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Prefiguring the Legal Subject of European Human Rights Law: From Universal Autonomy to Situated Affectivity

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In legal theory and practice, the legal subject has traditionally been theorised as an autonomous and independent individual with almost superhuman intellectual and physical capabilities, whereas groups and people that do not fit this theoretical norm are conceptualised as vulnerable others. In this article, the legal subject is prefigured as a relational and affective being (or becoming), through the new materialist concept of affectivity. It is argued that the paradigmatic liberal conception of legal subjectivity and the 'vulnerable groups' approach to discrimination deters a multifaceted understanding of diverse and heterogeneous legal subjects situated within complex economic and ecological webs. In conclusion, the article suggests a new direction for discrimination assessment as a transformative process of reconstructing legal principles to indiscriminately accommodate the vulnerability and affectivity of all legal subjects and further diverse life forms.
Keywords: legal subjectivity, human rights law, autonomy, vulnerability, affectivity .

Introduction

Supposedly, all humans are born free and equal in dignity and rights, endowed with reason and conscience. As autonomous and rational individuals, we intentionally and fully informed consent to the social contract and the legal order when we enter the world through the birth canal (be it vaginal or otherwise) and free ourselves from the womb. From this persistent philosophical standpoint, the state is constituted by individuals who, as independent entities, relinquish a certain amount of their inherent autonomy and freedom to obtain state protection from harm to their property and integrity. This entails that each individual is entitled to freedom from both illegitimate state interference and transgressions by other, equally independent, individuals (e.g., Hobbes 1651; Locke 1689; Rousseau 1762; and more recently Dworkin 1986; Rytter 2000; Letsas 2007). Thereby, relations with other people and institutions, as well as with the state, are implicitly conceptualised as the result of individuals' autonomous and rational calculations aimed at protecting

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their property and integrity, rather than the result of an inherent – or positive – social instinct or urge.

This contrasts with the omnipresence of human vulnerability and mutuality, beyond the rational and consensual avoidance of a natural condition of brutality and misery, in recent years, for example, the COVID-19 pandemic and the Russian attack on Ukraine, as well as the recent and current conflicts, *inter alia*, in Syria and Gaza, and the migration crises in the Mediterranean. While the pandemic made us aware that everybody (regardless of health, wealth, or any other status) is at risk of infection with a potentially deadly disease, the war in Ukraine is an urgent and tangible reminder to Europeans of collateral damage and other forms of corporeal vulnerabilities, such as a sparsity of food and energy and restrained access to air. However, while viruses and soldiers penetrate borders and bodies, unconcerned with individuality and human dignity (or social contracts, for that matter), others thirst or drown during the attempt of crossing deserts and oceans in pursuit of survival, and others again fly across continents and frontlines with the privilege of not noticing any hindrances in the legal and ecological landscapes. Thus, there are different modes of mobility within globalisation, whereby some are mobile on a global scale with the entire world as their property, whereas others have no mobility or residence (Braidotti 2011, 7). From this, it appears that groups and individuals are situated more and less precariously with regard to biological and other forms of harm. More specifically, some groups occupy a less resilient or protected position than others, with concern to infection, information, and access to medical treatment, as well as war, poverty, and famine.

Setting aside these recent experiences (which include corollaries in the past) and a long line of feminist critiques, the paradigm of the rational and autonomous legal subject is still prevalent in European human rights law. For instance, in the assessment of discrimination, groups and individuals in precarious situations are conceptualised as vulnerable and dependent, in need of special protection (see e.g. Arnardóttir 2014; Ippolito and Sánchez 2015; Nifosi-Sutton 2019), whereas the allegedly normal individual is implicitly perceived as resilient and self-sufficient. Some groups are considered inherently vulnerable and dependent, whereas others are considered vulnerable and disadvantaged due to past discrimination and marginalisation. In both categories, vulnerability is constructed as deviant and pathological, relative to the paradigmatic autonomous legal subject. This is problematic, not just from a feminist position, but also from a general human rights approach, because such logic replicates the hierarchy of power and privilege that the principle of equality and the prohibition of discrimination are intended to preclude. Through the legal gestures of categorisation and comparison, the conception of normalcy based on autonomy, enacting an exclusionary legal and philosophical genealogy, is reiterated in efforts towards equality, rather than contested and destabilised to promote inclusivity and diversity.

In this article, the concept of the liberal legal subject is critically analysed and discussed alongside feminist critiques and prefigurations of subjectivity.[2] The primary issue of inquiry is whether the conception of the legal subject contributes to inequality, thereby counteracting the aims of the prohibition of discrimination to condemn and contest discrimination and further equality, by engendering certain subjectivities or life forms to the extinction of others. The article contributes to legal theoretical debates by enacting novel theory in the analysis of legal subjectivity in human rights law. Furthermore, it suggests a new orientation for discrimination assessment as a transformative gesture.

The analytical prism takes inspiration from Fineman's vulnerability thesis (e.g. Fineman 2005) and, particularly, Grear's critique of the liberal legal subject as an incorporeal and hyper-rational individual (e.g. Grear 2006). Extending the work of Fineman and Grear, the article accentuates relationality as an essential facet of human subjectivity. However, as opposed to Fineman's vulnerability thesis, it does not conceptualise vulnerability as the ontological human condition or state, which entails both a rejection (or at least a neglect) of autonomy and agency as persuasive facets of human and legal subjectivity, and an emphasis on the state as the facilitator of equality. Rather, by prefiguring legal subjectivity as a situated and relational becoming that is characterised by dynamic and transversal affectivity,[3] the article theorises vulnerability and autonomy as mutually implicated aspects of subjectivity.

Theoretically, the article argues that a neutral or universal conception of the legal subject is not possible. As subjectivity is dynamic, it cannot be frozen into a simple and comprehensive conception. In contrast with universal and transcendental categories, theoretical concepts and categorisations may be understood as snapshots of agency or affect at a certain time and position, which may already be in the process of dissolving to create new possibilities of formation. In this sense, categories are never stable and complete, but always lacking and thereby revealing of the contingency of every attempt at universalisation. However, whereas a rigid and stable theorisation is neither

[2] The article does not distinguish sharply between the concepts of self, subjectivity, and personality. Legal personality sometimes refers to the subject of law, whereas legal subjectivity commonly refers to the actor of law. Accordingly, in the *Oxford Dictionary of Law*, the term 'legal person' is defined as a natural person (i.e. a human) or a juristic person (i.e. an artificial person with a legal personality, such as a corporation). Etymologically, however, 'subject' implies subjection to a system, whereas 'person' generally denotes a more naturalistic biological entity, centrally a human (Naffine 2003; Davies 2017, 114 n 19). In the legal theories with which this article engages, the concepts are employed interchangeably. Furthermore, from a more grounded position, it does not necessarily make sense to distinguish between the subject of law and the legal actor, as law is enacted in everyday encounters between its subjects. As Davies theorised through her new materialist, pluralist approach to law, "the subject is both creator and transmitter of law" (Davies 2017, 7, 116 ff), whereas the culturally and materially located self is a conduit for law creation (ibid 134). Concurrently, lawyers and judges are real living selves immersed in a social and material context and thus "subjects of socially plural environments" (ibid 124). As illustrated through the feminist critique of legal subjectivity, the legal person enacted in law seems to reflect the features, or at least the imagined features, of his enactor.

[3] In this regard, transversality is employed in the Braidottarian manner to accentuate the dynamism of subjectivity across multiple axes (Braidotti 2019, 40). This is also inherent in her earlier figuration of nomadic subjects (Braidotti 2011). Figuring the subject as transversal is a way of destabilising the power of dominant notions of identity and account for multiple belongings and becomings in complex and internally contradictory webs of social relations (ibid, 9-12).

possible nor desirable, the legal subject may be enacted for different purposes in different contexts. Therefore, this article focuses on affectivity as a facet of subjectivity that allow for new enactments of the legal subject in human rights law and beyond.

In relation to human rights law, the article suggests a new orientation for discrimination assessment that addresses the processes of marginalisation that contributes to the situated disadvantage of groups and individuals, by attending to dynamic affectivity. In support of this new orientation for human rights law, the principle of non-discrimination is preliminarily prefigured in a novel gesture to promote a transformation of laws and legal institutions to ensure that they become responsive to the affectivity and relationality of differentiated subjects, in their various becomings. Thereby, the article also contributes with a more practically oriented line of flight from the dominant paradigm of legal subjectivity.

The article is structured across six sections, including this introduction. The following section presents the overall methodological approach of the article. Subsequently, the feminist critique of legal subjectivity is introduced, followed by a discussion of the trope of the vulnerable subject, which inspired the theorising in the article. Thereafter, legal subjectivity is prefigured through the new materialist and posthuman conception of affectivity. Finally, some concluding remarks are offered, including a critical discussion of the prohibition on discrimination in human rights law through the prism of affectivity.

Methodology

The main contribution of the article consists of a theoretical reorientation and refiguration of the concept of the legal subject. This theoretical endeavour is not envisioned as a distinct academic critique, but as a venue of a more practically oriented critical engagement with the approach to discrimination in European human rights law, which this article however only shallowly touches upon.

The mode of analysis is inspired by the conception of situated knowledges (Haraway 1988), string figuring, and particularly the notion of tentacular thinking (Haraway 2016), as well as the related account of diffractive reading (Barad 2007; Geerts and Tuin 2016). Tentacular thinking enacts a less enlightened and unambiguous and more grounded and multidirectional mode og knowledge production than most academic work (Haraway 2016, 31), as this article for example does by not providing a universal concept of the legal subject, but a more dynamic and partial conception that allows for differentiated enactments of subjectivity, while fumbling a bit on the way, moving in different theoretical directions to situate the knowledge within the various legal and extra-legal contexts that it engages with, and trying to map a slightly new orientation for human rights law by spinning together these already existing insights. It also accounts for the traces and threads that the research projects engage and entangle with, creating certain webs of knowledge and thus also

certain worlds, as is evident to situated knowledges and the feminist politics of location. These webs that are created through attachments and detachments, cuts and knots, are patterned, but not determinate (ibid). Some threads might be picked up by other thinkers and drawn into new contexts or patterns, much as this article draws on various other threads of thinking in the analysis of legal subjectivity within human rights law. The method of diffractive reading, which involves a tangled reading of different knowledges, likewise attends to the entanglements of ideas and other materials, as well as patterns of difference and exclusion (Barad 2007, 29–30). Pulling strings from various theories enables different dimensions of an issue to be addressed, thereby acknowledging complexity. This approach encourages attention to the blind spots of different theories, which may be more readily noticed through some prisms and not others. For instance, subjectivity might be conceptualised in a more multidimensional manner if neither vulnerability nor autonomy is rejected. To switch metaphors, the method allows for multidirectional and multidimensional modes of listening for resonance and dissonance, as well as silence, while different voices intersect and intermingle in poly- or even cacophonic tones and frequencies.

The prism of affectivity is employed in the article as a way of situating the knowledges that are enacted from a position that contrasts with the conventional perspective of legal knowledge production, in order to tune into the exclusions that are inherent in the paradigmatic conception of legal subjectivity. Accordingly, affectivity and, to some extent, precarity function as apparatus to take notice of unscaled and non-scalable dimensions of legal subjectivity (Tsing 2015, 37 ff). Thinking with precarity, as an art of noticing, is a way of paying close attention to the shifting assemblages of humans and non-humans that make up various phenomena or projects, and particularly, charting the work of the *Anthropos* (or human of the Anthropocene) and exploring the terrain that they refuse to acknowledge, thereby tracking "what's left" (ibid 20). Accordingly, it is a way of mapping diversity by attending to details and differences, rather than summarising or scaling up to create a generic concept of subjectivity (ibid 37–38). In this regard, diversity is not considered essential, but contaminated (ibid 37), because all collaboration – and thus life – implies contamination and transformation through encounter (ibid 28). By obscuring the possibilities of teleology (ibid 20) and universalism, this mode of knowledge production attunes to the ways in which precarious and unorganised life pathways contribute to and become entangled with institutional forms of life and power. Notably, as everyone carries a history of contamination (ibid 27), it acknowledges that there is no neutral or pure position of knowledge production.

From this position, the legal subject or person (or the human) is not a universal and neutral category, but a theoretically contaminated figuration. The human has never been a neutral concept, but a normative category, indexing access to privileges and entitlements (Braidotti 2019, 84–85). Thus, appeals to

the human are always exclusionary and discriminatory, creating structural distinctions and inequalities between different categories of humans, as well as between humans and non-humans (ibid 85). For this reason, a simplistic appeal to a generic and undifferentiated figure of the human is problematic (ibid 10). On the contrary, any conception of the posthuman subject must be differentiated and distributed, accounting for relationality, including relational dependence on multiple non-humans and the environment (ibid 40). If there is an ontological reality of the posthuman, it is that of sociomaterial and relational existence, as an embodied and embedded, and thus affective and relational, creature (ibid 11, 40 ff). Rather than an abstract universal or an essential and transcendental being, the posthuman subject is a transversal becoming in and of the world that is dynamically differentiated through encounter and affect.

Through an ethics of response-ability (Haraway 2016, 130), the article aims at opening the category of the legal subject to account for various positionalities in their complex becomings, rather than closing the concept around a new paradigmatic personality or character. The cultivation of response-ability aspires to better attunement between various entangled persons and things, and thus a greater capacity to become well, in symbiosis with multiple others. This occurs outside an expectation of harmony, or a clear demarcation between self and other, while instead attending to the neither/nor or the in-between (Haraway 2016, 98). Response-ability, thus, requires staying with the troubling (ibid 12) complexity of subjectivity. Similarly, affirmative ethics that emerges from the processing of pain and vulnerability in relation to others, whereby the negative experiences and affects are transformed into affirmative and transformative practices (Braidotti 2019, 168 ff), are engaged as a mode of analysing. From this position, vulnerability is a "power of exposure" that includes an openness to – and hence availability to, or even containment of – others in the form of "trans-corporal entanglements" or "mutually interdependent transversal connections within a common flow" (ibid 169, referring to Alaimo). As such, this form of ethics does not linger on the negative aspects of vulnerability, but implies a positive commitment to endurance (ibid 169) as a generative force (ibid 170). The emphasis on endurance and the power of affect as a generative or transformative force contrasts with the notion of resilience (ibid 171–171) employed by Fineman and Grear. Rather than connoting an ability to adapt to dominant modes of production and life, the concept of endurance strikes a more critical note about alternative subject formation processes (ibid 172) and collective transformations. Endurance entails an ability to sustain and transform (ibid), and an incitement to resistance and hope. In this sense, the article enacts vulnerability (and affectivity) not as a negative or passive condition of powerlessness, but as a positive force of transformative potential and power (*potentia*) (see Bradotti 2011, 4; 2019, 92), methodologically, theoretically and ethically.

Feminist Critiques of Legal Subjectivity

In classical liberal human rights philosophy, the legal subject is figured as an independent and self-sufficient individual who engages in relations with others only to the extent that this rationally supports their self-interest. This conception, influenced by the Cartesian rational being and the Kantian transcendental self, presumes a split or ontological fracture between mind (*res cogitans*) and matter (*res extensa*), implying that rationality is "quintessentially disembodied, transcending the structures of bodily experience" (Grear 2015, 234). The presumption of rationality as distinct from bodily life suggests that the mind or reason of the ideal legal subject operates independently from emotions, affects, and desires, as well as physical, corporal, and hormonal processes and drives, and other allegedly irrational forces. Furthermore, it conceives of autonomy as an individual and atomistic capacity or will that operates in a vacuum, and is thus unaffected by social and material relations. Due to these various exclusions, the concept of the liberal legal subject has long been criticised by feminist lawyers, as well as anti-racist, post-colonial, and other critical scholars. As emphasised in legal feminist studies, the concept denotes a highly particular construction of the human subject around a specific kind of imagined masculinity and male morphology (e.g. Ahmed 1995, 56; Grear 2015, 235).

The feminist critique of exclusionary subjectivity dates back to at least Beauvoir's pervasive supposition that one is not born, but rather becomes, a woman (Beauvoir 1949). Later, feminists critiqued masculine discourse for fashioning the category of woman as the imagined other to the masculine self, positioning women as both excessively promiscuous and dangerous and excessively vulnerable and dependent. In this positioning, women contained everything that man could not comprehend; thus, men were compelled to control women.[4] As Irigaray mimicked the masculine imagines the feminine as the threshold or limit to what is, and the overflow that cannot be contained; the feminine is fluidity (Irigaray 1974; 1977; Stephens 2014; Bardsley 2018) and mucosity, or the membrane, which is either fluid or solid (Irigaray 1984; 1987; Whitford 1991). More recently, Ahmed argued in relation to law that "the undifferentiated body becomes then the male body, defining itself through an exclusion of the feminine, and the supposed awkwardness, smelliness, wetness and excess of the female body" (Ahmed 1995, 56). While women are not necessarily leakier than men, who themselves overflow with various compositions of mucous, feminist thinkers have activated the potential in the leakage or opening of subjectivities and categorisations. In continuation of this, this article enacts a less homogenous conception of legal subjectivity than the liberal legal subject, to promote a more multifaceted and nuanced legal assessment of personal capacities and needs. In so doing, it contends that both

[4] See, in particular, the work of Irigaray, Cixous, and Kristeva (e.g. Cixous 2010/c1975).

masculine and feminine potencies flow within any given body in multiple variations, and that the hierarchy between various identities is contingent and constrictive for subject formation and legal protection.

Other strains of feminist scholarship have critiqued the "Man of Reason" for being privileged as the measure of all things (e.g. Lloyd 1984).[5] As Braidotti recapped, the hegemonic European humanist ideal of subjectivity as a universal and sovereign reason has claimed exclusive rights to rational judgment and enlightened governance, as well as to morality (Braidotti 2022, 18). She observed that "[t]hat image was represented visually by Leonardo in the famous sketch of the Vetruvian body as the perfectly proportioned, healthy, male and white model, which became the golden mean for classical aesthetics and architecture (…), [while t]he human thus defined is not so much a species as a marker of European culture and society and for the scientific and technological activities it privileges" (ibid). Thus, this icon became a measure of human civilisation and perfectibility (ibid), even normalcy, in relation to which everything else was compared and classified (ibid 18–19).

This article engages in the legal feminist endeavour of disturbing this streamlined imaginary while creating other flows and currents around subjectivity, with accountability for both the desired and the detrimental potentials of every classification. Thus, the thinking of the article flows and breaks with different waves of legal feminist knowledge created in the slipstream of, *inter alia*, the thinking of the Nordic feminist pioneer Dahl, who argued that the law was dominated by male cultural hegemony, resulting in the systematic exclusion of women from the public sphere and thus the sphere of legal protection (Dahl 1987/c1985, 11). As MacKinnon condensed this early feminist critique, "to be human, in substance, means to be a man" (MacKinnon 1989, 229). Later, other streams of legal feminist critique emerged. From a Foucaultian inspiration, Smart argued that "[l]aw is deaf to core concerns of feminism and malevolence toward women's experience and knowledge", and thus antithetical to the myriad concerns and interests of women (Smart 1989, 90 ff). In this respect, she critiqued the "Frankensteinian monster" that was conceptualised in law as "the Woman", which disadvantaged real living women (ibid). In relation to motherhood, she furthermore advocated for a more fluid notion of gendered subject positions, to avoid essentialism (Smart 1992, 33). In a Derridian mode, Cornell reflected on the role of women as "the Other" and employed the concept of *différance* to analyse and critique the devaluation of the feminine, while encouraging the employment of Irigarian *mimesis* to prefigure the feminine in law (Cornell 1991). In the international law context, Charlesworth and Chinkin consistently addressed male bias and power and the resulting construction of women as the other (i.e. deviant from the male norm),

[5] He has also been called the "Majority subject" or the "Molar centre of being" (Deleuze and Guattari 1987), the "Same" or "He" (Irigaray 1985/c1977; 1993/c1984), the "Eurocentric bias" (Hill Collins 1991), and "Man the brand" (Haraway 1997).

which has resulted in the subordination of women (e.g. Charlesworth *et al.* 1991; Charlesworth and Chinkin 2000; Charlesworth 2015, see also Kuovo and Persson 2014). More recently, Cook and Cusack addressed the issue of gender stereotypes that are enforced and perpetuated, and thus institutionalised, legitimised, and normalised, through law (Cook and Cusack 2010). These critical interventions along with others have led to an extensive feminist disentanglement of the firm masculine knot of philosophy and law, extending its threads to many other spheres of thinking. Furthermore, the women's law standpoint has been subjected to various queer, trans, anti-racist, and anti-colonial critiques. Most notably, Crenshaw created the concept of intersectionality as an analytical instrument for assessing multiple and compound forms of oppression and discrimination (e.g. Crenshaw 1989; 1991), whereas Kapur addressed legal subjectivity from a post-colonial position, critiquing cultural essentialism (e.g. Kapur 1999).

All of these positions may be seen as efforts to correct the benchmarking of men (who are conceived of through a lens of sameness) and the exclusion of others from the legal framework (Davies 2017, 14), through specification *ad infinitum*. While these efforts are necessary to the objectives of equality and diversity, many feminist scholars have become stuck in the trap of exclusion and reciprocal critique in their efforts at creating just categories, as justice always lingers in the moment, the pause or the rest, i.e., the excess from the categorisations. As such, the desire for just or innocent categories within conventional as well as critical legal projects has a messianic ring to it, as a sort of Derridian 'to come' moment that can never be actualised (Derrida 1992), while situated accounts of law and justice are indeed possible (Haraway 1988). This article is not written with a desire for innocence or purity, but rather wonders with the virtual potential of law and justice as a trajectory, among others, not an arrival. It is written with an affirmative incentive for making kin (Haraway 2016) and wandering along with all these other feminist wanderers/wonderers in a peace march – a chaotic crowd – for collaborative survival, looking around rather than ahead (Tsing 2015), and listening for the polyphonic potential for justice among us.

This form of subjectivity is spectacular and pedestrian, intellectual and corporeal, as it is diverse or plural while being responsive and communal, in contrast with its liberal brother in his agitated form. Legal feminist thinkers have long addressed the sense in which the liberal conception of the legal subject as a rational and autonomous entity, with its mind/body, self/other, and masculine/feminine dichotomies, ignores the carnality and the relational aspects of human life. Accordingly, Naffine critiqued the paradigmatic figuration of the legal person for disregarding the animality or physicality of the corporeal being (Naffine 2009, 144 ff). In this regard, she argued that law should attend to the great multiplicity of humans and their fluctuating and highly diverse physical embodiments (ibid 145, 159–160). Furthermore, she observed that the

imagined rational legal subject "seems to be only incidentally, rather than essentially, embodied and certainly he is not defined by the body, for the legal focus is on the mind" (ibid 144). As she elaborated, to the extent that this subject is corporeal, several negative implications can be drawn about his physical embodiment: "his reason is not clouded by sickness or pain; his mind is not impaired by mental illness or disability; he is not pregnant and he is certainly not in labour; he is not a baby or a child" (ibid).

This critique has also been extended in a new materialist direction (e.g. Davies 2017; Normann 2022; Jones 2023). For instance, Davies critiqued the many forms of exclusion within law, and the privileging of some socially constituted voices and experiences alongside the marginalisation of others, which results from a biased mismatch between the normative expectation of singularity in law and the endless plurality of social life (Davies 2017, 6). According to Davies, the problem with the liberal conception of the autonomous and rational subject as an entirely mental or cognitive human construction is that it is alienated and isolated from both other subjects and the physical world (ibid 7). Therefore, it denies any connectivity with or reliance on different material forms, including human bodies and minds (ibid). Contrarily, Davies conceived humans as immersed in the world and thus not separate from the material environment, including their bodies (ibid 8). She argued that it is not possible to escape the situatedness of life (ibid 9) or detach thinking and subjectivity from one's material corporeal and social existence. Therefore, she suggested that legal thinking should move beyond its current nature/culture divide to recognise an undifferentiated sphere of "natureculture" as a continuous plane of existence (ibid 10 n 29; see also Haraway 2003). According to Davies, the mismatch between the liberal subjectivity and the "diversity of subjects in their multiple, embodied, overlapping, and contested social spheres" cannot be corrected by instating a new form of transcendental and non-malleable subjectivity in law (ibid 6–7, 12 ff). The illimitable nature of social identities, or affinities, entails that any thinkable category is exclusive and deficient (ibid 6–7), as contemporary feminist debates likewise expose. Therefore, any concept of a reified subject utterly obscures the inherent plurality of the self (ibid 132). In this regard, she reiterated that the subject is both discursively and materially constituted, elaborating that these aspects are not mutually exclusive, but rather "layers of an idea, mobilised at different moments in theory and practice for different purposes" (ibid 6).

Legal subjectivity can thereby take numerous forms with different potentials and risks, and thus also different possibilities of resonance or affinity. The acknowledgement of the malleability of subjectivity should not preclude but rather persuade performative and prefigurative engagements (ibid 16 ff), imperfect and unfixed as they may be in their desire for a more flexible lexis and praxis. These always partial prefigurations of legal subjectivity should, however, account for "the diversity – the radical and constitutive difference – of socially

situated subjects and their relationships as the starting point for law" (ibid 118), interrogating how law might be imagined or performed differently to accommodate this multiplicity (ibid 120). As Davies argued, the subject is corporeal and physical, enmeshed in the material world (ibid 124) and situated within a certain physical, temporal, and spatial location (ibid 125). Subjectivity does not consist of an individual pre-social self (ibid 124). Rather, the self is epiphenomenal – an effect or symptom of the innumerable and complex interactions between body, environment, and other subjectivities (ibid). Furthermore, "agency extends beyond the human to the non-human world and arises in the associative states of networked entities or in the dynamics that solidify those entities as such" (ibid 125, referring to Bruno Latour's actor-network theory and Karen Barad's agential realism). Accordingly, subjectivity is not individual, but constituted through community and ecological networks (ibid 125), as subjects exist within, and not outside or above, their material context (ibid 126). Focusing on the subject as an enactor of law, she elaborated that this has consequences for the understanding of law as a horizontal and multiperspective phenomenon (ibid 127–128). Furthermore, as argued here, it may have consequences for our understanding of the subject of law and the delineation of protected subjectivities within the human rights framework. Thus, theories on subjectivity can be mobilised to transform law by orienting legal theoretical prisms towards certain aspects of life (i.e. certain worlds or worldings).

Nordic feminist scholars have also engaged extensively with law/justice and legal subjectivity from different feminist positions on various legal topics, in more or less explicit manners (e.g. Ketscher 1990, 2012; Petersen 1991; Hellum 1993; Gunnarsson 1995; Brækhus 1996; Svensson 1997; Kuovo 2004; Pylkkänen 2009), more recently also prefiguring the legal subject through new materialist and posthuman theory (e.g. Käll 2020; Arvidsson 2018; 2021; 2024; Korhonen, Bruncevic and Arvidsson 2023). Most notable in relation to this article, Käll has diffracted Nordic feminist theory with a new materialist conception of justice, accentuating the new materialist feminist aspiration "to move towards post anthropocentrism implying a move beyond the centrality of *the human* as embedded in the Western worldview" (Käll 2020, 6*, inter alia*, referring to Braidotti and Haraway, emphasis in original), while encouraging a furthered questioning of *Anthropos* in Nordic legal feminism (ibid., 10), in order to make other lives more breathable through law (ibid., 23). As she argued, the relational new materialist conception of the subject and/or the body enables a postanthropocentric theorisation of affective connections between various human and nonhuman bodies, as well as flattening the conceptual difference between humans and nonhumans (Käll 2017, 98-103; Käll 2020, 11), much akin to the work of Grear, as mentioned below. Another, yet very different endeavour of prefiguring the legal subject, as well as the legal scholar subjectivity, from a posthuman position, is Arvidsson's encouragement to feminist legal translation

through *écriture feminine* (Arvidsson 2021). In her own words, this is a gesture "to live ethically in the world so that it becomes differently through my living" (ibid., 286) and "doing right through one's embodied writing: (w)righting" (ibid. 288), thus a way of transforming legal subjectivity and law by writing and living it otherwise, creating a sort of Cixourian 'elsewhere' to phallocentric law (sml. Cornell 1991, 182–183). Starting from the dichotomous tropes of the autonomous and the vulnerable subjects, this article engages with these writings and worldings of legal subjectivity with an aspiration of making law more breathable and liveable.

The Trope of the Vulnerable Subject

Focusing on embodiment and embeddedness as central aspects of human life, Fineman critiqued the concept of the autonomous legal subject for being blind to human dependency and vulnerability, which, according to her, better encapsulates the human condition (e.g. Fineman 2005; 2008; 2010; 2017; 2019; 2020; Fineman and Grear 2013). Taking inspiration from Fineman's vulnerability thesis, Grear more specifically critiqued human rights theory and its conception of the legal subject as an incorporeal and hyper-rational individual (e.g. Grear 2006; 2007; 2010; 2013a; 2013b; 2015; 2017; 2018; 2020). The central argument of Fineman and Grear was that the human subject is characterised by ontological vulnerability, and thus relationality. While Fineman emphasised the need for a responsive state, Grear was generally concerned with the response-ability of human rights to the non-human and ecological orders.

The vulnerable groups approach in European human rights law has previously been analysed in relation to Fineman's theory of the vulnerable subject, from various positions (e.g. Peroni and Timmer 2013; Timmer 2013; Arnardóttir 2014; Arnardóttir 2017; Heikkilä et al. 2020; Heikkilä and Mustaniemi-Laakso 2020; see also Ippolito and Sánchez 2015; Nifosi-Sutton 2019). These authors have argued that the identification of specifically vulnerable groups in the case law is problematic in relation to Fineman's theory, as it pathologises vulnerability and stigmatises vulnerable identities (Grear 2017, 12). More generally, it has been argued that "while Fineman supports vulnerability for its potential of capturing the universal, the Court does it for its ability to capture the particular" (Peroni and Timmer 2013, 1060). However, the Court's socio-contextual approach has also been described as 'situational', at least in some areas of the case law (Heikkilä et al. 2020, 1184; Heikkilä and Mustaniemi-Laakso 2020, 796 ff). As such, it can potentially account for processes of marginalisation and dynamics of precarity and privilege in an individual's social (and material) context; however, it does so by pointing to particular vulnerabilities, rather than theorising vulnerability as universal. Fineman and Grear argued that vulnerability must not be treated as a particular characteristic

of a specific identity or population, but should instead be considered an essential and universal aspect of human (and non-human) life. Thus, whereas the case law designates particular vulnerable groups that are discriminated against, the theoretical conception of vulnerability presumes that such marginalised groups or persons are not inherently more vulnerable than others, but situated more precariously within complex legal and institutional webs.

The following analysis and discussion aim at extending the vulnerability thesis in a new materialist direction, by theorising legal subjectivity through the concept of affectivity in new materialist and posthuman theory. This is inspired by Grear's thinking of vulnerability as a form of positive sociality and affectability (i.e. an openness to others and the world) (Grear 2020, 162–163). Thus, it is a critical encounter with the alleged negativity of vulnerability and precarity in law and some theories, in an effort to theorise their affirmative, and even transformative, potential. This theoretical endeavour may give rise to a more practically oriented critique, as it illustrates how comparison in discrimination assessment along with the vulnerable groups approach contribute to marginalisation through the logic of assimilation. As Grear argued, the problem with such an approach to vulnerability is that vulnerable groups remain other or marginal to the normally assumed autonomous subject of rights; in contrast, a post-identity conception of the vulnerable subject challenges the development of human rights jurisprudence by destabilising the silent measure against which these vulnerable others tend to be positioned (Grear 2017, 12). Thus, a new materialist prefiguration and analysis of legal subjectivity may be transformative by de- and reconstructing the concept of the legal subject to be response-able to the situated lives of diverse and transversal subjectivities.

While the thinking in this article is closely related Grear's theory on legal subjectivity, it does not embrace the dichotomy between vulnerability and autonomy (or even agency) that flows through the theorisation of Fineman. Such a dualism upholds the possibility of exclusions and hierarchy, by overemphasising the individual's dependence on the state. In this way, it understates the agential potential of transversal assemblages beyond institutional power. Accordingly, in this article, vulnerability and autonomy are conceived as complementary, or rather entangled, dimensions of posthuman life, and thus facets of affectivity. While humans are characterised by ontological relationality, they also have the ability to affect others and the world in assemblage, albeit always within particular situations and relations. An overemphasis on vulnerability in the capability to be affected does not account for the full spectrum of subjectivity. Subjectivity is not linear and static; it is a dynamic spectrum. Accordingly, the liberal legal subject of human rights law should not be replaced by a vulnerable subject. Rather, the abstraction of legal subjectivity should be prefigured as an open concept that accounts for various

aspects of subjectivity (as well as diverse life forms), including our ontological – yet situated and variously experienced – affectivity, and thus vulnerability.

From the Autonomy/Vulnerability Dualism to an Affective Continuum

In this section, legal subjectivity is prefigured through the prism of affectivity, enabling a more multifaceted theorisation of the subject of human rights law than those of the autonomous legal subject and the vulnerable subject, respectively. In a sense, this prefigurative endeavour collapses the dualism of these two conceptions of subjectivity to capture the affective continuum of human and non-human life.

In new materialist thinking, affect replaces agency, whereby the intra-action of matter and meaning is theorised as a mutually implicated process (Deleuze 1988, 101; Barad 2007, e.g. 140; Fox and Alldred 2015, 401; Grear 2020, 166). Thus, new materialist ontology collapses the mind/matter and culture/nature divides, as well as dualisms (e.g. structure/agency, reason/emotion, human/non-human, animate/inanimate, inside/outside) of transcendental humanist philosophy and social theory (van der Tuin and Dolphijn 2010, 155; Fox and Alldred 2015, 399). Expanding this work, the dichotomy between autonomy and vulnerability in human rights law is dissolved, in this article, as these two facets of subjectivity are theorised as mutually related aspects of human life along the spectrum of affectivity. Whereas autonomy is conceptualised as the ability to affect others, vulnerability is conceptualised as the capacity to be affected by others. Since these aspects of subjectivity and life are considered evident, the analysis is based on the underlying assumption that everybody is vulnerable, in the broad sense of being (able to be) affected by social and material conditions. However, not everybody is affected in the same way. Furthermore, as the legal infrastructure privilege certain subjectivities and characteristics while marginalising others, not everybody enjoys the same level of protection within national and international legal orders, including the European human rights framework.

The conception of agency in new materialist and posthuman theories is not focused on human action or autonomy, but on assemblages that affect and are affected (DeLanda 2006, 4; Fox and Alldred 2015, 399). An assemblage refers to processes and relations of becoming, moving beyond the dualisms of structure/agency and culture/nature (Deleuze and Guattari 1984, 3; Braidotti 2006, 14; van der Tuin and Dolphijn 2010, 154; Fox and Alldred 2015, 401). This entails a shift in thinking away from a conception of objects and bodies as occupying distinct and delimited spaces towards a conception of human and non-human bodies as ontologically relational: "having no ontological status or integrity other than that produced through their relationship to other similarly contingent and ephemeral bodies, things and ideas" (Fox and Alldred 2015, 401; see also Deleuze and Guattari 1987, 260ff; Deleuze 1988, 123). In assemblages,

there are no subject and object, as no single element possesses agency alone, but moves continuously with other affects and flows, thereby instigating further rhizomatic flows and ruptures (Deleuze and Guattari 1988, 7, 400–401; Fox and Alldred 2015, 401). In this sense, assemblages are subpersonal (DeLanda 2006, 5), existing beyond human subjects and bodies (Ansell Pearson 1999, 157–159; DeLanda 2006, 40; Fox and Alldred 2015, 401). The world moves irrespective of human agency, while humans indeed affect the movement of the world, in assemblage. In other terms, human extinction would not stop the movements of the world, as agency (in the sense of affect) is not exclusively human. More crucially for the theorising in this article, humans never move alone, but always intermingle with the manifold flows of the world in a relation of mutual implication or immersion.

Emphasising affectivity, new materialist thinking complicates the concept of autonomy that generally refers to self-governance, or more broadly freedom or independence from external control and influence. In Kantian metaphysics, autonomy is the doctrine of the will giving itself its own law, based on transcendental reason and conscience, rather than the influence of desire (see, e.g., Stanford Encyclopedia on Philosophy). This transcendental aspect of autonomy is untenable, from the new materialist mode of analysis engaging with a philosophy of immanence, or situated knowledges (Braidotti 2019, 42, 49; see also Haraway 1988), and thus the politics of location within a feminist philosophy of science (ibid 48–49). Furthermore, according to the conceptions of intra-action (Barad 2007, e.g. 140, 214, 176–178; Haraway 2016, e.g. 60, 99, 205 n 1) and sympoiesis (Haraway 2016, 58 ff), it is not possible to separate mind and body, or to distil reason from emotion, will from desire, and so forth. In a sense, the logic of autonomy and individualism as the ontological condition of human life in liberalism radically shifts to an account of relationality in the new materialist philosophy.

The concept of affect commonly refers to an emotional influence or response. Psychologically, it is linked to emotions and desire or moods. More generally, it connotes that one has produced a change in or made a difference to somebody or something. To be affected is to be influenced or touched by an external factor (or to be pretentious). Affection may refer to either a gentle feeling of fondness, or the action or process of affecting or being affected, as in a condition, a disease, or a mental state. In this article, the terms *affect* and *affectivity* refer to a force in an inter- or intra-active relation (Wetherell 2012, 2), or to a "change, or variation, that occurs when bodies collide, or come into contact" (Colman 2010, 11). Affect is the transitional product of an encounter, which produces a transformation of the affected body (ibid), or assemblage of bodies. Affect thus refers to a sort of happening, when "*something* throws itself together in a moment as an event and a sensation; a something both animated and inhabitable" (Stewart 2007, 1, emphasis in the original, see also Tsing 2015, 23). More generally, it refers to a process of making a difference (Wetherell 2012, 3),

or a becoming, in the Deleuzian sense, describing a transformation through movement over time (e.g. Massumi 1996; Braidotti 2019). Affect delineates 'boundaries of bodies and worlds' (Ahmed, 2014, 117). Here, the concept is not employed in the narrow sense of an emotional influence or response, and to the extent that affectivity relates to the psychological concept of affect, this dimension is considered inseparable from cognition.

Importantly, affect has both an extraverted component of affecting others or one's surroundings or context, and an introverted component of being affected by others or one's surroundings. These two aspects of affectivity are integrated into the dynamic process of affecting and being affected, with the result that affects occur in both or even multiple directions simultaneously. Affect always depends on a relation, and thus some degree of mutuality. Consequently, it does not derive from spatially and temporally delimited entities, but occurs continuously between entities, locations, and moments. Like a virus, affect spreads gradually through encounters over space and time, progressively penetrating borders, organisms, organs, cells, and molecules.

Vulnerability describes the capacity to be affected in relation with others, including non-humans, both in the negative sense of pain or harm and in the positive sense of pleasure and joy, as well as the entire spectrum in between. In this sense, vulnerability expresses the relational and affective dynamics of all living things, as well as the core of their generative powers (Braidotti 2019, 169). Thus, vulnerability is not only negative in the sense of relating to feeble porosity and powerlessness, but also positive and generative, in the sense that it entails an affirmative transformative energy or force that confirms our openness to the world (ibid 175). In other terms, it is affectability that enables mutual transformation. Furthermore, acknowledgement of one's vulnerability as a prerequisite for transformation entails a sort of epistemological humility, by acknowledging the infinite nature of the processes of becoming and the collective ability to potentiate different possibilities (ibid) and actualise virtual potential (ibid 176).

Etymologically, vulnerability derives from the Late Latin *vulnerabilis*, meaning wounding. Accordingly, its linguistic genealogy denotes exposure to harm. To be vulnerable, in a sense, means to be exposed or open. In new materialist philosophy, exposure is conceptualised in a double sense, not merely connoting exposure to wounding in the negative sense, but also encompassing the positive or affirmative capacities of being dynamic and relational (Alaimo 2016; Braidotti 2021, 136). From this position, the notion of exposure stresses our constitutive ability to affect and be affected by others and the intensity of our relation to a common nature or shared "naturecultures" (Alaimo 2016; Braidotti 2021, 136). As all beings are sentient (Alaimo 2014), this ability extends beyond the human, and entails the plight of a distributed model of consciousness and subjectivity (Alaimo 2014; Braidotti 2021, 136), as opposed to illusions of individual autonomy. The body is not a unitary entity as it is never

only human; and it is neither a mere biological given nor a mere social construction, but an ontological site of becoming (Braidotti, 2021, 112–113). As the brain is embodied and the body is "embrained", "[t]he human mind and the world it inhabits are inextricably entangled in a myriad of ways" (Braidotti 2021, 113), entailing a distributed sense of neural agency that connects human cognition to the external environment and its multiple ecologies (ibid 114).

While the subject is both brute materiality and signified sociality, bodies – and thus embodied subjects – are, above all else, relational and affective, in the sense that they are capable of both incorporating external influences and projecting their own affects outwards (ibid 113; see also Massumi 2002). Affect enfolds and unfolds in heterogeneous assemblages of human and non-human entities, rather than within an atomistic human mind or body; it is thus inter- or transcorporal and relational, characterised by transversality (Braidotti 2021, 134–137). Transversality consists of a collaborative, affective continuum, entailing that "what we are as bodies and minds is inextricably interlinked with the circulating substances, materialities and forces of the wider world" (Alaimo 2018, 49). Furthermore, "the trans-corporal recognition that humans are part of the flux of the material world – and not transcendent, rational, securely enclosed commanders – strikes a blow to human(ist) exceptionalism and feminist new humanism" (Alaimo 2018, 51).

As another facet of affectivity, autonomy could be conceptualised as the ability or power to affect others, or to enact an effect or an event, in relation. Within the relational ontology of agential realism, agency is enactment (Barad 2007, e.g. 176–178, 214), and not an attribute of subjects and objects (ibid 178, 214). Accordingly, it is a doing or becoming, rather than a being (ibid 178). It is a "matter of making iterative changes to particular practices through the dynamics of intra-activity (including enfoldings and other topological reconfigurations)" (ibid 214). Conceptualising autonomy as a relational and intra-active process implies that it is not an isolated individualist action, but an effect of complex social and material encounters between various human and non-human actors and actants, or "critters" (Haraway 2016, e.g. 2, 169 n 1). Thus, the conception of agency as a facet of affectivity stands in contrast to the humanist figuration of individualist autonomy, intentionality, and rationality, by stressing our ability to affect and be affected, rather than transcendental reason and dialectic consciousness based on the opposition of self and other in their struggle for recognition (Braidotti 2019, 45). Thereby, what defines our autonomous capacity is the "autonomy of affect as a virtual force that gets actualized through relational bonds" (ibid), and thus a sort of relational power. This position presumes an ontological relationality consisting of the power to affect and be affected (ibid 45, 54), emphasising our vital reliance on others as a facet of agency, and implying a relational ethical essence (ibid 166) by, *inter alia*, linking affirmative power (*potentia*) to affect (*affectus*) (ibid 171). This mutual capacity to affect and be affected is constitutive of a new materialist relational

vision of subjectivity (Braidotti 2021, 104). Furthermore, "it is capable of triggering unplanned transformative changes" (ibid). Ethically and epistemologically, it enables a becoming other than the *homo universalis* of humanism and the *Anthropos* of anthropocentrism, by appealing to a subtler and more diverse affective range (Braidotti 2019, 54–55), and thus stretching the (post)human continuum.

The relational and affective feature of subjectivity holds that the subject is not an individual in the sense of an entity who is disassembled from their environment, as in the atomistic liberal conception of the legal subject. Rather, as a situated and enmeshed being or becoming, the individual is always partaking in various fluctuating assemblages (Tsing 2015, 20 ff), and thus becoming with others of various kinds (Haraway 2007, e.g. 16; 2016, e.g. 13, 58 ff). Or, the individual is constituted of fluctuating assemblages, as they occupy a middle position between a variety of sources and forces, and are thus immersed in fields of constant flow and transformation (Braidotti 2009, 114). Furthermore, the subject is not a discrete individual, but "a movable assemblage within a common life-space, which the subject never masters or possesses, but merely inhabits, always in a community, a pack, a group, or a cluster" (ibid 106). As such, they are radically influenced and created by their habitat and fully immersed in webs of non-human (i.e. animal, vegetable, viral, etc.) relations, while both unfolding onto the world and being enfolded into the world (ibid). The subject is a complex and transversal assemblage with no fixed boundaries between inside and outside (Braidotti 2019, 45–46, 69) – a collective "becoming-subjects-together" (ibid 73). Accordingly, they do not make themselves up autopoietically, but make and become with multiple others in sympoiesis (Haraway 2016, 58), in a contingent and dynamic fashion (ibid 60). In this sense, posthuman (Braidotti 2019) or compost (Haraway 2016, e.g. 4, 11, 55, 97) affectivity entails that "[c]ritters are at stake in each other in every mixing and turning of the terran compost pile", thus becoming with each other, composing and decomposing one another, in "ecological evolutionary developmental earthly worlding and unworlding" (ibid 97). Furthermore, critters exist not only in the presence of others, but also "inside each other's tubes, folds and crevices, insides and outsides, and not quite either" (ibid 98).

As humans are connected to various bodies, things, events, moments, and forces, subjects can neither isolate nor control the enactments they partake in through pure acts or intentions. As mentioned above, affect is never individual, but always enacted in assemblage. The DeleuzoGuattarian concept of assemblage (in French, *agencement*) here refers to open-ended gatherings of various kinds – some collaborative, some conflictual, and others incidental with possible communal effects (Tsing 2015, 22–23). Furthermore, assemblages are not merely gatherings of lifeforms, but potential "happenings" that, as emergent effects of encounters, make lifeways through patterns of coordination and juxtaposition (ibid 23). Thus, assemblages are polyphonic, creating both

moments of harmony or resonance and moments of dissonance, in the encounter of multiple temporal rhythms and trajectories (ibid 24). While they may take the form of strategic and collaborative transversal alliances, as instances of collective affirmative ethics and practice (Braidotti 2019, 153 ff), even this sort of generative cross-pollination (ibid 124) cannot isolate itself from the polyphonic pollution of past, present and future encounters, or that of disagreement, depreciation, and deterioration.

To summarise, from the new materialist position, vulnerability and autonomy (or agency) are considered facets of subjectivity and life along the spectrums of affectivity and relationality. Both aspects relate to the ability to affect and be affected, and to move and be moved, physically, emotionally, intellectually, and so forth. However, these aspects of life, in their various forms, are not intrinsic or essential features of the individual, but co-emergent with the individual's material and social conditions. Thus, there are no essential differences between groups regarding the degree to which they possess vulnerability and autonomy, as differentiation is a process or becoming. It is through affect that various subjects are positioned differently (i.e. more are less precariously), within webs of relations. The principles of embodiment and embeddedness suggest that there are no invulnerable – or unaffectable and unaffected – subject positions, hence ontological relationality and thus affectivity. Individuals are always subjects in a context, situated and enmeshed in a semiotic and material world or various semioticmaterial worldings (Haraway 2016, e.g. 13, 58). They are always becoming with others, and never alone (ibid 58). Even when they are without human company, they are still in relation and collaboration with other companions such as bacteria and viruses (ibid 65), which no organisms or subjects become without.

Conclusion

An awareness of the affective work of law in creating differential material conditions for various groups opens possibilities for rethinking human rights law and legal subjectivity. It allows for the acknowledgement of a plenitude of life forms with the ability and right to exist synchronously, even sympoetically, without engaging in hegemonic power struggles. In other words, it allows power to enter legal analysis as a transversal and transformative potential (*potentia*), rather than merely as antagonistic and oppressive power (*potestas*). It also reinstates vulnerability and affectivity at the core of legal subjectivity and allows us to see these aspects of life as shared conditions rather than particular and peculiar features of the marginalised.

The paradigmatic legal subject is marked with traces of its exclusions. Rather than being unaffected, they host their genealogy like a parasite or a virus. In Tsing's words, they carry a history of contamination and continue to be contaminated through encounter. As purity is not an option, all subject positions

are abled and disabled by their affective and infectious genealogies. Troubling the assimilation logic of discrimination law, new materialist and posthuman theory infects legal thinking with a hope for transformation. This moves us beyond comparison with masculine subjectivity, and redistribution of the same old privileges and powers, by urging us to imagine the potentials offered by other modes of thinking and living. It enables other ways of becoming together. It replaces identity with affinity and thereby encourages the formation of kinships based on more than a proximately common ancestry and genealogy. It furthermore places collaborative survival and sustainability at the top of our ethical and legal agenda, not just as a political goal, but as an inherent feature of (post)human existence. Thus, it reminds us that, wherever we are positioned in relation to human rights law and protection, we cannot escape our affectivity, in the sense of becoming in relation to others and affecting the orientations and movements of the assemblages we inhabit. There are no universal – and thus no innocent – legal subjectivities that we can rely on when determining who to include and who to exclude. Notably, affectivity entails that survival, as much as homicide and extinction, is collaborative. No individual can act alone.

Aside from concealing the material affectability of all humans and non-humans as an aspect of ontological relationality and affectivity, the liberal concept of the legal subject makes us blind to many aspects of life that are, thus, precluded from principal legal protection. The solution in human rights law has so far been to enact special measures of legal protection to compensate for vulnerability. However, if the non-discrimination principle is to fully accommodate vulnerability, the legal inclusion of diverse groups must be more than a mere gesture of benevolence and a prospect of assimilation. In this regard, the current classification of 'vulnerable groups' in need of special protection obfuscates the situated and relational processes of subject formation and marginalisation. Thereby, it deters a multifaceted understanding of multiple and transversal legal subjectivities, as well as the acknowledgement and enactment of marginalised subject positions. Moreover, the approach contributes to further marginalisation by pointing to particular groups as deviant and dependent, as compared to the paradigmatic figuration of the autonomous and invulnerable legal subject. This entails that marginalised subjectivities are first excluded from legal protection by the narrow conception of legal subjectivity and then (allegedly benevolently) included as objects of legal protection in line with the prevalent discrimination logic of comparison and assimilation through positive measures, while they continue to be positioned as vulnerable others. From the perspective of affectivity, discrimination assessment should instead attend to the sociolegal and material positioning of certain groups and individuals in particularly precarious situations and dismantle oppressive webs of power to enable heterogeneous lives.

While vulnerability theory has been operationalised in legal analysis in order to transform the rigid structures of liberal human rights law to become more

attentive to human vulnerability, it does not fully account for the multiplicity and plasticity of posthuman subjectivity. Furthermore, it has had limited potential for dismantling the multifaceted and dynamic processes of othering at the crux of legal subjectivity and thus power, and of nourishing the potential for marginalised life forms to enact resistance to unresponsive legal classifications. The aspiration of this article is an open and preliminary prefiguration of legal subjectivity, without exclusionary closure around a new theoretical and illusory legal subject. It aspires to an ongoing response-ability and curiosity towards the process of becoming (post)human, in all its practical and e/affective aspects. Subjectivity should not freeze into a solid concept, but embrace the fluidity and liveliness of the social and material world in which it is enmeshed. While agency may congeal at certain temporalities and positionalities into what appears as a stable identity, there is always the possibility of liquefaction and leakage. Therefore, the concept of the legal subject must have the elasticity to contain multiple fluids and mixtures, and never become a fixed and inflexible stereotype that excludes the material overflow of real bodies from its privileged protection. The subject is and must be under continuous dissolution to nourish and sustain life. As Haraway poetically expressed it, we are compost in and of a continuous process of de- and recomposition (Haraway 2016, 55, 97).

The prefigurative conception of legal subjectivity as an affective continuum captures the dynamic and relational feature of the human as a becoming, rather than a being. It collapses the dualism between autonomy in liberal ideology and vulnerability in feminist materialism, thus theorising the mutual implication of these aspects of subjectivity. This avoids the purely negative associations with vulnerability as dependence on a superior autonomous subject or state. Rather, precarity becomes a site of endurance and resistance, loaded with the potential for transformation. It is exactly our ability to be affected that enables us to affect each other and the world in assemblage. While the autonomous legal subject is frozen into a caricature, the affective subject moves with the world, *inter alia*, initiating everyday resistance, political protests, and court cases. Thus, we do not need human rights practices to protect us from our vulnerability. Rather, we need them to embrace our affectivity as a site of cross-pollination and co-flourishing. Indeed, we need "new [human rights] practices of imagination, resistance, revolt, repair and mourning, and of living and dying well" (Grear 2020, 168, string figuring with Haraway), on a planet already irreversibly damaged by liberal philosophy and its deadly subjectivity. We must live and write the legal transformation, as we breathe the contaminated air, filter it through our lungs or leaves, while we are continuously reconstituted and transformed with the atmosphere, as we are both affected and affect with each breath – inhalation plus exhalation.

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