

Embodied and Embedded Vulnerable Subject: Asylum Seekers and Vulnerability Theory

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Abstract

The article discusses vulnerability of victims of torture in asylum process. Based on case study materials, recognizing and addressing vulnerability seems random in asylum process. Vulnerabilities of torture victims are systematically ignored in the process and expert medical certificates are not taken into account. In the background exists an assumption of a logical subject, who is able to make rational decisions and produce a coherent account of events, even when individuals are suffering from medical conditions making them unable to manifest such behaviour. This article searches for explanations relying on Martha Fineman's vulnerability theory. It will be argued that the difficulties of taking the vulnerability of the tortured asylum seeker into account in the asylum process reflect different understandings and uses of the concept of vulnerability. Moreover, it seems that the asylum process tends to confuse the question 'who is entitled to international protection?' with the question 'who is vulnerable?'. The globalized context is briefly discussed, which offers yet another way to explain the difficulties that the asylum system has with vulnerability. The article argues that a paradigm change is needed - a change where we would look at the concept of vulnerability in a dynamic and contextual way. Vulnerability should be understood as socially embedded notion and relational to the institutional and societal contexts in which it is produced. Vulnerability should be seen as primary human condition that does not exclude agency, but is rather qualified by different levels of resilience. These, in turn, are produced within and through institutions and relationships which confer privilege and power.

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1. Introduction

The starting point for this paper was a disturbing finding arising from my PhD project: case study material of 99 cases involving asylum seekers who are victim of torture; who according to the Common European Asylum System (CEAS) legislation should be entitled to special protection but whose asylum process in terms of outcome and recognition and addressing vulnerability seems random. Their vulnerabilities are systematically ignored in the process. Expert medical certificates are not taken into account and the background assumption of a logical subject who is able to make rational decisions and produce a coherent account is expected even when applicants are suffering from medical conditions making them unable to manifest such behaviour. In search of an explanation(s), I rely on Fineman's vulnerability theory.²

An asylum seeker is the most judicially naked of all human beings and in need of protection. However, as Arendt laments, human rights fail those who are at their most human; those who do not have the protection of citizenship status and whose world has been intrinsically politically ruptured by torture. I claim, following Martha Fineman's vulnerability theory, that this failure can be traced back to Western liberal thought and its fundamental split between the mind and the body, where autonomy forms a foundation of legal and political subjectivity – rather than vulnerability as a universal condition. The law, however, regulates, orders and controls bodies, but when it does, it has a certain kind of body in mind: it categorizes, forms groups and sets boundaries of inclusion and exclusion. When the term vulnerability is used in law, it is attributed only to some individuals or groups who are vulnerable populations or it is used in the asylum determination process as a basis for comparison to share scarce resources / special services among those most vulnerable, thus ignoring the universality and constancy of vulnerability as described by Fineman. Her thesis also recognises the radical particularity of vulnerability in our embodiment and embeddedness. Asylum seekers, like all human beings, are embedded in institutions and societal structures, which confer power and privilege through the operation of the system and by creating societal identities. Law's stagnant categories are at odds with constantly changing human vulnerability, which the asylum process seeks to identify and respond to. In this paper, I will focus on the embodied and embedded vulnerable subject, who is at the interface with the structural and institutional mediation of power and vulnerability. I try to analyse, through Fineman's vulnerability thesis, the tortured subject as an inherent representation of the ways in which politics and law work on an embodied vulnerable subject.

¹ My ongoing PhD project working title is 'Construction of vulnerability. Victims of torture in the asylum process'.

² I express my gratitude to Professor Fineman for making me think of this question. For the purpose of this paper and my PhD project in general, the following articles among others are central for my understanding of vulnerability: Fineman 2008, 8-40; Fineman 2010, 10-130; Fineman 2017, 133-149; Fineman 2000, 13-29; Fineman 2012, 12-224; Fineman 2015, 15-348; Fineman 2014, 14-292; Fineman 2013, 13-28 and Fineman & Gear 2013, 1-12.

In the asylum process, asylum interviews hold the central position in terms of gaining knowledge of an applicant's grounds for protection.³ Evaluation of the credibility of the applicant is in the central position in the protection determination process. The assumption is that the asylum seeker has to tell his/her grounds for asylum in a logical and consistent manner. However, a tortured asylum seeker may offer fragmented or contradictory testimony which is attributed to fabrication rather than underlying memory disturbances and dissociation caused by torture trauma. It is estimated that up to 35% of refugees are torture victims, who are particularly susceptible to mental health problems, such as PTSD, anxiety, suicidal thoughts and depression (Heeren & Mueller et al. 2012, 1-8).⁴ A Swedish study found that the staff conducting interviews do not always take into account how human memory functions when formulating the interview questions. This may result in grave injustices (van Veldhuizen et al. 2017, 3-12). To assess the credibility of the account, with or without trauma, the assessment should not focus on the applicant's answers in isolation but on the basis of coproduction of questions and answers by the interviewer and the applicant. What is being asked is crucial when evaluating credibility (Vrij & Granhag 2012, 110-117).

The process has been criticized for producing epistemologies of ignorance (Bohmer & Shuman 2007, 603-629), suffering from a culture of disbelief (Jubany 2011, 74-94); indicating that problems arise from the organization and conduct of asylum interviews, creating a gap in how knowledge about cases is produced.⁵ The asylum process is a power-knowledge regime which produces truths: the power producing knowledge and those in power defining the truth. During the asylum procedure, a particular truth about the applicant is produced and only the authorities have the power to decide whose truth is accepted.

2. The concept of vulnerability: Vulnerability in and of the asylum process

Although the concept of vulnerability is nowadays frequently used in legal and political language (see e.g. Abrisketa, et al. 2015, 16; Churruca Muguruza et al. 2014, 129-166) it is a relatively recent development in policy discourses and frameworks, now carrying a normative undertone of constrained human agency as to who requires or deserves support (Brown 2017, 11-12). The concept of vulnerability carries a negative connotation in everyday discourses. It is often used when defining stigmatized or otherwise disadvantaged groups and populations. Some vulnerable

³ I will describe and discuss the challenges of asylum interviews in more detail in my PhD project.

⁴ In a study carried out in 2005 on the mental health of Cambodian refugees who had resettled in the USA, 54% of the respondents reported torture. See Marshall, Schell et al. 2005, 571-579, cited in Carswell, Blackburn & Barker 2011, 107-119. See also a recent TERTTU (2019) study revealing high percentages of injuries stemming from experiences of violence among asylum seekers, which should also have practical implications regarding asylum processes.

⁵ Herlihy & Turner 2009, 171; Jubany 2011, 74-94; Määttä 2015, 21-35; Puumala 2017; Puumala & Kynsilehto 2015, 352-368.

groups are seen as perhaps more sympathetic than others – for example, children – but vulnerability as a concept is generally associated with victimhood, deprivation, dependency and pathology (Fineman 2011, 166). However, as a legal concept vulnerability remains ambiguous and even contested (Peroni Manzoni & Timmer 2013, 1056-1058; 1061).⁶

International human rights law is based on the premise that all persons, by virtue of their humanity, should enjoy equal human rights (Weissbrodt 2008, 35). Specific human rights instruments have been created to ensure that specific protection is guaranteed to those individuals who are in need of enhanced protection due to their particular vulnerability or due to structural inequality (Mustaniemi-Laakso et al. 2016, 2, fn 5), such as women, children, migrant workers, trafficked persons and persons with disabilities (Grant 2011, 29). While these instruments do not directly refer to the groups they are designed to protect and empower as vulnerable, their inherent rationale is to counteract and mitigate vulnerability through special safeguards and measures to enable such groups to enjoy all their human rights to the full (Mustaniemi-Laakso et al. 2016, 2, fn 6). According to many authors, embodied vulnerability is foundational to human rights, but also complex and contested and the individual that human rights law seeks to protect is not always the vulnerable subject (Turner 2006; Gear 2010).

In the asylum system vulnerability bears different meanings. It defines either the precarious position of all people seeking asylum, not least due to their legal status,⁷ or classifies individuals with different needs due to their particular physical, mental or social circumstances. Vulnerability can also be understood and occupied as a tool for categorising the asylum-seeking population. Vulnerability as a gradual position leads to a situation where decision makers, consciously or not, are demanding a higher level of violence experienced and a higher level of vulnerability expressed. The threshold for granting protection gets higher and higher and the practice of granting protection moves further and further away from the criterion of international protection as defined in international law. It can also be understood as not a relevant factor when assessing international protection. As voiced by some of those operating the system:

- ‘It is possible that the ground for international protection is found without having to think of vulnerability [...]’⁸
- ‘That person has anyway already been granted international protection, whether or not she/ he is vulnerable or not [...]’⁹
- ‘Mostly those actual asylum seekers who are granted protection are not

6 On the conceptualisation of vulnerability and the usage of the term, see, e.g., Fineman & Gear (eds.) 2013. See also Churrua Muguruza et al. 2014, 130-131 and Abrisketa, et al. 2015.

7 *M.S.S. v Belgium and Greece*, app no 30696/09, judgment on 21 January 2011, at paras 232-233. See also Peroni & Timmer 2013, 1056, 1068-1070; for an analysis of whether the Court’s finding points to recognition of the vulnerability of asylum-seekers as a group.

8 Semi-structured Interview with Helsinki Administrative Court Judge, 2.2.2014, Judge A.

9 Semi-structured Interview with Helsinki Administrative Court Judge, 2.2.2014, Judge B.

vulnerable but active political fighters.¹⁰

In the asylum determination process, a person's rightful presence and access to rights in the receiving society are determined (Mountz 2010). While the right to asylum is written into international human rights law, it is still the state's right to decide to whom protection is granted. This situates asylum between law and politics, institutional practice and migration governance (Puumala, Ylikomi & Ristimäki 2018, 197-215). The purpose of the asylum process is to recognize those in need of international protection, such as those fleeing persecution or serious harm. To that end, the authorities are interested in only a fraction of the issues that affect asylum seekers' vulnerable position.¹¹ The eligibility criteria are defined by the Geneva Convention on the Status of Refugees, and in the Finnish context also by the Qualification Directive (2011/95/EU) and national policy guidelines on admissibility. According to CEAS legislation, the state has the duty to recognize and address vulnerability, which in the asylum process works as another criterion of inclusion / exclusion. 'Once identified as vulnerable, applicants enjoy specific rights and safeguards in the asylum process under EU law. Vulnerability should therefore trigger additional or tailored support to ensure that people have the necessary conditions to bring forward a claim for protection' (AIDA Report 2017, 7).

The asylum system, when focusing only on the individual in separation, deems inability to act according to expectations in the asylum process as a sign of failure, which in the context of international protection has potentially very dramatic consequences when failed asylum seekers are sent back to their country of origin. A sign of failing can be an inconsistent, not detailed and illogical story; the criteria the authorities use when assessing the credibility of the application and which according to psychological knowledge are not able to tell anything about credibility (Deeb 2017). Designating only some (vulnerable asylum seekers) as vulnerable entails that some would not be vulnerable - a construction which is ultimately impossible.

Under the Common European Asylum System there are legal standards that refer to vulnerability placing the duty on states to take vulnerability into account. The legislation is based on group-based logic that connects the concept to the characteristics of the person thus reinforcing the idea that vulnerability describes an identity or characteristic of certain groups rather than the general human condition. The individual who is labelled vulnerable under the CEAS is an able and liberal subject while the vulnerable subject is seen as something different from the standard subject of law, thus requiring special measures / protection.¹² However, the legislation

10 Semi-structured Interview with Helsinki Administrative Court Judge, 2.2.2014, Judge A.

11 Not only does the legal definition of refugee set the limit of what is relevant and what is not but the protocol itself at the Finnish Immigration Service hearing also sets those limits. The report is a kind of standardized report where certain things are always asked in a certain order and certain information is always provided. The asylum interview begins with an opening statement from the interviewer. This statement sets the limits and the aim of the hearing. The one asking the questions defines what can be said, in what order and what is considered relevant and what is not. Applicants have no power to negotiate these limits but have to adapt themselves and their story to the frame set by the authority.

12 For example, The Qualification Directive recognizes the specific situation of vulnerable persons and the

on vulnerability leads to situations where the authorities should first recognise vulnerability in order to grant the special protection that vulnerable applicants are entitled to, but vulnerability will pass unrecognized until the benefits of vulnerability are conferred on the applicant.

The concept is thus not one and static as the law's internal logic aims to represent but many different understandings and background assumptions that operate in many different ways and to many different ends. In short, the logic of exception and the background assumption of autonomous and logical subject operate in law in such a manner that they do not manage to protect those in need of protection. So, the question is: what shall we do with vulnerability?

3. Vulnerability thesis and embodied and embedded vulnerability

Martha Fineman has developed 'a legal paradigm that brings vulnerability and dependency, as well as social institutions and relationships, together into an analysis of state responsibility' (Fineman 2017, 1). Vulnerability theory challenges the dominant conception of the universal legal subject as an autonomous, independent and fully functioning adult, who is able to negotiate the terms of a contract, assess their options and make rational choices (Fineman, Andersson & Mattsson 2017, 3; Fineman 2008, 10). Vulnerability theory challenges the stagnant categories and group-based understanding of vulnerability in law. 'Vulnerability is – and should be understood to be – universal and constant, inherent in the human condition' (Fineman 2008, 1). Vulnerability is also particular as 'each embodiment performs a unique set of circumstances which renders vulnerability particular' (Truscan 2013, 66).

Vulnerability is thus universal in its nature but particular in terms of how it manifests itself. It is complex and can manifest itself in multiple forms (Fineman 2013b, 22). Two forms of differences are relevant. The first consists of variations in human embodiment: we are physically, mentally and intellectually different. The second difference is social and constructed as we are situated within and dependent upon overlapping and complex webs of economic and institutional relationships.

duty to take that into account in connection to the issues regulated in Chapter VII of the Directive, but only after individual evaluation of their situation. Vulnerability is seen as something different from the standard subject of the Directive; that of an able applicant with the capacity to state the facts of their case in a logical and consistent manner. Article 4 of the Directive is a good example of that. The evaluation of credibility plays a central role in identifying international protection needs. According to article 4(1) it is the duty of the applicant to submit as soon as possible all the elements needed to substantiate their application for international protection and it is duty of the State to assess the relevant elements of the application in cooperation with the applicant. The assumption is that the asylum seeker has to tell their grounds for asylum in a logical and consistent manner. Only in exceptional situations listed in article 4(5) is the applicant exempted from presenting evidence supporting their story and those exceptions are also based on the ability to produce a logical and coherent story. However, a tortured asylum seeker can offer fragmented or contradictory testimony which is attributed to fabrication rather than underlying memory disturbances and dissociation caused by torture trauma. See Wilson & Droždek (eds.) 2004, 19. The Directive fails to recognize the possibility that the applicant's vulnerability may have a bearing on their capacity to act according the requirements of article 4 for reasons beyond their control.

We are constantly dependent on institutions and relationships throughout our lives while that reliance varies over time and in response to changes in embodiment and social context. Fineman argues that the state must be responsive to the realities of human vulnerability and its corollary, social dependency, as well as to situations reflecting inherent or necessary inequality, when it initially establishes or sets up mechanisms to monitor these relationships and institutions (Fineman 2017, 2).

In my PhD project I started searching for an explanation for inconsistent practice in Scarry's analysis on pain, according to which pain and torture happen because of the body and 'embodied vulnerability is directly and focally at stake in the case of right to life [...]the rights to protection against torture' (Gear 2010, 160). Scarry's analysis on bodily pain links speech, pain and the body intimately together. 'World, self and voice are lost, or nearly lost, through the intense pain of torture' (Scarry 1985, 35). Pain, according to Scarry, is unsharable through its resistance to language because of its exceptional character to other interior states.¹³ However, my case material seemed not to support this claim totally. For example, an unaccompanied minor was able to tell his experience of torture, captivity and being forced to watch and hear other people being tortured from the first interview with the police. However, at the Finnish Immigration Service interview no clarifying questions were asked about the violence, even though apart from the Finnish immigration service personnel, the lawyer and the legal guardian were also present. His vulnerability, although well explained by him, was ignored in the process that followed.¹⁴ Focusing only on embodiment does not explain the initial problem I started this paper with: how does the vulnerability of those defined in law as vulnerable still pass unrecognised even when they have medical certificates as evidence to prove their embodied vulnerability? How is it that psychological and medical knowledge about the effects of trauma are not enough to revoke the basic assumption and point of comparison of the autonomous and logical subject in law?

Vulnerability is a primary human condition, not merely openness to physical or emotional harm (Fineman 2017, 11). Vulnerability is not just the capacity to suffer but also a source and expression of dynamic inter-relationality with other human beings and with the world; an aspect which I claim the asylum process tends to ignore as it focuses only on the asylum seeker and her particular abilities and inabilities. The vulnerability thesis not only replaces the autonomous, liberal subject with the vulnerable subject, but also looks at the societal institutions and structures that can produce or reduce vulnerability (Fineman 2008).¹⁵ 'Therefore, the appropriate comparison is *not* that of relative *vulnerability*, but of relative *resilience* (in the form of access to and opportunity within society and its institutions) [...] Important, in

13 '[...] physical pain – unlike any other state of consciousness - has no referential content. It is not *of* or *for* anything.

It is precisely because it takes no object that it, more than any other phenomenon, resists objectification in language.' Scarry, 1985, 5.

14 Case study, case 1/99: Finnish Immigration Service asylum protocol.

15 The vulnerability thesis offers a good theoretical framework for analyzing the role of institutions and their effect on the asylum process.

this regard is the realization that resilience is not an innate characteristic for anyone, but it is socially produced over time and within structures and institutions' (Fineman 2013, 85-86). 'The individual experience of vulnerability varies depending on quality and quantity of resources we possess and can command' (Fineman 2013b, 21). Thus, while vulnerability theory begins with the idea of human vulnerability, the emphasis is not there but on the inequality of resilience which turns the attention to societal institutions, processes and legislation that can confer power and privilege (Fineman 2015, 1). Importantly, human beings are not rendered more or less vulnerable due to certain characteristics or membership in a group; rather, we should focus on 'different spaces, places, situations or relationships as indicators of the proximity of, exposure to, or probability for vulnerability to be manifested or realized in the form of dependency' (Fineman 2015, 2). We experience the world with different levels of resilience which is produced in those same places, situations and sites; those being the sites of state responsibility. Thus, focusing on resilience brings societal institutions and state responsibility to the fore and into the conversation with the vulnerable subject. A responsive state provides assets and removes obstacles for the enjoyment of rights and then contributes to the resilience of the individual (see e.g. Fineman 2008; Fineman 2013b, 24-26).

Fineman rightly claims that the institutional and structural approach allows for greater recognition of individual differences than identity-based analysis grouping individuals according to their characteristics (victims of torture, unaccompanied minors, women etc.) even those characteristics are nuanced and multiple (an asylum seeker who is a victim of torture, who has against her will left her country including her own family there, who is now in strange cultural, social and societal surroundings, does not speak the language...). The focus being on institutions producing distinguishing characteristics and 'identities' allows the observer to notice that those identities are neither individual nor static, but social and reflecting allocation of power and privilege (Fineman 2013a, 85-86). Suppose, for example, that the resilience and vulnerabilities of the system itself were to be taken into account: would the situation look different?

4. Resilience in the asylum process

According to Fineman, 'differences are produced as a result of an individual's experiences within societal institutions and relationships over the life course. These differences structure options and create or impede opportunities' (Fineman 2013, 22). Fineman lists physical, human, social, ecological / environmental and existential assets that societal institutions and organizations can provide, creating and fostering resilience (Fineman 2013, 22). 'Although nothing can completely mitigate our vulnerability, resilience is what provides an individual with the means and ability to recover from harm, setbacks, and the misfortunes that affect our lives' (Fineman 2017, 133-149).

In the asylum process resilience is truncated to the ability / capability of the individual in question and is interpreted rather as a sign of invulnerability, making

the individual able to return to her country of origin. ‘You are a young man with a history of employment and able to work in the future’: the factors that the Finnish Immigration Service considered as proofs of invulnerability in a negative decision on asylum.¹⁶ Meanwhile the lawyer in the appeal described his client as a trustworthy person, able to navigate well in Finnish society, being able to study with good grades and having learned Finnish.¹⁷ In the appeal phase, the Finnish Immigration Service described the appellant as an able 16-year old, who in the cultural context in his country of origin would already be responsible for taking care of his family; being the man of the house and if he had a family of his own, he would already be responsible for offering protection to them. Based on this cultural interpretation of the appellant’s age, the Finnish Immigration Service referred to a general policy according to which ‘returning an adult man, who is able to work, to country X, a lack of existing safety networks does not complicate his adjustment to society.’¹⁸ In the asylum process resilience – if even indirectly described – involves either proof of invulnerability with unrealistic and false expectations of individual ability and capacity to overcome any obstacles or a description of individual capacities to overcome all inherent difficulties of being an asylum seeker in a strange country and heroically adapting oneself and proving worthiness to stay.

The asylum process has been criticized for being too focused on trauma stories, neglecting the strengths of applicants and pathologizing them as traumatized victims, running the risk that medical diagnosis is just another way of categorizing and labelling persons. Elsewhere I have also analysed national legal development through the vulnerability lens and found the same pattern of seeing resilience as the capability of the individual only dependent on her personal abilities in a system built around a highly capable subject who needs to overcome almost impossible barriers in order to be able to enjoy state protection (see more Tarvainen, 2017).

How could resilience be built into the asylum process? Fineman claims that ‘experiences with institutions are often concurrent and interactive, but also can be sequential’ (Hutchinson & Dorsett 2012, 55-78). Instead of focusing only on the individual and her ability in the asylum-seeking context to communicate her vulnerability, we instead focus on the system and its role of producing, creating and alleviating vulnerability. We start to ask very different questions if the counterpoint of vulnerability is not invulnerability but resilience-building institutions and processes, limiting or enhancing our ability to exercise autonomy, thus defining the scope and nature of our agency. The critical focus is shifted to the operation of societal institutions and their ability to mitigate vulnerability. The role of law in structuring societal relationships and institutions means that the state should bear responsibility for ensuring that they are justly structured and fairly functioning (Fineman, Andersson & Mattsson 2017, 4).

16 Case study, case 1/99: *Migri* decision.

17 Case study, Case 1/99: appeal to the Helsinki Administrative Court.

18 Case study, Case 1/99: *Migri*’s request for appeal before the Supreme Administrative Court.

5. Vulnerability of the system

Even the Preamble to the Refugee Convention (RC)¹⁹ is ambiguous. On the one hand it is about protecting the human rights of refugees, on the other hand stating that ‘the grant of asylum may place an unduly heavy burden on certain countries’ (Walker 2003, 596). There is thus an inbuilt tension between protecting the human rights of refugees and recognizing its limitations (Hathaway 1990, 113; Walker 2003).²⁰ Or, as Noll has expressed, ‘while the universalist perspective focuses on the existential threat facing the individual, the particularist perspective is eager to avoid existential threats facing communities’ (Noll 2000, 80). Noll and Vested-Hansen phrase the tension in the following way: ‘by its very nature, migration and asylum law is situated in the conflict zone between particularism and universalism. In ultimate questions, participants in this discourse have a choice between two foundational paradigms – one striving for the global realization of human rights and another giving preference to the interests of a certain state population’ (Noll & Vested-Hansen 1999, 360).

The asylum seeker is per definition dependent on the protection of the host state and dependent on its support,²¹ and if those support systems fail or are inadequate, the system actually increases the vulnerability of those already in a vulnerable position. What is the justification behind the current system, which is unable to distinguish those who are vulnerable (as the system understands the concept) resulting in a system that harms those it seeks to protect?²² The state (here Finland, but the same applies to the EU as a whole) has played favourites and chosen vulnerable institutions over the vulnerable applicant.

In 2015 1.2 million human beings submitted an asylum claim in the EU. Of these, 32 476 came to Finland. The mass media and political leaders described the refugee situation in the EU as a major ‘refugee crisis’ or ‘migrant crisis.’²³ In 2017, 650 000 new applications for asylum were filed in the EU and 2139 in Finland. However, the decrease in the number of applications is clearly a consequence not only of

19 According to Nykänen: ‘The UN Refugee Convention constitutes the unequivocal foundation of the legal framework for the international framework for international protection of forced migrants. With 147 states formally adhering to the Convention and/or its 1967 Protocol, among them all the Member States of the EU, this instrument has nearly global coverage.’ Nykänen 2011, 14-15. As of 5 March 2014, the total number of states parties to the RC was 145 and to the 1967 Protocol 146, available on <<http://www.unhcr.org/pages/49da0e466.html>> (accessed 5 May 2014).

20 However, Foster argues that the reference to the ‘heavy burden’ emphasizes the need for co-operation in dealing with the refugee problem, rather than undermining the ‘humanitarian and human rights purpose of the Refugee Convention.’ Foster 2007, 44-45; Beard & Noll 2009, 460.

21 For example, in the form of access to reception services including accommodation, reception allowance or spending allowance, any necessary social and health services, interpretation and translation services as well as work and training activities.

22 The mental health consequences of prolonged asylum processes are well-documented. See for more, for example: Jakobsen Meyer DeMott, Wentzel-Larsen et al. 2017; Lindert, Ehrenstein, Priebe et al. 2009, 246-257; Carta, Moro & Bass 2015, 33-38; Lambert & Alhassoon 2015, 28-37; Patel, Kellezi & Williams 2014; Mollica, Ekblad & McDonald 2015, 341-378.

23 In January 2016 Donald Tusk, President of the European Council, described ‘the migration and refugee crisis’ as ‘an existential challenge for the EU’. *Report by President Donald Tusk to the European Parliament on the outcome of the December European Council*, Statement 16/17 of 19 January 2016, § 2.

national legislative decisions but also of EU policy in general towards asylum seekers. Individual EU Member States have built fences, have decided to detain all asylum seekers, and have established Schengen border controls, among other restrictive policy measures.²⁴ However, in a longer time span, it is clear that these restrictive policies will not stop people seeking asylum but only forces them to switch to more dangerous routes in order to reach Europe.²⁵

Vulnerability can serve as a legitimization of resources to be deployed. In public debate during and in the aftermath of the 2015 ‘refugee crisis’, women and children deemed vulnerable were described as entitled to seek asylum while others (i.e. young men) were categorically seen as exploiting the system when they actually should have been defending their countries and vulnerable women and children there. However, the debate over those deserving protection and safe routes to the EU quickly turned into an agreement between the EU and Turkey, thus making it impossible for anyone to reach Europe through that route. In summer 2018, EU leaders started to discuss outsourcing asylum altogether by establishing regional disembarkation platforms to provide rapid processing to distinguish between economic migrants and those in need of international protection.²⁶ In similar vein, on 4 May 2016 the European Commission proposed reforming the CEAS ‘by creating a fairer, more efficient and more sustainable system for allocating asylum applications among Member States’ (EC press release 2016). The aim continues to be ‘to ensure quick identification of persons in genuine need of international protection and return of those who do not have protection needs.’

The press release also claims that it is ‘generous to the most vulnerable and strict towards potential abuse, while always respecting fundamental rights’ (COM[2016] 467). On 13 July 2016 the Commission gave its second set of legislative proposals on ‘Managing the refugee crisis’, which included reforming the Procedures Directive and Qualification Directive as regulations²⁷ and reforming

24 In summer 2018 the Hungarian government passed a law that made helping asylum seekers a crime. See: <<https://www.helsinki.hu/en/hungarian-government-marks-world-refugee-day-by-passing-law-to-jail-helpers/>>.

25 ‘The EU’s migration and border control policies aim to adhere to a *human rights-based* logic, but at the same time the policy field is very *security-oriented*. As the case studies in this report indicate, security considerations often take the upper hand in designing and implementing policies at the operational and policy level at the expense of the protection of human rights and the consideration of vulnerabilities of individuals’ (Mustaniemi-Laakso et al. 2016, 122 and 126). States are now trying to shut the doors to the welfare state as well as to work, housing, education and other institutions of society. Access to public services has become an instrument of migration policy. Broeders 2009, 14-15.

26 EU summit, 28-29 June 2018, where EU leaders discussed taking all necessary internal legislative and administrative measures to prevent asylum seekers from freely travelling across the EU. The probability of reaching agreement on reform of Dublin is so unlikely, that individual Member States have been reaching individual solutions to stop asylum seekers from moving and reaching Europe. This summit proposed a common EU solution, namely outsourcing asylum altogether outside of the union.

27 Proposal for a Regulation of the European Parliament and the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. Brussels 13.7.2016, COM(2016) 467 final; Proposal for a Regulation of the European Parliament and Council 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

the Reception Conditions Directive²⁸ for further harmonization.²⁹ It has, however, been argued that the Commission proposals do not address the persistent failure of EU asylum policy but are more likely to worsen the current crisis of solidarity by reproducing and intensifying the structural flaws of the CEAS by continuing to further externalisation of refugee protection, continuing to save the Dublin system at any cost and controlling asylum seekers through harmonisation (Chetail 2016, 584-587).³⁰ While it has been acknowledged that some modifications improve protection of asylum seekers across the Union,³¹ ‘the most numerous and substantial changes proposed by the Commission are in fact fuelled by three primary objectives: those of accelerated asylum procedures, fighting secondary movements and limiting access to international protection’ (Chetail 2016, 600). As the structural flaws of the CEAS are not addressed, the bearer of the cost of the broken system is the asylum seeker who in human rights logic requires special protection does not in the CEAS even have the chance to enter that logic of being deserving and requiring support. In this regard, one must ask: is CEAS legislation on vulnerability really about protecting those in vulnerable situations or protecting the system itself?

Finland responded in December 2015 to an increase in asylum applications with its asylum policy operational plan, according to which it promised to restrain immigration and cut off the uncontrolled stream of asylum seekers to Finland, better control the economic expense of the asylum system and effectively integrate those who receive international protection in Finland.³² The plan does not mention protection of those in a vulnerable situation. As a reaction to the increase in applications, the Finnish government applied restrictive immigration and asylum policies and many separate restrictions to legislation were approved.³³

In early 2018 research by Åbo akademi, the University of Turku and the Non-discrimination Ombudsman showed that the legal position of people applying for international protection seemed to have become significantly weaker, a fact that cannot be explained by the amendments to the preconditions for granting international protection under the Aliens Act. Indeed, in many ways the principles of data interpretation have become visibly stricter. The research claimed that the source of the change could be found in the general interpretation policies of the authorities

and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Brussels 13.7.2016, COM(2016)466 final

28 Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), Brussels 13.7.2016, COM(2016)465 final.

29 The first set of legislative proposals include: reforming the Dublin System, reinforcing the Eurodac system and Establishing a European Union Agency for Asylum.

30 More on this issue also in Tarvainen 2007.

31 They notably concern an extended notion of family members, early access of asylum seekers to the labour market, and an explicit time-limit for appointment of unaccompanied minors’ guardians. Chetail 2016, 599.

32 Hallituksen turvapaikkapoliittinen toimenpideohjelma, 8.12.2015.

33 These amendments and policies had been criticized by many notable legal scholars, such as the President of the Supreme Administrative Court and the Finnish Non-discrimination ombudsman, demanding that the effect and their accordance with the Finnish Constitution should be investigated. More on national development in Tarvainen, 34-42.

and in possible political and administrative steering influencing these policies.³⁴ At the request of the Finnish Interior Minister to respond to worries both for fulfilment of basic and human rights as well as for the Finnish constitutional state, the Finnish Immigration Service conducted and published its own investigation regarding its own decision-making practice, concluding that ‘its decisions are principally made according to the law’s criteria.’ As to documented quality problems in interpreting and handling claims, the Finnish Immigration Service concluded that they were probably more likely after the dramatic 2015 increase in applications and the need for multiplying the personnel responsible for those applications in a short time span. However, it considered that quality was better already as ‘the processes are amplified, the trainings are intensified and the experience of the personnel has accrued.’³⁵ According to the Finnish Interior Minister, this investigation by the Finnish Immigration Service does not exclude the possibility of independent assessment in the future of which to date there is no new information.³⁶

Based on initial analysis of the interviews conducted for my PhD research, it seems that there is a general phenomenon of passing the responsibility for recognizing vulnerability to some other actor / institution than one’s own. The Finnish Immigration Service took the view that health care professionals or social workers at reception centres are better positioned to recognize vulnerability during their health screenings, even though at the same time recognizing the practical difficulty of accomplishing that. A reception centre worker might be responsible for 150 clients and their health screening.³⁷ At the same time, the administrative court saw that its role as appeal court prevented it from taking an active part and asking about vulnerability.³⁸ Instead the judges considered themselves as tied to decisions by the Finnish Immigration Service, to the claims made in an appeal and finally it was in any case the responsibility of lawyers to raise the issue. The judges, however, did accept that there might be situations where it is impossible for an asylum seeker to tell about his / her vulnerability even to their lawyer, and then ‘it stays

34 To support this claim, the research referred to a reprimand by the Chancellor of Justice to the Finnish Immigration Office on 3.2.2017 (Dnro OKV/8/50/2016) and to the fact that administrative courts have returned many Finnish Immigration Service decisions to be re-assessed (some 32% in 2017) either because of new information in the appellate stage or because of a procedural mistake or mistake in application of the law (4 %). Also the COI assessment of security situations has had a significant role in the legal position of those seeking asylum in Finland. The possibility of being granted international protection was significantly lower for Iraqi asylum applicants after the Finnish Immigration Service updated its view on the security situation in Iraq in 2015. This pilot study supports my claim that states are confused and vulnerable themselves in their attempt to solve the allocation problem with stricter decision-making practice.

35 Maahanmuuttoviraston selvitys Sisäministerille turvapaikkapäätöksentekoon ja -menettelyyn liittyen, 13.6.2018.

36 See webpage in Finnish: <https://intermin.fi/artikkeli/-/asset_publisher/selvitys-turvapaikkamenettelysta-loytyi-kehittavaa-mutta-ei-systemaattisia-virheita>.

37 Semi-structured Interview with Finnish Immigration Service designated personnel, 13.12.2017.

38 Under the Administrative Procedure Act 31 § An authority shall ensure that a matter is sufficiently and appropriately examined, by acquiring the information and evidence necessary for a decision to be made on the matter.

in the dark. It stays there and we cannot really do anything about that.³⁹ However, the judge recognized that the system is vulnerable itself as '[t]here are all kinds of lawyers. There are differences in quality. The whole process is quite appalling right now: there are differences in quality before Finnish Immigration Service interviews, quality is different among lawyers, our quality is different and I guess the Supreme Administrative court struggles with the same issue... They have also hired a lot of new people. The situation taken as a whole is very special; with bad luck someone might be on the bad side of the whole process...'⁴⁰ Finnish Immigration Service personnel recognized personal attitudes of the personnel as potential vulnerabilities of the system,⁴¹ also the time allocated for interview during which 'it's not possible to recognize vulnerability' and the risk of re-traumatization.

Personal attitudes were apparent when interviewing Finnish Immigration Service designated personnel, who was very optimistic of the ability of social workers to recognize possible special needs even in a situation of scarce resources: 'If the social worker does not handle the pressure, she / he is not fit for that profession'. According to him 'everyone knows in the psychiatric health sector that not everything is what it appears to be. I, for example, had a client who claimed he was going to kill himself if he didn't receive more money'. He also expressed his skepticism of any tools for identifying vulnerable asylum seekers, including PROTECT⁴² as one of them 'as it is guaranteed that with those tools, you will get fake positive cases'.

As Fineman states, 'those who are not seen as sufficiently autonomous and independent actors are herded together in designated "vulnerable populations" and are susceptible to monitoring, discipline, and supervision' (Fineman 2012, 114). Monitoring is definitely needed, but instead of monitoring those designated as vulnerable, states and their institutions should be monitored, evaluated, updated and reformed when necessary (Fineman 2010, 38). As Fineman notes, '[t]he state and its institutions are thus vulnerable themselves. Because they are so important both to individuals and to society, the flaws, barriers, gaps, and potential pitfalls that such institutions contain must be monitored and adjusted when they are functioning in ways harmful to society. This is what I mean by calls for a responsive state – a state responsive to the vulnerability of both individuals and institutions, one that takes seriously its responsibility to monitor even itself to ensure equality of access and opportunity' (Fineman 2013a, 84-89).

39 Semi-structured Interview with Oulu Administrative Court Judge, 8.12.2017, Judge B.

40 Semi-structured Interview with Helsinki Administrative Court Judge, 2.2.2014, Judge A.

41 The designated person stated that background attitudes towards, for example, sexual minorities could be so strong that the effect of any training is limited. According to her, those attitudes affect, for example, how questions are phrased etc. If she has noticed such attitudes, she has strongly recommended to that person's boss to exclude them from interviewing persons belonging to that particular category. Semi-structured Interview with Finnish Immigration Service designated personnel, 13.12.2017.

42 The PROTECT-ABLE project aims at disseminating, through training, lobbying, networking and communication a process of early screening and orientation for asylum seekers suffering from consequences of traumatic experiences (torture, rape, serious forms of physical, psychological or sexual violence), in order to encourage the Member States to comply with European directives on asylum. It also aims at developing good practice in the registration process for asylum seekers by implementing an evaluation tool for vulnerable asylum seekers.

6. A vulnerability analysis in globalized context: some initial thoughts

While vulnerability, uncertainty and insecurity are not new in the life of people, what is new that their causes and manifestations have multiplied and changed profoundly over the last decade. Examples include civil strife and the proliferation of conflicts, growing inequalities within and among the countries further accentuated by globalization, mixed outcomes of poverty, reduction efforts, increased mobility of populations and changes in family structure (UN 2003:2, 1 at para. 3).

Vulnerability analysis, placed in a globalized context, makes us aware of the high human cost of selective forms of state responsiveness. Kirby, for example, has identified causal networks between neoliberal globalisation and deepening human vulnerability in a globalized context where the power has shifted from states to market forces (Kirby 2006). Beck has argued that the nature of power itself has changed under the conditions of neoliberal globalisation (Beck 2005). In this context, the state could be argued to be one element in an extensive system of capitalist interactions, as Gear phrases it. Gear questions the theoretical freedom of the state from the market and the adequate ability of the state to be responsive to the violent unevenness characterising the ethico-material urgencies of our age (Gear 2013, 55).

One criterion for triggering protection under the 1951 Convention is that a person 'is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country' (189 UNTS 150; SopS 77/1968, art. 1 A [2]). Territorial sovereignty reigns supreme and an asylum seeker needs to first cross an international border to be able to trigger the protection of another country than her own. However, the securitisation trend of EU asylum and migration policies with an increasing array of non-entrée policies is states' reaction to their loss of control of the global forces behind movements of people. Are migration laws and their enforcement in an attempt to control migration the last bastion of state sovereignty (Dauvergne 2008)?

I claim that states are actually vulnerable themselves when trying to solve global challenges on a local level and confusing two different issues: 1) the duty stemming from international law to take responsibility over asylum seekers and design a suitable process for them to decide who is entitled to protection and who is not; and then 2) the allocation problem: it is not states that really decide where the applicants end up applying for asylum but it is asylum seekers themselves and/or smugglers, whose decisions are shaped by the securitisation trend of EU policies aiming to control irregular migration flows at the expense of protecting vulnerabilities. This illustrates the state's vulnerability and their attempt to actually solve this second question by addressing the first one. States within a globalized context are seeking to preserve national sovereignty for the state at the expense of the individual.

The reason why I started to ponder the roles and possibilities of the state alone to be responsive, was protest movements in asylum and deportation, where political protest is articulated by movements, activists, grassroots organizations, ordinary

citizens and asylum seekers themselves; where resistance and power within civil society, its citizens and non-citizens is built and the liberal state's coercive capacity to control its borders is challenged. Fineman defines the state as 'a cluster of relationships, entities, and agencies reflecting and shaping public norms and values, through law and policy. Those relationships include the relationship between the citizen and state, as well as between state and institutions' (Fineman 2013b, 26). Even though the state does not mean a monolith, nor is it limited to the definition of 'state' under international law,⁴³ are states able in this context not to tolerate a system that unduly privileges any group of citizens over another as Fineman states (Fineman 2010, 41)? Or do we need to add civil society, which is distinct from the state and the market, to shape policies, norms and social structures to be able to achieve the paradigm change⁴⁴ proposed by Fineman?

7. Conclusions

The problem I started this paper with was a finding arising from my case study material where the vulnerability of victims of torture was taken into account randomly or even systematically ignored in the asylum process. The background assumption - namely, of a logical and rational subject who is able to produce a coherent account - is expected even when the asylum seeker is suffering from medical conditions proved by medical certificate making him/her unable to manifest such expected behaviour. My aim in this paper was to seek explanations for this finding relying on vulnerability theory. I have analysed - through Fineman's theory - the tortured subject as an inherent representation of the ways in which politics and law work on the vulnerable subject.

The challenges in the asylum process of taking the vulnerability of the tortured asylum seeker into account reflect the different understandings and uses of the concept of vulnerability. The concept is thus not unique, uniform or static as the law's internal logic would aim to represent but, rather, many different understandings and background assumptions that operate in many different ways and to many different ends. Additionally, it seems that the asylum process tends to confuse the question 'who is entitled to international protection?' with the question 'who is vulnerable?' by granting protection to the most vulnerable: a construction which is ultimately impossible. Moreover, I have briefly discussed the vulnerability of the system in a globalized context, which offers yet another way to explain the difficulty of the asylum system in terms of taking the vulnerability of the individual asylum seeker

43 Montevideo Convention, art 1 'the state as a person of international law should possess the following qualifications: Permanent population, Defined territory, Government, Capacity to enter into relations with the other states.'

44 A paradigm change is needed, where we would look at the concept of vulnerability in a dynamic and contextual way, as socially embedded and as relational to the institutional and societal contexts where it is produced. Vulnerability is a primary human condition that does not exclude agency and qualifies itself by different levels of resilience, which are produced within and through institutions and relationships which confer privilege and power.

into account.

To conclude, a paradigm change is needed – a change where we would look at the concept of vulnerability in a dynamic and contextual way, as socially embedded and as relational to the institutional and societal contexts where it is produced. Vulnerability is a primary human condition that does not exclude agency and qualifies itself by different levels of resilience, which in turn is produced within and through institutions and relationships which confer privilege and power.

What if, instead of a logical subject to which the exception is a person with personality disorders we would take human vulnerability as a starting point? The clinical attributions of disorders rely on a set of shared assumptions on what is normal and that in turn is determined by the myth of the autonomous, logical and rational subject. Vulnerability theory offers a lens to reconceptualize and recast different behaviours operating within a relational system where everyone is recast as vulnerable. The logic of exception and the background assumption of an autonomous and logical subject operate in law so that they fail to protect those in need of protection. It would need a paradigm shift from the logical and autonomous subject to the vulnerable subject. It would need vulnerability to be seen as both universal and particular, resilience seen as socially produced and the state being the entity responsible for building resilience to vulnerability; thus it would need a change of the entire system if protection of vulnerability were to be taken seriously. That would among other things mean a system which depends on individual evaluation of vulnerability, which is not based on any categories but on different situations that can render someone vulnerable. This evaluation would have to take into account the idea of resilience being socially produced. Thus even though the evaluation as such would be individual, it would focus on the institutions and social and societal settings producing or alleviating vulnerability.⁴⁵ The legislator would take situational vulnerability into account when addressing vulnerability by providing appropriate measures and remedies. It would do away with the othering effect of choosing who is vulnerable and who is not, which, if following Fineman's approach, is theoretically impossible as there is no such thing as invulnerability. The starting point in the process would hence be that of the vulnerable subject in Fineman's sense and the procedure would be design-based on that starting point. It would be an asylum process of universal design that takes the universality and particularity of human vulnerability into account. My assumption is that an asylum process based on the vulnerability approach would then be better prepared to recognize, assess and address human vulnerability.

45 One argument for the need to change the system being not only inconsistent practice but the fact that the system as it is, harms the asylum seekers it seeks to protect. The present findings underline the stressful impact of asylum interviews on traumatized refugees. They indicate that the asylum interview might decrease posttraumatic avoidance and trigger posttraumatic intrusions, thus highlighting the importance of ensuring that an already vulnerable group of traumatized refugees needs to be treated with empathy during their asylum interview. See, Schock, Rosner & Knaevelsrud 2015.

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