
[2] C. Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (2021), 205.
[3] Ibid., at 235.

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of human rights (in their vulnerability and resilience) square with the law's liberal (reductive and unrealistic) conception? What is the nature of the *human* in human rights (to what degree is it embedded, embodied, or extended)?

There is a pitfall of overemphasizing the good work the Court has done in expanding recognition and, in turn, overlooking where it has failed. Yet, as revealed in subsequent chapters, Heri is exemplary in including both the congratulatory narrative of recognition as well as the counter-narrative of denial.[4] Additionally, Heri asks and answers a difficult question: to what extent has relativity and contextuality been significant in the Court's reason and discretion? Is it minimal, mitigatory or material? That is, how much vulnerability is needed to tip the scale? This is posed not as *lowering* but *levelling* (as equalizing) thresholds – not as favourable but as fair treatment.

The third chapter, representing a third of the book, is its longest. In 90 pages, Heri outlines a typology onto which she maps the case law featuring vulnerability and adjacent notions (dignity, agency, precarity, powerlessness, and helplessness). She provides a systematic review, building on and beyond previous efforts to have studied the groups the Court has recognized to date (people living with HIV, asylum-seekers, people with disabilities, and the Roma).[5] Vulnerability is thus accepted to operate both at the individual and collective level, but Heri wisely forgoes with the distinction. Although groups may be a device of evidentiary expedience, Heri is rather interested in identifying and understanding the dynamics and dimensions of vulnerability at play in the Court's reasoning. These centre around factors which produce power differentials between the state and individuals (and, secondarily, between individuals). These factors relate to dependence (age and disability), control (detention), victimization (gender violence), migration, discrimination (stigma), unpopularity (political opinions), and at their intersections. What is commendable here is that, whilst vulnerability in detention is a dominant source of vulnerability in the case law, Heri does not allow it to dominate the discussion. The length of the chapter reflects the prevalence of vulnerability (and adjacent concepts) in Article 3 case law and the meticulous work required by the author for a coherent presentation.

The fourth chapter starts the task of analysing the impact vulnerability-related reasoning has had on the Court's judgments. Quantitatively, references are shown to have increased dramatically (and as recently having peaked and declining) – featuring mostly in activist cases to have expanded Article 3's scope before an incremental rolling back since. Qualitatively, vulnerability reasoning is found in prioritizing applications; facilitating interim protections; in relaxing the requirement to exhaust domestic remedies; as overriding the six-month (now four) admissibility rule; reversing the burden of proof; developing positive obligations; reassessing domestic findings; and broadening/accommodating/relativizing the minimum level of severity. Overall, it has helped shift the perspective from a 'neutral' to a victim-oriented perspective.

Heri's discussion on the interplay between 'inherent harm', exceptionality, and vulnerability represent a significant contribution to the field. For the Court, harm needs to somehow be differentiated from the 'merely' difficult position the victim is in (e.g., in detention) to satisfy the Article 3 severity threshold. Vulnerability visibilizes harm to aid this assessment. That is, the Court essentially uses the language of vulnerability to gauge a fuller understanding of the harms before it, building a more convincing case for finding a violation. This is a revealing discussion that also brings the politics of legitimacy into view. Simultaneously, the Court is shown to be stealthy in expanding protection through formulating compounding and cumulative degrees of harm whilst staying clear of explicitly naming 'intersectionality', which is clearly at play.

[4]A recent edited volume is less circumspect in parts: F. Ippolito and S. I. Sánchez (eds.), *Protecting Vulnerable Groups: The European Human Rights Framework* (2017).

[5]L. Peroni and A. Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', (2013) 11 *International Journal of Constitutional Law* 1056; A. Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', in Fineman and Grear, *supra* note 1.

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The fifth chapter, the book's shortest at five pages, is its pivot from the descriptive to the decidedly analytic and activist. Here, Heri ties up the first half and introduces the framing of the second half. The sixth chapter identifies that also other human rights bodies use the concept of vulnerability (although the Court's, in comparison, is distant and distinct), that the history of minority rights in the Council of Europe has had a degree of influence on the ECtHR, and that there are continuities and discontinuities in how vulnerability is used across Article 3 and 14 cases. Often missing in much of Article 3 scholarship, useful connections (and cautions) are offered throughout the book between Article 3 and other areas of the Court's case law. This chapter, ultimately, demonstrates how autonomous the Court's use of vulnerability-reasoning has been.

In the book's last two chapters, Heri offers a solid analysis of the foregoing. In weaving legal philosophy and practice, chapter seven carefully takes the reader through vulnerability's interrelation with dignity, capability, and empathy – presenting the Court's practice as poised between potentials and pitfalls. Heri's discussion of vulnerability, emotion and empathy is one of the first in anti-torture scholarship. So, what is the role of empathy in this equation of recognition? She points out that visceral responses work as a conduit for heightening judicial receptivity to victims' lived experience. As vulnerability is inextricably connected to social and cultural contexts, it is also bound with emotion – even to a point where vulnerability can be viewed as a 'placeholder' for the level of empathy on offer by the Court. Locating the natural role of emotion generally in Article 3 determinations, we are instead called to ask 'to what extent' is this justified. Here, Heri speculates widely and productively, estimating that 'vulnerability and judicial empathy thus seem reserved to exceptional cases or at least to less-than-universal application'.[6] She also notes the power of empathy to legitimate and support a convincing case for recognition. In any case, empathy, like dignity, presents yet another apt lens through which to analyse what is an emotionally and morally-thick case law – where moral reasoning is duly invoked against majoritarian drives. Does emotion allow the Court to do what it likes and wrap it up in emotional common sense? This is a subversive speculation – one amongst many – that is quickly withdrawn.

Heri is not a one-eyed champion of vulnerability theory. She affords ample space to address the difficult questions head on. Vulnerability is known to prove problematic in practice – with the productive potential to reinforce stereotypes, essentializing, pathologizing, and paternalizing. Theoretically conceived however, by the likes of Fineman, vulnerability places emphasis on social conditions to avoid inadvertently further burdening the individual. Resilience, vulnerability's counterpoint, is also problematic in theory – with the potential to *responsibilize* individuals to resist state power. Despite past practice showing that conceptual problems are amplified when handed over to the law's impulses, Heri is ultimately and conditionally willing to entrust resilience to an institution that has made a mess of vulnerability.

Despite the problematic practice to date, and her own nuanced reflection of the institutional challenges, Heri concludes her otherwise critical exposition by prescribing a hopeful roadmap for the Court in 'revolutionizing this quiet revolution, making it a louder but also a more inclusive, sustainable, just, and agency-promoting one'.[7] This, she proposes, would be realized if the Court was to: (i) move to a vulnerability-resilience continuum; (ii) adopt a minimum content of vulnerability; (iii) maintain a reasonable scope for Article 3; (iv) address selectivity and accept inclusivity; (v) respect and mainstream agency; (vi) provide procedural justice; and (vii) be aware of potential for paternalism, stereotyping and essentialism. She is cautious of undermining judicial creativity and discretion with a mechanical application in this endeavour. Whilst appreciative of the enriching aspects as outlined, I do not share the author's optimism, albeit cautious, in fashioning a more coherent case law. Heri gestures at the structural obstructions but moves on unduly quickly. We are left to ask: how much can we tame Article 3 assessments anyway – given its multiple internal inconsistencies, varied emotional evocations, and given the broader political

[6]Heri, *supra* note 2, at 199.
[7]Ibid., at 225.

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fragility and susceptibility of the Court? Where is the space to genuinely inform or correct the Court upon such a backdrop? It is possible to be critical and stay critical.

In all, Corina Heri makes a clear and compelling (and practitioner-friendly) case for why vulnerability is a useful organizing principle and prism (at least theoretically) in articulating and refining understandings of the evolving conditions of recognition under Article 3. She is simultaneously circumspect as comprehensive – offering abundant connections for the field. Perhaps more importantly, Heri advances an appealing approach for 'law and torture' scholarship – methodologically rigorous and theoretically engaged.

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