

Southampton Law School Centre for Law, Policy and Society (CLPS)
Workshop: Vulnerability and the Law

This collaborative, inter-disciplinary workshop brings together colleagues within and beyond Southampton Law School to explore issues of vulnerability and the law. Topics covered range across the areas of expertise of Law School scholars, from questions relating to migration, to housing and education, to international justice, criminal justice and broader questions about the meaning of vulnerability. These matters are explored at the level of policy, practice and principle; reflecting the various forms of methodological expertise with which CLPS members are equipped.

We encourage you to use this workshop as an prompt to look ahead to potential future collaborations: most immediately as regards the production of a special issue or edited book stimulated by this workshop; as well as co-writing; and collaborations on future research projects.

Alun Gibbs and Harry Annison (Co-Directors, CLPS)

Workshop 10:30-16:30

Registration from 10:30

Panel 1 10:45-12:15

Lunch 12:15-13:00

Panel 2 13:00-14:30

Coffee 14:30-15:00

Panel 3 15:00-16:30

Drinks 17:00-18:00

CLPS Ganz Annual Lecture 18:00-19:30

Workshop venue: 02/3043

Drinks: 04/2043

Lecture: Nuffield Lecture Theatre A

Panel 1: Migration, Vulnerability and the Law

Exploring EU nationals' vulnerability in the context of Brexit'

Sara Benedi Lahuerta

Since late 1990s, populist discourses based on anti-immigration sentiments have been on the rise in Britain, with such feelings being increasingly expressed even among the elites and the political Establishment. Some have argued that this phenomenon reached a peak during the Referendum Campaign ('RC') and shortly thereafter, and the Brexit vote has been linked with the upsurge in racially and religiously aggravated offences recorded in July 2016. Polish nationals, who have become the largest group of EU nationals, were targeted by many post-Brexit hate crime incidents recorded in the UK. Against this background, it could be argued that, in the last years, and particularly, since the Brexit Referendum, EU nationals living in the UK have become more 'vulnerable' to abuse and discrimination. This contribution will explore socio-legal evidence about the increasing vulnerability of EU nationals in connection with Brexit, focusing, in particular, on empirical evidence currently being collected in the frame of the project 'Perceived Discrimination Experienced by Poles in the Context of Brexit'. On that basis, institutional responses to address EU nationals' vulnerability will be suggested.

Vulnerability at sea: a more integrating construction of 'distress' in search and rescue to respond to the needs of migrants at sea?

Ainhoa Campàs Velasco

This contribution will explore the notion of vulnerability in the context of irregular migration by sea, where the term 'sea migrants' involves a heterogeneous group, including refugees, asylum seekers and economic migrants, travelling irregularly by sea in mixed migration flows.

The concept of vulnerability will focus chiefly on the exposure to physical, psychological and moral harm and suffering, marked by the circumstances and the conditions in which these journeys are made. This will be linked to the notion of 'distress phase', which triggers the commencement of maritime search and rescue operations and the obligation to render assistance at sea in the maritime search and rescue (SAR) legal framework.¹ This paper will argue that the maritime SAR system risks perpetuating, if not exacerbating, the vulnerability of sea migrants by allowing differing interpretations of the concept of 'distress phase' or 'persons in distress at sea'.

This contribution proposes a more integrating interpretation of the notion of distress at sea, where international human rights law concerns are considered. The purpose is to enhance the level of protection in the maritime SAR system, in order to become more responsive to the needs of sea migrants.

¹ This involves the International Convention on Maritime Search and Rescue, 1979, as amended, 1405 UNTS 19; the International Convention of Safety of Life at Sea, 1974, as amended, 1184 UNTS 278, Chapter V, Regulation 33; the United Nations Convention on the law of the Sea, 1982, 1833 UNTS 3, Article 98 and the International Convention on Salvage, 1989, 1953 UNTS 165, Article 10.

The “Rescue” of victims of trafficking in Hampshire, England – the extent in compliance to a victim-centred approach of the UK National Referral Mechanism

Ana Fuentes Cano

As part of the United Kingdom’s endeavour to improve and develop an anti-trafficking identification system, the National Referral Mechanism was established in 2009 in order to facilitate a standardised system of identification for potential victims of trafficking and thus a gateway to access assistance.

This article explores practitioners’ interpretations of the present UK anti-trafficking system to rescue potential victims of trafficking within Hampshire, England. By shining a spotlight on this issue I hope to show the extent of compliance with the anti-trafficking theory and reality to adequately rescue victims of trafficking considering and according to their individual needs. Therefore, this analysis will focus on interpreting whether enough consideration is being given to the conditions of vulnerability of victims of trafficking within the present UK identification system (NRM). Also, by highlighting possible experienced-based concerns of the present National Referral Mechanism to rescue potential victims of trafficking, I aim to facilitate, in the light of what is already acknowledged, laying the foundations for future anti-trafficking policies developments, if needed.

Panel 2: Housing, Education and Vulnerability

Transgender Teenagers and Secondary Education

Joan Mahoney

I am working on a project involving transgender teenagers. Although there is some literature on the medical issues, there does not seem to be much on the questions that arise in secondary education. The first part of the project will focus on single sex schools, which are common in the Bournemouth/Poole area. The primary issues involve which school a transgender child should attend, how the schools can accommodate their needs, as required by the Equality Act, while still insuring the child’s safety and the safety and comfort of other students. Schools presumably need guidelines on admissions, toilets, changing rooms, sports teams, and uniforms, but there has been no guidance from the Department of Education or the local authority on these questions. At this point, I have more questions than answers, but it would be helpful to get input from others on these issues.

Vulnerability as a rationing device in access to housing

Emma Laurie

This paper explores the role played by vulnerability when it is used to establish which duties (if any) are owed by English and Welsh local authorities to a homeless person. Certain groups must demonstrate vulnerability to be considered 'in priority need' under the statutory framework. Without priority need, the duties owed by the local authority are minimal and thus vulnerability is used as a way to ration publicly funded resources. Its meaning is therefore critical, yet vulnerability is not statutorily defined and so instead has been judicially determined. A recent Supreme Court decision has altered the long-standing test, simultaneously narrowing and expanding it. The Court also clarified the relationship between an assessment of a person's vulnerability and the availability of resources. This paper seeks to analyse the way in which vulnerability is deployed as a rationing device in the legislative scheme and the courts' role in establishing its parameters. In contrast to England and Wales, Scotland has chosen to dispense with the priority needs categories and thus the requirement to establish vulnerability. As a consequence, the Scottish approach to homelessness is significantly more expansive.

How Does Vulnerability Work? The emergence of vulnerability in community safety in England and Wales

Francesca Menichelli

The analysis presented here is part of a comparative research project on the local governance of community safety in England, Wales, and Italy. Its key claim is that a vulnerability paradigm is now central to community safety work in England and Wales, both on an operational and a conceptual level. On one hand, vulnerability is used as an instrumental criterion to assess needs and decide on the level of services to be provided to individuals. On the other, it is used as an organising concept to facilitate cross-agency cooperation and the mutual identification of problems and solutions. Based on an extensive body of in-depth interviews with community safety practitioners and senior management in local authorities, offices of the police and crime commissioners and police forces across England and Wales, the paper wishes to answer three questions: first, why the scope of community safety has widened to include concerns with the safeguarding of vulnerable populations; second, what work is done by vulnerability in the context of community safety; third, what the implications are of this shift for CSPs and partner agencies on one hand, and service users on the other.

Panel 3: Examining Justice, Legitimacy and Vulnerability

Justice or hospitals? Questioning the Trust Fund for Victims for the International Criminal Court

Regina E Rauxloh

This paper addresses the role of victims in the international criminal process. The unspeakable suffering of victims in armed conflict coupled with the inactivity of national and international actors is the *raison d'être* for the permanent International Criminal Court (ICC). To bring justice to these victims when no other court is willing or able to do so is the core object of this Court. Building on the experience of previous international tribunals, the ICC Statute has introduced multiple provisions protecting the interests of victims from greater protection of victims in their role as witnesses, over a robust reparation procedure to an innovate system of representations rights at all stages of the proceedings. One of the most ground breaking innovations of the new Court, however, is the establishment of the Trust Fund for Victims. Besides being responsible for making reparation payments to victims, this body is unprecedented because it provides funds even before the trial has ended and to victims who are not attached to a specific case. The Trust Fund for Victims is therefore repeatedly praised for supporting hundreds of thousands of victims without the need for awaiting a conviction after years of trial.

This paper wants to question this strong role of the victims in the ICC. While the ICC Statute tries to balance the interests of the victims with the rights of the defendant this paper argues that a too strong role, especially the functions of the Trust Fund for Victims, undermines the aims and objectives of the ICC and even the legitimacy of the Court. While the immediate material help for the most vulnerable must be welcome, this paper identifies the underlying theoretical and practical difficulties which will undermine the interests of the victims in the long run.

Vulnerability and the Law

Alice Harrison

Sensory powers (which have been recognised since antiquity as physically or emotionally (spiritually) felt or (logically) reasoned) and the lack thereof, expose vulnerability in human being. Liberating individual and group life, positively reveals that people that can physically, reasonably, emotionally, out manoeuvre their peers, may do so. Meritorious behaviour is encouraged in the fiercely competitive world in which we live, not least at the adversarial crux of politics and law; where a powerful voice can trump the rights of others. Yet, if we recognise emotive (morally driven) care and add the realistic potential for reasoned cooperation to traditional models of coercive governance, we find common ground for consensus (people willing to stand-up, as, for or with, others) between, sometimes vulnerable, groups. I will use an environmental example; a group of ridiculed and derided environmentalists, carefully and cooperatively allied with indigenous groups, who educated the wider populous and government of British Columbia to save the Great Bear Rainforest, including its bears.

***Dietschmann*, Bereavement and the Process of Justice**

Katie Hunt (Southampton) and Sotirios Santatzoglou (Keele University)

In *Dietschmann* [2003], the House of Lords issued guidance on the subject of mental abnormality and voluntary intoxication in the context of diminished responsibility. *Dietschmann* [2003] is an important case in this area and led to a number of publications addressing these legal questions. However, we argue that the significance of *Dietschmann* lies in the material facts of the case, which demonstrate the inability of the criminal justice process to address the needs of vulnerable offenders and, in particular, to recognise the ways in which the experience of conviction and incarceration exacerbates their vulnerability. As Anthony Dietschmann, at the time of the homicide, had recently been released from prison and suffered from a ‘depressed grief reaction’, the focus of the paper is on the vulnerability of bereaved prisoners.

We begin by addressing the theory of ‘disenfranchised grief’ and existing research on bereaved prisoners. The discussion highlights the lack of recognition of the continuum of losses that shape the lived experience of the bereaved offenders. We then analyse the facts of *Dietschmann* and indicate the limits of the criminal justice process which, on a policy level, are defined by its emphasis on individual moral responsibility and punishment; often overlooking the human dimension of the offenders and their individual needs. Lastly, we consider the lessons to be learned from *Dietschmann*, and submit that compassion should be a constituent element of criminal practice. In *Smith (Morgan)* [2001], Lord Hoffmann explicitly referred to “the *principle* of compassion to human infirmity” which, as we argue, promotes an enhanced understanding of the vulnerability that arises from loss and bereavement. In this final part, we also explain why a rights approach alone could not be sufficient in addressing such vulnerabilities within the criminal justice context.