Free and equal in dignity and rights - human rights in migration law practice/ Frei und gleich an Würde und Rechten Menschenrechte in der Praxis des Migrationsrechts

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'HUMANISING THE EU MIGRATION POLICY: RECOGNISING IRREGULAR MIGRANTS' HUMANITY'
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The basic premise of my talk is that the EU's migration policy is not and cannot be fit for purpose because and so long as it dehumanises migrants and migration.

To date, the EU migration policy has failed to recognise migration for what it is: a fundamentally human and universal phenomenon. The problematising, securitisation and criminalisation of irregular migrants and migration show how the EU migration policy confines the human to its margins.

I posit that the persisting failings of the EU migration policy call for a radical rethink of the EU migration policy. In this regard, I contend that **fuller vulnerability analysis offers a potent critical device to engage in a fundamental rethink of the EU migration policy that firmly locates the human at its core**.

Fuller vulnerability analysis interrogates the purpose of the EU's migration policy and unravels the relationships that form its fabric. In doing so, it tests the EU's self-affirmation as a global human rights champion and promoter of core *human* values and principles.

Before I delve into fuller vulnerability analysis and discuss how, in my view, it can transform and humanise the EU's migration policy, it is important to stress that vulnerability analysis must be distinguished from the language of vulnerability routinely deployed in migration policies.

Migration policies, including the EU's migration policy, commonly identify vulnerable groups of migrants. We are all familiar with the image of the vulnerable irregular migrant at the mercy of ruthless smugglers. I do not contest the vulnerability of migrants. **What I take issue with, however, is the EU's underpinning understanding of vulnerability and the EU's instrumentalisation of this concept to serve its migration policy objectives.** Here I would like to highlight **three key issues** with the language of vulnerability in migration policies:

- First, **this language creates an arbitrary binary between the vulnerable and the *invulnerable***. It upholds the liberal theory's fictional *invulnerable* subject, thereby ignoring a fundamental human reality => **vulnerability comes with being human**. *I will come back to this point as it is fundamental to vulnerability analysis*. This, in turn, yields distorted versions of human vulnerability and thus human life. For example, EU directives identify vulnerable migrant populations:

  E.g. 'minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence' (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, Article 3(9)). Are we to assume, for example, that young adult male migrants are *invulnerable*?

- Secondly, because vulnerability is seen as a deviation from the 'norm' – *invulnerability* -, it is exclusively associated with negative connotations such as harm and suffering. Persons cast vulnerable are thus commonly stereotyped and stigmatised as well as objectified and silenced. For example, the term 'vulnerable' too often serves to portray migrants in a negative light, as helpless victims. Because vulnerability is understood as victimisation and passivity, so-called vulnerable persons are exposed to paternalistic responses.

More recently, the label vulnerable has been attached to migratory situations rather than migrants (2016 New York Declaration for Refugees and Migrants). However, this approach replicates the drawbacks of the vulnerable group approach. Those migrants deemed in a vulnerable situation are themselves deemed vulnerable. Besides, the notion of vulnerable situation is equally arbitrary. Typically, the New York Declaration focuses on 'large movements' of migrants and only envisages vulnerable situations within this specific migratory framework. Because it 'almost exclusively deals with the situation of migrants prior to their arrival in the country of destination', it glosses over the pull factors of migration and destination countries' responsibilities.

- Thirdly and lastly, **the language of vulnerability deployed in migration policies is not the protective device that it purports to be**. The language of vulnerability is deployed - or not - to serve migration policy objectives. Tellingly, the image of the vulnerable migrant does not dislodge the construction of the migrant as a problem and a threat; rather it participates in the securitisation of migration and migrants. Mainwaring points out that

> 'In the Mediterranean, migrants are rendered victims (…); however, once ashore on EU territory, they quickly become risky, securitized bodies, possible villains' (Mainwaring 2016).[1]

Revealingly, the depiction of migrants as the victims of ruthless smugglers conceals their vulnerability to EU and Member States' policies:

> 'Much of the suffering and death that we witness at Europe's borders is indeed the result of European border policies instituted over the last 20 years that make safe and legal travel to Europe all but impossible for those fleeing war and poverty.'[2]

This instrumentalisation of the language of vulnerability in migration policies is further apparent in its deployment as a mere rhetorical tool. For example, the Returns Directive identifies vulnerable persons, but there are very few provisions dealing with any special requirements applicable to these persons and they are not far-reaching

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[1] Cetta Mainwaring, 'Migrant Agency: Negotiating Borders and Migration Controls' (2016) 4(3) *Migration Studies* 289-308, p. 290.
[2] Polly Palister-Wilkins, 'Interrogating the Mediterranean "Migration Crisis" (2016) 21(2) *Mediterranean Politics* 311-315, p. 312. In the same vain, see Jane Freedman, 'Engendering Security at the Borders of Europe: Women Migrants and the Mediterranean "Crisis" (2018) 29(4) *Journal of Refugee Studies* 568-582, p. 572.

(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, Articles 4(4)(a), 14(1)(d) and 16(3)**).** Importantly, migration policy objectives can also frustrate the deployment of the language of vulnerability. For instance, in December 2016, the Coordinator for the EU-Turkey Statement recommended that Greece reconsider the exclusion of vulnerable asylum seekers from transfers to Turkey under the fast-track border procedure.

So what is fuller vulnerability analysis and how does it differ from the problematic language of vulnerability?

Here I draw on the work of Martha Fineman and Anna Grear.

Fuller vulnerability analysis is best described as a '*critical normative project*' (Grear 2013). It offers a powerful device to investigate the 'systems of power and privilege that interact to produce the webs of advantages and disadvantages' in which we are located with a view to responding to our vulnerability.

Significantly, the counterpoint to vulnerability is not invulnerability'; vulnerability analysis seeks to build resilience. Resilience is 'the critical but incomplete remedy to vulnerability' (Fineman 2015). Although nothing can completely mitigate vulnerability, resilience is what provides individuals with the means and ability to recover from harm, setbacks and the misfortunes that affect [their] life' (Fineman 2015).'

The fundamental premise of vulnerability analysis is that vulnerability is the '*primal* human condition'.[3] Indeed, Fineman compellingly demonstrates that **vulnerability has five fundamental traits**:

- **Universal and constant:** we are all vulnerable. Our vulnerability arises from 'our embodiment which carries with it the ever present possibility of harm, injury and misfortune from mildly adverse to catastrophically devastating events whether accidental, intentional or otherwise' (Fineman 2008). Our vulnerability further arises

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[3] Martha Albertson Fineman, 'Equality and Difference – The Restrained State' (2015) 66(3) *Alabama Law Review* 609-626, p. 614.

from our condition as embedded beings (Grear 2013). We are all vulnerable to the actions of others as well as institutions.

Thus, vulnerability analysis firmly rebukes the myth of the autonomous liberal subject 'as the foundation of our legal and social order.'[4]

- Because it is universal and constant, vulnerability is also **shared.** This is key to rethink our relationships with migrants and thus critical to rethinking the EU's migration policy.

- **Vulnerability is also particular:** we 'have different forms of embodiment and also are differently situated within webs of economic and institutional relationships' (Fineman 2010-11). We therefore experience vulnerability in different ways.

- **Generative:** we are both vulnerable to the actions of others and inescapably dependent on others. Thus, we all need reach out to others, form relationships, and build institutions' (Fineman 2012). It follows vulnerability 'presents [us with] opportunities for innovation and growth, creativity, and fulfilment' (Fineman 2012). Importantly, **the generative dimension of vulnerability allows us to reclaim dependency as something positive**. It mainstreams our dependency on others and on institutions, which is key to humanising migration policies.

I advocate fuller vulnerability analysis, but I do not advocate complacency. **Caution must always be exercised when using the concept of vulnerability**. This is because the state and other institutions possess the power 'to exploit and thwart its meaning and significance' (Butler 2004). However, in my view, **because vulnerability analysis is fundamentally critical, it can 'maintain an ongoing reflexivity concerning the employment of the notion of vulnerability'** (Grear 2011).

This theorisation of vulnerability has far-reaching consequences for our responses to vulnerability:

- **It redefines our relationship with institutions.** Vulnerability analysis recognises that we all need access to institutional resources to build our resilience. Fineman points

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[4] Stu Marvel, 'The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage' (2015) 64 *Emory Law Journal* 2047-2088, p. 2065.

out that 'interactions with institutions not only can have immediate effects, but also produce determinative outcomes that can significantly affect future opportunities and capabilities.'[5] For example, elsewhere I show how constraints on irregular migrants' access to health care have detrimental immediate as long as long-term effects on irregular migrants as well as host communities. I have also shown how precarious immigration statuses place hurdles on integration.

- Fineman convincingly argues that this calls for a **responsive state** (Fineman 2010-11). However, this is not enough. I concur with Grear that we need a **fuller theorisation of vulnerability** that recognises that the state is embedded within a 'complex uneven globalised world' (Grear 2013). The state is only one actor among many. Vulnerability analysis must thus be concerned with these actors' positioning within the plethora of processes, systems and institutional relationships that form the fabric of our globalised world. It must also account for their vulnerability as human constructions.

- **The shared and generative dimensions of vulnerability have a critical role to play in achieving greater inclusiveness in the mobilisation and distribution of resilience-building resources in our *uneven globalised world*.**

  ⇨ **Our shared vulnerability enables us to relate to 'others' as fellow (vulnerable) beings and therefore strengthens our emotional identification with 'others'** (Carens 1996). This is critical when it comes to reimagining our relationships with migrants, especially irregular migrants as they epitomise the 'other'. Our shared vulnerability fosters mutual understanding and yields what Radhakrishnan describes as 'a deeply ethical impulse' that enables us 'to envision cooperations and solidarities across the divide and the asymmetry' of our globalised world (Radhakrishnan 2003).

  ⇨ **The generative dimension of vulnerability also supports greater inclusiveness in the mobilisation and distribution of resilience-building resources because it sheds a positive light on our dependency on others.**

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[5] Martha Albertson Fineman, 'Equality and Difference – The Restrained State' (2015) 66(3) *Alabama Law Review* 609-626, p. 623.

At the start of this talk, I mentioned that **fuller vulnerability analysis interrogates the purpose of the EU migration policy and unravels the relationships that form its fabric, and in doing so tests the EU's self-affirmation as a global human rights champion and promoter of core *human* values and principles**.

The EU's migration policy is primarily concerned with **migration management**. When it comes to irregular migration, the aim is to **'combat' irregular migration to and in the EU**. To this end, the EU's migration policy places its focus squarely on:

- **Border control**
- **Security**

In 2019, the Commission stressed that the EU needed to develop 'a collective policy on migration management and border security' (Communication from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation on the European Agenda on Migration, Brussels, 16.10.2019, COM(2019) 481 final, para. 1).

- **Return and readmission:** : formal readmission agreements or practical arrangements on return and readmission are in place in 23 countries of origin and transit, with extra support from the EU to push for effective return (Communication from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation on the European Agenda on Migration, Brussels, 16.10.2019, COM(2019) 481 final, para. 1). The Commission emphasises the need for 'a humane and effective return and readmission policy (European Commission, Migration and Home Affairs, Irregular Migration & Return, https://ec.europa.eu/info/index_en). I would argue that the humane dimension should be considered critical to achieving effectiveness if it is to pervade and shape this particular policy as well as the other aspects of the EU asylum policy.

This focus shapes the relationships that form the fabric of the EU's migration policy. It makes for a deeply EU-centric policy:

- Pushes and confines (irregular) migrants to the margins of the EU's migration policy. They are seen as 'an unwanted burden' whose interests are set against those of the EU'.

This approach supports the EU's drive towards externalisation. Responsibility for this 'burden' shifts to third-countries through a network of 'informal agreements' with countries of origin and countries of transit, often at the expense of migrants' human rights (agreements with Turkey and Libya). The European Migration Agenda puts much emphasis on **'partnerships' with third countries**. In a communication of October 2019, the Commission opines that 'innovative approaches to partnerships with third countries' have been key to progressing the European Migration Agenda and explicitly mentions the **EU-Turkey Agreement of March 2016** (Communication from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation on the European Agenda on Migration, Brussels, 16.10.2019, COM(2019) 481 final, para. 1).

The consequences are that the EU policy:

- Rests on an 'us versus others' discourse.
- Dehumanises (irregular) migrants. They become mere objects of the EU migration policy.
- Instrumentalises relationships with third countries to serve the externalisation agenda of the EU migration policy.
- Perpetuates the *unevenness* of our globalised world; and
- Ultimately calls into question the EU's self-affirmation as a global human rights champion and promoter of core *human* values and principles.

Paradoxically, the EU is founded on values and principles that support the development of a humane migration policy.

Article 2 of the Treaty on European Union (TEU) provides:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Yet these values and principles have, to date, failed to shape the EU migration policy.

Here, I posit that **fuller vulnerability analysis prompts paradigm shift in the EU migration policy that embraces the EU's values and principles and as such humanises the EU migration policy**.

One such critical value and principle is **solidarity**. In my view, how the EU migration policy understands and practices solidarity determines the EU's ability – or inability – to uphold values and principles that are central to a humane migration policy (respect for human rights; fair sharing of responsibility; true partnership).

Solidarity has a tri-dimensional nature (Moreno-Lax 2017):
- **Vertical:** institutions (including states)-persons solidarity.
- **Horizontal:** inter- institutional solidarity.
- **Systemic:** the whole policy must foster solidarity.

Each facet of solidarity has an internal and external dimension.

What would solidarity look like in an EU migration policy transformed by fuller vulnerability analysis?
- **Internal and external vertical solidarity:** the EU migration policy must first and foremost **extend solidarity to all migrants – including irregular migrants** – as fellow human beings, whether these migrants are located within or outside the EU territory.
  - ⇨ Counters the 'us versus others' discourse.
  - ⇨ Fosters EU citizens emotional identification with migrants.

  Fuller vulnerability analysis mainstreams dependency on others and sees it as something to be valued:
  - ⇨ Solidarity towards migrants can be de-problematised solidarity towards migrants.
  - ⇨ Migrants can be given a voice in the EU migration policy: from objects to actors of the EU migration policy.
- **Internal and external horizontal solidarity:** fuller vulnerability analysis compels the EU to reconsiders the nature of its internal and external relationships.
  - ⇨ Internally, fuller vulnerability analysis extends solidarity to all EU Member States and their communities. For example, at the moment, the Common

European Asylum System places disproportionate responsibilities on certain Members States (Greece, Italy and Spain).

⇨ Externally, solidarity is extended to third countries (countries of origin and transit countries). These countries are given a voice in the EU migration policy with a view to developing 'true partnerships'. This in turn compels the EU to reconsider it externalisation agenda.

- **Internal and external systemic solidarity:** solidarity must be fostered so that the EU migration policy can advance good migration governance – based on a human rights-based approach that promotes humane migration policies at all levels (see Da Lomba 2019).

⇨ The EU migration policy becomes responsive to human and institutional vulnerability in our uneven globalised word.

Concluding remarks: The EU migration needs a 'dose' of idealism

The proposed transformation of the EU migration policy through fuller vulnerability analysis can be considered unrealistic on account of its being overly idealistic. It is certainly the case that the proposed endeavour has an idealistic aspect.

However, I posit that this must not be perceived as a flaw. Rather, an *idealistic* perspective is precisely what we need if we are to humanise the EU migration policy, especially in relation to irregular migrants. Indeed, **'some degree of idealism compels us to recognise that our institutions and practices may not be all that they should be'** (Carens 1996). In other words, it compels us to be radically critical. It follows that the 'dose' of idealism that comes with fuller vulnerability analysis can prevent developments in the EU migration policy from perpetuating its profound shortcomings.