

LEAD

Institute of Law,
Emergencies & Disasters

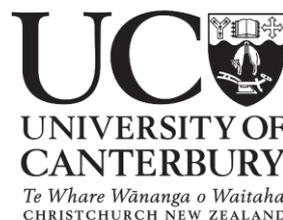
RESEARCH COLLECTION

NATACHA WISSTT

EXPLORE THE DEVELOPMENT AND
CURRENT USE OF THE CONCEPT OF
“VULNERABILITY” WITHIN THE WIDER
HUMAN RIGHTS DISCOURSE (RESEARCH
REPORT)

UNIVERSITY OF CANTERBURY

SEPTEMBER 2021



Law, Emergencies and Disasters Research Collection [2021:3]

<https://doi.org/10.26021/12406>



TABLE OF CONTENTS

I	<i>The Concept of Vulnerability</i>	3
II	<i>Vulnerability and its connection to other concepts and factors</i>	4
A	<i>Compounded vulnerability</i>	5
B	<i>Vulnerability as both “universal” and “particular”</i>	6
C	<i>The concept of “Vulnerability” in the International Human Rights Framework</i> ...	7
D	<i>Defining “Vulnerable groups”</i>	8
E	<i>Vulnerability and state responsibility</i>	10
III	<i>The European Court of Human Rights</i>	11
A	<i>Cases before the European Court of Human Rights</i>	11
1	<i>Chapman v the United Kingdom 2001</i>	11
2	<i>DH v the Czech Republic 2007</i>	12
3	<i>Sampanis v Greece 2008</i>	13
4	<i>Opuz v Turkey 2009</i>	14
5	<i>Oršuš v Croatia 2010</i>	14
6	<i>Alajos Kiss v Hungary 2010</i>	15
7	<i>MSS v Belgium 2011</i>	15
8	<i>Kiyutin v Russia 2011</i>	16
9	<i>VC v Slovakia 2011</i>	17
10	<i>Yordanova v Bulgaria 2012</i>	17
11	<i>Horváth v Hungary 2013</i>	18
12	<i>Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania 2014</i>	18
13	<i>Tarakhel v Switzerland 2014</i>	19
14	<i>AME v The Netherlands 2015</i>	20
15	<i>SF v Bulgaria 2017</i>	20
IV	<i>Conclusion</i>	21

RESEARCH TASK 1:

EXPLORE THE DEVELOPMENT AND CURRENT USE OF THE CONCEPT OF “VULNERABILITY” WITHIN THE WIDER HUMAN RIGHTS DISCOURSE

NATACHA WISST^{*}

ABSTRACT

These research papers explore the concept of vulnerability in international human rights law. In the wake of the Christchurch earthquakes of 2010-2011, this research focuses on how "vulnerability" has been used and developed within the wider human rights discourse.

They also examine jurisprudence of international human rights bodies, and how the concept of "vulnerability" has been applied. The research also includes a brief investigation into the experiences of vulnerable populations in disaster contexts, focusing primarily on the experiences of "vulnerable persons" in the Christchurch earthquakes and their aftermath.

I The Concept of Vulnerability

Peroni and Timmer write that “vulnerability is a concept fraught with paradox” with scholars across various disciplines referring to it as “confusing, complex, vague, [and] ambiguous”.¹ Similarly, Hudson notes that throughout literature it is discussed in contradictory terms, as “both universal and categorical, as enduring yet situational, as variable, occurrent, dispositional, pathogenic, layered, and more”.² Nevertheless, the term “vulnerability” or “vulnerable” most often refers to certain individuals or groups who “should be the recipients of extra care and attention”.³ This special care requires the assessment of both the factors that influence vulnerability as well as the experiences of certain individuals and group.⁴ Vulnerable groups will typically experience “discrimination, social exclusion, stigmatization, and

^{*} Natacha Wisst was a student at the University of Canterbury, having just completed a Bachelor of Laws (2018) and enrolled in a Master of Laws (International Law and Politics) (2020) at the time of this research.

¹ Lourdes Peroni and Alexandra Timmer “Vulnerable groups: The promise of an emerging concept in European Human Rights Convention Law” (2013) 11(4) ICON 1056 at 1058.

² Ben Hudson “Migration in the Mediterranean: Exposing the Limits of Vulnerability at the European Court of Human Rights” (2018) 4 Maritime Safety and Security Law Journal 26 at 26.

³ Alexander HE Morawa “Vulnerability as a Concept of International Human Rights Law” (2003) 6(2) JIRD 139, at 139.

⁴ Ivona Truscan “Considerations of vulnerability: from principles to action in the case law of the European Court of Human Rights” (2013) 36 Retfærd Årgang 64 at 78.

deprivation of protections and entitlements on an ongoing basis”.⁵ The concept has also been defined as the culmination of factors that impact on an individuals, or certain groups, ability to anticipate, resist, deal with, and recover from harm.⁶ Even further than this, vulnerability not only refers to a “potential to be affected” but also “a road to empowerment”.⁷ Fineman considers the concept of vulnerability to be useful to recognise the hidden biases that are interwoven in our legal practices.⁸

Unfortunately, while the concept of vulnerability enjoys much discussion in the literature and jurisprudence, especially at the European Court of Human Rights (ECtHR), there is little consensus on the appropriate approach to the concept and its core elements.⁹ The literature often refers to the “universality” of vulnerability, while within the legal framework vulnerability is most often used to label particular population groups.¹⁰

II Vulnerability and its connection to other concepts and factors

According to Fineman, a focus on equality alone is insufficient to truly tackle historical and social inequalities.¹¹ Instead, vulnerability dives deeper and “links human experience and context”.¹² Thus, vulnerability links to other factors such as “development, governance, and power inequalities”.¹³ These may manifest in experiences of poverty and marginalisation, which interrelate with vulnerability.¹⁴ Poverty and extreme poverty are increasingly being recognised as a significant cause of vulnerability.¹⁵ In a 2010 article further considering and developing her vulnerability theory, Fineman writes:¹⁶

... if our bodily fragility, material needs, and the possibility of messy dependency ... cannot be ignored in life, how can they be absent in our theories about equality, society, politics, and law?

⁵ Audrey R Chapman and Benjamin Carbonetti “Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights” (2011) 33 Hum Rts Q 682 at 683.

⁶ Mariangela Bizzarri “Protection of Vulnerable Groups in Natural and Man-Made Disasters” in A de Guttry and others (eds) *International Disaster Response Law* (2012) at 386.

⁷ Truscan, above n 4, at 65.

⁸ Martha Albertson Fineman “The Vulnerable Subject and the Responsive State” (2010) 60 Emory LJ 251, at 268.

⁹ Hudson, above n 2, at 27.

¹⁰ At 27.

¹¹ Fineman, above n 8, at 262.

¹² Truscan, above n 4, at 65.

¹³ Bizzarri, above n 6, at 386.

¹⁴ At 387.

¹⁵ Chapman and Carbonetti, above n 5, at 684.

¹⁶ Fineman, above n 8, at 263.

Thus, she argues, vulnerability theory must also incorporate considerations of *dependency* – an inherent element of the human condition that significantly impacts the human experience. Furthermore, Nifosi-Sutton submits, “notions of disadvantage and vulnerability appear to coincide”.¹⁷ So, the concept of vulnerability is linked to concepts such as dependency and disadvantage, as well as factors such as development, governance, power inequalities, poverty, and marginalisation.

A Compounded vulnerability

Vulnerability is a multi-faceted concept where multiple factors overlap to create different levels of vulnerability in individuals and groups.¹⁸ Thus, vulnerability is multi-layered resulting in individuals and groups, as well as individuals within the same group, have differing levels of vulnerability.¹⁹ Nifosi-Sutton agrees that the vulnerability of individuals may be “compounded and layered” and states that:²⁰

... within vulnerable or marginalised and disadvantaged groups, there are persons who are more vulnerable, disadvantaged, and marginalised than other group members because they experience multiple forms of discrimination.

In contrast to this “layered” approach to vulnerability, Fineman argues that institutional systems of power and privilege are what compound vulnerability, as opposed to multiple identities of the self.²¹ She considers that the culminations of economic and institutional factors are what can compound an individual’s vulnerability.²² Similarly, Guidry-Grimes and Victor also argue that it is not just the individual situations of peoples that causes vulnerability but the effect of certain social institutions that can compound vulnerability.²³ However, they also argue that the concept of vulnerability has to incorporate a persons or groups circumstances in order to be flexible and responsive to the special needs of these persons or groups.²⁴ This will mean that vulnerability is dependent upon “physical health and social, political, and economic

¹⁷ Ingrid Nifosi-Sutton “A Human Rights-Based Vulnerability Paradigm: Lessons from the case of displaced women in post-quake Haiti” in Flavia Zorzi Giustiniani and others (eds) *Routledge Handbook of Human Rights and Disasters* (Routledge, Abingdon, 2018) at 280.

¹⁸ Bizzarri, above n 6, at 387.

¹⁹ At 387.

²⁰ Nifosi-Sutton, above n 17, at 280.

²¹ Martha Albertson Fineman “The Vulnerable Subject: Anchoring Equality in the Human Condition” 20(1) *Yale JL & Feminism* at 17.

²² Fineman, above n 8, at 268.

²³ Laura Guidry-Grimes and Elizabeth Victor “Vulnerabilities compounded by social institutions” (2012) 5(2) *IJFAB* 126 at 127.

²⁴ At 131.

circumstances.”²⁵ Therefore, the concept of “vulnerability” spans across the personal, relational, and institutional spheres of human existence.²⁶ Cooper notes that these all connect as:²⁷

... individuals influence relationships and institutions, relationships influence individuals and institutions, and institutions influence individuals and relationships. None of these aspects is completely separate from the other.

Bizzarri argues that this perspective on vulnerability is important as it recognises the “wide variety of scales of interaction between different vulnerabilities that combine to create relevant categories of people at risk”.²⁸ Guidry-Grimes and Victor also consider that this “intersection of social practices, the individual, and her situation” is what creates vulnerability and systemic disadvantage.²⁹

B Vulnerability as both “universal” and “particular”

Peroni and Timmer focus on the “central paradox of vulnerability” being that “it is both universal and particular”.³⁰ The universality of “vulnerability” arises from “our embodiment: as embodied beings we are all vulnerable, but we experience this vulnerability uniquely through our individual bodies”.³¹ Fineman is the leader of the universal approach to the concept of vulnerability. Cooper sums it up as being “based on a recognition that we are all born defenceless, become feeble, must fear natural disasters, and might be failed by social institutions”.³² Fineman therefore views vulnerability as a constant aspect of the human condition, universal to us all. However, there is tension within the literature between the universal approach to vulnerability and the group-based or particular approach to vulnerability.³³

Cooper critiques Fineman’s vulnerability theory as it, in his view, fails to function for an analysis of racial profiling as the evidence “conflicts with Fineman’s belief that neither

²⁵ At 131.

²⁶ Frank Rudy Cooper “Always Already Suspect: Revising Vulnerability Theory” (2015) 93(5) CL Rev 1339 at 1356.

²⁷ At 1356–1357.

²⁸ Bizzarri, above n 6, at 388.

²⁹ Guidry-Grimes and Victor, above n 23, at 134–135.

³⁰ Peroni and Timmer, above n 1, at 1058.

³¹ At 1058.

³² Cooper, above n 26, at 1339.

³³ Peroni and Timmer, above n 1, at 1060.

privilege nor advantage is tied to identities”.³⁴ He further argues that, through a critical race theory lens, “there is no universal that does not in fact hide an intrinsic particularity”.³⁵ Cooper thus posits that viewing vulnerability as universal ignores the social statuses of individuals and groups which exist regardless of whether they are accepted or not.³⁶ Cooper writes: “the problem with subsuming identities under vulnerability theory’s principles of complexity and particularity is that we are not all vulnerable in the same ways or even to the same degrees”.³⁷ He rejects the proposition of Fineman’s vulnerability theory that vulnerabilities stem from the institutional rather than from identities. In his view, analysing vulnerabilities as consequences of “the intersection of categories of identities” is necessary to fully realise the depth of vulnerability and to not fail to take account of any “unique identity that is not generalizable to the lowest common denominator of ... [any amount] ... of categories”.³⁸ Overall, Cooper argues that the four elements of Fineman’s vulnerability theory require a revision that takes account of the intersecting identities that impact upon human vulnerability. In analysing the four elements, Cooper comes to the conclusion that the vulnerability theory misses the element of *privilege*. Incorporating considerations of privilege into vulnerability analysis will mean the theory will “be able to explain how systems of power both benefit some identities and make others more vulnerable”.³⁹

C The concept of “Vulnerability” in the International Human Rights Framework

Peroni and Timmer argue that the concept of “vulnerability” is a core element in human rights considerations by referencing Marie-Bénédicte Dembour who used the term “protest scholars” to mean those who see human rights as an articulation of “rightful claims made by or on behalf of the poor, the underprivileged and the oppressed”.⁴⁰ Thus, the human rights framework must “emphasize the imperative to pay special attention to the needs of particularly vulnerable people”.⁴¹ Todres notes that human rights law is a body that presents an importing starting point for considerations of “vulnerability” due to “its recognition of, and central focus

³⁴ Cooper, above n 26, at 1364.

³⁵ At 1365.

³⁶ At 1366.

³⁷ At 1367.

³⁸ At 1368.

³⁹ Cooper, above n 26, at 1373.

⁴⁰ Marie-Bénédicte Dembour “What are Human Rights” (2010) 32 Hum Rts Q 1, at 3 as cited in Lourdes Peroni and Alexandra Timmer “Vulnerable groups: The promise of an emerging concept in European Human Rights Convention Law” (2013) 11(4) ICON 1056–1085 at 1062.

⁴¹ Peroni and Timmer, above n 1, at 1062.

on, the dignity of every individual irrespective of race, ethnicity, sex, religion, class, disability, or other protected status”.⁴² Fineman argues that vulnerability theory focuses on the social and institutional aspects of vulnerability in the human rights approach, which especially concerns the responsibility of the state.⁴³

D Defining “Vulnerable groups”

Lists of those who are considered to be a “vulnerable group” are common throughout the international human rights framework.⁴⁴ While there is no exhaustive list on which groups may be considered vulnerable, in analysing the literature, law, policy, and other relevant documents in the international human rights sphere, it is revealed that certain groups are consistently considered to be “vulnerable”.

Nifosi-Sutton focuses on the vulnerability of disaster-affected persons, applying the United Nations (UN) Committee on Economic, Social and Cultural Rights “vulnerability paradigm” and analyses the implementation of this paradigm and how it gives legal protection to persons affected by disasters.⁴⁵ Nifosi-Sutton notes that in General Comment No 4 of 1991 on the right to adequate housing as implied in para 1 of art 11 of the ICESCR, the United Nations (UN) Committee on Economic, Social and Cultural Rights recognises that “disadvantaged groups must be accorded *full and sustainable* access to housing resources. Such groups include, among others, the elderly, children, persons with disabilities and victims of natural disasters”.⁴⁶ Thus, according to Nifosi-Sutton, the concept of “vulnerability” includes those referred to as “disadvantaged groups”, especially those listed above. Others have referred to vulnerable groups as including “children, the aged, ethnic minorities, displaced populations, people suffering from chronic illnesses and persons with disabilities”.⁴⁷ Bizzarri notes that “gender, age, ethnicity, and disability ... [as well as] ... socioeconomic status and geographic location”

⁴² Jonathan Todres “Mainstreaming Children’s Rights in Post-Disaster Settings” (2011) 25 *Emory International Law Review* 1233 at 1247.

⁴³ Fineman, above n 8, at 255.

⁴⁴ Morawa, above n 3, at 140.

⁴⁵ Nifosi-Sutton, above n 17, at 277.

⁴⁶ At 279.

⁴⁷ Hasheem Mannan and others “Core concepts of human rights and inclusion of vulnerable groups in the United Nations Convention on the rights of persons with disabilities” (2012) 6 *European Journal of Disability Research* 159–177 at 164.

can cause groups to be “vulnerable”.⁴⁸ Morawa lists factors that frequently and systematically create vulnerable groups, and the relevant vulnerable groups, as including:⁴⁹

- Age (comprising children, adolescents, the elderly etc);
- Sex (women, including those who are pregnant, ill, involved in armed conflict etc, girls, but also transsexuals);
- Ethnicity, sometimes intertwined with residency status (minorities and indigenous peoples, the rural population, people living on islands, or people living in disaster-prone areas);
- Health status (physically and mentally handicapped people, the terminally ill etc);
- Liberty status (detainees and prisoners under whatever regime of deprivation of liberty); and
- Other status (a diverse group encompassing, for instance, landless persons, foreigners, refugees and asylum seekers, deportees, the homeless etc).

The Council of Europe specifies vulnerable groups as including “people with disabilities; migrants, asylum seekers and refugees; and children”.⁵⁰ The Icelandic Human Rights Centre identifies several “vulnerable groups”, including women and girls, children, refugees, internally displaced persons, stateless persons, national minorities, indigenous peoples, migrant workers, disabled persons, elderly persons, HIV-positive persons and AIDS victims, Roma/Gypsies/Sinti, and lesbian, gay, and transgender people.⁵¹ This list is not exhaustive, as other persons, such as those in a low socio-economic group, could be considered vulnerable.⁵²

With regard to the elderly, Fineman posits that we should not position “old age as a spate designation or category of human existence” but we should recognise it “as one end of the continuum that represents the life-course of the vulnerable subject”.⁵³ This perspective on the

⁴⁸ Bizzarri, above n 6, at 386.

⁴⁹ Morawa, above n 3, at 141.

⁵⁰ Council of Europe “European and Mediterranean Major Hazards Agreement: Vulnerable Groups” <www.coe.int>.

⁵¹ Icelandic Human Rights Centre “The Human Rights Protection of Vulnerable Groups” (2009) <www.humanrights.is>.

⁵² Chapman and Carbonetti, above n 5, at 684.

⁵³ Martha Albertson Fineman “Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility” (2012) 20 *Elder LJ* 71 at 110.

vulnerability of the elderly follows Fineman’s work on the “universality” of “vulnerability”. As such, the elderly are vulnerable humans, much like everyone else, with “ever-present possibility of changing needs and circumstances in their individual and collective lives”.⁵⁴ Fineman argues that this approach recognises the need to consider the changing needs and circumstances of both those we consider elderly, those who are ageing into the category, and those who have similar needs and circumstances.⁵⁵

Some scholars actually reject the use of vulnerability as a label for groups because it “assumes a standard baseline for evaluating vulnerability” and fails to account for “the whole host of expressions of vulnerability at individual level”.⁵⁶ Gilson warns against labelling vulnerable groups as it can have the effect of “thinking of those who are vulnerable as weak”.⁵⁷ This is dangerous as it could result in the further stigmatization of vulnerable peoples as “the term *vulnerable population* has an air of victimhood, deprivation, dependency, or pathology attached to it”.⁵⁸ Truscan comments that vulnerability should instead be a description of “an experience rather than an identity or property of certain groups”.⁵⁹

E Vulnerability and state responsibility

Many scholars submit that the existence of vulnerability gives rise to state responsibility. Morawa notes that vulnerability, human rights violations, and the responsibility of states to protect and restore, are all closely related.⁶⁰ Truscan calls this a “reconsideration of power, balances, privileges, and distribution of resources” in order to correct the imbalances in these areas which affect vulnerable peoples especially.⁶¹ She notes that “dependence, capacity and discrimination describe vulnerability” and so, state action is required to protect individuals’ human rights.⁶²

⁵⁴ At 110.

⁵⁵ At 110.

⁵⁶ Truscan, above n 4, at 67.

⁵⁷ Erinn Gilson “Vulnerability, Ignorance and Oppression” (2011) 26(2) *Hypathia* at 311.

⁵⁸ Fineman, above n 8, at 266.

⁵⁹ Truscan, above n 4, at 69–70.

⁶⁰ Morawa, above n 3, at 150.

⁶¹ Truscan, above n 4, at 65.

⁶² At 77.

III The European Court of Human Rights

The inclusion of the consideration of “vulnerability” and “vulnerable groups” has increased in cases coming through the ECtHR.⁶³ Peroni and Timmer argue:⁶⁴

... the Court’s use of the term “vulnerable groups” is not mere rhetorical flourish. The term *does* something: it allows the Court to address different aspects of inequality in a more substantive manner.

Peroni and Timmer examine the case law of the ECtHR and state that it “reveals some blanks or inconsistencies in the application of the notion of vulnerable groups”.⁶⁵ They also challenge the Court’s failure to consider the issue of “group vulnerability” in various cases. Nevertheless, in their view, the developments that *have* occurred concerning group vulnerability within the case law of the ECtHR have had positive implications and represent “a crucial step towards an enhanced antidiscrimination case law and a more robust idea of equality”.⁶⁶ Arnardóttir considers the developments in the ECtHR to be moving “in the direction of substantive equality”.⁶⁷

O’Boyle points out that the Court has not yet developed the core elements of a vulnerability approach and has instead limited itself to considering vulnerability to flow from historical stigmatisation and discrimination.⁶⁸ The Court has identified on a case-by-case basis whether those concerned can be considered “vulnerable” or part of a “vulnerable group”.⁶⁹

A Cases before the European Court of Human Rights

1 Chapman v the United Kingdom 2001

The concept of “vulnerability” was introduced in a 2001 case before the European Court of Human Rights: *Chapman v the United Kingdom*.⁷⁰ In this case, the applicant, who was a Roma woman, alleged violations of the right to respect for her minority lifestyle under art 8 of the

⁶³ Peroni and Timmer, above n 1, at 1056.

⁶⁴ At 1057.

⁶⁵ At 1070.

⁶⁶ At 1074.

⁶⁷ Oddný Mjöll Arnardóttir “Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?” (2017) 4 Oslo L Rev 150, at 152.

⁶⁸ Michael O’Boyle “The notion of ‘vulnerable groups’ in the case law of the European Court of Human Rights” (Report presented at the Conference on the Constitutional Protection of Vulnerable Groups: A Judicial Dialogue, Santiago, Chile, 4–5 December 2015) at 2.

⁶⁹ Above n 4, at 73.

⁷⁰ *Chapman v The United Kingdom* (2001) 33 EHRR 18 (Grand Chamber) at [96].

European Convention on Human Rights (ECHR) and discrimination (art 14 ECHR) due to her eviction from her land because her caravan was stationed there without planning permission. The applicant urged the Court to take account of international developments, which included recognition of the vulnerability of certain groups (such as in the Framework Convention for the Protection of National Minorities).⁷¹ The Grand Chamber observed that there is an emerging recognition of “the special needs of minorities and an obligation to protect their security, identity and lifestyle”.⁷² The Grand Chamber held:⁷³

... the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions on particular cases.

In the joint dissenting opinion of Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall JJ, the Judges stated that there was a:⁷⁴

... clearly recognised need of Gypsies for protection of the effective enjoyment of their rights ... their vulnerability as a minority whose needs and values differ from those of the general community.

Peroni and Timmer comment that, in this case, “the vulnerability of Roma seems to arise primarily from the group’s minority status and from the lack of consideration of its minority lifestyle in the planning and decision-making processes”.

At this stage in the development of the concept of “vulnerability” through case law, the vulnerability of Roma appears to be drawn from their minority status and from a lack of protection and consideration from authorities in planning and decision-making.⁷⁵ Peroni and Timmer comment that this early articulation of vulnerability is reflective of the Court’s later developments, where vulnerable groups are defined as having vulnerability that “is partly constructed by broader societal, political, and institutional circumstances”.⁷⁶

2 *DH v the Czech Republic* 2007

The case of *DH v the Czech Republic* was yet another case that drew on the concept of vulnerability in its decision. In this case, the Grand Chamber of the European Court of Human

⁷¹ At [93].

⁷² At [93].

⁷³ At [96].

⁷⁴ Dissenting opinion, *Chapman*, above n 70, at [3].

⁷⁵ Peroni and Timmer, above n 1, at 1063.

⁷⁶ At 1063.

Rights ruled that the segregation of Roma students into “special schools” was in breach of art 14 of the ECHR. Evidence demonstrated that Romani children were being segregated into “special schools” regardless of their intellectual abilities and denied enrolment in mainstream schools. The case was significant as it referenced *Chapman v the United Kingdom*, recognising that “as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority”.⁷⁷

The Court referenced the European Commission against Racism and Intolerance (ECRI) general policy recommendation no 3, “Combating racism and intolerance against Roma/Gypsies”, which noted that “combating racism, xenophobia, anti-Semitism and intolerance is above all a matter of protecting the rights of vulnerable members of society”.⁷⁸

3 *Sampanis v Greece 2008*

The case of *Sampanis v Greece 2008* is yet another example of the Courts acknowledging the vulnerability of Roma. In this case, the Court referenced Recommendation No 1557 (2002) on the legal situation of Roma in Europe from a Council of Europe Parliamentary Assembly which stated that Roma are “subject to discrimination, marginalisation and segregation”, the consequences of which will affect vulnerable groups in society. Furthermore, the recommendation considered that “Roma constitute a special group, minority for twofold reasons: ethnically minority, they also very often belong to the socially disadvantaged state of society”.⁷⁹ Again, as in *DH v Czech Republic*, the Court referenced the European Commission against Racism and Intolerance (ECRI) general policy recommendation no 3, “Combating racism and intolerance against Roma/Gypsies”, which aims to protect the rights of vulnerable members of society. The Court cites both *Chapman v the United Kingdom* and *DH v Czech Republic* as evidence of the vulnerability of Rome and notes that “because of their vicissitudes and their perpetual uprooting, the Roma constitute a disadvantage and vulnerable minority of a particular character”.⁸⁰

⁷⁷ *DH v the Czech Republic* (2007) 47 EHRR 3 (Grand Chamber), at [182].

⁷⁸ At [59].

⁷⁹ Recommendation No. 1557 (2002) on the legal situation of Roma in Europe as cited in *Sampanis v Greece* (32526/05) Section I, ECHR 5 June 2008, at [41](3)–[41](4).

⁸⁰ *Sampanis v Greece* (32526/05) Section I, ECHR 5 June 2008 at [71].

4 *Opuz v Turkey 2009*

The case of *Opuz v Turkey 2009* concerned the failure of the Turkish authorities to protect the applicant's mother against domestic violence, which posed a threat to her life and ultimately ended it. The Court found violations of arts 2 and 3 of the ECHR as well as art 14 for discriminatory judicial passivity in relation to the reported domestic violence. The Court also found that the authorities punishment of the perpetrator of the violence was "disproportionate ... [and] ... the authorities failed to address the issues at all".⁸¹ The case cited Amnesty International's 2004 report entitled "Turkey: women confronting family violence" and stated that: "Women from vulnerable groups, such as those from low-income families or who are fleeing conflict or natural disasters, are particularly at risk [of domestic violence]."⁸² This discussion on the vulnerability of women, especially women with compounding circumstances, demonstrates the Court's recognition of the layers to vulnerability. In further discussing the applicant's vulnerability, the Court stated that they considered the applicant's mother to be entitled to state protection as:⁸³

... the applicant may be considered to fall within the group of "vulnerable individuals ... [due to] ... the violence suffered by the applicant in the past, the threats issued by H.O. following his release from prison and her fear of further violence as well as her social background, namely the vulnerable situation of women in south-east Turkey.

5 *Oršuš v Croatia 2010*

Oršuš v Croatia 2010 was yet another case concerning the education of Roma children. The applicants alleged that the separation of Roma pupils into separate classes and curriculums amounted to racial discrimination and violated rights to education and freedom from inhuman and degrading treatment under the ECHR. The Court applied *Chapman* in regarding the Roma as a vulnerable minority where, again, "as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority".⁸⁴ This case was cited in *Sampanis v Greece*, where the Court reflected that, in this case, the Court had noted that it would be impossible to disregard the minority status of Roma and, due to their history, they were "a

⁸¹ *Opuz v Turkey* (33401/02) Section III, ECHR 9 June 2009 at [147].

⁸² At [99].

⁸³ At [160].

⁸⁴ *Oršuš v Croatia* (2010) 52 EHRR 7 (Grand Chamber, ECHR) at [147].

particular type of vulnerable minority in need of special protection”.⁸⁵ The Court repeated the need to give “special consideration ... to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases” due to their vulnerable status.⁸⁶ Together, the cases of *DH v the Czech Republic (2007)*, *Sampanis v Greece (2008)*, and *Oršuš v Croatia (2010)* all acknowledge that the vulnerability of Roma exists due to prejudices stemming from historical experiences.

6 *Alajos Kiss v Hungary 2010*

In this case, the applicant, who suffered from manic depression, was excluded from voting due to being placed under partial guardianship.⁸⁷ The applicant alleged violations of art 3 of Protocol No 1, read alone or in conjunction with arts 13 and 14 of the ECHR.⁸⁸ The Court stated:⁸⁹

In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.

Peroni and Timmer consider that, in this approach, “the Court takes the first steps towards embracing a ‘social model’ of disability ... [which] recognises the built environment and society’s negative attitude towards people with impairment” that leads to vulnerability.⁹⁰

7 *MSS v Belgium 2011*

The case of *MSS v Belgium* was a landmark ruling, specifically in terms of developing and broadening the concept of “group vulnerability”. The applicant, an Afghan asylum seeker, alleged that Belgian authorities had violated arts 2 and 3 of the ECHR due to his expulsion from Belgium to Greece under the Dublin II Regulation.⁹¹ It was alleged that the conditions he was kept under in Greece amounted to a violation of art 3 of the Convention. The Court stated that, in considering the legality of Belgium’s actions, it was necessary to take into account “that

⁸⁵ *Sampanis v Greece* (59608/09) Section I ECHR 11 December 2012 at [76].

⁸⁶ *Oršuš*, above n 84, at [148].

⁸⁷ *Alajos Kiss v Hungary* (38832/06) Section II, ECHR 20 May 2010 at [7].

⁸⁸ At [3].

⁸⁹ At [42].

⁹⁰ Peroni and Timmer, above n 1, at 1066–1067.

⁹¹ *MSS v Belgium* (2011) 53 EHRR 2 (Grand Chamber) at [3].

the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.”⁹² As Peroni and Timmer note, this points to the individual experience of the applicant. However, the Court broadens the application by stating that the applicant’s vulnerability was “inherent in his situation as an asylum-seeker”, thus attaching vulnerability as applicable to all asylum-seekers.⁹³ The Court further stated that, as an asylum-seeker, the applicant was “a member of a particularly underprivileged and vulnerable population group in need of special protection”.⁹⁴ Peroni and Timmer summarise the grounds upon which the Court, in this case, considers will amount to the creation of a vulnerable group. Those being: “a reality that is characterised by material and psychological want ... dependence ... inherent vulnerability [due to experiences] ... and systematic deficiencies [of the state systems]”.⁹⁵

However, in a separate opinion in the case, Judge Sajó disagrees with considering asylum-seekers to be a “vulnerable group” because they have not been “historically subject to prejudice with lasting consequences, resulting in their social exclusion”.⁹⁶ Such an argument demonstrates the wariness that exists in leaving the concept of vulnerability wide open. Truscan considers this approach to be “problematic, because it affords special protection based on membership in a group considered vulnerable, while ignoring the particular circumstances of the individuals concerned”.⁹⁷

8 *Kiyutin v Russia 2011*

The case *Kiyutin v Russia* was brought before the Court concerning the exclusion of Mr Kiyutin, an Uzbek national living in Russia, from a residence permit on the grounds of his HIV-positive status. The Court held “that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8”,⁹⁸ due to the exclusion being unreasonable and unjustifiable as the applicant belonged to a particularly vulnerable group.⁹⁹ This was a landmark case in terms of recognising claims of discrimination on the grounds of an individual’s HIV-positive status. The Court held that they consider “...that people living with

⁹² At [232].

⁹³ At [233].

⁹⁴ At [251].

⁹⁵ Peroni and Timmer, above n 1, at 1069.

⁹⁶ Above n 91, Sajó J, partly concurring and partly dissenting, at [102].

⁹⁷ Truscan, above n 4, at 73.

⁹⁸ *Kiyutin v Russia* (2011) 53 EHRR 26 (ECHR) at 19 [2].

⁹⁹ At [74].

HIV are a vulnerable group with a history of prejudice and stigmatization”.¹⁰⁰ In assessing the status of “vulnerability”, the Court also referred to peoples living with HIV experiencing historically “widespread stigma and ostracism”.¹⁰¹

9 *VC v Slovakia 2011*

The case of *VC v Slovakia* concerned the forced sterilisation of a Roma woman.¹⁰² In this case, the applicant, a Roma woman, alleged that her sterilisation in a public hospital amounted to breaches of arts 3, 8, 12, 13, and 14 of the ECHR. In the Court’s assessment it was held that “the practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups”. Again, the Court considers that the Roma are a vulnerable community, which require protection. It is noted that the vulnerability of Roma women is due to:¹⁰³

... the widespread negative attitudes towards the relatively high birth rate among the Roma compared to other parts of the population, often expressed as worries of an increased proportion of the population living on social benefits.

Unfortunately, the Court did not address whether the acts were a violation of the right to non-discrimination under art 14 of the Convention, which would have been tied to considerations of “vulnerability”.

10 *Yordanova v Bulgaria 2012*

The case of *Yordanova v Bulgaria* is yet another case concerning the vulnerability of Roma, however, the Court does not explicitly use the word “vulnerable” or “vulnerability”.¹⁰⁴ Although, Peroni and Timmer note that the Court makes use of “two indicators of group vulnerability ... *social disadvantage* and *material deprivation* [emphasis in original]”.¹⁰⁵

¹⁰⁰ At [64].

¹⁰¹ At [48].

¹⁰² Peroni and Timmer, above n 1, at 1066.

¹⁰³ *VC v Slovakia* (18968/07) Section IV ECHR 8 November 2011 at [42].

¹⁰⁴ *Yordanova v Bulgaria* (25446/06) Section IV, ECHR 24 April 2012.

¹⁰⁵ Peroni and Timmer, above n 1, at 1067.

11 *Horváth v Hungary 2013*

In 2011, Mr Horváth and Mr Kiss, two young Roma men, complained to the ECtHR that their placement at a remedial school created for children with mental disabilities was a result of discrimination and a breach of their right to education.¹⁰⁶ Discrimination arose from the “systemic misdiagnosis of Roma children as mentally disabled [which] has been a tool to segregate Roma children from non-Roma children in the Hungarian school system since at least the 1970s”.¹⁰⁷ In the Court’s assessment they again consider the ECtHR’s establishment that, “as a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority”.¹⁰⁸ Again, the Court considers that vulnerable groups require special consideration in decision-making and any regulatory framework.¹⁰⁹ The Court stated: “It must thus be observed that a general policy measure exerted a disproportionately prejudicial effect on the Roma, a particularly vulnerable group.”¹¹⁰ The case *Alajos Kiss v Hungary* is referred to, where the Court had made note of the vulnerability of persons with mental disabilities. Again, the finding of vulnerability is based on the group’s historical experiences of discrimination and prejudice.¹¹¹

12 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania 2014*

The Centre for Legal Resources (CLR), a Romanian NGO, complained to the ECtHR of breaches to the human rights of Valentin Câmpeanu, a youth with mental disabilities who was living with HIV, who died as a result of the breaches. The Court extensively considered the CLR’s ability to bring a case on behalf of Valentin Câmpeanu, in which they referenced his “undisputed vulnerability” frequently.¹¹² The Council of Europe Commissioner for Human Rights is cited as viewing that:¹¹³

... a strict approach to *locus standi* requirements concerning people with disabilities (in this case, intellectual) would have the undesired effect of depriving this vulnerable group of any

¹⁰⁶ *Hovárth v Hungary* (11146/11) Section II, ECHR 29 January 2013, at [6].

¹⁰⁷ *MSS v Belgium*, above n 91, at [9].

¹⁰⁸ At [102].

¹⁰⁹ At [102].

¹¹⁰ At [110].

¹¹¹ At [128].

¹¹² *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania Judgment* (47848/08) Grand Chamber, ECHR 14 July 2014 at [82].

¹¹³ At [92].

opportunity to seek and obtain redress for breaches of their human rights, thus running counter to the fundamental aims of the Convention.

The Court held that, although applications can traditionally only be brought before the Court by living persons, or their representatives, “particular considerations has been shown with regard to the victim’s vulnerability on account of their age, sex or disability” and, therefore, the application by CLR was admissible.

In assessing the breaches of Valentin Câmpeanu’s human rights the Court reiterated that “particular attention should be paid to Mr Câmpeanu’s vulnerable state” to which they refer to the facts in para 7 of the case.¹¹⁴ This points to the fact that the Court considers that Vantin Câmpeanu’s severe mental disability and other associated symptoms, orphan status, and HIV-positive status all produced his vulnerability.¹¹⁵ It was a landmark case as it concerned both issues of access to justice for vulnerable groups as well as institutional human rights violations against peoples vulnerable due to their disability.

13 Tarakhel v Switzerland 2014

Tarakhel v Switzerland is another case concerned asylum seekers who, similar to those in *MSS v Belgium*, were alleging that their planned expulsion from the state of Switzerland to Italy would be in breach of human rights obligations (specifically arts 3 and 8 of the ECHR).¹¹⁶ In regards to vulnerability, the Court cites *MSS v Belgium*, which holds asylum seekers to be a “particularly underprivileged and vulnerable” population group which require “special protection”.¹¹⁷ More specifically, the Court in *Tarakhel v Switerland* considers the vulnerability of asylum seeker families with children.¹¹⁸ O’Boyle states that this discussion by the Court recognises that “some are more vulnerable than others even within a well-recognised category of vulnerability”.¹¹⁹

¹¹⁴ Above n 112, at [140].

¹¹⁵ At [7].

¹¹⁶ *Tarakhel v Switzerland* (29217/12) Grand Chamber ECHR 4 November 2014 at [3].

¹¹⁷ Above n 91, [251] as cited in *Tarakhel v Switerland* at [118].

¹¹⁸ *Tarakhel v Switzerland*, above n 116, at [91].

¹¹⁹ O’Boyle, above n 68, at 9.

14 AME v The Netherlands 2015

This was yet another case concerning an asylum seeker being processed pursuant to the Dublin Regulation. In this case, the applicant had originally entered Italy and then made an asylum request in the Netherlands, which was rejected.¹²⁰ In regards to the alleged vulnerability of the applicant, the Court submitted that, “unlike the applicants in the case of *Tarakhel* ... who were a family with six minor children, the applicant is an able young man with no dependents”.¹²¹ The Court limits the scope of vulnerability by reiterating that the situation for asylum seekers in Italy differed greatly from that in Greece, such as in the case of *MSS v Belgium*, and that “the structure and overall situation of the reception arrangements in Italy cannot themselves act as a bar to all removals of asylum seekers to that country”.¹²²

15 SF v Bulgaria 2017

The case *SF v Bulgaria* was an application by peoples of Iraqi nationalities that entered a State illegally and were held in an immigration detention centre, which allegedly subjected them to inhuman and degrading treatment. In this case, the Court recognised that:¹²³

...children, whether accompanied or not, are extremely vulnerable and have specific needs
... Indeed, the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant.

¹²⁰ *AME v the Netherlands* (51428/10) Section III, ECHR 5 February 2015 at [3]–[19].

¹²¹ At [34].

¹²² At [35].

¹²³ *SF v Bulgaria* (8138/16) Section V ECHR 7 December 2017, at [79].

IV Conclusion

As demonstrated, there have been no “core elements” of a vulnerability approach developed, as the very approach to the concept itself remains contested. The ECtHR has been the most active in considering the concept, however, it has limited its use and has not developed it very far. The most significant tension in the literature is between two approaches to vulnerability: the universal and the particular or group-based approach. On the surface level, it appears that the literature largely subscribes to the universal approach, while the ECtHR has followed the group-based approach. However, Peroni and Timmer note, “there is no inherent impediment to reconciling these two approaches on a *conceptual* level – on the contrary; that would fit the concept’s paradoxical nature well”.¹²⁴ Overall, the concept is gaining significant traction in the international human rights framework and is proving a useful tool for dealing with complex issues interwoven with discrimination, dependency, and state responsibility.

¹²⁴ Peroni and Timmer, above n 1, at 1060–1061.