

The potential and pitfalls of the vulnerability concept for human rights

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Abstract

In the past decade or so, vulnerability has become a fairly prominent concept in human rights law. It has evolved from being an underlying notion to an explicit concept. This column takes stock of vulnerability's relationship to, and possible influence on human rights law, assessing the concept's potential and pitfalls. It focuses on the not altogether unrelated issues of migrants' social rights and on the role of human rights in environmental protection. The discussion commences with a reflection on the potential of vulnerability to re-interrogate those aspects of the human rights paradigm that relate to environmental protection. The next section focuses on the potential of vulnerability to enhance migrants' social rights within human rights law. Subsequently, it focuses on the pitfalls and the difficulties of the vulnerability concept. It concludes by offering an outlook for the future of the concept.

Keywords

Vulnerability, legal concepts, discourse, environmental protection, migrants' rights

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Introduction

Vulnerability has become a fairly prominent concept in human rights law. In the past decade or so, it has evolved from being an underlying notion to an explicit concept that is now more generally recognised,¹ despite critique.² It frequently appears nowadays in, for example, international human rights law, European Union law and policy, and in the case law of the European Court of Human Rights (ECtHR or Court)³ and of the European Committee of Social Rights (ECSR or Committee).⁴ The concept of vulnerability has an intuitive and broad appeal. It has become more than a legal concept to the extent that it has evolved into a discourse within the broader human rights movement, and it has the potential to steer discussions about the human rights movement in one direction or another. Considering its progressive embeddedness in human rights law, we believe it is now an appropriate time to take stock of vulnerability's relationship to, and possible influence on human rights law, assessing the potential and the pitfalls. We focus on the not altogether unrelated issues of migrants' social rights and on the role of human rights in environmental protection.⁵

The four authors of this editorial have different areas of expertise and hold different views on how vulnerability is used or could and even *should* be used in different legal domains. Our aim, therefore, is to sketch some of the (often conflicting) complexities, promises, and the many contestations that this concept brings, rather than providing readers with a unified vision of what vulnerability is and what it means for human rights law. Indeed, there are various understandings of the promise of the concept for human rights. One broadly shared view seems to be that the promise of vulnerability is to bring human rights law closer to real-lived experiences, thereby providing an avenue to incorporate a more robust understanding of (substantive) equality into human rights law.⁶ As a heuristic and alternative approach to ethical evaluation, vulnerability offers an opportunity to re-interrogate the role of human rights as key constraints on State power and catalysts for social change. On a more ambitious reading, vulnerability has the potential to inform an ontological change of stance away from a human-centred, neo-liberal, and impregnable Western understanding of human rights, towards an altogether more porous and contingent understanding of the vulnerability of the entire living order as a starting point from which to critique the epistemological closures and regulatory challenges that increasingly confront human rights.⁷

The discussion commences with a reflection on the potential of vulnerability to re-interrogate those aspects of the human rights paradigm that relate to environmental protection. The next

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1. Francesca Ippolito, *Understanding Vulnerability in International Human Rights Law* (Editoriale Scientifica 2020).
 2. See, for example, So Yeon Kim, 'Les vulnérables: Evaluating the vulnerability criterion in Article 14 cases by the European Court of Human Rights' (2021) *Legal Studies* <<https://doi.org/10.1017/lst.2021.2>> accessed 3 September 2021, Section 4.
 3. See for example, Laurence Burgorgue Larsen, *La Vulnérabilité Saisie par les Judges en Europe* (Éditions Pedone 2014); Corina Heri, *Responsive Human Rights* (Hart 2021).
 4. See a recent ECSR decision as an example, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v Greece* Complaint No. 173/2018 (ECSR, 26 January 2021).
 5. The relation is evident for example in the area of climate-induced migration; see, for example, Benoît Mayer and Christel Cournil (eds), *Climate Change, Migration and Human Rights: Towards Group-specific Protection?* (Routledge 2015).
 6. See for example, Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056, 1056–1085.
 7. Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013).

section focuses on the potential of vulnerability to enhance migrants' social rights within human rights law. In the following section we discuss the pitfalls and the difficulties of the vulnerability concept. We conclude by offering our outlook for the future.

Vulnerability, Human Rights, and Environmental Protection in the Anthropocene⁸

The human rights framework, in its current guise, seems to be ill-suited for the epistemic and material demands of the Anthropocene;⁹ the proposed new geological epoch following the Holocene epoch, which is characterised by a deepening socio-ecological crisis and associated inter and intra-species injustices.¹⁰ The Anthropocene trope reveals the possibility of a human-induced mass extinction on Earth, the potential for the loss of Earth system resilience, and a host of uncertainties related to the continuation of life on Earth as we know it.

Human rights have played an important role in revealing the many dimensions of *human* suffering associated with continued environmental degradation, and in achieving some justice for some people. Yet, the invocation of rights language has not led to justice for many vulnerable human and non-human beings in any meaningful way. Despite their lofty ideals and higher-order normative force, human rights have been unable to improve the lived realities of many people all over the world, or to advance substantive as well as formal equality and to confront discrimination, both generally and specifically, in the context of environmental protection. The Anthropocene trope demands of us to rethink the role of law, and human rights particularly, in ensuring the protection of a vulnerable living order. It does so by promoting 'new calls for thought and action that can imagine different relationships between geologic time, the cultural logics of capital and accumulation, and the ontological realities of our species-being.'¹¹

The vulnerability framework offers such a new way of seeing, being, understanding and, hopefully, a way to better respond to the suffering of the entire living order. In this framework, the vulnerable human (and non-human) subject replaces the autonomous subject, and moves it beyond a Cartesian ontology of disembodiment where invulnerable, invincible humans who are emboldened by their hubris, are able to master 'nature', control natural disasters and (ironically) the fate of humanity itself.¹² The Anthropocene trope, in turn, reveals that while vulnerability is universal, it is also characterised by differentially distributed patterns of vulnerability; in other words, everyone is vulnerable, but some are more vulnerable than others, which is a central tenet of vulnerability theory as developed by Fineman and others.¹³ A critical awareness of unevenness is therefore

8. This part draws on Louis Kotzé, 'The Anthropocene, Earth System Vulnerability and Socio-ecological Injustice in an Age of Human Rights' (2019) 10 *Journal of Human Rights and the Environment* 62, 62–85.
9. Louis Kotzé, 'Human Rights and the Environment in the Anthropocene' (2014) 1 *The Anthropocene Review* 252, 252–275.
10. Angela Harris, 'Vulnerability and Power in the Age of the Anthropocene' (2014) 6 *Washington and Lee Journal of Energy, Climate, and the Environment* 98, 98–161.
11. Donna Houston, 'Crisis is Where We Live: Environmental Justice for the Anthropocene' (2013) 10 *Globalizations* 439, 440; Sam Adelman, 'Human Rights in the Paris Agreement. Too Little, Too Late?' (2018) 7 *Transnational Environmental Law* 17, 17–36.
12. Alison Assiter, 'Kierkegaard and Vulnerability' in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 30.
13. See for example, Martha Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251; and Fineman and Grear (n 7).

necessary in relation to how vulnerability should be understood. It is precisely this shared but differentially distributed vulnerability of the entire living order, including of humans and non-human beings, that human rights should ideally address.

One advantage of deploying the vulnerability framework in the environmental protection domain is that it highlights the pitfalls of human ‘progress’, which continues deploying longstanding ideologies such as developmentalism and neoliberalism that are entrenched in social (legal) system, including in human rights.¹⁴ It is exactly these ideologies and doctrines that human rights themselves need to steer well clear of, and that human rights must confront. For example, the ‘human right to a healthy environment’ has now been entrenched in most constitutions all over the world,¹⁵ but its anthropocentric orientation remains a concern that renders this right unable to fully embrace the concerns of, and to provide protection to, the entire living order, including non-human beings. Environmental human rights retain the entitled, hierarchically superior human as their main referent and beneficiary while failing to address injustices thereby occasioned.¹⁶

Through the vulnerability lens, however, one is able to see that ‘[A]nimals can matter in vulnerability theorizations because they are beings leading precarious lives.’¹⁷ Vulnerability thus makes it possible to value the non-human world and its diverse entities, not for their proximity to humans, but because the non-human world is itself materially vulnerable – a universal vulnerability that is intimately shared with the human world. For Deckha, vulnerability theory offers a more inclusive and potentially more powerful narrative within which to re-interrogate the incompatibility of human rights and social justice movements with the socio-ecological justice concerns of the non-human living world; it allows a deeper critique of the ‘liberal humanist tradition [...] whose application to animals, however animal friendly, is an instantiation of human sovereign power over animal lives.’¹⁸ In short, if it is recognised that the non-human world is vulnerable, as it is, then it would be easier to accept that that protective scope of human rights could and should be reconfigured so that it extends its reach to also embrace the non-human world. Such an extension is already starting to occur through the rights of nature paradigm. The rise in rights of nature provisions in some jurisdictions reflects the potential of a rights-based approach to environmental protection that is critically aware of the need to recognise the vulnerability of non-human beings in addition to those of humans.

The Potential of Vulnerability to Extend the Scope of Migrants’ Social Rights

While rights are formally granted to everyone, migrants often require some sort of legal membership in order to receive full protection of their social rights.¹⁹ Within this framework, the concept of

14. Sam Adelman, ‘Epistemologies of Mastery’ in Anna Grear and Louis Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015) 9.

15. David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press 2012).

16. Maneesha Deckha, ‘Initiating a Non-anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm’ (2013) 50 *Alberta Law Review* 783, 784.

17. Maneesha Deckha, ‘Vulnerability, Equality, and Animals’ (2015) 27 *Canadian Journal of Women and the Law* 47, 60.

18. *Ibid* 69.

19. Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) ch 8.

vulnerability has served as an additional basis for social protection for migrants who lack social or legal membership. During the last decades human rights courts and bodies have started to refer to the concept of vulnerability when deciding on the scope of migrants' rights. As regards their social rights, the ECtHR has used the concept of vulnerability to extend the scope of positive obligations under Article 3 of the European Convention on Human Rights (ECHR) into the socioeconomic sphere. In *MSS*, for example, the Court's observation that asylum seekers are members of a 'particularly underprivileged and vulnerable population group in need of special protection' was one of the arguments to conclude that Article 3 ECHR was violated due to destitution.²⁰ The ECSR has used the concept of vulnerability to broaden the personal scope of some of the rights laid down in the European Social Charter (ECR or Charter). It held that the Charter's restricted personal scope 'should not end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake';²¹ an interpretation that led it to conclude that irregular migrants fall under the scope of the right to shelter. These are examples of how 'a more inclusive human rights law' is being created through the vulnerability lens.²² This is a welcome development given that the Court's role in protecting the rights of migrants has generally been ambiguous at best.²³

In drawing attention to the situation of particularly vulnerable migrants, the concept of vulnerability, however, also allows human rights courts to distinguish between cases depending on the circumstances. Looking at the ECtHR specifically, this can lead to assertive, rights-affirming judgments in certain instances, for example, those related to unaccompanied minors or migrants with a health condition.²⁴ At the same time, the same notion of vulnerability is also invoked in restrained and deferential judgments when the ECtHR finds that 'the applicant... was not more vulnerable than any other adult asylum seeker detained at the time'.²⁵ It ought to be concluded, therefore, that references to vulnerability are presently double-edged, with vulnerable immigrants possibly – but not at all necessarily – being the beneficiaries. This observation chimes with previous research that has found the ECtHR's usage of vulnerability to be driven less by rigour and a consideration for the general 'structure' of human rights law than by convenience and pre-existing legal rationales.²⁶

Pitfalls of Vulnerability

The obvious risk of the concept of vulnerability is that it stigmatises and stereotypes those who are held vulnerable. In everyday use, 'vulnerability' is mostly seen as something that makes you weak, as something to be avoided. The key problem with designating only specific categories of people as

20. *M.S.S v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) para 251; See also, *Shioshvili and Others v Russia* App no 19356/07 (ECtHR, 20 December 2016); *Khan v France* App no 12267/16 (ECtHR, 28 February 2019).

21. *DCI v the Netherlands*, Complaint No 47/2008 (ECSR, 20 October 2009) para 37; *CEC v the Netherlands* Complaint No 90/2013, (ECSR, 1 July 2014) para 123; the Committee in this decision did not explicitly refer to the concept of vulnerability, but it did refer to irregular migrants as 'individuals in a highly precarious situation'.

22. Alexandra Timmer, 'A quiet revolution. Vulnerability in the European Court of Human Rights' in Martha Fineman and Anna Grear (eds), *Vulnerability. Reflections on a new ethical foundation for law and politics* (Ashgate 2013) 169.

23. See Dembour (n 19); and Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (CUP 2019).

24. See, for instance, *Rahimi v Greece* App no 8687/08 (ECtHR, 4 April 2011) para 86; *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) para 97.

25. *Mahamed Jama v Malta* App no 10290/13 (ECtHR, 16 November 2015) para 100.

26. Samantha Besson, 'La vulnérabilité et la structure des droits de l'homme' in Laurence Burgorgue-Larsen (ed), *La vulnérabilité saisie par les juges en Europe* (Pedone 2014) 80–81.

vulnerable in law and policy is that it ‘reinforces and valorizes’ the ideal of the liberal subject who is conceived of as autonomous and independent.²⁷ Vulnerable persons are then seen as deviant, as the exception to the norm.

This is closely linked to an attitude of paternalism, whereby vulnerability is equated with the need for greater protection, not so much empowerment or participation. The use of vulnerability language can then act as a moral justification for social control²⁸ and behavioural regulation.²⁹ This has happened in the Netherlands where, due to human rights case law based on vulnerability and deservingness,³⁰ the government was forced to provide irregular migrants who had minors, with housing. The government decided to house such families in ‘family locations’ where their freedom of movement was severely restricted. People living there were subjected to a daily duty to report to the authorities and were not allowed to leave the territory of the municipality in which the shelter was located. Whereas their (supposed) vulnerability entitled them to housing, they ended up being subjected to far-reaching State control.³¹

In essence, vulnerability is a chameleon concept, able to change its content depending on who uses it in which context. The famous lines from Lewis Carroll’s *Through the Looking-Glass* come to mind here:

“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean — neither more nor less.”

‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’

‘The question is,’ said Humpty Dumpty, ‘which is to be master — that’s all.’³²

Its chameleon character means that vulnerability can be (mis-)used to sit comfortably with the status quo. When only specific groups are deemed vulnerable, rather than appreciating the vulnerability of the entire living order, the concept does not necessarily challenge a neo-liberal world order; it just accepts that this order has some losers and then the concept of vulnerability can be used to remove some of the sharp edges by giving the losers certain limited entitlements.

This dynamic is evident in the area of migrants’ rights. Migration law itself produces vulnerabilities by discriminating amongst people.³³ A pitfall that then arises is that granting social rights based on vulnerability might make it less necessary to accept certain forms of social or quasi-legal membership as relevant for acquiring rights. This phenomenon can be detected in the interpretations

27. Martha Fineman, ‘“Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ (2012) 20 *The Elder Law Journal* 71, 86.

28. Kate Brown, ‘Re-moralising ‘vulnerability’’ (2012) 6 *People, Place & Policy* 41, 41–53.

29. Kate Brown, ‘Questioning the Vulnerability Zeitgeist: Care and Control Practices with ‘Vulnerable’ Young People’ (2014) 13 *Social Policy and Society* 371, 371–387.

30. Lieneke Slingenberg, ‘Deservingness in Judicial Discourse. An Analysis of the Legal Reasoning Adopted in Dutch Case Law on Irregular Migrant Families’ (2021) 20 *Access to Shelter, Social Policy and Society* 521, 521–530.

31. Lieneke Slingenberg, ‘Evaluating ‘Life Steeped in Power’: Non-Domination, the Rule of Law and Spatial Restrictions for Irregular Migrants’ (2020) 12 *Hague J Rule Law* 399, 399–420.

32. Lewis Carroll, *Through the Looking-Glass* (Hayes Barton Press 1872) 72.

33. See Jean-Yves Carlier, ‘Des droits de l’homme vulnérable à la vulnérabilité des droits de l’homme, la fragilité des équilibres’ (2017) 79 *Revue interdisciplinaire d’études juridiques* 175, 185; and Lydia Morris, ‘Managing Contradiction: Civic Stratification and Migrants’ Rights’ (2003) 37 *International Migration Review* 74, 96.

of the ECSR. In *DCI v the Netherlands*, the Committee ruled that the provision on discrimination (Article E ESC) was not applicable, since ‘States Parties may treat individuals differently depending on whether or not they are lawfully on their territory’.³⁴ In addition, the Committee held that Article 31(1) on the right to ‘adequate’ housing was not applicable to irregular migrants, since ‘to require that a Party provide such lasting housing would run counter to the State’s aliens policy objective of encouraging persons unlawfully on its territory to return to their country of origin’.³⁵ Accordingly, the ECSR detaches its vulnerability notion from the social membership that irregular migrants usually obtain over time and from the possibility of entitlement to equal treatment with nationals.³⁶ In other words, the ECSR conceptualises irregular migrants as vulnerable individuals in need of shelter, but not as (possible) members of society, based on, for example, the length of their residence on the territory and/or the unlikelihood of deportation. From a migrant’s point of view, the resulting advantages are possibly rather short-lived, since it is the recognition of a kind of national membership that provides a more powerful, stable and durable base than the recognition of particular vulnerability.

To avoid pitfalls and ensure the effective protection of migrant rights, the notion of vulnerability would have to be adapted to the context of migration. Rather than designating – and ultimately trapping – people on the move within predefined legal categories, it ought to be based on a recognition of the contingent, socially induced, and contextual nature of vulnerability as found in Fineman’s work.³⁷ Indeed, it seems more appropriate to speak of ‘migratory’ vulnerabilities that affect migrants differently depending on various factors including their legal status, countries of origin and residence, age, gender, race, or socioeconomic status (the list goes on).³⁸ The ‘trait’ shared by these persons is their legal exclusion by the State as the cause of their (diverse) migratory vulnerabilities. Were judicial institutions to pursue such a context-sensitive approach, the notion of vulnerability could serve as a tool to analyse what specific disadvantages are being created, whether these are indeed conducive to immigration control (or merely based on an unproven assumption based on deterrence), and what the State and courts can and should do to offset them. In other words, migratory vulnerability could help courts to identify ‘dependencies’ grounded in the social relation between persons and the State, and ultimately reduce overall levels of ‘domination’.³⁹

Future Outlook

As part of the human condition, vulnerability is here to stay. As a heuristic and possibly even legal concept, its momentum still appears to be growing. It has a broad and intuitive appeal, proven

34. *DCI v the Netherlands* (n 21) para 73.

35. *ibid* para 44; in *CEC v the Netherlands* (n 21), the Committee held that the Netherlands could uphold irregular migrants’ exclusion from non-emergency social benefits and, again, that States were not required to provide long-lasting housing of an adequate standard to irregular migrants.

36. See for the relevance of social membership for social rights, William Rogers Brubaker, ‘Membership without Citizenship: The Economic and Social Rights of Noncitizens’ in William Rogers Brubaker (ed), *Immigration and the Politics of Citizenship in Europe and North America* (University Press of America 1989) 145–162.

37. Fineman (n 13).

38. Moritz Baumgärtel, ‘Facing the challenge of migratory vulnerability in the European Court of Human Rights’ (2020) 38 *Netherlands Quarterly of Human Rights* 12, 12–29.

39. Lieneke Slingenberg, ‘The Right not to be Dominated: The Case Law of the European Court of Human Rights on Migrants’ Destitution’ (2019) 19 *Human Rights Law Review* 291, 291–314.

strategic value, and is already embedded in some of the practices of human rights institutions. Applied reflectively, it can improve human rights practice, for example in the domains of migration and environmental protection. Because the concept is malleable and because it recognises the connections between humans and their surroundings, vulnerability has at least the potential to rise to the status of a guiding principle of human rights law comparable to dignity or equality. The pitfalls that we mentioned above will have to be recognised and addressed, however, for the concept to deliver on its promises – whether one has a technical or a more ambitious conception of that promise.