

Vulnerability as a basis for Justice and equality in the Nordic countries.

Introduction

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Martha Albertson Fineman has for several decades been a leading feminist legal theorist and is among the founders of the field. She is the director of the Feminism and Legal Theory Project, which is entering its thirtieth year of operation. Her current research programme, the Vulnerability and the Human Condition Initiative, is directed at finding new ways to reformulate existing legal and social bases for global justice.

The vulnerability approach, as outlined by Fineman, has gained considerable interest internationally, and is currently being seriously explored in a series of workshops and publications, attracting an expanding international research community. In the Nordic countries, the Faculty of Law at Lund University has launched the research group Law and Vulnerabilities, and appointed Fineman a Hedda Andersson Visiting Professor. In 2013 Fineman also received an honorary doctorate from Lund University.

Fineman was first introduced to a Scandinavian readership in an interview in *Retfærd* in 2011.¹ The newly established Nordic Women's University, based in Norway, funded a theory project that included hosting the first workshop with Fineman in Scandinavia to explore the possible relevance and applicability of the vulnerability approach in a Nordic context. The workshop, held in August 2012, was co-organised with the research group Law and Vulnerabilities at Lund University and the University of Oslo Faculty of Law, and attracted scholars from Norway, Sweden, Denmark, Belgium and Switzerland, and from different disciplines, including law, sociology, social anthropology and theology. The papers demonstrated the possible applicability and relevance of the vulnerability approach in the Nordic context, and we are happy to have been invited by the journal *Retfærd* to present this special issue based on the workshop.

While often seen as models for, and exporters of, welfare state policies, the Nordic countries are actually net importers of theories of justice.² During a period in which

1 Selberg and Wegerstad (2011)

2 See for instance the recent collected volume titled *Rettfærdighet* [Justice], edited by Halsaa and Hellum (2010), in which the vast majority of contributors draw on a pool of well-known international theories rather than home grown ones.

the Nordic model³ is under pressure due to a number of causes, there is a need of new approaches and theorizations of the relations between the state and the individual and a further theoretical grounding of the rationale for states and of state obligations.

The Nordic welfare states are at a crossroad. On one hand, there is increasing interest internationally, both politically and scholarly, in the Nordic model. On the other hand, the Nordic model is increasingly being challenged and transformed from within. Although the Nordic countries continue to rank at the top of the most egalitarian countries in the world in international comparisons,⁴ income inequality is rising. In Sweden, neo-liberal policies have led to the fastest growing inequality in any OECD country.⁵ The Swedish economist and former Deputy Governor of Sveriges Riksbank Lars E.O. Svensson received a great deal of attention after he left the Sveriges Riksbank, arguing that the recession and persisting unemployment in Sweden, including an alarmingly high unemployment rate among young people, was the result of a too strict monetary policy.⁶

Svensson's critique illustrates how states and their institutions and policies, including macro-economic policies are pivotal in the production of privilege and disadvantage, which is a major emphasis of the vulnerability approach. A vulnerability analysis draws attention to the mechanisms and institutions through which injustice arises and is reproduced and reveals how institutions at both a national and global scale operate in ways that privilege some and disadvantage others. The fact that these institutions are the product of law and regulated through law places states at the center of the approach: states are ultimately responsible for the operations of the institutions and mechanisms that cause injustice. At the same time, states also have in their power to create institutions and secure the just operation of systems and mechanisms as well as to raise and allocate resources. An example which has received increased attention from human rights organizations as well as from scholars, such as economists drawing on a human rights framework⁷, is the effectiveness and operation of tax collection. There is an obligation flowing from the human rights mandates for states to build capacity to effectively collect taxes and to reduce tax evasion in order to raise the

3 The Nordic model refers to the economic and social models of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland). Despite significant differences among them, they share some important common traits, such as support for a universalist welfare state which is aimed at enhancing individual autonomy, promoting social mobility and ensuring provision of basic human rights, as well as stabilizing the economy. Another important feature is its emphasis on maximizing labour force participation and promoting gender equality, extensive benefit levels and wealth redistribution, and liberal use of expansionary fiscal policy. See Brandal, Bratberg and Thorsen (2013).

4 Wilkinson and Pickett (2010)

5 The Guardian (2013)

6 Svensson (2013)

7 Elson and Balakrishnan 2011

necessary revenue to provide social security and necessary services such as education and health care. The vulnerability approach could be combined with to both advance and represent a theoretical grounding of this kind of thinking.⁸

Over the last three decades, the public sector in all the Nordic countries has to a larger or smaller extent been subject to neo-liberal re-organisations, privatizations and the introduction of more business like models, including market simulacra or quasi-markets. This has the potential to radically change the nature of the public sector as well as transform the relations between the state and its citizens. Globalization, work migration, unemployment and welfare cuts within the EU and the recession in Europe after the financial crisis, as well as internal factors, among them neo-liberal policies and demographic trends such as aging populations, have put further pressure on the Nordic welfare states. There is a current and pressing concern about their sustainability. In this situation, there is a need for fresh theories addressing the relations between people and the state, as well as for theories engaging with the rationale of states and of states' obligations towards their inhabitants.

Although Scandinavian Women's Law and Gender studies from an early stage developed their own theories of justice and equality⁹, there is today a net import of theories even in these fields. Theories of justice and equality in the Nordic countries today typically draw on an international pool of thinkers, among them John Rawls, Susan Moller Okin, Amartya Sen, Martha Nussbaum, Nancy Fraser, as well as identity theorists such as Axel Honneth and Emmanuel Levinas.

When explaining how she arrived at the vulnerability approach, Fineman says it began as a strategy of stealth, producing human rights thinking, tailored for an American audience, but starting from the 'human', rather than the 'rights' side of the human rights trope. It has grown well beyond that initial ambition, however, and is now seen as relevant for any system where autonomy and independence are argued to be desirable and attainable primary objectives. Of course, it is legitimate to ask: do we need another theory of justice developed in the US? Is it relevant outside of the United States, and in particular in the Nordic countries, which to some extent can be said to represent the kind of responsive state called for in Fineman's vulnerability approach? With high interest internationally in the Nordic model and the current challenges to it within the Nordic countries, the answer might well be 'yes.'

The vulnerability approach is the last stage so far, of Martha Albertsson Fineman's long involvement with feminist legal theory, during which she has continually broad-

8 Bjørnholt and McKay (2014)

9 Among a number of noteworthy contributions, Tove Stang-Dahls's theorization of women's economic citizenship, Yvonne Hirdmann's sex/gender system, Berit Ås' theorization of "women's culture" and its double role in the subjugation as well as liberation of women, Hanne Haavind's and Anna G. Jónasdóttir's theorizations the role of gender identity and the exploitation of love power, respectively, as the origin(s) of gender inequality.

ened her scope, from family and gender relations, to theorizing dependency, and, most recently, to vulnerability as a universal human condition. By taking the shared, human condition of vulnerability as embodied beings as a point of departure, the vulnerability approach reorganizes the relations between individuals and society. It emphasizes state obligations to provide the resources and institutions that generate resilience towards the inevitable dependencies and misfortunes, as well as the positive opportunities and challenges that define human life. The vulnerability approach is a theoretical and philosophical reconceptualisation of the basis for society and the relations between the state and its citizens and challenges the view of the individual as free and autonomous, as commonly expressed in most other theories of justice and traditional jurisprudence.

In challenging the basic assumption of the liberal subject the vulnerability approach draws on and expands theorizations of care¹⁰ and dependency¹¹, as well as the critique within feminist economics and other critical perspectives within heterodox economics, criticizing the assumption of *economic man* as the main assumption of human behaviour and the basis of society.¹² Following this critique, Margunn Bjørnholt and Ailsa McKay argue that *homo economicus* should be replaced by *homo socius*.¹³

Seeing vulnerability as universal also implies seeing human constructs like institutions and states as vulnerable. In the wake of the financial crisis, it is generally acknowledged that the response to the crisis has been to let the most vulnerable shoulder the costs of rescuing the banks and balancing the budgets. Drawing on the notion of universal vulnerability and pointing out that resilience comes from resources, which are often provided or allocated by states, Fineman argues that states have been much more responsive to the vulnerability of global corporations in the financial sector than to the vulnerabilities of households and individuals.¹⁴

In explicitly drawing attention to institutions and the allocation of resources the vulnerability approach also challenges identity politics and the concept of recognition as formulated by Axel Honneth, as well as more psychological approaches such as that of Emmanuel Levinas.

With its origin in human rights thinking and feminist care ethics the vulnerability approach bears a family resemblance with older more familiar theories drawing on the Human Rights, particularly the capability approach, launched by Amartya Sen and

10 Theorizations of care is one of the major contributions of Scandinavian research on work and family. Kari Wærness (1984) coined the concept *rationality of caring* and Bjørg Åse Sørensen (1982) introduced the concept *rationality of responsibility* in order to explain how women's adaptations of work and care followed a different logic than the market logic.

11 Fineman (2004)

12 Within the feminist legal theory project, Fineman and Dougherty (2005) co-edited *Feminism confronts homo economicus*

13 Bjørnholt and McKay (2014)

14 Fineman (2013)

elaborated on by Martha Nussbaum. There is obviously some resemblance between these approaches: both challenge the assumption of the liberal subject, and both take as their starting point the vulnerability of embodied beings. However, while the capabilities approach focuses on human dignity, the vulnerability approach, in contrast, focuses on institutions and their role in allocating the resources that provide resilience and the state responsibility for those institutions. One could ask if resilience is not just another word for capabilities, but the centering of both institutions and the way resilience is acquired by individuals over their life course in interrelated systems of social, economic, cultural, and familial relationships marks the focus of vulnerability as unique. Eking out in more detail the commonalities and differences between these approaches could be very interesting.

Another interesting theoretical “neighbour” is Nancy Fraser. Fraser emphasizes the equal right to participation, *participatory parity*, as the measure of a just society, seeing cultural recognition, economic redistribution and political democracy as three necessary and equally important dimensions. In her well-known exchange with Axel Honneth¹⁵, she has criticized the move from redistribution towards recognition and identity policies. In Fraser’s conceptualization cultural recognition applies to status rather than to identity, and she argues that we need to distinguish between cultural injustice and economic injustice, while at the same time acknowledging that they are intertwined. There are definitely similarities with Fineman’s vulnerability approach and its focus on the different kinds of resources which are seen as necessary for providing resilience. The resource aspect of the vulnerability approach is presented and explored in Bjørnholt’s contribution to this volume. One important difference would be that by focusing on participation, Fraser focuses on the individual, not the institutional and implicitly assumes an able-bodied and able minded adult subject, capable of participation. In addition, by focusing on universal vulnerability, Fineman’s vulnerability approach on the individual level is more inclusive, including all embodied individuals, regardless of their ability to participate in society. As with the capabilities approach, it would be interesting to do a systematic analysis of Fineman’s vulnerability approach as compared to Fraser’s.

The possibilities of combining the vulnerability approach with other approaches also needs further exploration. Bjørnholt and McKay¹⁶ suggest combining the vulnerability approach with the framework for evaluating macro-economic policy according to the Human Rights, developed by Diane Elson and Rhadika Balakrishnan and Elinor Ostrom’s work on governing the commons.¹⁷

15 Fraser and Honneth (2003)

16 Bjørnholt and McKay (2014)

17 Elson and Balakrishnan have presented their arguments and analysis in a number of publications. The book, (2011) presents the framework based on a comparative analysis of USA and Mexico; Ostrom, the first woman who was the winner of The Sveriges Riksbank Prize in Eco-

The implications of Fineman's vulnerability analysis are possibly far-reaching, with wide-ranging implications even for Nordic countries. The contributors to this special issue explore the relevance and possible uses of the vulnerability approach in a Nordic context, from different disciplines, perspectives and countries.

In her chapter, Swedish law professor Titti Mattsson discusses whether the Ombudsman institution can become a useful tool for the state to provide resilience towards the inevitable age-related and situation-based dependencies in life, asking whether it is reasonable to argue for an expansion of the Ombudsman office also to include an Ombudsman for the elderly.

Norwegian sociologist Margunn Bjørnholt applies the vulnerability approach to gender equality in the Norwegian context and discusses whether the vulnerability approach could be a way of re-conceptualising gender equality in a way that acknowledges both difference and equality. Taking the critiques of Norway from the CEDAW committee in the last hearing of the status on women in Norway as a starting point, the paper focuses on the gendered distribution and the gendered access to resources that provide resilience and to the institutions that reproduce male gender privilege and female marginalization in Norway today.

Danish social anthropologists Bo Wagner Sørensen & Sofie Danneskiold-Samsøe present a study of women of ethnic minorities, who are either marriage migrants or successive victims of violence, that is, women of ethnic minority origin who experience violence from different perpetrators over time, often both in childhood and adulthood. The analysis demonstrates how the risk of stigmatization can be reduced if we construct our categories as inclusive and encompassing, and if we focus on the social position of vulnerable subjects, not on their innate capacities.

Ivona Truscan, a Geneva-based PhD student in International Law, studies the approach of the European Court of Human Rights to the vulnerability of the applicants and the legal basis of the Court's use of the notion of vulnerability, the subjects and the elements of the vulnerability analysis in her article: "Consideration of vulnerability: from principles to action in the case-law of the European Court of Human Rights".

This volume demonstrates the applicability of the vulnerability approach in the Nordic context, but there are still many issues left untended to. We invite other researchers in the Nordic region and the rest of Europe to further explore the vulnerability approach, asking additional questions, such as: What kind of legislation would be needed and which law reforms would be necessary if the vulnerability approach should become the basis of justice: regionally, nationally, and globally? What might be vulnerability's relation to ongoing reforms within the Nordic region of laws, in-

economic Sciences in Memory of Alfred Nobel 2009, has over her long career developed her research and theories of self-governance and collective action in the management of natural resources, both before and after her groundbreaking book *Governing the commons* (1990).

cluding the regulation of equality and inclusion, as well as the integration of human rights and international conventions into national law?

Finally there is room for further explorations of how the institutions in our societies produce or modify inequality, privilege and resilience in groups and individuals. We should also engage in constructive involvement with the question of what kind of institutions would be needed if vulnerability were the basis of justice? To what extent do the Nordic welfare states provide resilience today? How are institutions in the Nordic countries vulnerable, in danger of co-optation, or being undermined by economic recession and privatization? Fineman has pointed to the Ombudsman-institution as an important institution in the surveillance of injustice and the achievement of justice. How do these institutions function in the countries that invented them? And finally, what are the benefits and the problems with looking at inequality from a vulnerability perspective?

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