# HUMAN RIGHTS AND VULNERABILITY.

# EXAMPLES OF SEXISM AND AGEISM

## Mª DEL CARMEN BARRANCO AVILÉS[1]

**Abstract:** A human rights based approach applied to the idea of 'vulnerable group' connects vulnerability and structural discrimination. The Convention on the Rights of Persons with Disability provides some elements that allow to state that we are facing a new paradigm in the International Human Rights Law. One of the keys for the understanding of this new framework is the assumption of the disadvantage related to vulnerability as, at least in a part, socially built and ideologically justified. Sexism and ageism are examples of how ideologies reinforce vulnerability of women, children and aged persons transforming them in groups which members are in risk of discrimination.

**Keywords:** Vulnerability, Equality, Human Rights, Discrimination.

**Summary:** I. VULNERABILITY AND HUMAN RIGHTS; I.1. Concept of vulnerability and human rights; I.2 A new paradigm?; II. STRUCTURAL DISCRIMINATION AND "VULNERABLE GROUPS"; III. VULNERABILITY, NORMALITY AND POWER. SOME EXAMPLES.

## I. VULNERABILITY AND HUMAN RIGHTS

## I.1. Concept of vulnerability and human rights

The concept of vulnerability is applied in different fields; in each of these fields it assumes partially different senses[2]. With respect to our purposes, at least we can identify two relevant uses. One of them is closely related with risk exposures and the other with discrimination. Both concepts have a scope which is closely related, however distance themselves in the discipline concerned in the first instance, and the type of action required.

---

[1] "Bartolomé de las Casas" Institute of Human Rights, University Carlos III of Madrid, Spain (mayca@der-pu.uc3m.es).
[2] For example in bioethics, healthcare and medical research (Solbakk 2011).

The perspective of vulnerability as risk exposure prevails within the field of humanitarian action and the assistance in case of disasters. The highlighted idea is that there are some groups whose members require more protection due to their weakness.

There are two key aspects of this dimension, which are common to the other concept to which we will pay attention; these are care and reference to the groups. In some way, the vulnerability argument is an invitation to become aware of the different susceptibility to disasters that some persons show; this shared susceptibility becomes them a group (Fordhman 2007). The assumption of this use is that circumstances in which some groups of persons are found against disasters, affect their capacity to face them, and, therefore, must be taken into account when they are given help[3].

This is not the sense to which I am going to refer mainly, if not to the following one, which, we could say is more related with the International Law of human rights than with Humanitarian International Law. However, I cannot stop pointing out that attention to vulnerability within this context has experienced a change of focus similar to that produced in its use related with protection of human rights, as we will see in the next section.

It is appropriate to point out that vulnerability treatment has been based almost exclusively on the identification of categories of vulnerable persons (children, women….), managed many times independently from the context, and not considering the capabilities of the persons included within these categories. This point of view has been complemented with simultaneous attention to capabilities. In this way, the vulnerability approach has led us also to resilience analysis, so that not only the risk exposure is taken into account, but also the capacity to recover (Handmer 2003: p. 56). With the modification of the perspective, some of the problems derived from a more rigid use of the idea have been avoided. For example, the difficulties to take into account that in each context the groups that can identify as vulnerable vary; that the representation of vulnerability contributed to perpetuate the stereotypes associated with the group; the thoughtlessness of the potential of its members as agents against disasters; and in relation with the previous statement, a paternalistic attitude in which the persons of the group are ignored when defining their own needs and interests.

We will see that some of the problems related with the first way of managing vulnerability which has been hereby considered, recurrently result in International Law and

---

[3] Maureen Fordhman, stated as an example: "making the assumption that earthquake relief aid delivered in a public setting in Pakistan by male relief workers would necessarily reach widows and female heads of household is to misunderstand the cultural context that prohibits or discourages females from going out in public unaccompanied by male family members. After the earthquake, many women and girls failed to receive much-needed aid, or they suffered violence when transgressing village and tribal norms of honourable behaviour. Similarly, in Hurricane Katrina, an evacuation call assumed erroneously that all victims had access to private transport, when in reality many people without vehicles were unable to escape and were left stranded on rooftops – or worse – during the ensuing floods (Fordham 2007: p. 1).

the internal policies within the framework of the historical process of the specification of human rights. The parallelism between the way of facing vulnerability against disasters and the implementation of rights systems does not end here. The document *What is VCA? An introduction to vulnerability and capacity assessment* (International Federation of Red Cross and Red Crescent Societies 2006: p. 8 and 10)[4] shows how reducing discrimination, reducing gender inequality and controlling power systems vulnerability is reduced and people's capacity of response is strengthened. All these actions are required to protect efficiently the human rights of everybody.

Although originally the scope of use of these two ideas of vulnerability was not very different, it is possible affirming that when we are dealing with human rights, other definitions which relate it with a "tendency to discrimination" make sense. Also, in this sense, the ideas of group and necessity of care are present; however, it refers more to justification and demanding of welfare provision than to risk against natural hazards[5]. The tendency is to consider that vulnerable groups are formed by those persons who meet two requirements. The first one is that there is a situation of inferiority, which may be derived from a socio-cultural or physical condition[6]. The second is that these situations "lead to a supposed weakness that law tries to palliate or correct" (Peces-Barba et al. 1995: p.181) and that means that individuals who are found in this situation "are incapable by themselves to satisfy their basic needs or participate in social relations on equal terms" (Peces-Barba et al. 1995: p. 317). In this way, differentiated treatments such as public policies are justified and lead to the specification process of rights.

The rights added to the texts as a consequence of this process, unlike the way in which the rights of rationalist *ius naturale* are conceived do not have a universal ownership. These rights are assigned to some individuals who are considered a part of the vulnerable groups.

It is true that there is not a pure concept about the meaning of vulnerable group in International Law; however, it seems to be appropriate to use it for these persons, to whom it is considered as justified the recognition of specific rights. In the words of Mona Pare, "the term "vulnerable group" is not found in the international legal instruments. However, it seems to be the most appropriate way to designate groups of persons who are treated separately by the law of human rights due to their vulnerable position within society can

---

[4] See specifically Figure 1 ("Crunch" pressure model) and 2 ("Release" model).

[5] In *What is VCA? An introduction to vulnerability and capacity assessment* the difference between both uses is shown: the definition of vulnerability used in VCA was at times vague and did not relate to natural hazards. Instead, pre-defined groups were identified as being "vulnerable" and requiring some form of welfare provision (examples included the unemployed or poor; sick or elderly; hungry or addicted; bullied or abused). (International Federation of Red Cross and Red Cross Crescent Societies 2006: pp. 18 and 19).

[6] G. Peces-Barba adds to these circumstances "the situation that some persons occupy in some specific social relations", with that consumers would be included among the vulnerable groups (Peces-Barba et al. 1995: pp.181-182).

limit the enjoyment of human rights" (Pare 2003: p. 6)[7]. Some of these individuals had been traditionally recipients of assistance by the public powers or private agents, on many occasions, justified by welfare. The specification process represents a very important step towards equality, because this attention becomes a human rights matter. For this reason, the states are obliged to develop public policies addressed to satisfy the needs of these groups. The aim is to compare them with "the generic models of the target group of rights' (Peces-Barba 1995: p. 182).

However, the interventions carried out as a consequence of this process are directed almost exclusively to the protection of vulnerable persons, and they do not consider their will and, neglect their participation in political processes in general and in the decisions that affect them as a group or especially as individuals. In this way, interventions acquire a paternalistic character.

On the other hand, the specification process contains the trap of normality. In a certain way, the starting point is that there is a normal situation, which is considered in relation with the abstract ownership, and "abnormal" situations where certain individuals are found. The differentiated rights are directed to the normalisation of these individuals, with which the interventions seem to contain a preference for "that which is normal" as representative of human dignity.

In short, this priority contributes to the consolidation of the man who is white, bourgeois, heterosexual and socio-physically independent, as the ideal of humanity and results compatible with the survival of the power relations of those who achieve adjusting to this model against the rest. There is another element that the groups considered as vulnerable share, "their members are vulnerable to discrimination because they are members of the group", so that, "the main characteristic of the vulnerable groups is the risk for their members of being treated in a different way due to unlawful grounds based on the social stigma" (Pare 2003-2004: p. 6 and 9).

The deepening in this idea that vulnerability is closely related with risk of discrimination, as well as the revision of the image of the right holder, permits venturing a change of paradigm in the treatment of vulnerability within moral reflection, and at least, related with some groups and contexts, within positive law of human rights.

---

[7] Alexander Morawa, highlights the lack of an exhaustive list of vulnerable groups in International Law of human rights and he proposes as criteria: age, sex, ethnic group, sometimes related with the residence status" (minorities and indigenous people, rural population, persons who live in islands, persons who live in "zones with risk of disaster"), health condition, freedom condition, other conditions (Morawa 2003: p. 141).

## I.2.    A new paradigm?

According to the reflection stated above, vulnerability depends on a personal condition shared by the members of a group. The identification of a group as vulnerable based on this concept permits justifying a differentiated treatment which is directed, mainly, to the protection of the members, and adopts an almost exclusive perspective of standardisation.

Facing this model, it is possible to state that we have witnessed a change of thinking. In my opinion, the turning point of the new paradigm of vulnerability is the International Convention on the rights of Persons with Disabilities, and is formulated on three elements. The first one is the revision of the theory of justice based on rights; the second has to do with the application of the approach based on rights to treat disability; finally, the Convention introduces a social concept, and not an individualised one, of disability.

The International Convention on the Rights of Persons with Disabilities means the consolidation at international level of a conception of human rights, in which these rights are definitely separated from their abstract holder, which means a revision of the theory of justice based on rights.

Although I will go back to the idea later, we must remember that these theories establish the justification of the rules and the institutions in the protection of human rights and are characterised by universalism, individualism and egalitarianism (González Amuchastegui 2004: p. 83). So, in spite of  these assumptions the rights should correspond with all the human beings, the protection systems have been constructed in a particular way.

In effect, universalism and individualism, which have been historically established on the basis of phylosophy of human rights, have permitted justifying that the righst and the capacity to exercise them is only assigned to those who correspond with the abstract holder in the collective imaginary, that is to say, those who are autonomous and rational in the social relationships (Barranco, 2010, pp. 26 y ss.). Given that dealing with disability as a human rights issue implies the acceptance that instrumentalisation of persons with disability represents an attack against human dignity, the Convention on the rights of Persons with Disabilities represents the abandonment by the international community of a scheme in that the authentic rights are  appropiate to safeguard dignity, the man who is white, bourgeois, heterosexual and socio-physically independent. On the other hand, within the text of the Convention[8] it is clear that autonomy is not the assumption for the conferring of rights, but, in large part, the objective pursued.

---

[8] And specifically article 12 establishes the right of persons with disabilities  to "equal recognition before the law"

In short, the Convention implies the revision of the theory of the justice based on rights which may justify the International Law of human rights. A reflection which undelies it regards the way in which the different situations in which the holder can be found determines hazards for his dignity.

An important milestone in the creation of this new paradigm was the International Convention on the Rights of the Child (1990), which introduces the international system of protection of childrens' rights as human rights. In spite of the text is in line with the specification, it highlights the importance of the child's will in relation with the decisions that affect them (article 12). We must remember that the trigger of the process was the confirmation of there are some individuals, or some circunstamces in which all the individuals can be found, which may be considered as being outside of normality. The ownership of the rights resulting from the specification corresponds to these abnormal persons. This point of view, as it has been pointed out, led to paternalism, and as we will explain below, paternalism is far from an approach based on rights. From the point of view of the Convention on the Rights of the Child, not only specific rights are recognised, but also the childrens' ownership of all the human rights is highlighted.

Secondly, the Convention on the Rights of Persons with Disabilities implies a change of approach with respect to the treatment of disability, because this has become a human rights issue in the institutional agenda. The model of protection of rights of the Convention constitutes the spearhead which permits arguing in favour of an approach which is based on rights for public policies related with vulnerability.

These policies have been historically adjusted to three possible types, according to the principles on which they are inspired and the intervention agent: conservative, technocratic and social. The conservative policies are characterised because they leave in the hands of society the treatment of persons who, as those who live with disability or women, are considered to share characterisitcs with other persons which remove from "normality". From this point of view, conservative policies imply the non intervention of political power. As we can see, not to make politics (that it to say, being neutral) is a type of politics. In the particular case of disability, from this view, it refers to consequences of past actions reprehensible morally of those who suffer them or their parents. Furthermore, those persons affected represent a burden for society, therefore, it would be better that they did not exist.

Technocratic policies imply the acquisition of leadership by public power, whether in the definition as well as the implementation of policy. They are based on utilitarian arguments, so that intervention is directed to recover persons for society, or to avoid a big evil in relation with the cost of the measures. The main purpose of the policies is not the protection of rights of the persons to whom they are directed, but improving the global welfare of the society on which intervention is made.

Finally, public policies of social type are directed to the exercise of rights by the persons to whom intervention goes back. These persons are not considered as "abnormal", they are considered as representatives of human diversity. Furthermore, the definition of intervention, as well as the implementation of the same are articulated with participation of these persons. Within the context of this model, the exclusion suffered by persons with disability (and, in general, by those included in "vulnerable groups") is considered a discrimination issue and, therefore, a human rights issue.

In this way, the approach based on rights is introduced in the treatment of vulnerability, that, as is described in the Programme of Reform of the Secretary-General of United Nations in 1997, presupposes that the aim of intervention is rights, that participation is the mean and the result must be the empowerment. However, the scheme is only possible if a previous revision of the concept of vulnerability has been made, which in the case of the Convention becomes clear in the concept which manages of person with disability.

So that, the third element on which the change of paradigm is articulated is the social model of disability. We can find this new model in the definition of persons with disabilities which is stated in Article 1 of the Convention : "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". According to this, disability is a consequence of interaction between an individual condition and the existence of social barriers. From this point of view, the way in which society is organised causes disability.

Some keys to understanding the meaning of the social model and the scope of its incorporation into an international text of protection of human rights can be found in the work of Abberley, "The Concept of Oppression and the Development of a Social Theory of Disability", in which the author proposes applying the scope of the concept of disability to the concept of oppression which had been forged within the context of theories about "racial and sexual disadvantage". With this, the following is being defended "on significant dimensions, disabled people can be regarded as a group whose members are in an inferior position to other members of society because they are disabled people. It is also to argue that these disadvantages are dialectically related to an ideology or group of ideologies which justify and perpetuate the situation. Beyond this it is to make the claim that such disadvantages and their supporting ideologies are neither natural nor inevitable. Finally it involves the identification of some beneficiary of this state of affairs." (Abberley 1987: p. 7).

It is possible to conclude that, from this perspective, the difference between the normal and non-normal becomes a power issue. And the conclusion is interesting, not only in the representation of disability, but also in the reflection about vulnerability, which is bound closely with structural discrimination powers and, therefore, with the presence of oppression and domination conditions.

In this way, a vulnerable group is formed by persons that in some important aspects are found in a position of inferiority, precisely due to the quality that identify them as members of that group. Up to here, the meaning does not differ from that used in the specification process, however, this new paradigm implies to assume that the vulnerability position is justified ideologically, therefore, it does not have to be natural or inevitable; and in addition to this, "someone" benefits from this disadvantage situation.

## II.    STRUCTURAL DISCRIMINATION AND "VULNERABLE GROUPS"

When we say that a fair society is a society organised with the purpose of persons exercising their rights, we are adopting a theory of justice based on rights. As it has been shown, the acceptance of this type of theory implies assuming that equality is one of the values that must direct the ruling of institutions.

There are other conceptions about how we must organise that could lead us to justify equality. For example, utilitarianism. In contrast with utilitarianism, which is consequentialism, a theory of justice based on rights starting from the idea that actions are good or bad in essence, independently from the consequences, and furthermore, that human beings are not interchangeable.

Indeed, for those who defend a theory of justice based on rights, the state is justified to the extent that it is capable of establishing the appropriate conditions to safeguard human dignity. In other words, the aim of the political organisation is to prevent human beings from being treated as mere means. And precisely, human rights are instruments directed to safeguard persons against their instrumentalisation. Furthermore, as dignity is a common characteristic of all human beings, all of them are rights' holders.

Egalitarianism which is assumed in the theories of justice based on rights is derived from the acceptance of common dignity. However, since its origin, these theories have tended to consider that the human being of whom dignity is declared is the man mentioned above; white, and bourgeois, economical and socio-physical independent. On the one hand, such relation is based on enlightened rationalism, and, on the other hand, on political liberalism. Both conceptions assume individualism and relate dignity with moral agency, which depends on autonomy. Dignity implies being capable of choosing between choices of action and being responsible for one's own decisions.

The issue is that in the social field, when the bourgeois revolutions take place in the current United States of North America and in Europe, autonomous is the real individual described above. He is the holder of dignity and rights. Therefore, equality in this model is compatible with the idea that not all the human beings have the same value. Women, persons who must sell their work in exchange for a salary, persons with disability … if they are not autonomous likewise they are not honourable.

Equality which is included in the human rights texts at that historical moment was referred to formal equality, with which the neutrality of the state is guaranteed: through the law, differences between circumstances that in the relevant aspects are equal cannot be established. Sex, age, nationality, income, etc., are relevant from the point of view of autonomy, therefore, justify the possibility of different legal treatments in the attributing of rights. Therefore, from the point of view of public policies, the model which is justified is the conservative.

Facing this conception, there are proposals that highlight that equality of rights must go beyond formal equality. The starting point is the revision of the rationalist and enlightened idea which states that law has to be neutral. To illustrate that neutrality of liberal law was an ideological instrument which permitted disguise and legitimate, and therefore, keep in the most absolute arbitrariness, social relations of domination, the scope of wage work can be taken as example. As it is known, in the nineteenth century, Europe becomes industrialised, and the legal covering of the relationship between employer and worker is the services agreement (Gierke 1982). This contract, of civil nature, is based on free will, that is to say, the idea that employer and worker are both free, and therefore, they had to agree freely the conditions of the exchange of money for work. Law treats employer and worker equally, however, the application of equality in a situation which is materially different, contributes to disguise and perpetuate exploitation and, therefore, in fact makes the inequality worse. Such reflection is one of the principles of Labour Law, which means breaking formal equality from two points of view. On one hand, because accepting the different power situation, establishes restrictions to what can be agreed; on the other hand, because it recognises the capacity to negotiate to the collective agents who represent the workers' interest.

To understand the meaning of equality within the context of rights, it is necessary to refer to the discrimination concept, which in the Universal System for the Protection of Human Rights is explained in two texts, the Convention on the Elimination of All Forms of Racial Discrimination (1965) and the Convention on the Elimination of All Forms of Discrimination against Women, hereinafter CEDAW-(1979).

According to these instruments, "discrimination" should be understood to imply any distinction, exclusion, restriction or preference which is based on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (CCPR, General Comment 18, 10-11-1989, § 7). From the concept of vulnerability which has been stated above, we have to understand that the persons, who are susceptible to discrimination due to the reasons enumerated, are in a vulnerability situation. Protection against discrimination stated in international instruments is referred to discrimination in law as well as discrimination in fact (§9) and the states can take specific actions to grant certain preferential treatment for a time when "the general conditions of a

certain part of the population prevent or impair their enjoyment of human rights" (§10). In short, affirmative actions are being considered as an admissible solution against the discrimination suffered by some population sectors whose situation impedes or makes difficult the enjoyment of human rights.

CEDAW is especially interesting because its article 5 contains a call for the States Parties to take the appropriate measures to eliminate social stereotypes[9], reflects the ideas of the origin of discrimination against women is found in the way in which society is organised and only pointing to that organisation it is possible to face it. Therefore, it is a structural discrimination.

Structural discrimination has its roots in the presence of social stereotypes that assign the discriminated persons subordination roles, but theories of rights have been enunciated on two assumptions which make them impervious to vulnerability as it is understood: individualism and the definition of political freedom as non interference.

As has been mentioned above, theories based on rights are individualist. Individualism implies that human beings are capable of choosing and being responsible for their actions. Moral agency depends on it and, therefore, the assignment of rights. When social stereotype denies the person the capacity to choose (and it happens with women, children, elderly persons and persons with disabilities), one of the characteristics that is unanimously considered as distinctive of human dignity is also denied. For this reason, the exclusions and restrictions of fact are considered as justified and, sometimes, these exclusions and restrictions are protected legally.

On the other hand, human rights appear as a theory bound to political liberalism and to the idea of freedom as non-interference. From this model, it is considered that rights form a barrier around the holder within which his will is sovereign. The matter is that, when stereotypes become persons dependent on other persons, the rights serve to legitimise and strengthen the power relationships produced in private spaces.

Nancy Fraser distinguished between the groups of persons that have been traditionally considered as vulnerable in terms of two categories of injustice: socioeconomic and cultural. While the first one has to do with "the lack of movable goods essential to lead a decent life", the second is shown in behaviours such as cultural

---

[9] According to this order, "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases".

domination, non recognition and disrespect (Fraser 1997: p. 21 y 22). Both injustices generate inequalities because they place some groups of persons at a disadvantage in relation with others. The author considers that social policies that try to correct the distribution and recognition of problems without paying attention to the causes are not satisfactory. In some way, this has been the direction marked by the specialisation process and a part of the problem is derived from it: the results of the exclusion of individuals not considered as normal are corrected, but the distinction between those who are normal and abnormal is not called into question.

For her part, Iris Marion Young considers that distributive theories (and this criticism can be applied to Fraser's approach) do not consider the aspects related with taking decisions, social division of work and culture and, therefore, they are not appropriate in relation to the two big consequences of structural discrimination: oppression and domination.

Oppression becomes an obstacle for self development, from the moment it affects the possibility of expressing one's own feelings, perspectives and interests. It is a direct consequence of the denial of moral agency, and it is shown through exploitation phenomena, alienation, lack of power, violence and also through the cultural imperialism. For its part, domination affects the capacity to decide one's own actions. Whether the first, as with the other, derives from the denial of the moral agency and is strengthened by the liberal construction of rights, the main problem of these type of theories (that Marxist proposals do not solve) is that they do not take into account that society generates in large part the identities and capacities. A social concept of vulnerability, such as the one applied by the International Convention on the Rights of Persons with Disabilities to disability is fully in tune with this criticism (Young 2011: pp. 15-38).

From this point of view, vulnerability has been considered, in large part, from anti discrimination law. This strategy means, amongst other issues, breaking up the idea that law and state are neutrals. And precisely, the survival of discriminatory structures permits the justification of affirmative action measures (Carter 1991).

Such types of measures have adopted different manners, for example in United States, where in the labour field and in relation with racial and sexual discrimination, different techniques have been developed, as jurisprudence of "disparate impact" or the "impact treatment", which implies a reversal of the burden of the proof and, since 1979, of the "voluntary affirmative action" (Higgins and Rosenbury 2000).

### III.     VULNERABILITY, NORMALITY AND POWER. SOME EXAMPLES.

I am going to refer to three particular vulnerabilities in this section, which affect women, related to sex; and those that affect children and elderly persons, which are associated with age.

These exclusions share and have in common characteristics with those persons affected with disabilities that are justified in the presence of a natural circumstance that is considered as an obstacle for autonomy, and, therefore, a justification for the persons that under these conditions are subject to other persons' power.

In all these cases, we find structural discriminations strengthened historically by law. In the same way that law strengthens discrimination, it may contribute to compensate it; however, accepting that discrimination is structural implies that law, by itself, is not enough to guarantee equality conditions. And this situation is appreciated clearly in the case of women and elderly persons.

In the case of women, the origin of "vulnerability" is placed with sexism. Enlightened feminists have denounced, from the beginning of liberal revolutions, the exclusion of women. However, the recognition of this as structural discrimination is built from the radical feminist criticism.

That initial exclusion was not spontaneous or thoughtless. On the contrary, there was a determined positioning by republicanism in favour of the natural character of inferiority of women. It is interesting to remember Kant's reflection on excluding women and wage workers from active citizenship. According to this author, neither women nor wage workers are autonomous, therefore, their will is irrelevant for the determination of the general will (Kant 2004: p. 149). Among other reasons, in the case of women, this lack of autonomy derives from their incapacity to choose, which is produced by their lack of training and their added incompetence for abstract reasoning. Only in the last point, Kant agrees with Rousseau, who, precisely in their works about education (Rousseau 1985), point out the need that women's training has to be consistent with their feeling nature.

Against this characterisation of female condition, Wollstonecraft (1792: p. 55) had highlighted the reason as being the distinctive characteristic of the dignity of human being: "the perfection of our nature and capability of happiness must be estimated by the degree of reason, virtue, and knowledge that distinguishes the individual, and directs the laws which bind society. And that from the exercise of reason, knowledge and virtue naturally flow is equally undeniable, if mankind be viewed collectively." Since woman is a part of mankind, she has, as man, the condition of being rational, so that the lack of reasoning by women, as a specifically human faculty, is only due to the education received.

As in the case of other exclusions, the enlightened thought and use a natural condition, sex, to justify the social inferiority of woman. Mary Wollstonecraft highlights that the predisposition of woman towards emotion is not natural, but it has been built culturally. All of that is independent from the criticism of the idea that she maintained about the male is the ideal of the human, and, therefore, her purpose is to make women equivalent to men, with a certain scorn of "female".

In this line, Simone de Beauvoir, points out that "woman is determined not by her hormones or by mysterious instincts, but by the manner in which her body and her relation to the world are modified through the action of others than herself; the abyss that separates the adolescent boy and girl has been deliberately widened between them since earliest childhood; later on, woman could not be other than what she *was made*, and that past was bound to shadow her for life. If we appreciate its influence, we see dearly that her destiny is not predetermined for all eternity" (Beauvoir 1998: p. 896). However, against enlightened feminism, but also against the liberal feminism of the twentieth century, S. de Beauvoir added two elements of great significance for a posterior reflection. On the one hand, social subordination of women has benefited men, and economic transformation is not enough to subvert this order. On the other hand, the solution of considering woman and man equal has been a failure: "the woman of today is torn between the past and the future: She appears most often as a "true woman" disguised as a man and she feels herself as ill at ease in her flesh as in her masculine garb. She must shed her old skin and cut her own new clothes. This she could do only through a social evolution" (Beauvoir 1998: p. 896). And this diagnosis of Simone de Beauvoir permits a better understanding of the scope of women's "vulnerability", but also of all those persons, such as children, elderly persons or persons with disabilities who are identified as group by a supposed natural condition.

Radical feminism goes into these arguments in depth from its recognition of the politicisation of private life. So that, the motto 'the personal is political' (Hanish 1970) constitutes a call for attention on the fact that also power relations have been established in private relations that favour men, and within these relations the conditions that prevent women from reaching equality are constituted, in spite of the fact that legal obstacles have been eliminated. This reflection permits justifying the intervention of law and rights in that space, which had been impermeable up to now, and can be applicable to other vulnerability situations.

On the other hand, radical feminism adopted the category of gender "to insist on the inadequacy of existing bodies of theory for explaining persistent inequalities between women and men" (Scott 1990: p. 43). This instrument, which appeared at the end of the twentieth century, attempts to be used for showing how from the biological circumstance of sex, since from the time human beings are born, they are given a series of characteristics which imply also the share of social power. Female characteristics (which are attributed to women) will suppose their higher aptitudes to develop care tasks, for persuading and getting on in the private field. On the contrary, male characteristics are defined through appropriate features for

calculating interest, authority and performance in public spaces. Women will stop being vulnerable when this system is dismantled, a system where men had been the main beneficiaries.

Equality feminism and difference feminism debate over which is the aim from this point. To explain the scope of the discussion in terms of vindication of rights, it is advisable to remember the sense of the historical processes of generalisation and specification (Bobbio 1991). Both are constructed as a succession of responses against the incoherence between the formal proclamation of equality and the effective situation of inequality. The process of generalisation supposes the extension of "citizenship" to some that were only "men" before and to some that not even had this condition. We must remember that the process of specification is produced when situations are considered in which the material inequality of individuals belonging to some groups prevent the effective enjoyment of the recognised rights. So, equality feminism and difference feminism would lead to different answers to the question concerning the appropriate strategy in relation to the effectiveness of women's rights as to whether it is generalisation or specification.

In any case, it seems that the debate about which qualities are specifically female cannot be carried out insofar as, firstly, the foundations for generalisation have not been laid and, secondly, the moral and political theories have not been revised from a gender focus.

Women have come to have the same rights than men attributed formally, however, there are many influential groups in our societies that continue to present them as incomplete human beings who are not worthy in the same sense as men. This incomplete character of women is the real ground which justifies the worse treatment that women receive (and which is reflected in realities such as the horizontal and vertical segregation in the workplace, or the scorn of her integrity and her life)[10] are not considered incoherent with the proclamation of equality.

The type of discrimination that affects persons of advanced age and children can be considered as "ageism" and is shown in a different way in the two cases. In the case of children, the exclusion is formal, given that minor age is a commonly accepted argument to justify a differentiated treatment. In the case of elderly persons, the exclusion is not formalised, but we will see how stereotypes associated with advanced age justify equally discrimination.

---

[10] "Sex discrimination kills women daily. When combined with race, class and other forms of oppression, it constitutes a deadly denial of women's right to life and liberty on a large scale throughout the world. The most pervasive violation of females is violence against women in all its manifestations, from wife battery, incest, and rape, to dowry deaths, genital mutilation and female sexual slavery. These abuses occur in every country and are found in the home and in the workplace on streets, campuses, and in prisons and refugee camps. They cross class, race, age, and national lines; and at the same time, the forms this violence takes often reinforce other oppressions such as racism, "able-bodyism", and imperialism" (Bunch 1990, 489).

Rarely have the texts of positive law contained children' rights and, on the contrary, frequently the notions of "protection" and responsibility appear in the titles of the rules. Children' rights not only do not appear to a large extent in the language of legal rules, but also their inclusion in the theory of rights is relatively recent and  is bound to the process of specification.

For the liberal conception of law and rights, minors are incapable (Fanlo, 2004, p.8) and the consequences are, mainly of patrimonial type. The minor acts in the economic traffic by representation. In this approach, there is only one subject of law and the capacity, related with age, is acquired also in a specific moment. Children's rights do not exist because rights are assigned to men and citizens. Children may have attributed formally the same rights as adults, however, from this liberal reflection, they are incomplete human beings, as women and persons with disabilities were, because they are not autonomous. Again there is a natural circumstance that affects the possibility of giving the children the same treatment as adults. In the relevant circumstance for the attribution of rights, the legal age, is not equal to adults, for this reason, it is not an exception to the equality principle that children cannot exercise many of their rights by themselves or in relation to others (as political rights) as they do not even have conferred ownership.

The Convention on the Rights of the Child was adopted by the General Assembly of United Nations on 29 November 1989, constituting the first legal-international instrument in this matter of binding nature and, also, adopting a starting point that is very different from that of other documents about children, because in this context we find an express reference to the child as a holder of rights. Effectively, within the Convention, a child's rights are not rights of the adult he will become in the future, but rights that take into account, on the one hand, the specific circumstances affecting children and, on the other hand, that children are worthy as children (and not as potential adults), therefore, it is important to implement rights that take into account these differences to avoid children being treated as mere means[11]. It has been already pointed out that this is an important aspect from the point of view of the history of rights, because it implies the incorporation of a diversified image of the rights' holder to positive law of human rights.

On the contrary, generalisation has not had big repercussions in positive law that affect the configuration of childrens' rights. Timidly, under the Convention mandate, national legislations will include references to the need of considering the child's view in all matters affecting him, but in these situations, the responsibility of determining the degree of "autonomy" of the child usually falls on the person who receives the consent, who may be subject of a posterior control. In spite of the scarce consideration that the minor's will deserves today, there are approaches that, from the verification of the evolving

---

[11] An example of this type of rights can be found in the *Convention on the Rights of the Child*, Article 9.1 which states that a child shall not be separated from his or her parents, or in Article 31.1 which recognises the right of a child to engage in play and recreational activities.

capacities of the child (Lansdown 2005), propose a reconsideration of the limit of full age as fixed data for the effects of attributing some rights. In a significant way, this reflection affects political rights, but also to the consideration of their will, to which I have just referred (Campbell 1992).

As it has already been pointed out, child vulnerability maintains a clear parallelism with the formal exclusion of women and persons with disabilities, because in both cases, a natural condition is referred to which becomes an obstacle for moral agency. When rights depend on this moral agency, and furthermore children are not considered as moral agents, they are not holders of rights in the moral field. From this point of view, the positive rights that can be attributed to them are not justified by moral rights. Rather the foundations of these rights will be constituted by the obligations of other subjects. Moral rights protect the exercise of moral autonomy; therefore, it only makes sense to assign them to the subjects which are morally autonomous. On the other hand, these theories presuppose the idea that the exercise of rights has to be at their holder's disposal, given that, in no way interferences with respect to the freedom of moral agents can be justified if they are not directed to avoid damage to third parties. Some authors who start from this idea about rights, however, think about the possibility of attributing rights to some children who precisely have achieved a level of autonomy comparable with adults. In some way, the recognition of the agency is determined by scientific studies about the process of acquisition of capacities by children, which may also vary in the different cultural and economic scenes.

If children acquire their rights as their capacities progress, until they reach a sufficient level of development, we can only justify their protection (not their rights) based on the imposition of duties to other subjects, in other words, we should talk then about duties towards children. However, we should put the same level of moral quality on small children (and, we could say, of the persons who do not reach the required level of autonomy) as we do for the protection of animals, the good of general interest or the environment contradict our moral institutions. Within a context where moral theories are based on rights, the attribution of rights supposes to offer an argument which is out of the calculation of interests, children have to have rights. If a theory cannot reflect this situation, this theory is not appropriate. From this point of view, the revision of the idea of agency which justifies the scope of the International Convention on the rights of Persons with Disabilities makes sense, and specifically, article 12 (Cuenca 2012).

The first difference between ageism referring to children and the elderly is that the presence of explicit references to the elderly in positive law is scarce. Socially, a person is considered as older from 60-65 years. This definition is arbitrary and it only makes sense in a westernised context[12], for this reason, functional (and not chronological) delimitations are also proposed about what becoming older implies. Legally, there is not a definition of older person. The nearest category is retirement, which is related to a westernised concept, but

---

[12] http://www.who.int/healthinfo/survey/ageingdefnolder/en/#, consulted on 25 April 2013.

not all older persons are retired because for this, retirement systems have to exist and also to be active. Recently, the idea of old adults has been usually related to the idea of a dependent person, although there is not a necessary relation in this case (Barranco y Bariffi 2010). Maybe for this reason, direct formal discriminations have not been frequent, historically, but they are in fact indirectly discriminated subjects, to the point that the inclusion of rules prohibiting and penalising discrimination due to age are claimed.

Unlike the children situation, the elderly are not considered to be legally incapable, therefore they have full legal capacity and capacity to act (except for formal incapacity). But this legal comparison does not mean that older persons may exercise their rights under the same conditions. In spite of the incidence of discrimination of all the texts of the universal system, only the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families bans discrimination due to age in article 7 (1990)[13] –the same does not happen in the European Union or in Spanish law, where age has become one of the prohibited bases for discrimination.

Considering these deficiencies, the General Assembly adopted a resolution on 13 February 2013: "Towards a comprehensive and integral international legal instrument to promote and project the rights and dignity of older persons" (A/RES/67/139), "*Acknowledging* that there are numerous obligations vis-à-vis older persons implicit in most core human rights treaties but that explicit references to age in core international human rights treaties are scarce, that there is no such instrument for older persons and that only a few instruments contain explicit references to age", encouraged by the increasing interest of the international community in the situation of older persons.

This interest is due to the ageing of the population (from 1950 to 2010 life expectancy in the world has increased from 46 to 68 years and in 2050 it is foreseen that persons older than 60 years will exceed 20% of world population), and it is reflected in the policies and programmes related with health, welfare and social security carried out in the last 10 years.

However, at this moment, elderly persons do not exist as a legal category (unlike minors), therefore there is traditionally a situation of formal equality. However, that formal equality has been historically compatible with situations of material inequality and discriminations caused indirectly, which assume a structural nature and are related to a social perception of old age.

We have seen how protest movements related to women and children have been reflected in international documents of positive law and also in the internal legal systems. In

---

[13] *Strengthening older people rights. Towards a UN Convention,* http://social.un.org/ageing-working-group/documents/Coalition%20to%20Strengthen%20the%20Rights%20of%20Older%20People.pdf*, consulted on 22 April 2013.

the case of elderly persons, the situation is different, except for the timid manner pointed out. Partly, it is due to a social conception of old age which prevails in our cultural context and is characterised by a series of pejorative connotations.

Old age is something to avoid, the elderly are a burden for the Social Security and Health Systems –they consume a lot of resources– and, in addition to this, they cannot work (Walker 1999). In general, this attitude is known as "ageism" (Melero y Buz 2005) –due to its similarity with sexism or racism– and it supposes the appearance of behaviour that goes from the rejection of violence passing through discrimination. Maybe this attitude that is again based on stereotypes that do not correspond with scientific evidence is the reason why older people had been the big forgotten in the generalisation. In addition to the negative repercussion of the treatment that others give to old persons, this image is also shared by its own subjects, so that they stop recognising themselves as creditors of equal dignity and respect, in other words, as holders of rights. On the other hand, the lack of attention to the subordination structures established leads to present as free decisions that have been conditioned, as in the case of women (Añón 2010).

In fact, as it has been pointed out, different documents highlight that interest in the elderly is explained more by the statistical verification of old age and longevity and the bond with the gender problem than an awareness of their traditional exclusion in the system of rights. In some way, the purpose is inventing formulas that avoid the collapse of the pension and health systems, as well as "free" women. I think that it is necessary to redirect public policies directed to old persons and reconsider them as policies of rights. Only if the rights of older persons are moral rights, they are represented as demands that are necessary to meet. Furthermore, the current tendency does not consider autonomy of persons of advanced age.

This is a particular situation within the context of the history of rights that cannot be considered equal to the women and children situation and that, in relation with those, has meant that the elderly be excluded from freedom and equality, meaning they have been victims of domination and, in the most extreme situations, of mistreatment socially accepted. In relation to the vulnerability of the elderly, it is extremely important to recover the feminist reflection that the personal is political.

Effectively, we must remember that the distinction between public and private, with respect to our interests, frequently results in the actions affecting women, children and elderly being included in the privacy scope and, therefore, being considered as expressions of freedom legally protected by husbands, parents, guardians, or in the case of elderly, caregivers. The "violations" of rights by relatives remain, from this dichotomy, out of the political scope.

On the other hand, the conception of rights as barriers against interferences which correspond with their first formulations within liberalism, means forgetting that human beings cannot develop all their faculties fully without the help of some "interferences" from other

subjects (parents, teachers, partner, children….); and, which is especially important in the case of women, children, elderly and other persons considered traditionally as "vulnerable", the lack of interferences is compatible with the survival of situations of arbitrary domination which many times pose a threat, and even an obstacle, for development (for example, we must remember that parents enjoy *parental authority* in relation to their children).

Furthermore, in all these cases an addition of discriminations is carried out. In this way, the problem is even more pressing when exclusion by age is added to exclusion by gender and even more so when different situations coincide, such as with disabilities, cultural or ethnic or sexual minorities and being immigrant.

## REFERENCES

ABBERLEY, P. (1987) "The Concept of Oppression and the Development of a Social Theory of Disability", *Disability, Handicap and Society,* vol. 2, nº1, pp. 5-19.

AÑÓN ROIG, M. J. (2010) "Autonomía de las mujeres: una utopía paradójica", in RAMIRO, M. Á, y CUENCA, P., Dykinson, Madrid, pp. 127-162.

BARRANCO AVILÉS, M.C., (2010) *Diversidad de situaciones y universalidad de los derechos,* Dykinson, Madrid.

BARRANCO, M.C. Y BARIFFI, F. (2010) "La Convención Internacional sobre los Derechos de las Personas con Discapacidad y su potencial aplicación a las personas mayores", *Informes Portal Mayores*, nº 105, Madrid.

BEAUVOIR, S. (1998) *El segundo sexo* (1949)*,* trad. A. Martorell, Cátedra, Madrid.

BOBBIO, N. (1991) "El tiempo de los derechos", *El tiempo de los derechos,* trad. R. de Asís, Debate, Madrid, pp. 97-112

BUNCH, Ch. (1990) "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights", *Human Rights Quarterly*, Vol. 12, No. 4, pp. 486-498.

CAMPBELL, T. D. (1992) "The rights of the minors: as person, as child, as juvenile, as future adult", *Children, Rights and de Law,* ed. Ph. Alston, S Parker, J. Symour, Clanedon Press, Oxford, pp. 1-23. In Spanish in FANLO, I. comp. (2004), *Derecho de los niños. Unacontribuciónteórica,*Fontamara, México, pp. 107-141.

CARTER, S. L. (1991) *Reflections of an affirmative action baby,* Harper Collins, New York, 1991.

CUENCA, P. (2012) "Sobre la inclusión de la discapacidad en la teoría de los derechos humanos", *Revista de Estudios Políticos,* nº 158, pp. 103-137.

FANLO, I., (2004) "Los derechos de los niños ante las teorías de los derechos. Algunas notas introductorias", in FANLO, I. (comp.), *Derechos de los niños. Una contribución teórica,* Fontamara, México, pp. 7-37.

FRASER, N. (1997) *IustitiaInterrupta. Reflexiones críticas sobre la condición "postsocialista",* Siglo del Hombre- Universidad de los Andes*",* trad. M. Hoguín e I. C. Jaramillo, Siglo del Hombre-Universidad de los Andes, Bogotá.

HIGGINS, T. E., ROSENBURY, Laura A. (2000) *"*Agency, Equality, and Antidiscrimination Law", *Cornell Law Review*, nº 85, pp. 1194-1220.

LANSDOWN, G. (2005) *La evolución de las facultades del niño,* UNICEF.

FORDHMAN, M. (2007) "Social vulnerability and capacity", *Natural Hazard Observer,* vol. XXXII, 2, pp. 1-3.

FEDERACIÓN INTERNACIONAL DE SOCIEDADES DE LA CRUZ ROJA Y DE LA MEDIA LUNA ROJA (2006) *¿Qué es el AVC? Introducción al Análisis de vulnerabilidad y capacidad,* http://www.ifrc.org/Global/Publications/disasters/vca/whats-vca-sp.pdf, consultada el 30 de abril de 2013.

GIERKE, O. von (1982) *Las raíces del contrato de servicios,* trad. G. Berreiro González, Civitas, Madrid.

GONZÁLEZ AMUCHASTEGUI, J. (2004) *Autonomía, dignidad y ciudadanía. Una teoría de los derechos humanos,* Tirant lo Blanch, Valencia.

HANISH, C., *The personal is political* (1969) in FIRESTONE, SH. Y KOEDT, A. (ed.) *Notes from the Second Year: Women's Liberation*, Radical Feminism, New York.

KANT, I. (2004) *Principios metafísicos del Derecho* (1797)*,* edición de Francisco Ayala, Espuela de Plata.

HANDMER, J. (2003) "We are all vulnerable", *The Australian Journal of Emergency Management*, Vol. 18 No 3, pp. 55-60.

MELERO MARCO, J. y BUZ DELGADO, J. (2005) "Modificación de estereotipos sobre mayores. Análisis del cambio de actitudes", *Estudio de I+D+I,* nº 9, IMSERSO, *Estudios I+D+I*, nº 9, http://www.imsersomayores.csic.es/documentos/documentos/imserso-estudiosidi-09.pdf, consultada el 24-4-2013.

MORAWA, A.H.E. (2003) "Vulnerability as a Concept of International Human Rights Law, *Journal of Intenational Relations and Development¸* vol. 6, nº2, pp. 139-155.

PARE, M. (2003) "Why Have Street Children Desappeared- The Role of International Human Rights Law in Protecting Vulnerable Groups", *International Journal of Children's Rights,* 11, 2003-2004, pp. 1-32.

PECES-BARBA, G. et. al. (1995) *Curso de derechos fundamentales,* B.O.E.-Uc3m, Madrid.

ROUSSEAU, J. J. (1985) *Emilio o de la Educación* (1762)*,* trad. Luis Aguirre Prado, Edaf, Madrid.

SOLBAKK, J. H. (2011) "The principle of respect for human vulnerability and global Bioethics", in CHADWICK, R. et al. (eds), *Health Care Ethics in an Era of Globalisation*, SAGE. In Spanish in "Vulnerabilidad: ¿un principio fútil o útil en la ética de la asistencia sanitaria?, *Revista Redbioética*, Año 2, 1(3), pp. 89-101.

WALKER, A. (1999) "Actitudes hacia el envejecimiento en europa. Una comparación de los eurobarómetros de 1992 y 1999", consulted on 24 April 2013.

WOLLSTONECRAFF, M. (2005) *Vindicación de los derechos de la mujer* (1792)*,* edited by Marta Lois, Istmo, Madrid.

YOUNG, I. M. (2011) *Justice and the Politics of Difference,* 2ª edición, Princeton University Press, New Jersey. Spanish version by Silvina Álvarez, Cátedra, Madrid, 2000.