

# Vulnerability as the new frontier in regulatory debate

Martin Lodge and Andrea Mennicken discuss the implications of the rise in interest in vulnerability

The theme of 'vulnerability' is enjoying considerable currency in contemporary debates of regulation. The current focus is less on concerns regarding the Achilles' heel and blind spots of particular regulatory arrangements and instruments. Rather, contemporary questions focus on who is being defined as being 'vulnerable'. Based on answers to those questions, what are the implications for regulation aimed at protecting and empowering citizens, public service users and consumers in vulnerable situations?

Vulnerability relates to those without voice and choice in contemporary regulated arrangements. Such a shift in attention towards 'vulnerability' of the voice- and choice-less points to a potentially significant shift in contemporary debates regarding regulation in general, and the regulation of markets in particular. Whereas regulatory debates around vulnerability tended to concentrate on questions of resilience and the building of resilience at organizational and/or systemic level, the discussion centres now more on questions concerning the capacity of public service users, and consumers (e.g. students or electricity consumers) to exercise voice and choice.

Of course, sceptics would suggest that a focus on 'vulnerable customers' has always been at the heart of regulatory activities. The elderly, children and the interests of future generations have always featured in regulatory contexts. In the area of utility regulation, for example, vulnerable customers have been supported by ensuring that minimum access conditions are met (such as specifying maximum distances to postal and telephone boxes), ensuring continuity of supply, or by creating special watchdogs for consumer support and advocacy. Yet, in the last few years we have seen a remarkable increase in activity focusing on regulatory design for and around the vulnerable.

In economic regulation, 'vulnerable consumers' are usually classified as those who seem to lack the resources to undertake informed choices. Here, the focus is largely on creating conditions for informed choice. These include offering easy-to-understand information, creating tariff structures that reduce regressive effects (as resource-rich individuals are said to benefit from hunting around for the latest offers), prohibiting certain products to be sold to particular sets of individuals, or researching why individuals may not be undertaking choices that would be economically beneficial to them.

Such a focus of regulatory attention largely assumes that regulated markets 'work' and that regulation and regulators

are largely about ensuring that individuals are in a position to exercise meaningful choice. Acknowledging that individual choice on the market place needs support via regulatory interventions is already a major departure from those days where market liberalization in and of itself was praised as facilitating customer choice and market efficiency. Debating how much support individuals need for the exercise of meaningful choice is therefore fundamentally also about what one assumes individuals are capable of, and how 'paternalistic' regulation should be.


Definitions of who is regarded as 'vulnerable' and in need of support shift with regulatory paradigms. Regulation needs to consider the changing boundaries of who is regarded as vulnerable. This concerns also questions of how far vulnerability should be taken and where the boundaries of regulatory concern should lie; if it is largely about enabling individuals to partake in markets, then the agenda regarding vulnerable customers is mostly about adding so-called behavioural insights to the tool box of regulators. However, a regulatory agenda could also be much more far-reaching, namely by focusing on different conditions that create vulnerability, whether it is a lack of language competencies, trust in market providers, reluctance to engage with public authorities that might offer redress, or genuine incapacity. How regulators should involve the 'voiceless' (which might include the unborn when it comes to decisions about long-term investments in infrastructures) goes a long way beyond the traditional regulatory interest in correcting market outcomes in view of some ill-defined fairness objectives.

In particular non-economic regulation has a far more extensive agenda when it comes to vulnerability. In healthcare, for example, patients, especially elderly patients, are usually not well-positioned to exercise much choice; dementia patients in care homes are not able to inform, or take comfort from, benchmarking exercises. Furthermore, concerns about vulnerability – defined as the inability to exercise voice and/or choice – might not only be related to humans but also to animals (e.g. regulation aimed at ensuring the humane treatment of animals) or our planet (e.g. climate change debates).

The challenge for regulators in dealing with vulnerability lies, firstly, in the identification of different types of vulnerability. One key issue in this context concerns the question whether vulnerable individuals are easy to detect or not. For example, it might be easy to spot those individuals who are at risk of financial over-extension when seeking loans if records exist







about income and expenditure patterns. Equally, socio-economic and other background data might offer indications about which individuals should deserve special support in higher education. However, in other cases, such detection is far more problematic, especially when it comes, for example, to migrants or low-pay areas of the economy.

A second key challenge relates to distinguishing between those that identify themselves as vulnerable and those who do not. Sources of non-identification may be due to issues of optimism bias, but might also point to genuine ignorance about being vulnerable. For example, most of the victims in Grenfell Tower were arguably unaware of being vulnerable due to lacking fire safety installations. Similarly, customers of online banking may not regard themselves as vulnerable as they rely on their institutions to ensure cyber security. Likewise, laboratory animals are not in a position to identify themselves as vulnerable regardless of how inhumane their treatment might be.

Looking across these two sets of issues offers insight into the multi-dimensional nature of the regulatory challenges that are involved in dealing with vulnerability. Without wishing to suggest that one form of vulnerability is more important than others, a key regulatory challenge lies arguably in attending to the 'undetected and non-self-identifying'. At minimum, it suggests that regulatory concern should not merely be limited to those who are (already) identified as vulnerable. Regulatory attention has to move beyond existing knowledge and deal also with individuals who might be reluctant to cooperate with regulatory authorities (as they may be unwilling to deal with state authorities due to previous experiences in, for example, authoritarian contexts).

There are, of course, further complications. One relates to the question whether the 'harm occurred' (i.e. the actualization of the vulnerability) is 'reversible' or not. Similarly, there is also

a question about relying on 'gatekeepers' and 'bottlenecks'. It might, for example, be argued that regulated organizations should be required to identify individuals as vulnerable (e.g. in banking) even if those individuals may not regard themselves as vulnerable. However, such a reliance on third parties' ability and willingness to identify vulnerability, is inherently problematic, as it depends on incentives; a 'trustee' role will not succeed in contexts where business models rely on the exploitation of vulnerable individuals (human and non-human). In these cases, the regulated sector may present a distinct form of vulnerability in itself.

To sum up, the boundaries of who and what is being defined as vulnerable are extremely fuzzy. For regulators to merely respond to vulnerability by looking at individual decision-making biases (and possibilities for 'nudging') suggests an ultimate faith in the potency of information and regulation to enable voice and choice among individuals. Such a response, in other words, is about enhancing a regulator's mandate to enhance (market) efficiency. It is a response that might be organizationally and ideationally convenient. But it neither touches on fundamental questions relating to vulnerability, nor deals it with the decreasing legitimacy of contemporary regulatory arrangements, and the vulnerability of regulation itself.

The current topicality of the vulnerability theme highlights a much deeper concern with the performance (and purpose) of the 'regulatory state'. A much more far-reaching debate about vulnerability is therefore warranted – one that inevitably will lead to difficult conversations about perceptions of fairness and efficiency and the trade-offs between them. Such conversations, albeit difficult, have the potential to transform understandings of regulation, and therefore deserve to be at the forefront of current discussions.

#### REFERENCES

- 1 See for example Ofgem, 'Protecting and empowering customers in vulnerable situations', <https://www.ofgem.gov.uk/about-us/how-we-work/working-consumers/protecting-and-empowering-consumers-vulnerable-situations> Accessed 25 October 2018.

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