Considerations of vulnerability: from principles to action in the case law of the European Court of Human Rights

BY IVONA TRUSCAN, PHD STUDENT IN INTERNATIONAL LAW AT THE GRADUATE INSTITUTE OF INTERNATIONAL AND DEVELOPMENT STUDIES, GENEVA

Abstract: The concept of vulnerability offers a new approach to interpret and apply human rights norms. This paper studies how the European Court of Human Rights integrated the condition of vulnerability of the applicants into its reasoning and decision-making. The text first reflects on the meaning of vulnerability. Next, the paper analyzes the legal basis of the Court’s use of vulnerability; identifies the vulnerable subjects; and spells out the steps of the analysis of vulnerability. The paper draws from case law on minority groups, the British Gypsy in the United Kingdom and the Roma in Bulgaria, asylum-seekers, children, and persons with disabilities. A set of conclusions completes this study.

Keywords: vulnerability; European Court of Human Rights; minority groups; asylum seekers; persons with disabilities

Introduction

The European Court of Human Rights will once again have to answer whether domestic authorities have given sufficient weight to the applicants’ vulnerability in their decision-making.1 The right to private and family life is again in focus with circumstances which echo Court’s decisions in cases about housing, itinerant ways of life, and evictions for urban development. Winterstein v. France is unlikely to recognize a right to housing for vulnerable persons living in extreme poverty conditions. The tests of proportionality and necessity will probably play again a significant part to reduce the substantive claim to matters of procedural determination. However, should the Court provide further insights into the concept of vulnerability and its correlation with poverty, it would foster dialogue among practitioners, scholars, and policy-makers about vulnerability.

Understandings of vulnerability vary according to professional areas. Economists portray vulnerability as risk, precariousness, or insecurity. In medicine, vulnerability

---

concerns patients and their ability to overcome physical or mental harm. Environmental sciences discuss vulnerability in relation to harm and resilience. Lawyers think of vulnerability as weakness or fragility.

Irrespective of context, vulnerability links human experience and context. It provides the space where subject and circumstance co-exist. Vulnerability has two dimensions. It suggests both a potential to be affected and a road to empowerment. Defining vulnerability, thus, offers a lens to better understand structural problems and to design empowering solutions.

Normative responses to vulnerability concentrate on adopting special measures of protection and/or affording claims of priority to vulnerable persons. In the economy of State action, giving special measures or priority implies a reconsideration of power balances, privileges, and distribution of resources. Using the concept of vulnerability helps to correct imbalances which affect people disproportionally.

Martha Fineman has highlighted the structures that sustain such imbalances in the context of the plight for equality and civil rights in the United States. To move beyond strict equality and identity determinations, Fineman proposed an analysis of vulnerability which concentrated on societal structures. Scholars and organizations have joined the effort to open new avenues for vulnerability considerations, and this issue of the *Retford Journal* stands as proof.

The present paper analyzes the concept of vulnerability developed by the European Court of Human Rights. The intention of this article is to begin a discussion about the challenges to include vulnerability analysis in the court room. The paper builds on work from commentators from various contexts, but especially from civil rights discourse, ethics, and philosophy. The paper highlights those aspects where the Court would benefit from looking at scholarly views. It also points to those aspects which merit further attention from both scholars and practitioners.

The first part of this paper discusses different approaches to understand vulnerability. The second part consists of the analysis of vulnerability in several selected cases decided by the European Court of Human Rights. The cases underscore different aspects of vulnerability. *D.H. et al. v Czech Republic* and *Mubilanzila v. Belgium* reflect vulnerability as fragility. *Chapman v. The United Kingdom* and *Yordanova v. Bulgaria* speak about vulnerability arising not from physical embodiment, but from social embodiment and belonging in minority groups. *M.S.S. v Belgium and Greece* looks at vulnerability described as a complex of social, economic and legal terms. As part of the analysis, the paper looks at the legal basis for vulnerability considerations, identifies the subjects deemed vulnerable by the Court, and unpacks the elements of the Court’s vulnerability analysis.

---

Reflections on the notion of vulnerability

Vulnerability suggests a potential most often associated with suffering harm. The harm’s nature is irrelevant; it may be physical, moral, or material harm. Vulnerability is a condition pre-existing the harm. All individuals share a common layer of vulnerability as a reflection of their embodiment. Exposure to harm gives visibility to “primary human vulnerability”. For, Martha Fineman to be vulnerable is to be human. Vulnerability is a condition common across all individuals. It is universal as it originates in our embodiment. In Fineman’s words, “vulnerability is – and should be understood to be – universal and constant, inherent in the human condition.” Vulnerability is universal, because it affects all individuals; and constant, because it accompanies individuals throughout their life span. This recognition leads Fineman to describe vulnerability as an “inevitable, enduring aspect of human condition”. Each embodiment performs on a unique set of circumstances which render vulnerability particular. Vulnerability is universal in nature, but particular as manifestation. Being universal in nature, vulnerability does not create categories of vulnerable individuals. Responses to vulnerability should consider both the universal nature of vulnerability, and the specific forms it takes for each individual. Structural and institutional factors are essential for any vulnerability response.

Fineman makes an interesting distinction between vulnerability and resilience. Vulnerability is universal, common to all persons, and particular to each individual as manifestation. Resilience defines the capacity to respond to vulnerability. Fineman observes that while vulnerability is universal, resilience is relative. Resilience depends on the quantity and quality of resources persons can mobilize to respond to factors which enhance their vulnerability. Resilience also depends on the nature of the harm which accentuates vulnerability.

On this basis, Fineman criticizes two aspects of the current approaches to vulnerability. First, Fineman points out the pitfalls of group-approaches to vulnerability. Practice has developed fragmented responses to vulnerability depending on group characteristics. Women, children, persons with disabilities, elderly people have often been considered vulnerable. To respond to this criticism, Fineman proposes the universal vulnerable subject.

The second aspect regards quantifying vulnerability. Again, practice speaks of different degrees of vulnerability. Certain population groups are more vulnerable than others, or most vulnerable, or particularly vulnerable. For Fineman, this argument


Ivona Truscan
confuses vulnerability and resilience. Quantifiers should be connected to resilience, and not to vulnerability.

Fineman’s views are shared among a number of scholars. Anna Grear argues that vulnerability is not a uniform concept as “nuances, interplays, orders of complexity, distinctions and systems of vulnerability” can be identified. Vulnerability becomes for Grear a commonality shared among individuals and with the living order. In this sense, vulnerability represents “a certain affectability emerging from bio-materiality itself.”

Writing from an ethics point of view, Florencia Luna rejects, like Fineman, the use of vulnerability as a label for certain population groups. This scholar criticizes “the metaphor of labels approach” based on two grounds. First, this approach assumes a standard baseline for evaluating vulnerability. Second, it fails short from accounting the whole host of expressions of vulnerability at individual level.

Erinn Gilson’s psychological perspective on vulnerability reinforces the views that vulnerability is a condition, and not a property which characterizes certain population groups. Gilson remarks that associating vulnerability to certain population groups shifts the perspective from describing vulnerability as weakness to “thinking of those who are vulnerable as weak”. Moving our lenses away from negative stances on vulnerability helps to imagine it as a “condition of potential that makes possible other conditions.” Vulnerability presupposes not only lack of capacity, or dependence, but also affectivity, openness to change, dispossession, and exposure. These, in Gilson’s words, constitute “the basis for certain fundamental structures of subjectivity, language, and sociality.” Gilson further asserts vulnerability as implying the possibility to become affected, and to affect in both positive and negative ways. Otherwise said, every individual becomes an agent of vulnerability for him/herself and others; actions may produce both harms and benefits. Not all actions are, therefore, a priori harms.

Laura Grimes and Elizabeth Victor argue that not every loss or exposure to harm enhances vulnerability. In that sense, vulnerability depends on the “individual’s physi-

7 Ibid.
8 Ibid.
10 Gilson, Erinn, “Vulnerability, Ignorance and Oppression”, 26(2) Hypatia 2011, p. 311.
11 Ibid.
12 Id., p. 310.
13 Ibid.
14 Gilson, pp. 309-310.
Ivona Truscan

cal health and social, political, and economic circumstances.” In Fineman’s view, this approach is more closely connected with resilience rather than vulnerability. Nonetheless, for Grimes and Victor, addressing vulnerability to ensure well-being takes precedence over mitigating harm. An individual is vulnerable when he or she is in a position that threatens his or her ability to develop and achieve the most fundamental dimensions of well-being.

Fineman’s construction of vulnerability comes as a response to the abstract identity-based equality approach which dominates civil rights legal thought in the United States. The vulnerable subject opposes the liberal subject. The vulnerable subject shows that autonomy, self-sufficiency and personal responsibility do not describe the condition of all persons. The vulnerable subject also finds fault with the state’s relegation of responsibility to the individual. Vulnerability invites more state action whose purpose is to empower individuals.

The concept of vulnerability in the international human rights law discourse comes from a different angle. First considerations of vulnerability of persons occurred in the aftermath of the Second World War. This episode in human history is synonymous to violence, deprivation and discrimination at indescribable scale. In 1945, the United Nations Organization took shape with the purpose of saving “future generations from the scourge of war [...] which has brought untold sorrow to mankind.” In the face of indescribable deprivations, the United Nations Food and Agriculture Organization (FAO) referred to vulnerability to expose the dire effects of malnutrition on large population segments. Given the existing constraints, FAO decided to address first the persons most vulnerable and most in need of assistance. It is perhaps not surprising that one of the first explicit responses to vulnerability involved meeting a basic, and yet essential human need. Recognition that food was “basic to human well-being and the future peace of the world” contributed to expand hunger assistance programmes.

Carrying out such programmes progressively disclosed that inequalities in delivering food supplies represented a major impediment to achieving uniform nutrition levels. Social factors became relevant in the design of responses to vulnerability. These responses have catered with predilection for the needs of certain groups considered vulnerable, namely children, pregnant women and nursing mothers. Refugees from conflict and patients suffering from several diseases, including tuberculosis were also considered vulnerable in a medical and social sense. Therefore, crises endangering human lives, e.g. conflicts or natural disasters, were the main contexts for invoking

---

16 Ibid.
17 Fineman, supra 2, p. 19.
19 Ibid, p. 685.
vulnerability. Fragility and/or susceptibility to harm characterized the main views of vulnerability. Thus, the early responses focused on reducing vulnerability by providing resources which immediately supported life.

The developments having taken place so far at the United Nations disclose both common points with, but also sharp distinctions from Fineman’s approach. Both recognize that vulnerability stems from embodiment and the concourse of economic, social, political imbalances and institutional vulnerability. The responses to the identified problems were geared towards increasing individuals’ survival capacity, in other words resilience. However, these responses have made a choice which Fineman has criticized sharply. They took a group-based approach to addressing vulnerability.

Vulnerability became more strongly associated with human rights in the early 1980s. A General Assembly resolution from 1982 asserts that promoting and protecting human rights are “necessary conditions for the development of the human personality, whether in its individual or its social aspects.” Emphasis fell on states’ duty to secure the human rights of vulnerable or disadvantaged groups of individuals.

The past two decades have seen a growing international concern to protect vulnerable groups aiming at advancing human rights in various contexts. Human rights treaties as well as numerous other documents express states’ will to take action in this direction. Three human rights treaties contain direct provisions about protecting the rights of vulnerable groups. These are: the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the 2000 Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography; and the 2006 Convention for the Protection of All Persons from Enforced Disappearance. The obligation to protect these groups has the purpose to address causes rendering individuals vulnerable, and not their being vulnerable. The discussions at the 1993 World Conference on Human Rights and the Preamble of Convention on Migrant workers depict this understanding. The latter states that migrant workers need added protection, because they may become vulnerable owing to a series of factors, including having poor proficiency in the language of the country of employment.

We can draw three conclusions. First, the concept of vulnerability plays an instrumental role. It refines the definition of setbacks in the realization of human rights. In so doing, it opens new avenues to design more solid responses which empower individuals to claim their rights.

Second, the human rights instruments use the concept of vulnerability mainly to indentify potential harms. Vulnerability defined in relation to harms adds further layers to the primary human vulnerability.

21 Id., paras 6, 9.
Third, connecting vulnerability to risks or harms reinforces the idea that vulnerability describes an experience rather than an identity or property of certain groups. Not everyone suffers from the same harms. Even when the same harm hits several people, they all experience it differently both in terms of undergoing the harm and responding to it. This observation deters readers from applying vulnerability with a labeling intent to certain population groups. Migrant workers, for instance, are not a subcategory of individuals which may be a priori judged as vulnerable.

External to persons as entities, vulnerability appears when context, individual background, and social institutions intersect. In the example of migration, foreign States represent the context, while poor language skills may stand for individual background. Contextual elements create mutable acquired vulnerability. Not all migrant workers are vulnerable from the moment they step out from their State of origin. The vulnerability of migrant workers in the state of employment does not exclude experiences of vulnerability in the country of origin.

The intersectional acquired vulnerability adds another layer to vulnerability as a human condition. To capture this vulnerability, Luna proposes the formula of “layers of vulnerability”, while Fineman, Guidry-Grimes and Victor suggest the notion of “compounded vulnerability”. This approach moves away from views connecting vulnerability only with incapacity to defend personal interests. It displaces the root causes of vulnerability from the individual. It does not assume that individuals produce and exercise power and consent linearly. It also entails that vulnerability narrows the individuals’ capacity of agency in the society, and implicitly the capacity to respond to potential harm and to pursue well-being.

We may also interpret the migration example above in the line of vulnerability and resilience as described in Fineman’s work. Vulnerability affects all individuals, including migrants, irrespective of particular circumstances of location or time. Such circumstances together with aspects of individual background define migrants’ resilience capacity in the presence of harm. Poor language proficiency, or being outside the country of origin indicate lower resilience.

Although this perspective presents its advantages, it also overlooks the fact that resilience is not only socially constructed. It also relies on individual talent and creativity for the management of the available resources. Understanding vulnerability as universal, and resilience as relative offers one answer to the difficulties to operationalize the concept of vulnerability. On the other hand, Boris Cyrulnik argues that focusing the attention on resilience does not address the problem and the scale of suffering it caused. Resilience may praise the individuals who managed to overcome harm, but it does not provide the means to empower other individuals to do the same.

22 Grimes, supra 15, p. 134.
To sum up, literature conceives vulnerability under two dimensions. Vulnerability in relation to harm is defined in connection to circumstances detrimental to physical and mental integrity. In this perspective, approaches to vulnerability seem inclined to address the immediate harm while disregarding the structural or the root causes of the harm. The second dimension is that where vulnerability is defined in relation to well-being. Under these lenses, vulnerability brings forward those circumstances which may put at peril the individual’s opportunities for achieving well-being. If we consider that achieving well-being presumes setting aside innumerable harms, then the latter approach might open the vulnerability analysis to broader interpretations, and implications.

These reflections will be helpful to study the assumptions that articulate the concept of vulnerability in the case law of the European Court of Human Rights. The role of the concept of vulnerability is clearly interpretative. It enriches the understanding of the European Convention of Human Rights.24 The text of the Convention does not expressly refer to vulnerability. Only at the Court’s initiative, judgments started to reason with vulnerability. The following section explains the steps taken by the Court.

### Analysis of selected cases of the European Court of Human Rights

This paper addresses the following aspects: the legal basis for the invocation of vulnerability in the case-law of the Court (1); the identification of the subjects of the Court’s vulnerability analysis (2); and the elements of the vulnerability analysis (3).

#### 1 Legal basis of the claims invoking the notion of vulnerability

The Court’s case law has evolved significantly since its early decision in 1981 in a case invoking the applicant’s vulnerability.25 The complaint comes in the context of criminalization of homosexual behavior in Northern Ireland. The applicant asserted that feelings of fear, suffering and psychological distress added to police searches in his home violated his right to respect for private life protected under Article 8 of the Convention.26 Unlike most cases invoking vulnerability, the *Dudgeon v. United King*

---

26 The right to private and family life under the Convention can be subject to limitations if three conditions are cumulatively met: the interference is provided by the law, it has a legitimate aim, and it is necessary in a democratic society. These three conditions are stipulated in Article 8(2) of the Convention.
The case is unique, because it gave leeway to the vulnerability of "other people". The Court held that "one of the purposes of the legislation is to afford safeguards for vulnerable members of society, such as the young, against the consequences of homosexual practices". The Court explained that vulnerability implied "special protection for reasons such as lack of maturity, mental disability or state of dependence". These resonate with being "young, weak in the body or mind, inexperienced, or in a state of special physical, official or economic dependence".

As mentioned earlier, the text of the European Convention of Human Rights (ECHR) does not offer any legal basis for addressing vulnerability. The Court echoed other sources, especially international treaties, resolutions, findings and reports from international organizations. For instance, the 2011 Convention on preventing and combating violence against women and domestic violence contains reference to vulnerability. Measures to prevent violence, to protect and provide support to all victims should take vulnerability into account. They must also contribute to changing social and cultural patterns of behavior of women and men. Eradicating prejudices, customs, traditions, and other practices based on the idea of inferiority of women or on stereotyped roles for women and men should also be in focus. Instruments other than the ECHR support the Court’s analysis of vulnerability in cases dealing with ill-treatment of children, collaboration with police authorities, treatment of detainees, domestic violence against women, reproductive health, or participation in public life.

Otherwise, the Court relied on findings of consensus among the Member States of the Council of Europe about vulnerability. In a split panel, the judges sitting in the Grand Chamber found in the 2001 landmark case Chapman v. United Kingdom that an international consensus was emerging among the Contracting States of the Council of Europe. The consensus recognized the special needs of minorities and the duty to protect their security, identity and lifestyle.

In other cases, the Court was readier to take further vulnerability claims. In the M.S.S. v Belgium and Greece case, the Court sitting in Grand Chamber grounded the

---

27 Dudgeon v. The United Kingdom, para 47.
28 Ibid.
29 Ibid., para 49.
31 Z and Others v. The United Kingdom, Application No. 29392/95, 10 May 2001.
33 Stummer v. Austria, Application No. 37452/02, 22 May 2012; Saldaç v. Turkey, Application No. 36391/02, 27 November 2008.
34 Opuz v. Turkey, Application No. 33401/02, 9 June 2009.

Ivona Truscan
applicant’s entitlement to special protection as an asylum-seeker on a “broad consensus at the international and European level”.38 Dissonant on this aspect of the decision, Judge Sajó argued the special consideration strictly regards the needs of vulnerable minority groups. Other categories of individuals would not find legal basis for special protection on similar findings.

In our view, Judge Sajó’s approach is problematic, because it affords special protection based on membership in a group considered vulnerable, while ignoring the particular circumstances of the individuals concerned. This approach recalls Luna’s “metaphor of labels approach” as it implicitly associates vulnerability and belonging to a minority group. Fineman also warns that addressing vulnerability from a group perspective may lead to further stigmatization given the mainstream understandings of vulnerability as weakness, fragility, dependency, or deprivation.39 Although the Chapman v. United Kingdom case concerned a minority group, the Court hesitated to rule boldly on the obligation to afford special measures of protection. The judges held the consensus was not “sufficiently concrete […] to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation”.40

After deciding on consensus, the Court asserts the need to interpret and apply the Convention to respond adequately to the condition of vulnerability disclosed by the applicants. The right to private and family life protected under Article 8 ECHR is most often invoked in the cases involving vulnerability claims. Claims based on Article 14 of the European Convention which prohibits discrimination may accompany Article 8 complaints.

2 Identification of the subjects of the vulnerability analysis
The European Court of Human Rights defines neither the notion of vulnerability, nor that of vulnerable groups. The Court identifies on a case-by-case basis whether the applicants belong to a population group that faces a condition of vulnerability. In the M.S.S. v. Belgium and Greece case, the Court found that the applicant, as an asylum seeker, was “a member of a particularly underprivileged and vulnerable population group in need of special protection”.41 Several judgments signal that the Court considers children42 and persons with disabilities43 as vulnerable groups. There is no re-

39 Fineman, supra 2, p. 8.
40 Chapman v. United Kingdom, para 94.
41 M.S.S. v. Belgium and Greece, para 251.
43 Dordevic v. Croatia, Application No. 41526/10, 24 July 2012, para 133.
quirement asking for self-identification by the applicants as vulnerable individuals, or for recognition of a vulnerable position.

The Court has determined the question of belonging to a vulnerable group by using both deductive and inductive logic. In a deductive reasoning, the Court sets that “State authorities carry a specific duty to take reasonable care, and are bound to a heightened standard of vigilance”\textsuperscript{44} towards vulnerable persons. Recognizing the applicants as vulnerable persons, the Court would then apply the invoked standard of protection. The case applied deductive reasoning in cases about institutionalized children or mentally disturbed individuals.\textsuperscript{45} Guilty of being static, this argument also discounts the circumstances that characterize the applicants’ vulnerability. Instead, the Court should inspect the specific circumstances to make an evaluation of vulnerability.

When using induction, the Court refers to the applicant’s circumstances to reach a conclusion of vulnerability and of belonging to a vulnerable population group. For example, in a case involving a child asylum-seeker, four elements were relevant to define vulnerability. These elements include: her very young age; being an illegal immigrant in a foreign land; being unaccompanied by her family from whom she had become separated; and being left to her own devices.\textsuperscript{46} The Court inferred that these facts brought the applicant “within the class of highly vulnerable members of society”.\textsuperscript{47}

Irrespective of the logic followed, it remains unclear why the Court has opted for the test of belonging to a vulnerable group. The group-focused approach brings about a fragmented case law which falls short of providing a holistic understanding and interpretation of vulnerability. Moreover, this approach also echoes Luna’s “metaphor of labels”. Fineman strongly opposes group-approaches as they go against the universality of vulnerability.

3 The elements of the Court’s analysis of vulnerability
The Court’s analysis of vulnerability rests on a number of elements: (a) the determinants of vulnerability; (b) the nature of vulnerability; and (c) the legal effects of the invocation of vulnerability in the context of providing special consideration to the needs of the applicants concerned. Each of these elements is discussed in the following sub-sections.

\textsuperscript{44} Keenan v. The United Kingdom, Application No. 27229/95, 3 April 2001, para 85.
\textsuperscript{45} Id.
\textsuperscript{46} Mubilanzila Marysha And Kaniki Mitunga v. Belgium, Application No. 13178/03, 12 January 2007, para 55.
\textsuperscript{47} Ibid.
3.1 The determinants of vulnerability

The Court rarely provides details about how it determines vulnerability. In several cases related to the Roma minority, the Court has asserted that their vulnerability stems from a history of disadvantage and exclusion. In the M.S.S. v. Belgium and Greece case, the judges looked at the applicant’s being homeless, unemployed, living in extreme poverty in full dependence of state support, lacking total means of subsistence, and facing fear of physical violence.

Dissenting from this view, Judge Sajó argues that traditional discriminatory practices are determinant for vulnerability. To support his argument, he compares two groups, asylum-seekers and persons with mental disabilities. The comparison carries on causes triggering vulnerability. For asylum-seekers, vulnerability stems from their lack of knowledge of the system, culture, or language of the host country. The vulnerability of persons with mental disability has instead natural causes. This division is artificial. In our view, the two groups share a common source of vulnerability which is the lack of integration in the institutional system of the country concerned. Having access to clear procedures, decent living conditions and human treatment during their asylum applications would prevent asylum seekers from undergoing physical, material and social separation from the rest of the society. We can make an analogous argument for persons with mental disabilities.

For Judge Sajó, the Court does not address vulnerability as a human condition. He claims the Court’s jurisprudence narrows the scope of vulnerability to groups who suffered past discrimination, or “adverse social categorization.” It is difficult to agree with this view on two main grounds. It repeats the group labeling approach. Judge Sajó insists that asylum seekers are not “a group historically subject to prejudice with long lasting circumstances, resulting in social exclusion. In fact, they are not socially classified, and consequently treated, as a group. […] Asylum seekers are far from being homogenous, if such a group exists at all.” The reasoning proposes to discount the vulnerability of asylum seekers, because they “cannot be unconditionally considered as a particularly vulnerable group.” Per a contrario, persons with disabilities are a group unconditionally considered vulnerable. This approach is oblivious to the specific circumstances of the applicants, and it harms both groups. Fineman and Luna have warned against using group approaches to address vulnerability.

49 M.S.S. v. Belgium and Greece, para 254.
51 Ibid.
52 Ibid.
53 Ibid.
Another fault of this argument is its inconsistency with the Court’s case law. In *Chapman*, the Court admitted that the applicants belonged to a group with a turbulent history and constant uprooting, and yet their vulnerability claim failed.

Thirdly, Judge Sajó associates vulnerability with state passivity. State inaction, omission, or tolerance of a situation may depict state passivity. This may not only contribute to defining vulnerability, but it can also call for state responsibility. The next logical step is to infer a state duty to take action to address vulnerability.

What constitutes state inaction has been subject of inquiry. For Judge Sajó, the vulnerability of persons with mental disabilities does not lead to state responsibility, because state action has not caused such medical condition. However, the Court found to the contrary in a recent case. It held that failure to provide persons with disabilities adequate facilities and treatment violates the European Convention of Human Rights.54

3.2 The nature of vulnerability

The sources of vulnerability in the Court’s case law are diverse. They may be physical factors, such as maturity, strength, intellectual capacity. Discrimination, exclusion and marginalization are also part of the Court’s analysis. Speaking of children, the Court recognizes their immaturity both in body and mind. When it addresses the vulnerability of institutionalized persons, the Court would refer to dependency and lack of power. The responses to vulnerability focus on rebalancing power relations through legal safeguards.55

The Court addresses vulnerability from both harm and well-being perspectives. Suffering of the body or mind define vulnerability to harm. Vulnerability related to well-being adds an institutional perspective. This includes personal, socio-economic, political and legal structures which interact to create barriers to the full enjoyment of human rights. Butler, Fineman, and Turner comment on the precariousness of institutions.56 Vulnerability brings under scrutiny individuals, societal institutions, and the state.57 For Fineman, vulnerability mediates the positions we occupy “in relation to each other as human beings, and also suggests a relationship between the state and the individual”.58 Vulnerability entails, thus, questions of justice and fairness.

Certain decisions refer to both perspectives. In the *Mubilanzila* case, the Court used elements of bodily and institutional vulnerability. The young age of the second appli-

57 Fineman, supra 5, p. 255.
58 Ibid.
cant who was only three years old at the time of the facts falls under the former category. References to her status as an illegal migrant, unaccompanied by her parents and lacking resources fall within the latter.59

The Court’s intention to address vulnerability is to improve the effectiveness of human rights protection. Whether the Court lives to its intention is debatable. It has taken several steps to recognize the vulnerability of the applicants. But the Court’s approach to define vulnerability in connection to membership in a vulnerable group reinforces existing stereotypes. The discussion related to the M.S.S. v. Belgium and Greece case is relevant on this point.

Given that dependence, capacity and discrimination describe vulnerability, responses have a protective role. State action may bridge this gap and enable individuals’ realization of their human rights. Grear’s model of vulnerability as “affectability” may fulfill another role. Vulnerability implies that nobody is immune to the exercise of other’s power. International human rights law is a bundle of vertical relationships between the state and the individuals. This breaks the connections between individuals. When integrating vulnerability, human rights norms reconnect individuals and the complex individual networks. This opens opportunities to build a more inclusive system of protection.

3.3 The legal effects of invoking vulnerability

As mentioned earlier, the Court first finds whether the applicant belonged to a vulnerable population group. The next question to ask is whether the State provided special consideration in dealing with the facts complained of. To provide special consideration means to reflect on the specific circumstances of the case when applying the law. This section looks at how the Court examined the duty to provide special consideration. Two cases concerning ethnic minorities are the basis of our analysis. These cases are: Chapman v. United Kingdom and Yordanova et al. v. Bulgaria. Both cases involve claims of violations of the right to private and family life protected under Article 8 of the Convention. Despite the common elements, the vulnerability claims led to different outcomes.

The case of Chapman v. United Kingdom concerns a British Gypsy woman who renounced her itinerant way of life to ensure her children’s and family’s education and health. The applicant purchased land and applied for planning permission to station the family caravan. During 8 years, public authorities rejected the applicants’ requests for planning permissions. The applicant claimed the refusal unduly interfered with her right to private and family life. She argued that “occupation of her caravan is an integral part of her ethnic identity as a Gipsy, reflecting the long tradition of that minority of following a travelling lifestyle”.60 The backbone of the Court’s reasoning is the

59 Mubilanzila Mayeka And Kaniki Mitunga v. Belgium, para 55.
60 Chapman v. United Kingdom, para 73.
three-prong test: finding the interference complained about was in accordance with the law; pursued a legitimate aim; and was necessary in a democratic society. The necessity test hosts the analysis of vulnerability.

To give special consideration to the applicant’s circumstances means to assess the sources of vulnerability. Usually, the applicant’s different needs and lifestyle sufficiently characterized vulnerability.61 What counts is the vulnerability of the minority group as a whole. In the Court’s words, “the vulnerable position of the Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle”.62 The group criticism applies here as well. Besides, the applicant’s vulnerability ponders against the interests of others. This does not amount to recognizing specificity or vulnerability. It only weighs their value against a general standard interest. In *Coster v. United Kingdom*, the Court imagined the adequate comparator as being a “non-gypsy who wants to live in a caravan and finds it disagreeable to live in a house”.63 Such comparisons are questionable under the Convention’s prohibition of discrimination. They also depart from the intentions of the test to identify the applicant’s specific circumstances.

Given these drawbacks, finding no violation of the applicant’s right to private and family life protected by Article 8 of the Convention is not surprising. Seven judges of the Court contested this decision. They based their dissent on the object of the consensus to recognize the special needs of minorities and the obligation to protect their security, identity and lifestyle. On this basis, the judges inferred negative and positive obligations. The former refer to obligations of non-interference and non-discrimination. The scope of the obligation to take steps is to improve the situation of minority groups through legislation and specific programmes.64 The Judges also disapproved of the subsidiary role the Court assumed. They contend the Court’s interpretation may perpetuate vulnerability. According to them, Article 8 of the Convention imposes on States the obligation to ensure that Gypsies have a practical and effective opportunity to enjoy the right to private and family life. Minority groups should be able to exercise this right in accordance with their traditions and lifestyle.65

Regardless of the dissenting comments, the majority’s view has prevailed in a number of cases brought before the Court by British Gypsy applicants and decided in 2001. *Lee v. United Kingdom*,66 *Jane Smith v. United Kingdom*,67 *Coster v. United Kingdom*
Dom,68 and Beard v. United Kingdom69 all uphold environmental concerns over the right to private and family life of the applicants. In the Court’s view, reaching the legitimate aim in question merits side-lining the duty to provide special consideration to the specificity of the group and cultural diversity.

Another aspect which raises questions is the equality approach. The starting point of the Court’s discourse is to recognize the special needs of vulnerable groups. The Court also admitted that the content of vulnerability may vary depending on individual experiences. This diversity of experiences warrants special measures of protection. Adding an equality approach, at least in the model of the Court, seems to be counter-intuitive.

The model discussed by the Court focused on either finding a suitable, but neutral comparator, or on finding comparative characteristics across other population groups. The first approach impoverishes the subject of the particular characteristics that define him/her. This was the case in Chapman and the other cases similar to it. The second approach claims to find difference and distinction by comparing experiences, such as living with a disability, seeking asylum, or belonging to a minority group. Judge Sajó’s Dissenting Opinion in the M.S.S. v. Belgium and Greece case proposed this view.

The equality approach is, thus, limiting what vulnerability sets out to do. It recreates the negative labels contested by several commentators, and casts a negative look on the groups compared. Fineman also criticized translating equality in “requirements of sameness of treatment”.70 These requirements fail to address “persistent forms of subordination and domination”.71 It also ignores “disparities in economic, social well-being among various groups in society”.72 For Fineman, it is also unacceptable that only those groups that suffered a long history of discrimination merit particular attention.73 In response to this criticism, Fineman calls for a “more positive equality”,74 which would include a contextual reading in the equality determination.

The European Court has engaged in such an exercise in D.H. v. Czech Republic. The application dealt with the access to education by Roma children. The Court argued the community’s “turbulent history and constant uprooting” was the main cause of vulnerability.75 Besides special consideration to their situation of Roma ethnicity,76 the Court remarked the applicants were minor children when the facts of the case oc-

70 Fineman, supra 5, p. 251.
71 Fineman, supra 2, p. 3.
72 Ibid.
73 Fineman, supra 5, p. 253.
74 Ibid.
75 D.H. and Others v. Czech Republic, para 182.
76 Id., para 181.
curred. For children, the right to education was of paramount importance. These preliminary observations mark a concern for what this paper has discussed as the dual nature of vulnerability. On the one hand, the Court has identified the harms that have long affected the Roma population, namely their history and constant uprooting. On the other hand, the Court implicitly recognizes the potential inherent in the vulnerability of the applicants as children. Education is key to ensure their future well-being and development. The Court’s analysis of vulnerability relies on evidence about the effects of applying neutral schooling policies and norms on Roma children. Statistical evidence highlights that schooling policies “had considerably more impact on Roma children than on non-Roma children.”

Although applying the “sameness” model, the Court was readier in this case to explore the specific circumstances of the exercise of the right to education by Roma children. It showed how applying rules neutrally may lead to hidden effects which impede full and effective enjoyment of essential rights. Thinking of the Court’s previous case law on the right to private and family life of British Gypsy applicants, we consider this decision a welcome development. To assess whether this development has had reverberating effects, we shall consider the case of Yordanova et al. v. Bulgaria decided in 2012.

The Yordanova case concerns an order to evict a Roma community because for nearly 50 years they had been occupying public land intended for urban development plans. The applicants advanced two claims about their removal from their homes. It constituted inhuman and degrading treatment contrary to Article 3 ECHR. It also amounted to a violation of their right to respect for private and family life under Article 8 ECHR. The Court considered the case under Article 8 of the Convention and followed the same approach as in Chapman. Several elements marked the different outcome in Yordanova.

First, the Court upheld the importance of procedural safeguards. Independent tribunals must decide on the proportionality and reasonableness of any measure interfering with the rights protected under the Convention. Adopting such measures needs to follow formal procedures. The bodies adopting such measures should also be competent to modify them.

Second, the Court rejected the respondent state’s argument that measures tailored to address the vulnerability and specificity of the Roma community would negatively affect compliance with the prohibition of non-discrimination under the Convention. The Government claimed the eviction was necessary to enable urban development

77 Id., para 182.
78 Id., para 193.
79 The Court examined the case under Article 8 of the Convention.
81 Id., para 136.
plans. There was no suggestion that the development plans would include the Roma community. This means that the eviction would further isolate and marginalize the community. In the Court’s view, this argument continues to ignore the need to tackle discrimination and disadvantages.82

Thirdly, the Court considers two elements. The role of the community life and the duration of the occupation of the public land without any intervention on the side of the authorities are especially relevant. The Court states that authorities’ inactivity contributed to the development of community life on the occupied land. Approximately 300 families developed livelihoods on that land. About the duration the community had occupied the land, the Court accepts that Roma families had a “long history of undisturbed presence” there.83

The Court compares the proportionality of the order of eviction against the legitimate aim pursued. It stresses the proportionality test must examine community life and the duration of the occupation of the land.84 These two aspects distinguish Yordanova from cases of evictions or removals of individuals from unlawfully occupied property.85 They also count in assessing the risk that the applicants’ families become homeless.

The Court has previously considered temporal elements in its vulnerability analysis. In M.S.S. v. Belgium and Greece, it sanctioned the delay of the Greek authorities to make available to the applicant remedies responding to his essential needs. In the Court’s practice, the definition of vulnerable groups comprises an element of discrimination spanning over long periods of time. This is the case of discrimination based on mental disability, gender, race, or sexual orientation. Judge Sajó argued that historically attested experiences, grounded in social contexts, recognition as groups, and homogenous membership help to crystallize groups.86

The comparative analysis of the Chapman and Yordanova cases indicate the Court’s steps to engage more consistently in a substantive interpretation of the provisions of the European Convention from the point of view of vulnerability. In both cases, the Court found that vulnerability implied a duty to provide special measures of protection. Including vulnerability in the balance of interests dilutes the strength of this duty. It also points out that, so far, the Court has opted to develop procedural obligations that do not remove the harm, but which may mitigate its effects.

82 Id. paras 128-129.
83 Id., para 126.
84 Id., para 121.
85 Ibid.
4 Conclusions

The European Court of Human Rights has not shied away from the difficult task of introducing the concept of vulnerability to interpret the rights prescribed by the European Convention on Human Rights. The Court has made significant efforts to find legal techniques to introduce vulnerability in the silence of the Convention. These efforts have certainly enriched the Court’s case law. Important reflections consider vulnerability stemming from physical characteristics. *D.H. v. Czech Republic* and *Mabilanzila v. Belgium* work on assumptions of immaturity and fragility of children which renders them vulnerable. The Court found the respondent states in violation of their obligations under the Convention. The fact that the applicants of the *D.H. v. Czech Republic* case belonged to the Roma minority was not an impediment for the Court to rule in favour of the claimants.

Intersections of individual, social, economic, political and institutional factors complemented the discussions. *Yordanova v. Bulgaria* and *Winterstein v. France* offer again interesting comparisons. Both cases concern evictions of communities of persons who occupied public land for several decades. The applicants in the former case are a Roma community, while the second case concerns a community of persons with itinerant ways of life. In *Yordanova*, the Court did not recognize a right to housing. In cases where the removal of such communities was deemed necessary, the Court upheld the state’s duty to give due consideration to the underprivileged status of the applicant’s group in deciding on the timing and modalities of the removal as well as on making arrangements for alternative shelter. Whether the Court will follow the line of its case law in the *Winterstein* decision remains to be seen. The question of homelessness and living in extreme material poverty was addressed by the Court in the *M.S.S. v. Belgium and Greece* and *Yordanova* cases. While an obligation to provide housing remains outside the scope of Article 8 of the Convention, the case would be different for an obligation to secure shelter to particularly vulnerable individuals. Reflecting its previous finding in the *Budina v. Russia* case, the Court affirmed that State responsibility under Article 3 of the Convention may be activated in respect of treatment “where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.” Such arguments may play a role in the *Winterstein* case in relation to the applicants’ claim that they live in extreme poverty conditions.

The Court’s analysis also reflects scholarly debates on vulnerability. The reasoning of the Court points to vulnerability as embodiment and intersectional acquired vulnerability. However, several problematic aspects remain. One problem is the group-

---

87 *Yordanova et al v. Bulgaria*, para 133.
88 *M.S.S. v. Belgium and Greece*, para 130.
89 *Budina v. Russia*, Application No. 45603/05, 18 June 2009.

Ivona Truscan
focused approach and the test of belonging to a vulnerable group which may reiterate labels and stereotypes. Introducing Fineman’s vulnerable subject in the Court’s case law may have the advantage of moving beyond group-based approaches to vulnerability. It would also help clarify the scope of the duty to provide special measures of protection. Questions may arise about whether this duty covers primary human vulnerability or acquired vulnerability. If it is only the former, the ground for arguing special measures will disappear, because everyone can be considered vulnerable. In addition to this, if vulnerability is universal, the Court’s attention may turn indeed to resilience.

The cases presented in the paper all demonstrate the resilience of the claimants. Yordanova and Winterstein cases speak about communities who had been living for more than four decades in areas without any interest from the state to provide basic public services. The applicants in D.H. v Czech Republic have reached adulthood without fully enjoying their right to education. M.S.S. v Belgium and Greece complaints of allegations of ill-treatment, living in fear and extreme material poverty. The applicant’s resilience was tested, and he may have overcome the suffering that he experienced.

However, in all these cases, resilience does not address the violation itself, and it does not offer any remedies. The Court’s call for positive measures on the side of the states focuses on remedying the human rights violations that enhanced vulnerability and suffering. The Court bases its decision on the primary responsibility of the state to ensure respect and protection for individuals’ human rights.

To focus on resilience might place a difficult burden on the side of the applicants as they may have to demonstrate how they managed the available resources to respond to and overcome the violation. Resilience also calls for structural measures. The Court is tasked to decide on individual cases within the material limits of the complaint submitted. For this reason, the Court may not be in the best place to impose obligations which require States to adopt broader structural measures other than those necessary to respond to the violation found in each particular case.

The other problem which remains is the consideration of vulnerability under a balance of interests test. Performing this test undermines the duty to adopt special measures of protection. The Court still hesitates to engage vulnerability in a more concrete discourse based on the recognition not only of procedural entitlements, but of substantive rights.

The Court faces a new challenge to find a pertinent approach to discuss vulnerability. While it recognizes the gains that using the concept of vulnerability may bring in terms of human rights protection, the Court has not yet pinned down the best way to understand it and work with it.