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Indira Boutier

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Understanding Vulnerability through the Eyes of the European Court of Human Rights' Jurisprudence: Challenges and Responses

*Indira Boutier**

Abstract: Amidst the complex landscape of human rights, vulnerability has emerged as a critical concept in the protection of minority groups. Though the European Court of Human Rights integrates multifaceted dimensions of vulnerability within its jurisprudence, a deeper examination reveals troubling inconsistencies in cases related to discrimination against minority groups. Discrimination often perpetuates historical biases and societal norms that marginalize certain communities, and the Court's current approach intermittently falls short of addressing these deeply entrenched issues. Whilst the Court does employ the concept of vulnerability to highlight states' affirmative obligations and grave violations, it does so inconsistently, neglecting to thoroughly explore economic disparities, social origins, or cultural biases that could contribute to vulnerability. This inconsistent treatment of certain aspects of vulnerability may unintentionally perpetuate unequal treatment, further entrenching systemic discrimination. The selective use of the vulnerability concept hints at a more profound challenge that confronts the Court in safeguarding human rights. If the Court address specific dimensions of vulnerability, does it leave other marginalized groups without adequate legal recourse or protection, therefore exacerbating the systemic injustices that persist in European societies? This paper examines two principal aspects: the first focuses on the place of establishing a legal definition of vulnerability; the second debates the role of the European Court of Human Rights' practices in establishing criteria's of vulnerability. The paper aims to underline the evolution of the Strasbourg judges in incorporating vulnerability into their jurisprudence and explore how, despite an initially cautious approach, the Court has developed a varied and multifaceted use of the concept.

Keywords: European court of human rights, jurisprudence, vulnerability, inequality, inconsistency.

* Lecturer in Law, Glasgow Caledonian University, Indira.Boutier@gcu.ac.uk

Introduction

The notion of vulnerability is today not only widely acknowledged but has become a focal theme in extensive ethical, philosophical, and legal-theoretical discussions (Fineman 2008; Tronto 2009; Maillard 2018). Despite lacking a precise definition, this concept continues to hold significance in legal studies. Much like other concepts, such as the right to a fair trial, vulnerability has gained importance in the analysis of legal scenarios, whether in private or in public law, at the national or international level. A law of 'vulnerabilisation', and what could even be considered a subtle revolution of vulnerability has emerged (Timmer 2013, 147; O'Boyle 2015), prompting the need for a more rigorous comprehension of the concept and, more importantly, a deeper scrutiny of its practical applications. Indeed, the imperative for scholars to engage in a larger debate for the construction of such a framework arises from the deep interplay between vulnerability and human rights violations that calls for a comprehensive examination and analysis of the different mechanisms at work that contribute to its persistence. One of the challenges that has emerged over the past two decades (La Vulnérabilité Saisie Par Les Juges En Europe 2014) is due to the juxtaposition, and linking of this concept with other judicial categories such as poverty or social exclusion (Roman 2019). This convergence has given rise to three potential risks: firstly, the possible creation of differentiation that challenges two fundamental principles in international law – universalism of human rights and equality between individuals –; secondly, the categorization of individuals, which may lead to the propagation of stereotypes and stigmatization; thirdly, and lastly, the disempowerment of groups or individuals (Boiteux-Picheral 2019, 13). The concept of vulnerability does not suffice in itself, and is not without its risks. Although it can emphasize situations of human rights violation, thereby influencing State obligations, vulnerability itself does not establish new human rights (Czech and Brandl 2015, 253). However, it does prompt a re-examination and reinterpretation of existing human rights.[1] Comprehending and analysing vulnerability introduces new legal and moral obligations, such as an obligation of carefulness (Goodin 1985, 14–15). In fact, vulnerability has the potential to reshape the legal framework (Grear 2013, 41–60; 43–44). Beyond these qualifications, and extending these considerations further, vulnerability appears as a consequence of injustice,

[1] For example, in several cases, notably *Siliadin* (2005) and *Kudla* (2000), the European Court of Human Rights imposed the obligation on the State to integrate respect for human dignity in conditions of imprisonment because of the vulnerability of detainees (Kudla v. Poland 2000, para. 94; Siladin v. France 2005). This is because vulnerability and dignity are core concepts in the legal protection of individuals (Mislawski 2010, 262).

and invites an articulation of the various legal implications of such injustice. Martha Albertson Fineman emphasis this point, asserting that vulnerability revolves around a delineation of the distinctions amongst individuals based on institutional and economic variations. It fluctuates, depending on the quantity and quality of resources accessible to each individual in times of crisis or opportunity (Fineman 2008, 10; 13–15).

The introduction of the concept of vulnerability into both the national and international legal frameworks underlines the importance of reconciling fundamental rights with the safeguarding of individuals. This development compels a re-evaluation of our understanding of human rights, the implementation of legal principles, and their application to individuals, recognizing them as products shaped by multiple elements or dimensions. Formulating a framework for such a concept proves to be challenging, given the imperative of taking life experiences into account, and the connections or relations with the 'other'. Moreover, vulnerability serves not only as a legal translation of human rights violations but also offers an insight into the establishment and perpetuation of power relations. In reality, it highlights the persistent dynamics of conscious superiority of an individual or a group over another individual or group. When this superiority results in human rights violation, the law must be used to sanction such practices, and judicial decisions should not only emphasize the State's responsibility but also scrutinize the process that created or reinforced this vulnerability. Such a perspective urges us to move beyond a purely legal analysis of human rights violations and consider a moral aspect through the ethical lens (Maillard 2018). Indeed, this line of reasoning prompts an inquiry into the practices of the judicial system and how, through their jurisprudence, the laws seek to prevent an increase of vulnerability or abuses. This paper specifically examines the evolution of the concept within the European Court of Human Rights, emphasizing not only its development but also, significantly, its limitations in this European human rights institution.

1. Understanding Vulnerability through Definitions

From the above discussion, it is apparent that the concept of vulnerability in law, still lacks a core element: a well-defined framework, even if the term has been systematically recognized and defined over a long period of time. Stepping outside the legal sphere, vulnerability was affirmed by the major reference, French lexicographer Émile Littré, author of the *Dictionary of the French language* (1873) as 'the character of what is vulnerable' From a psychological perspective, Sigmund Freud argued as early as 1929 that

vulnerability manifests in various forms and affects individuals in diverse aspects. He highlighted that vulnerability was not limited to a certain age but, on the contrary, individuals can be vulnerable at any point in their lives:

> 'We are threatened with suffering from three directions: from our own body, which is doomed to decay and dissolution and which cannot even do without pain and anxiety as warning signals; from the external world, which may rage against us with overwhelming and merciless forces of destruction; and finally from our relations to other men. The suffering which comes from this last source is perhaps more painful to us than any other.' (Sigmund 1930, 77)

In the legal sphere, as mentioned above, vulnerability appears to have been gradually shaped over time by scholars and legal practitioners, including lawyers and judges at the national, regional and international level.

1.1. The 'Vulnerability Turn' in Legal Discourse

Understanding the concept of vulnerability is driven by a will to confront the disadvantages, inequalities and injustices imposed by society, culture or even history upon individuals and groups. Clearly, vulnerability extends beyond the confrontation and comprehension of injustice in legal terms. It delves deeper by challenging the relationship between individuals and the society in which they exist. Labelled as a 'vulnerability turn' by Laurence Burgogue-Larsen, this concept urges legal scholars, lawyers and judges as well as scholars across all fields to reconsider the connections between individuals and their surrounding environment (La Vulnérabilité Saisie Par Les Juges En Europe 2014). In 2018, Diane Roman, professor of public law, emphasized this shift in a conference on vulnerability and fundamental rights at the Université de la Réunion using the example of what is now commonly described as economic and social vulnerability. She pointed out that whilst under the Third Republic, the French legislator would refer to individuals as indigent, in 1998 the term used was social exclusion. Today, the discourse revolves around economic and social vulnerability (Roman 2019). It is indeed noteworthy that the term 'vulnerable' can be found in the United Nations treaty body jurisprudence (Committee Against Torture, Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Rights of the Child, etc…) in a sum total of 339 references. However, its usage does not universally equate to indigent. In only one case do vulnerability and indigence appear to be complementary. In the Committee on Economic, Social and Cultural Rights case, López Albán v. Spain (2018), which pertained to the right to housing, the State party's observations employed the term 'indigent situation' to encompass both the

'social vulnerability', and 'precarious economic situation' of the individual (López Albán v. Spain 2018, para. 4.8). In another case of the Human Rights Committee, the expression 'indigent' is utilized but does not specifically denote any precise type of vulnerability. In fact, in the Spanish translation, the phrase 'notoria pobreza' (flagrant poverty) is used (35 members of the K'iche' Mayan people of the municipality of Chiché et al. v. Guatemala 2022, para. 2.66). Indeed, these two cases highlight a crucial aspect of vulnerability, a characteristic that is also evident within the decisions of the European Court of Human Rights. Thus, vulnerability can serve as both a shared characteristic and a specific circumstance in legal contexts. It underscores the flexibility and adaptability of the concept in addressing diverse situations and individual conditions within the framework of human rights jurisprudence.

1.2. The Lack of a Clear Legal Definition and its Implication

At the international level there appears to be no conclusive categorisation of vulnerable groups nor a clear definition leading to an open understanding and development of these categories (Morawa 2003, 139). The absence of a clear legal definition has prompted legal scholars to qualify this concept as vague, complex and ambiguous (Peroni and Timmer 2013, 1058). In line with Jean Salmon's legal discourse on the concept of 'concepts with variable content' (les notions à contenu variable) (Salmon, Perelman, and Vander Elst 1984, 251), the lack of a clear definition may result in categorizing 'vulnerable individuals' as an ambiguous notion. The notion of 'variable content' concerning vulnerability suggests that the factors considered by the law fluctuate as the risks faced by individuals evolve. Therefore, the requirement for a precise definition arises not only to facilitate a clear comprehension of the concept but, more significantly, to discern its implications in the context of prevailing crises, be they economic or climatic, for instance. The escalating nature of these crises and their effects on individuals underscores the imperative to employ legal concepts that can enhance the protection of individuals. Moreover, viewed through a legal lens, this compels a requirement to renew constant protections for individuals. Consequently, establishing a strong foundation through a precise definition becomes indispensable. Definitions do play a fundamental role in judicial discourse as they are tools to avoid any ambiguity in terms of interpretations and are used as a support tool to apply rules in cases. In fact, for Aristotle, definition is 'a phrase signifying a thing's essence'(Aristotle 350AD). Going further, it is a way to affirm an accepted understanding of a concept. However, from a legal perspective, a definition plays a different role as it establishes one approach to different reasonings through two angles: (i) a descriptive

definition; (ii) a statutory definition (Macagno 2010, 201). In the first case, a definition explains a meaning of an unclear word or concept, or gives it a specific meaning. In the second case, the legislation provides a definition that is not just describing a concept but setting a specific meaning to it. In fact, it is not just giving an information, it is laying down a rule that everyone involved (legislator and individuals subject to the law) must adhere to. This allows a consistent understanding and application of that term within the legal context. In a field characterized by a 'quest for precision' (Tiersma 1999) legal definitions serve as argumentative instruments applied to cases and support the process of legal decision-making (Macagno 2010, 206).

1.3. The Role of International Institutions

Few international institutions have developed a definition of vulnerability such as for instance the United Nations Office for Disaster Risk Reduction, identifies on their website vulnerability as : 'the conditions determined by physical, social, economic and environmental factors or processes which increase the susceptibility of an individual, a community, assets or systems to the impact of hazards'('Vulnerability'). Besides this United Nations definition, the 2011 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights explains the concept of vulnerable and disadvantage groups as those 'who have faced and/or continue to face significant impediments to their enjoyments of …. rights' (*African Commission* Principles and Guidelines, para. 1(e)). No other explicit definition can be found in regional human rights conventions or international systems. However, vulnerability can be broadly defined as the condition of an individual or a group, which due to specific circumstances, lacks sufficient autonomy that enable it to exercise their fundamental rights. This condition justifies an increased level of protection by public authorities (Paillet 2014, 4). Despite this legal consequence, neither the European Convention on Human Rights nor the American Convention on Human Rights, including their protocols, explicitly mention or provide a definition for the concept of vulnerability. Yet, at the level of the European Court of Human Rights, the Strasbourg judges start a beginning of a definition of vulnerability within its jurisprudences in cases such as *Kiyutin* (2011) and *Alajos Kiss* (2010) as applying to groups that are 'historically subject to prejudice with lasting consequences'. This recognition of vulnerability encompasses situations leading to social exclusion and, in some instances, legislative stereotyping (Kiyutin v. Russia 2011, para. 63; Alajos Kiss v. Hungary 2010, para. 42). This shortcoming of the European Court of Human Rights has been pointed out by legal scholars and judges.

In the case *Ilias and Ahmed v. Hungary* (2019), concerning the detention conditions and asylum procedures faced by two Bangladeshi nationals at the border and their subsequent expulsion to Serbia, through an *Amicus Curiae*, five Italian scholars argued that 'variants of this concept had been used in different contexts without a definition of vulnerability and urged the Court to develop relevant principles in this regard' (Ilias and Ahmed v. Hungary 2019, para. 185). However, the Court declined to acknowledge this comment, and instead reiterated its reliance on existing jurisprudence (Ilias and Ahmed v. Hungary 2019, paras 191–1992). Legal scholars, including Palanco and Besson provide an explanation for why the Court does not establish a such legal framework through a definition. Palanco argues firstly, that the establishment of a definition would constrain the Court in the future (Palanco 2019, 33). Secondly, Besson contends that for the European Court of Human Rights, given the concept's pivotal role within the human rights structure, vulnerability does not even require a justification (Besson 2014, 62). In a more recent case in 2022, Judges Wojtyczek and Sabato, in the conclusion of their joint dissenting opinion, argued the necessity to establish a 'standardised and non-discriminatory definition of vulnerable' (Dragan Kovačević v. Croatia 2022, para. 27). The European Court of Human Rights position to not establish a definition, is however not followed by its members. In fact, in France, in the 2015 'avis sur le consentement des personnes vulnérables', the French legislator does give a definition of vulnerability:

> 'A vulnerable person can be defined as someone who is unable to exercise all the attributes of legal personality.'[2] (Assemblée Nationale 2015, para. 10)

For the international institutions, there is not only a need to define concepts utilized by the judiciary but, more importantly, to establish clarity, particularly when the responsibility of States is concerned, and it is imperative to provide individuals with a means to access more protective rights. Besides these legal consequences, vulnerability, if understood and used correctly, can be a tool for social change through the limitation of prejudice, injustice and oppression (Catanzariti 2022). The legal scholar Corina Heri, in her exploration of the concept of vulnerability and its application by the European Court of Human Rights, argues that vulnerability is essentially a mechanism for fostering judicial empathy. It serves as a tool to rediscover a form of humanity and individuality within applicants (Heri 2021).

[2] Original translation: « la personne vulnérable peut se définir comme celle qui n'est pas en mesure d'exercer tous les attributs de la personnalité juridique. ».

2. Evolution and Dimensions of Vulnerability at the Strasbourg Court

2.1. Categorising Vulnerability

Examining the approach of the European Court of Human Rights proves to be enlightening. Over the years, particularly since 2001 with the *Chapman* case (Chapman v. the United Kingdom 2001, para. 96), acknowledged as a landmark case in vulnerability, the Court has underscored the vulnerable position of individuals and groups. In this case, it pinpointed the Roma community, in order to emphasise the imperative of granting special consideration to their unique needs and lifestyle. In this case, the Court's use of vulnerability, a concept without a legal definition, allowed the Strasbourg judges to avoid dwelling on the need to define the concept of minorities. Through vulnerability, the Court could still narrow States margin of appreciation to protect specific individuals or groups.

From a more general perspective, vulnerability is used in cases related to: women (B.S. v. Spain 2012), pregnant women (R.R. v. Poland 2011, para. 209), adolescents (P. and S. v. Poland 2012), children (Stubbings v. the United Kingdom 1996), physical and psychologically sick individuals (Renolde v. France 2008), transexuals (Christine Goodwin v. the United Kingdom 2002), homosexuals (Dudgeon v. the United Kingdom 1981), detainees (Aydin v. Turkey 1997), refugees (Hirsi Jamaa v. Italy 2012), stateless (Kurić v. Slovenia 2012), Roma minority (Oršuš v. Croatia 2010, para. 147; Chapman v. the United Kingdom 2001, para. 96; D.H. v. the Czech Republic 2007; Yordanova v. Bulgaria 2012; Horváth and Kiss v. Hungary 2013), individuals with mental disabilities (Alajos Kiss v. Hungary 2010), individuals with HIV (Kiyutin v. Russia 2011, para. 64), individual victims of crimes (Gisayev v. Russia 2011), victims of torture (Aksoy v. Turkey 1996, para. 98), or asylum seekers (M.S.S. v. Belgium and Greece 2011, para. 251). This establishment of 'categories' by the European Court of Human Rights could lead to developing an extensional definition, also known as an incorporative definition. Following Peter Tiersma's idea, this type of approach enumerates elements or gives examples. In the case of vulnerability, and following the case to case approach of the Strasbourg Court, an enumeration of 'categories' would seem to work as it would include all the entities of which may be possible to apply vulnerability to. However, this type of definition would be present the following risk: in law, the ongoing evolution of human rights violations necessitates maintaining rules in a general form for them to be applicable to new cases.

Two other key elements come to the fore. Firstly, vulnerability is comprehended either as an individual's situation (Renolde v. France 2008, para. 83) or as a status (Mugenzi c. France 2014). Secondly, it is seen that many individuals or groups recognized as vulnerable are, in fact, protected by human rights conventions, such as the Convention on the Rights of the Child, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993), and the Convention on the Rights of Persons with Disabilities, or that international instruments do mention the vulnerability of individuals, such as victims of domestic abuses for instance (E.M. v. Romania 2012, para. 58; Ertük 2006; Velasquez Rodriguez v. Honduras 1988). This pattern can also be seen within the African human rights system. Such an approach, at the level of regional court systems permits a renewed use of vulnerability and indicates that the concept is a construction by legal actors, and hence, open to enlargement.

The case to case approach has led scholars delving into vulnerability, to formulate a typology of sources of vulnerability based on the European Court's jurisprudence. In the analysis presented by the European Court of Human Rights, vulnerability transcends individual traits and originates from the broader social context and circumstances. Through its jurisprudence, the European Court of Human Rights has shaped an understanding of vulnerability, leading to the formulation of the following characterization: vulnerability corresponds to a correlation between two factors, namely, a specific weakness of an individual and the ensuing risk that weighs upon them. Using this application of the vulnerability concept serves therefore to underscore complex and deep-rooted situations of discrimination in social contexts. Out of 12,750 cases from 1996 to 2022 on the HUDOC platform who has cases going back to1960, in 569 cases where vulnerability is referenced, only 37% (a total of 211 cases) mention discrimination. In comparison, out of 21,335 documents (cases and consultative opinion), the term 'vulnerability' (*vulnerabilidad*) is used 442 times, with 15% of these documents (68 in total) linking vulnerability to discrimination (*discriminación*).

Viewed in this way, vulnerability emerges as a result of social construction. When characterizing an individual, vulnerability denotes an increased susceptibility to harm, exploitation, or adverse outcomes due to a combination of factors, circumstances, or characteristics that diminish their capacity to safeguard or advocate for themselves. Similarly, the African Court illustrated how vulnerability could contribute to heightened human rights violations, including policies of exclusion, discrimination, and various forms of persecution (African Commission on Human and Peoples' Rights v Kenya 2017, para. 180). However, the consideration of vulnerability often implies a comparison with another individual who

is perceived as less vulnerable. This observation can be utilized as an argument to explain the difficulty in providing a universal definition for vulnerability. Furthermore, some argue that this comparative framework may weaken the concept of equality (Pin and Cohet-Cordey 2001, 119). Nevertheless, the adaptable nature of the vulnerability concept allows for some adjustments in imbalanced situations, serving as a tool to re-establish equality. Vulnerability can manifest diversely and may be either transitory or persistent, contingent on the specific context. It is often relative, shaped by a confluence of personal, environmental, and social elements. Regardless of these factors, the outcome is consistent—vulnerable individuals may encounter an array of detrimental effects and obstacles that impact their well-being, safety, and overall quality of life. Consequently, certain legal systems at the national level often establish mechanisms to afford protection for individuals deemed vulnerable. Interestingly, in certain cases, national legal systems may even surpass the standards set by the European Court of Human Rights. For instance, in the case of France, in the 2015 'avis sur le consentement des personnes vulnérables' (advisory opinion on the consent of vulnerable persons), the French legislator does argue that vulnerability 'is now more easily recognised' (*Avis Sur Le Consentement Des Personnes Vulnérables* 2015, para. 11). The 2015 advisory opinion does establish a list of what is understood by the expression 'vulnerable individual' through the following terms: 'their pathological situation or disability, or their age, or the economic conditions in which they live' (*Avis Sur Le Consentement Des Personnes Vulnérables* 2015, para. 11).

2.2. An Ungoing Concept

Nevertheless, despite the comprehensive understanding of vulnerability, it remains a concept that is continually evolving within the legal framework, as it is viewed and interpreted from various perspectives. A first angle involves categorizing sources through two distinct approaches: etic and emic. The etic perspective regards vulnerability as the presence of a risk, warranting intervention. The emic approach on the other hand, is tied to an individual's own psycho-social cultural context, which leads to perceiving vulnerability as a subjective lived experience (Dunn, Clare, and Holland 2008, 234–53; 245–46). The Court's jurisprudence, particularly concerning Article 3 related to Freedom from torture and inhuman or degrading treatment, reflects both etic and emic approaches. For instance, in *IIN v. Netherlands* (2004), the Court adopts an etic approach in a case pertaining to the vulnerability of migrants facing return, while in *Rachwalski and Ferenc v. Poland* (2009) addressing police violence, the Court takes an emic approach

(I.I.N. v. the Netherlands 2004; Rachwalski and Ferenc v. Poland 2009). The second typology revolves around the distinction between vulnerable groups and vulnerable individuals, a differentiation explicitly recognized by the European Court of Human Rights. Throughout its jurisprudence, the Court has identified various vulnerable groups, including the Roma community, people living with HIV, asylum-seekers, and individuals with cognitive disabilities (D.H. v. the Czech Republic 2007, para. 182; Kiyutin v. Russia 2011, para. 64; M.S.S. v. Belgium and Greece 2011, para. 251; Alajos Kiss v. Hungary 2010). Vulnerable groups can also emerge due to factors such as sex, sexual orientation, race or ethnicity, mental faculties, or disability. In addition to vulnerable groups, individual vulnerability may arise from specific aspects of an individual's status or identity, as well as from powerlessness, dependence, or exposure to an increased risk of human rights violations. For instance, in the *B.S v. Spain* case (2012), the Court emphasized that the applicant's vulnerability stemmed not solely from one element but from an intersection of factors, which included an African origin, gender, as well as being a sex worker (B.S. v. Spain 2012, para. 62). This approach by the Court not only acknowledges the intersectionality of factors contributing to individual vulnerability, but also demonstrates through this consideration of intersectionality that vulnerability is not linked to one unique specificity. In fact, it can result from several sources, which, coming together create a heightened condition of vulnerability. Intersectionality, a concept pioneered by the jurist Kimberlé Crenshaw in 1989 (Crenshaw 1989), stresses the interconnectedness of social categories such as race, gender, class or disability. Examining vulnerability through an intersectional lens reveals that individuals may encounter compounded challenges stemming from the convergence of multiple social identities. In fact, individual experiences cannot be fully grasped through a singular, unique perspective. Grasping vulnerability through the lens of intersectionality emphasizes the complex tapestry of interdependent human experiences within societal structures. Vulnerability, indicating a susceptibility to harm or adversity, is also not evenly distributed across society. Acknowledging the intersectionality in vulnerability is crucial in order to formulate nuanced interventions and policies that address the distinct challenges faced by individuals with overlapping identities. This approach recognizes the limitations of singular categorizations and promotes a more comprehensive understanding of the intricate dynamics contributing to vulnerability within diverse populations. However, even with the *B.S* case and the European Court of Human Rights' minor recognition of 'intersectionality,' the concept has only been employed by the Strasbourg judges in seven cases related to vulnerability. Furthermore, the European Court of Human Rights does not use intersectionality to

understand inequalities within society or how it leads to exclusions or specific experiences (Heri 2022).

The lack of a clear definition has both advantages and disadvantages at the European level. On the one hand, it seems to have permitted flexibility in the application of the concept of vulnerability, allowing for a functional protection of individuals. Indeed, this adaptability has facilitated the integration of the notion of a vulnerable individual into positive law. On the other hand, considering the influence of this concept on the judiciary and its consequential effects, particularly in relation to State obligations, the necessity for more precise conceptualization becomes imperative.

2.3. General Perspective

From a global perspective, the concept of vulnerability associated with 'vulnerable individuals' or 'vulnerable groups' is used even if, as shown above, without a specific definition. Still, each regional human rights system – the Inter-American Human Rights System, the African Human Rights System and the European Court of Human Rights – has more or less developed and provided noteworthy applications of vulnerability reasoning. Thus, it is crucial to recognise the ongoing evolution fostered by the Courts and Commissions within each regional human rights systems. For instance, on the side of the Inter-American Court of Human Rights, a vulnerability test is developed and still under construction. The Colombian lawyer, Rosmerlin Estupiñan-Silva details this test according to the following elements: 'underlying causes', 'exposure to pressure' or 'sensitivity to the threat' (Estupiñan-Silva 2014, 90–108). As seen in the African Human Rights system, with the exception of the African Children's Committee (Michelo Hansungule & Others (on Behalf of Children in Northern Uganda) v. Uganda 2013), vulnerability is generally regarded as an inherent or static concept in the African context.

Moreover, the recognition of these vulnerable groups and individuals are not exclusive to specific regional legal frameworks. They are also acknowledged by other legal structures such as the United Nations treaty bodies. Notable examples include the recognition of asylum seekers (M.E.N. v. Denmark 2013, para. 13), children (Bronson Blessington and Matthew Elliot v. Australia 2014, para. 7.11), 'racial minorities, migrants and persons of different sexual orientation' (L.J.R v. Australia 2008, para. 4.10) and disabled women (R.P.B v. The Philippines 2014, para. 8.3). Identifying vulnerability in this manner allows the argument that a specific weakness leads to a stronger protection. This approach underlines the progressive construction of the concept through the efforts of legal actors, Courts and

international institutions' jurisprudence. Thus, despite the absence of a definition, this method results in a construction of the concept. It emphasizes the integration of the following equation: the origins of vulnerability must be linked to a specific risk. In addition, it underlines a core idea, vulnerability is not just a rigid category, legal practitioners do not simply label groups and individuals as 'vulnerable'. Instead, they engage in ongoing processes where vulnerability is given meaning and applied through the interactions between different people and situations.

3. Insights from the European Court of Human Rights

The significance of the vulnerability concept lies in its aim to safeguard individuals and groups. The European Court of Human Rights, through its jurisprudence, has highlighted specific groups and individuals requiring a 'heightened' level of protection from the States and its actors. Vulnerability often arises, among other factors, from societal exclusion, resulting in a susceptibility to fragility. Whilst it can be argued that vulnerability is inherent to the human condition, it is graded and can be categorized as normal vulnerability and unusual or excessive vulnerability. This classification helps navigate potential legal issues surrounding the concept by establishing a distinction between different types of vulnerability. Broader interpretations might lead to a generalization of the concept, whilst stricter analyses could eliminate the current flexibility inherent in its application.

3.1. A Data-driven View of Vulnerability

Despite the flexibility afforded by the concept, challenges have emerged in its application. Although the European Court of Human Rights first introduced the concept in 1981 with the *Dudgeon v. the UK* case, where the Court argued that homosexuals and young people are vulnerable people (Dudgeon v. the United Kingdom 1981, paras 24–25), the Strasbourg judges initially seemed to face difficulties in employing the concept as it refers to it only a few times. It wasn't until 2001 that a systematic use of the concept became evident in the Court's reasoning. However, despite its incorporation into jurisprudence, the concept has still remained somewhat fragile. Since 1981, with the cases being digitalised on the HUDOC platform, the terms 'vulnerable' or 'vulnerability' have been used 1493 times out of 12,731 cases. In total, the concept is invoked in 11% of the Court's cases, with a notable prevalence in cases related to Russia, Turkey, and the United Kingdom (Figure 1). The majority of cases where vulnerability is used are associated with the violation of the prohibition of torture, totalling 592 cases (Article 3

of the European Convention of Human Rights). Following closely behind are cases related to the violation of the right to liberty and security, comprising 292 cases (Article 5 of the European Convention of Human Rights), and the violation of the right to a fair trial with 248 cases (Article 6 of the European Convention of Human Rights). An analysis of this element accentuates the Court's approach in utilizing the concept of vulnerability. Whilst the majority of cases are related to Article 3 of the European Convention of Human Rights, it is only since the 1990s that the Court has begun incorporating vulnerability in the context of ill-treatment and torture.

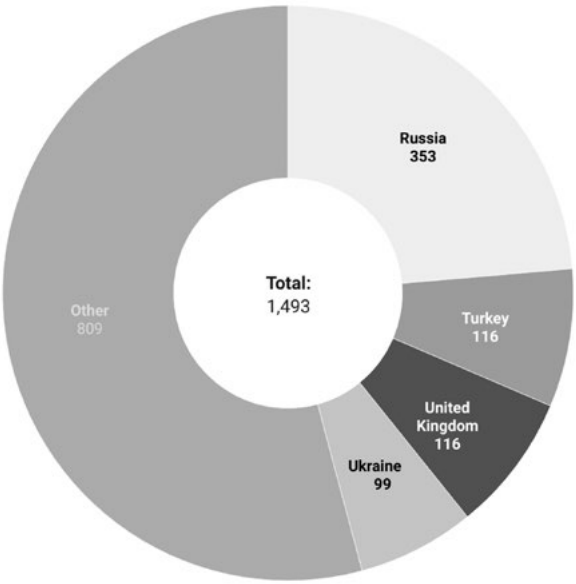

Figure 1: Countries where the concept of vulnerability is most used

Intriguingly, from a general perspective the majority of cases brought before the European Court of Human Rights between 1960 and 2024 involve Russia (1983 cases), Turkey (1355 cases), Ukraine (970 cases), and the United Kingdom (558 cases) 6 8 5, which ranked sixth (in between Ukraine and the United Kingdom can be found Poland – with 960 cases–, and Italy – with 567 cases). Regarding vulnerability, with the exception of Ukraine and the United Kingdom, Russia and Turkey appear to predominantly violate, and in that order, Articles 6, 3, and 5 of the European Convention of Human Rights,

This data draws attention to two elements: (i) the absence of Article 14; and (ii) a specific type of vulnerability, structural vulnerability. Firstly, although Article 14 of the European Convention of Human Rights, which relates to the protection of the right to non-discrimination, is frequently cited to illustrate

the protection of vulnerability, this data reveals that it is not the most commonly used article. However, in instances where Article 14 is employed, the concept of vulnerability is often utilized as an aggravating factor in the violations of this article (Catanzariti 2022). The emergence of vulnerability under Article 14 appears to have started in 2007 with the Grand Chamber judgement of *D.H. v. the Czech Republic* related to the discrimination of Roma children in school through school segregation (D.H. v. the Czech Republic 2007). This case not only marks the first instance where vulnerability and Article 14 are combined but is also a precedent-setting case for the European Court of Human Rights in addressing issues related to racial segregation. The analysis of the European Court of Human Rights case law highlights another core element: the limitation of the Strasbourg judges to four categories of discrimination, namely gender and sex – with a focus on victims of gender-based violence – (Opuz v. Turkey 2009; Talpis v. Italy 2017), ethnic original and race – with cases related to the Roma group – (Oršuš v. Croatia 2010; Muñoz Díaz v. Spain 2009), sexual orientation and LGBTI status (Kiyutin v. Russia 2011; Identoba and Others v. Georgia 2015), and disability (Guberina v. Croatia 2016). While this limitation might initially suggest that the European Court of Human Rights treats discrimination differently depending on the 'category', it actually underscores how the Strasbourg judges take into consideration the social context and focuses on the consequences of the identity marker (Mjöll Arnardóttir 2017).

3.2. Jurisprudential Approaches and Dimensions

The approach followed by the Strasbourg judges reveals two key elements: (i) how the association to this identity marker can be a result of the history and social attitudes that perpetuate disadvantages; (ii) within these groups, individuals have different experiences. Secondly, through the angle of structural vulnerability, the concept is linked to the violation of a fundamental norm such as for instance the prohibition of torture, protected by Article 3 of the European Convention of Human Rights (Aksoy v. Turkey 1996). In addition to this structural vulnerability, the Court's jurisprudence reveals two distinct types of vulnerability: situational and inherent. Situational vulnerability is connected to vulnerability arising from the social context, while inherent vulnerability is rooted in a human condition, such as age or health. (Mackenzie 2013, 7; Besson 2014, 70). For instance, concerning situational vulnerability, the Court, in the case *Akdivar v. Turkey* (1996), acknowledged a political vulnerability and deemed the request admissible:

> 'Given the vulnerable position of the applicant villagers and the reality that in South-East Turkey complaints against the authorities

> might well give rise to a legitimate fear of reprisals, the matters complained of amount to a form of illicit and unacceptable pressure on the applicants to withdraw their application.' (Akdivar and Others v. Turkey 1996, para. 105)

In this context, political vulnerability is interpreted as a situation in which individuals experience pressure from authorities principally due to a political context stemming from the persistent conflict between the security forces and the Kurdistan Workers' Party. Two years later, in *Kurt v. Turkey* (1998), the Court developed a method in relation to political vulnerability and argued that it is necessary to consider the vulnerability of the complainant and the risk of the authorities intervening to influence them (Kurt v. Turkey 1998, para. 160). Through this case, the Court followed its previous jurisprudence and explicitly took into consideration the social context that gives rise to vulnerability.

At the level of the Inter-American Court of Human Rights, the judges have notably recognized political vulnerability. It did so in the case *Yamata v. Nicaragua* (2005) that involved an indigenous community. In this instance, the political representatives of the indigenous groups were prohibited from participating in municipal elections. The Inter-American Court of Human Rights argued that the State failed in its obligation to implement special protective measures for this group, considering the situation of weakness or helplessness in which they find themselves ('*situación de debilidad o desvalimiento*') (Yatama v. Nicaragua 2005, para. 201; Juridical Condition and rights of the undocumented migrants 2003, para. 89). The consideration of the social context here appears to be fundamentally important, as in theory, the law evolves around the reality of social factors. In the case of vulnerability, taking such an element into account allows for an expansion of the legal scope of human rights.

Interestingly, inherent vulnerability, specifically related to age, may be linked to the influence of international law and the need, after World War Two, to refocus on individuals (Depuy 1999). At the level of the European Court of Human Rights, children are recognised as vulnerable, and the Court does defend its approach throughout its jurisprudence such as in *Stubbings* (1996) where it clearly states that: 'children and other vulnerable individuals are entitled to State protection' (Stubbings and Others v. the United Kingdom 1996). However, when it comes to elderly persons, the European Court of Human Rights tends to favor protection within the concept of incapacity. This approach is more developed as it encompasses a specific status and a judicial regime of protection, whereas 'vulnerability' is still perceived as a somewhat vague concept. In fact, the European Court of Human Rights

argued in *Zehentner v. Austria* (2009) that 'persons who lack legal capacity are particularly vulnerable and States may thus have a positive obligation under Article 8 to provide them with specific protection by the law' (Zehentner v. Austria 2009, para. 63). Through this case, it may seem as the European Court of Human Rights does not consider age alone as a sufficient criterion to establish vulnerability. Instead, it seems to require a connection to other factors, such as incapacity, in this instance. The link between incapacity and vulnerability appears to have roots in the infiltration of the term vulnerability into the medical world. Indeed, the initial reference to vulnerability dates back to the 1970s when it was used as a synonym for fragility. For instance, in the case *Pretty vs. United Kingdom* (2002) related to the right to die, the Court justified is ban on euthanasia on the grounds of protecting vulnerable individuals, 'especially those who are not in a condition to take informed decisions' (Pretty v. the United Kingdom 2002, para. 74). Despite making a distinction between inherent and situational vulnerability, the Court still encounters challenges in emphasizing situational vulnerability. Core cases, such as *D.H. v. the Czech Republic*, highlight this struggle. In this case, the Court underscored the turbulent history and constant uprooting of the Roma community, acknowledging the situational vulnerability faced by this particular group (D.H. v. the Czech Republic 2007, para. 182). However, the broader application of situational vulnerability across various contexts and groups remains to be addressed by the Court, revealing ongoing complexities in addressing vulnerabilities arising from specific social contexts. The challenge in emphasizing situational vulnerability within the Court's decisions may be attributed to its tendency to not consistently account for the multitude and intersectionality of elements resulting from the combination of inherent (emic) and external (etic) factors contributing to vulnerability. Notably, the Court does not thoroughly consider economic situations, social circumstances, or cultural origins as additional contributors to vulnerability (Xenos 2009, 593–94). Despite making several references to vulnerability, the European Court of Human Rights maintains a reserved stance on the concept and its specific criteria. It mentions vulnerability without detailed exploration, treating it more as an observed factual element rather than engaging in an in-depth analysis.

3.3. Individuals vs. Groups

However, there is one more notable point to consider. As mentioned previously, the Court makes a distinction between vulnerable groups and vulnerable individuals. Groups are considered vulnerable due to a history of discrimination, while individuals are vulnerable based on certain traits,

conditions, or situations. Nevertheless, in practice, the Court does not consistently differentiate between individuals and groups, posing a difficulty. In fact, the Grand Chamber, on the whole, appears to have confined its use of 'vulnerable groups' to specific cases, predominantly those dealing with the Roma community – with its cases related to Roma children and their segregation in schools (Oršuš v. Croatia 2010)– mainly due to the positive influence of the European union with two recommendations, 1203 (1993) and 1557 (2002) related to tziganes in Europe and the judicial situations of Romas in Europe ('Recommandation N°1203: Relative Aux Tsiganes En Europe' 1993; 'Recommandation N°1557 Relative à La Situation Juridique Des Roms En Europe' 2002). In addition, three other categories were considered as vulnerable groups: people with learning disabilities – due to their past discrimination – (Alajos Kiss v. Hungary 2010, para. 42), asylum seekers – the Court argues their traumatic experiences – (M.S.S. v. Belgium and Greece 2011, paras 232; 251), and finally displaced persons. Yet, the inclination of the Court to maintain its reasoning in terms of categories rather than groups might be associated with the fundamental distinction between these two elements. The difference lies in the idea that categories encompass individuals, whereas groups, often defined by an ethnic or religious element, are driven by the idea of existing as a collective. Thus, for instance, the Court does not qualify women (Palanco 2019, 48) nor homosexuals as vulnerable groups but rather as vulnerable individuals. In the *Nepomnyashchiy* case (2023), the European Court of Human Rights whilst referring to the homosexual minority does argue indirectly that homosexuals are considered vulnerable groups:

> 'In the Court's view, an explicit mention of sexual orientation and gender identity as prohibited grounds for discrimination may be beneficial for avoiding any legal uncertainty and to convey to the general public the clear message that these vulnerable groups are protected by law' (Nepomnyashchiy and others v. Russia 2023, para. 78)

From a general perspective, within the European Court of Human Rights, homosexuals are acknowledged as vulnerable groups through reports from external actors such as the Office of the Equal Opportunities Ombudsperson as seen in the *Valaitis* case (Valaitis v. Lithuania 2023, para. 55). European institutions, such as the European Commission against Racism and Intolerance also recognise this vulnerability within the group category as indicated in the *Macaté* case (Macaté v. Lithuania 2023, para. 109). However, the European Court of Human Rights still hesitates to explicitly categorize them as such. This divergence between individual and group identities is not

a novel concept and can be observed in other fields of law, as illustrated in the intellectual differences that developed between Lemkin and Lauterpacht when discussing the concepts of genocide and crimes against humanity. Lauterpacht aimed at protecting the individual, whereas Lemkin aimed at protecting the group. Lauterpacht had deep reservations about Lemkin's backing of the notion of genocide. He considered that the term was potentially divisive. It singled out victim groups, and indeed, encouraged identification and solidarity as members of victimized communities by reinforcing negative feelings towards the perpetrator group. He predicted that it would eventually pitch communities against each other and sanctifu hostile memories. This rendered the prospect of reconciliation more problematic. In reality, there is no clear distinction between individual and collective vulnerability. However, as it is often the case in law, there may be exceptions to the principle. In the instance, the Court has only recognized Roma as vulnerable within the category of individuals facing ethnic discrimination (Sampanis v. Greece 2008). This exception stresses a fundamental issue: the process of identifying a group or an individual as vulnerable lacks transparency and is not explicitly outlined by the Strasbourg judges. This lack of clarity makes it challenging to understand how the Court determines vulnerability. Furthermore, the legal reasoning applied to one group is not consistently extended to other groups that could also be considered vulnerable. As a result, there are no clear identity markers for vulnerability. However, a noticeable pattern emerges in the jurisprudence: the assessment of an individual often begins with their association with a specific group, such as the Roma.

Hence, despite the incorporation of vulnerability in its jurisprudence, the Court's approach has far from settled the subject. There are instances where the court did not consistently apply vulnerability reasoning in similar cases. Whilst the specific reasons are not known, this discrepancy may be linked to political sensitivity or a necessity to refine the role of vulnerability within the legal vocabulary. Nevertheless, a discernible trend throughout the European Court of Human Rights jurisprudence is the utilization of vulnerability to strengthen the connection between human rights law, its theoretical framework, and the lived experiences of individuals (Peroni and Timmer 2013, 1056–85).

Conclusion

The European Court of Human Rights' approach to vulnerability has been keenly examined by legal scholars. Despite not providing a formal definition through its jurisprudence, the analysis of its case-based approach opens up

to a comprehensive understanding of the Strasbourg judges' perspectives on vulnerability from various angles, such as emic, etic, structural, situational, and inherent. However, establishing a consistent pattern in the Court's use of vulnerability proves to be problematic, as it recognizes certain forms of vulnerability in specific cases but does not consistently apply them across cases. The recognition of structural vulnerability underlines this argument. Indeed, while the Strasbourg judges clearly acknowledged it, they do not consistently apply it in their jurisprudence. This lack of consistency poses challenges for lawyers, and legal scholars in comprehending the Court's reasoning and, most importantly, the criteria for determining vulnerability, as there appear to be no clear identity markers. This limitation is 'aggravated' by the absence of clear statements in specific case, for instance the recognition of homosexual as a vulnerable group. The European Court of Human Rights' indirect recognition linked with the complexity of the legal language in specific cases within the Courts jurisprudence may increase the complexity of the concept. Yet, the Strasbourg judges practice has led to a constructive discussion around the link between the need to recognise vulnerability and the bridge between human rights law and lived experiences. Through vulnerability, the European Court of Human Rights has been able to reveal the different dimensions of human rights violations and its impact on individuals and groups, putting circumstances at the heart of the cases. When the Strasbourg judges have employed the concept, they have been better equipped to address social exclusion, human rights abuses, and enhance legal protection. However, it is crucial to acknowledge the potential risks associated with this concept, as it may contribute to increased stigmatization and perpetuation of stereotypes about individuals. This challenge may be linked to the perception that vulnerability resonates for some to individuals incapacity, thereby potentially leading to greater social control (see: Slingenberg 2021).

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