

# The institute of vulnerability in the time of COVID-19 pandemic: all shades of the human rights spectrum

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## THE INSTITUTE OF VULNERABILITY IN THE TIME OF COVID-19 PANDEMIC – ALL SHADES OF THE HUMAN RIGHTS SPECTRUM\*

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### **ABSTRACT**

*The vulnerability thesis is one of the most important legal concepts in contemporary legal theory. Apart from being studied by legal scholars, the notion of vulnerability has been embodied in concrete legal rules and transferred to national case law allowing courts to set its boundaries by the power of judicial interpretation. Even though it would be hard to contest Schroeder and Gefena's statement that it is not necessary for an academic to say what vulnerability is because common sense dictates the existence of it, recent scholarly analysis clearly shows that the concept itself has become intolerably vague and slippery. More precisely, it is not quite clear what the essence of vulnerability is and what the effects of its gradation as well as repercussions are on other constitutional institutes across the human rights spectrum. The noted vagueness poses a great concern, particularly in the time of COVID-19, the greatest social stressor that humanity has faced in recent months. The COVID-19 crisis has had untold consequences on our health, mental well-being, educational growth, and economic stability. In order for the state to bear the COVID-19 social burden and adequately protect the vulnerable, it is of the utmost importance to set clear guidance for the interpretation and implementation of the vulnerability concept. Seeking to contribute to literature on these issues, the author brings light to constitutional and criminal legal standards on vulnerability set within the current jurisprudence and doctrine. Bearing in mind the influence of the European Court of Human Rights (hereinafter, the ECtHR or the Court) on developments in human rights law, 196 judgments related to vulnerability have been retrieved from the HUDOC database using a keywords search strategy. The quantitative analysis was supplemented with more in-depth qualitative linguistic research of the Court's reasoning in cases concerning vulnerable children, persons suffering from mental illness and victims of family violence. Although the vulnerability reasoning has considerably expended their rights within the ambit of the Convention, the analysis has shown that inconsistencies and ambiguities emerge around the formulation of the applicant's vulnerability and its gradation with respect to positive obligations. The full creative and transformative potential of the institute of vulnerability is yet to be realized.*

**Keywords:** COVID-19, quantitative and qualitative analysis, state's positive obligations, the European Court of Human Rights, vulnerability

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## 1. INTRODUCTORY NOTES ON SOCIAL VULNERABILITY IN THE WAKE OF COVID-19 PANDEMIC

The global pandemic of COVID-19 is affecting humanity in an unprecedented manner. From the first reports on 31 December, 2019, the virus has spread from Wuhan City and reached numerous countries on every continent infecting millions of people and changing individual and social life as we know it. On April 1, 2020, WHO Director-General clearly warned that the world was not prepared for the first coronavirus pandemic and that going forward the world community had to jointly do much better in future outbreaks.<sup>1</sup> His conclusions were supported by WHO's statistics, a valid global data set for coronavirus global monitoring, according to which, only three days later, there were 130,422,190 cases detected globally as well as 2,842,135 lost lives due to COVID-19 complications.<sup>2</sup> The number of infected citizens has also reached a grim milestone in Croatia. As of April 4, the total number of infected persons rose to 280,026 while the death toll was brought to 6,058.<sup>3</sup> As health professionals are unanimous in the claim that the virus has been proven to be highly contagious, it seems realistic to assume that additional burden will be placed on public health systems, social care and economy in terms of reduction in trade, lost work, workforce reduction, and increase in poverty.

In the time of COVID-19 pandemic, the virus substantially lowered the quality of health care causing a shortage of hospital beds for the infected and disrupting effective treatment of patients not related to the infection.<sup>4</sup> Furthermore, the economic and social blows are devastating. In a joint statement, FAO, ILO, IFAD and WHO estimated that the pandemic's economic and social outcomes are placing "tens of millions of people at risk of falling into extreme poverty" and "nearly half of the world's 3.3 billion global workforce at risk of losing their livelihoods", while the virus could push between 83 and 132 million people into chronic hunger by the end of 2020 contingent on the economic growth trajectories.<sup>5</sup> The global GDP scenario is not at all encouraging, since it envisaged a fall of 5 per cent

<sup>1</sup> World Health Organisation, *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 1 April 2021*, [<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-1-april-2021>], Accessed 1 April 2021.

<sup>2</sup> World Health Organisation, *WHO Coronavirus (COVID-19) Dashboard*, [<https://covid19.who.int/>], Accessed 4 April 2021.

<sup>3</sup> Government of the Republic of Croatia, *Coronavirus - Statistical Indicators for Croatia and the EU*, [<https://www.koronavirus.hr/en>], Accessed 4 April 2021.

<sup>4</sup> Altheimer, I. *et al.*, *The Impact of Covid-19 on Community-Based Violence Interventions*, American Journal of Criminal Justice, Vol. 45, 2020, pp. 810 – 811.

<sup>5</sup> FAO, IFAD, UNICEF, WFP and WHO, *The State of Food Security and Nutrition in the World 2020. Transforming food systems for affordable healthy diets*, Rome, 2020, p. 3.

in the same year resulting with a loss of about \$10 trillion for the global economy.<sup>6</sup> According to Makin and Layton, the fiscal policy responses of countries around the globe to the COVID-19 crisis has led to additional negative consequences, such as huge budget deficits and substantially increased, public debts, which were already high.<sup>7</sup> The official data show that the COVID-19 pandemic is a global phenomenon that has activated the most severe global recession since World War II.

The occurrence of the pandemic has triggered a wave of harmful social, economic, and political outcomes that are a clear predictor of further increasing social vulnerability. According to Biggs and colleagues, social vulnerability can be defined as “the degree to which a community is able to prepare and respond to a natural or man-made disaster, such as a hurricane, chemical spill, or disease outbreak” and research suggests that there is a clear link between the amplified social disadvantage and COVID-19 incidence.<sup>8</sup> Communities with increased social vulnerability carry the disproportionate burden of the pandemic because of their limited capacities to cope with and respond to the novel virus. The issues of social vulnerability and virus outbreak research responses are considerably discussed in the political arena and the present political discourse calls for immediate protection of vulnerable populations.<sup>9</sup> The Sustainable Development Goals are a good example of how to translate political proposals into a concrete, universal agenda.<sup>10</sup> In pandemic circumstances, their call to leave no one behind is of utmost importance as it places the most vulnerable in the centre of actions. The approach is praiseworthy and has to be further extended across the UN member states and embedded in government policies, practices and procedures. The fact is that those who live with social and individual disadvantages have little prospect of coping with coronavirus crisis.

A growing body of research has already assessed the effect of the government mandated restrictions designed to suppress the impact of the COVID-19 pandemic on vulnerable groups. Depending on the methodology and design of the research, certain studies confirm a link between the coronavirus and the increase in family

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<sup>6</sup> Naisbitt, B. *et al.*, *The World Economy: Global Outlook Overview*, National Institute Economic Review, Vol. 253, 2020, p. 35.

<sup>7</sup> Makin, A. J.; Layton, A. *The Global Fiscal Response to COVID-19: Risks and Repercussions*, Economic Analysis and Policy, Vol. 69, 2021, p. 348.

<sup>8</sup> Biggs, E. N. *et al.*, *The Relationship Between Social Vulnerability and COVID-19 Incidence Among Louisiana Census Tracts*, *Frontiers in Public Health*, Vol. 8, 2021, pp. 2, 6.

<sup>9</sup> See for example Senator Sylvia Santana’s amendment to include social vulnerability index as a decision point for the distribution of COVID-19 vaccines. Senate TV, *Protecting the Most Vulnerable*, [<https://www.facebook.com/SenSylviaSantana/videos/425732561844665/>], Accessed 25 February 2021.

<sup>10</sup> The United Nations, *The Sustainable Development Goals*, [<https://www.un.org/sustainabledevelopment/>], Accessed 1 April 2021.

violence, while others show mixed conclusions, equal prevalence, or a decrease of delinquent behaviour in focus.<sup>11</sup> Although the research results seem quite inconclusive, the official criminal justice statistics in some countries confirmed the rapid growth of criminal offences in home settings caused by the coronavirus lockdown mandatory cohabitation. Over the first three weeks of lockdown measures in France, official reports recorded a 32% - 36% upsurge in family violence.<sup>12</sup> Due to a lack of access to criminal justice intervention services as well as to health, social care and other support services, the risk of abuse for family violence victims cannot be excluded. The lockdown measures have been perceived as a possible mechanism through which the pandemic also affects victimisation of children. Children may face the additional risk of abuse and neglect because of mandatory stay-at-home measures, school closures, disruption of child welfare services, and stress within family households. Even if a decrease of the suspected child abuse during lockdown is observed, there is a probability that it only reflects a lack of screening, a serious and exacerbated misreporting problem.<sup>13</sup> Throughout the pandemic, a number of research studies highlighted the fact that children and their parents experience the deterioration of their mental health and well-being. The psychological impact of the virus on general population and the infected has also been noted in different scholarly articles. People affected by COVID-19 may struggle with depression, anxiety disorders, and sleep disturbances and may experience diverse levels of stress, panic attack, irrational anger, and impulsivity. The list of mental health consequences also includes somatization disorder, emotional disturbance, posttraumatic stress symptoms, and suicidal behaviour.<sup>14</sup> It is clear that the coronavirus will have a long-term impact on mental health and negative psychological effects will not cease to exist once the pandemic is over. A study predicted the escalation of suicides after the COVID-19 crisis because of the intensity of lockdown and additional, multiple causes such as substance consumption, job loss, social isolation, anxiety, trauma, and living in resource-poor communities without adequate mental health support.<sup>15</sup>

<sup>11</sup> Arenas-Arroyo, E., *Can't Leave You Now! Intimate Partner Violence under Forced Coexistence and Economic Uncertainty*, IZA Institute of Labor Economics Discussion Paper, no. 13570, 2020, p. 2.

<sup>12</sup> Usher, K. et al., *Family Violence and COVID-19: Increased Vulnerability and Reduced Options for Support*, International Journal of Mental Health Nursing, Vol. 29, No. 4, p. 549.

<sup>13</sup> Caron, A. et al., *Was Child Abuse Underdetected during the COVID-19 Lockdown?*, Archives de Pédiatrie, Vol. 27, No. 7, p. 399.

<sup>14</sup> Hossain, M. et al., *Epidemiology of Mental Health Problems in COVID-19: A Review*, F1000Research, Vol. 9, No. 636, p. 1.

<sup>15</sup> Standish, K., *A Coming Wave: Suicide and Gender after COVID-19*, Journal of Gender Studies, Vol. 30, No. 1, 2021, p. 116.

It appears that the COVID-19 pandemic has unfolded new vistas and research perspectives for scholars, urging them to explore the virus paradigm within the vulnerability boundaries. Even though COVID-19 is an infectious disease with physical health implications, a broad body of research tends to link it to the underlying individual and social factors leading to vulnerability. Two conclusions can be drawn from the above-mentioned findings. First, the pandemic has shown that the academic community and policy officials have to assess its impact in terms of different levels of vulnerability, i.e. the global, social vulnerability and the individual one. The second conclusion refers to the joint and interdependent action of vulnerability forces. In all likelihood, the drivers of vulnerability, combined with unexpected pandemic circumstances, generate additional vulnerability and it is hard to contest the conclusion that those who were vulnerable are now more vulnerable than ever. Understanding the different layers of vulnerability and forces behind it has the potential to place vulnerability within the human rights spectrum and to recall the state's positive obligation to effectively protect and guarantee the rights of vulnerable persons. In order for the state to bear the COVID-19 social burden and adequately protect the vulnerable, it is essential to solve the puzzle of the definition of vulnerability and to set clear guidance on the interpretation and implementation of the vulnerability concept.

## **2. DEFINING VULNERABILITY: THE FIRST STEP TOWARDS THE DEMYSTIFICATION OF VULNERABILITY CONCEPT**

### **2.1. The Notion of Vulnerability in Public Discourses**

The pandemic subset of the social climate has placed the notion of vulnerability at the heart of public discussions and political discourses. In one of his recent statements on the impact of COVID-19, Minister of Health Beroš warned that the health system in Croatia is vulnerable amid surging cases. Correspondingly, State Secretary at the Ministry of Economy and Sustainable Development Mikuš Žigman has concluded that the economy, along with the services that form the basis of the economy, is vulnerable.<sup>16</sup> Similarly, Dehaghani and Newman argue for a conceptual understanding of vulnerability as a condition associated with the criminal justice system.<sup>17</sup> According to them, the police service and the criminal legal aid system both have a vulnerable nature as vulnerability is revealed in the

<sup>16</sup> Prvi program Hrvatskoga radija, *Poslovni tjedan*, [<https://radio.hrt.hr/prvi-program/ep/poslovni-tjedan/378307/>], Accessed 12 April 2021.

<sup>17</sup> The identical argument was raised by the applicant in *Abdulla Ali v. the United Kingdom* (2015). According to the applicant, "le côté faible" of the criminal justice system in the United Kingdom lies in its reliance on juries.

early phases of criminal proceedings.<sup>18</sup> Apart from the fact that the education system has been labelled as vulnerable in recent months, state policy documents indicate that there are certain groups in higher education that share a common layer of vulnerability, e.g. students with children, senior students, and students who have completed vocational schools.<sup>19</sup> If considered through the lens of social exclusion based on economic status, the list of vulnerable persons is lengthy encompassing the poor, the unemployed, especially long-term unemployed, the homeless, returnees and displaced persons, migrants, especially asylum seekers and foreigners under subsidiary protection, persons living on islands and in rural areas.<sup>20</sup> The potentiality of invoking vulnerability in public debates seems endless and there are indications that political speech has also been transformed under the influence of the vulnerability context. As head of the opposition GLAS party, Mrak Taritaš stated in her comments on last year's parliamentary election results that the former mayor of Zagreb was vulnerable.<sup>21</sup> Associated with different state systems and political officials, the vulnerability narrative has transcendent significance and one occasion it went so far that, surprisingly, the Republic of Croatia was also said to be vulnerable.<sup>22</sup>

The analysis of Croatian public discourse shows the transformative capacity of the vulnerability idea in its finest forms. The intensity of invoking it confirms that vulnerability has become a permanent part of the public domain and political discussions, and that it is almost inevitable that, at some point, everyone and everything will become vulnerable. If so, it would be difficult not to agree with Schroeder and Gefenas's point that it is not necessary for an academic to say what vulnerability is. It is all around us and it requires recognition, knowing that "we

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<sup>18</sup> Dehaghani, R.; Newman, D. *We're Vulnerable Too: An (Alternative) Analysis of Vulnerability within English Criminal Legal Aid and Police Custody*, Oñati Socio-Legal Series, Vol. 7, No. 6, 2017, p. 1199, 1222; A similar conclusion was reached by the Council of Europe's Parliamentary Assembly in Resolution 2015 (2014) adopted on 1 October 2014. According to the Parliamentary Assembly "the proceedings in sensitive legal cases (...) have revealed continuing vulnerabilities and deficiencies in the justice system (...)."

<sup>19</sup> 6<sup>th</sup> Aim of the Strategy of Education, Science and Technology, Official Gazette No. 124/2014.

<sup>20</sup> Chap. 3.2. of the Strategy for Combating Poverty and Social Exclusion in the Republic of Croatia (2014 -2020.), [<https://vlada.gov.hr/UserDocsImages/ZPPI/Strategije/Strategija%20borbe%20protiv%20siroma%C5%A1tva.pdf>], Accessed 1 April 2021.

<sup>21</sup> N1, *Newsroom*, [<https://www.youtube.com/watch?v=TXihgyADthM>], Accessed 2 April 2021.

<sup>22</sup> 3<sup>th</sup> Chapter of the Republic of Croatia National Security Strategy, Official Gazette No. 73/2017; Equally conceptualised, the state vulnerability is mentioned in *Vinks and Ribicka v. Latvia* (2020). The Court took note of the "concerns expressed by international experts that Latvia was vulnerable to being used for money laundering purposes".



can all see it, much more often than we care to”.<sup>23</sup> Furthermore, a common thread that runs through all vulnerability scenarios is the susceptibility to different forms of harm, i.e. bodily, psychological, moral, economic, financial and institutional, and the absence of control over decisions, again leading to harm.<sup>24</sup> The central dimension granted to harm springs, on the one hand, from its use as a common rhetorical connection to vulnerability, and on the other, from the etymology of the word itself. Vulnerability, according to the Oxford dictionary, is “the quality or state of being exposed to the possibility of being attacked or harmed”, and it was first coined in early 17<sup>th</sup> century from the Latin *vulnerare*, “to wound”.<sup>25</sup> Still, the meaning of vulnerability depends on the disciplinary standpoint from which it is approached. While analysing the multidimensional meaning of the term, Truscan explains that economists think about vulnerability in terms of risk, precariousness, or insecurity while medical professionals focus on patients and their capacity to overcome physical or mental harm. Harm and resilience are in the centre of environmental scientists’ attention; as for lawyers, vulnerability is associated predominantly with weakness and fragility.<sup>26</sup> This could further add to possible misunderstanding and general confusion about the whole concept of vulnerability. Despite the fact that the concept is gaining momentum, its meaning is intolerably vague, confusing, complex and ambiguous. It appears that there is a limited understanding of its definition, legal substance, boundaries and effects. Little is known about the legal notion of vulnerability and its implications on state duty to organise and implement specific measures aimed at reducing vulnerability and protecting the vulnerable. In order to better understand vulnerability in the legal context, further attention has to be given to Fineman’s understanding of vulnerability as a universal phenomenon and its potential to redefine human rights standards.

## 2.2. Fineman’s Understanding of Vulnerability - A Potent Theoretical Instrument

Marta Fineman’s philosophical reasoning has considerably questioned the notion of universal human rights, the ultimate rights that are valid as such and to which everyone has a legitimate claim as a human being. Human rights are, therefore, universal because they do not need to be established or promulgated, but rather

<sup>23</sup> Schroeder, D.; Gefenas, E. *Vulnerability: Too Vague and too Broad?*, Cambridge Quarterly of Healthcare Ethics, Vol. 18, 2009, p. 113.

<sup>24</sup> Peroni, L.; Timmer, A. *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, International Journal of Constitutional Law, Vol. 11, No. 4, 2013, p. 1058.

<sup>25</sup> *Oxford Lexico*, [<https://www.lexico.com/en/definition/vulnerability/vulnerable>], Accessed 6 April 2021.

<sup>26</sup> Truscan, I., *Considerations of Vulnerability: From Principles to Action in the Case Law of the European Court of Human Rights*, Retfaerd Årgang, Vol. 36, No. 3, 2013, pp. 64 – 65.



recognised or acknowledged by others. The universality of human rights lies on the thesis that a human rights holder is a free-born, autonomous individual. In the Western liberal tradition, John Lock's philosophy of liberal individualism has been a building block of the liberal model. Although its vision of equality has radical potential, according to Fineman, it can be interpreted narrowly in the form of sameness of treatment and prohibition of discrimination. Fineman argues that the formal equality model is too weak because it "fails to take into account existing inequality of circumstances... [and] to disrupt persistent forms of inequality".<sup>27</sup> While the list of material and social inequalities is long and growing, the society and its institutions perpetually produce and reproduce inequalities. Along with inequality generators we note the issue of state non-intervention. The state's passivity is mirrored by a policy of restraint and abstention acknowledging that there are certain activities and institutions that are out of the reach of state interventions. Having said that, Fineman concludes that we should abandon the liberal tradition thesis and replace it with one that puts at the centre of social policy discussions a more complex subject, the vulnerable subject.<sup>28</sup>

Vulnerability mostly carries negative connotations and implies that the vulnerable persons are different, isolated, placed on the margins of society, and in need of assistance and protection. The states' obligation to protect human rights of the disadvantaged or vulnerable categories of persons emerged in human rights and international legal discourses four decades ago.<sup>29</sup> Emerging literature on the vulnerability manifestations reveals that the term in question particularly refers to children, the elderly, victims of crime, disabled individuals, members of minorities, HIV infected patients, the poor and persons deprived of liberty in state institutions.<sup>30</sup> Such labelling can have a stigmatising effect and, therefore, the notion of vulnerability has to be freed from its limited and negative associations. A possible way to do that, Fineman claims, is to apply a reverse approach and acknowledge that vulnerability is "a universal, inevitable, enduring aspect of the human condition"<sup>31</sup> While exploiting the ambiguity and common use of the term in focus, she revises the essence of it and conceives a heuristic device for con-

<sup>27</sup> Fineman, M. A., *The Vulnerable Subject: Anchoring Equality in the Human Condition*, Yale Journal of Law and Feminism, Vol. 20, No. 1, 2008, pp. 2 - 3, 5.

<sup>28</sup> *Ibid.*, p. 2.

<sup>29</sup> Truscan, I., *op. cit.*, note 26, p. 69.

<sup>30</sup> Fineman, M. A., *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, Boston University Law Review, Vol. 92, No. 6, 2012, pp. 1748 - 1750.

<sup>31</sup> Fineman, M. A., *op. cit.*, note 27, p. 8; Similarly, Turner and Dumas talk about "ontological vulnerability", a condition that all human beings have in common. Turner, B. S.; Dumas, A., *Vulnerability, Diversity and Scarcity: On Universal Rights*, Medicine, Health Care, and Philosophy, Vol. 16, No. 4, 2013, p. 666.

ceptualising an almost pessimistic understanding of human resilience to internal and external stressors. Interestingly, similarly to Fichte's and Hegel's thoughts on vulnerability,<sup>32</sup> Fineman seeks to show that vulnerability inevitably emerges from human physical embodiment but also from embodiment in social institutions and relationships and constant susceptibility to change in bodily and social well-being.<sup>33</sup> Harm, injury, process of aging, misfortune, crime, natural disasters, disease, epidemics, resistant viruses all play part of Fineman's negative change scenario out of human control. Remarkably, the conceptualised perspective is best confirmed by the current COVID-19 pandemic circumstances. Vulnerability, because it is universal, inherent, constant, ever-present, and enduring, goes beyond dependency and has to be a leitmotiv of social policy and law. We, as vulnerable subjects, are in need of a more responsive and responsible state that acts through its institutions with equal regard for our shared vulnerability.<sup>34</sup> The principal governmental responsibility with respect to social justice issues, due to acknowledged human vulnerability, is significant and has to be fulfilled primarily through the formation and support of societal institutions.<sup>35</sup> These assertions rely on the assumption that social problems need social or collective solutions, rather than an individual one. Vulnerability cannot be erased, this is the fact, however, Fineman's idea to mediate, compensate, and reduce it through programmes, institutions, and structures seems quite promising.

In recent scholarly work different theoreticians have expressed criticism of the notion of human rights and the liberal subject, an imaginary bearer of human rights who is supposed to be male, white, autonomous, distant, lonely, capable of making his own decisions and choices, and whose rights have to be protected from infringement from state arbitrary actions. The concepts of human rights built around the idea of the liberal subject are predominantly seen as negative obligations to refrain from unjustified interventions, rather than positive state obligations to act and protect. Fineman's approach to vulnerability is a promising and viable option that offers a solution to raised issues putting an emphasis on the state's involvement in creating the effective factors to increase resilience to vulnerability. Fineman's call for a more responsive state lays the basis for a more extensive human rights protection and shifts the focus to the doctrine of positive obligations. In the blunt words of Alice Margaria, the said doctrine is perhaps "the tightest *trait*

<sup>32</sup> Dryden, J. *Embodiment and Vulnerability in Fichte and Hegel*. Dialogue, Vol. 52, No. 1, 2013, pp. 109 - 128.

<sup>33</sup> Fineman, M. A., *Vulnerable and Inevitable Inequality*, Oslo Law Journal, Vol. 4, No. 4, 2017, p. 143.

<sup>34</sup> Fineman, M. A., *Vulnerability and Social Justice*, Valparaiso University Law Review, Vol. 53, No. 2, 2019, p. 356.

<sup>35</sup> Fineman, M. A., *The Vulnerable Subject and the Responsive State*, Emory Law Journal, Vol. 60, No. 2, 2010, pp. 255 - 256.

*d'union*” between Fineman’s vulnerability model and the ECtHR juridical vision of the protection of individual rights.<sup>36</sup> Thus, it seems quite important to explore how the concept of vulnerability is shaped through the lens of ECtHR jurisprudence and how this provides the possibility for the Court in Strasbourg to create a more substantive frame for human rights protection.

### 3. THE CONCEPT OF VULNERABILITY – A DRIVING FORCE TO ENHANCE HUMAN RIGHTS PROTECTION IN THE CASE LAW OF THE ECTHR?

#### 3.1. Methodological Determinants and Selection of the Research Sample

Regardless of the fact that in recent years vulnerability issues have attracted a considerable scholarly attention, little is known about vulnerability as a legal institute whose connotations are shaped in ECtHR discourse. The concept of vulnerability and its application in Court’s case law has timidly fostered dialogue among practitioners and theoreticians about the boundaries of protection of basic human rights and freedoms. Some authors have acknowledged that vulnerability is an emerging concept in the Court’s practice and a judicial tool with transformative potential,<sup>37</sup> yet scholars do not appear to examine how the concept itself evolves and modifies the already established constitutional institutes. To the best of the author’s knowledge, this is one of a few academic essays looking into the definition of vulnerability, its gradation, and possible transformation of constitutional principles and relevant tests to protect the rights of vulnerable applicants set by the Court.

Account taken of the above, the goal of this study is, first of all, to investigate the prevalence of vulnerability cases in the Strasbourg Court’s case law. The quantitative methodology will be applied to identify the number of cases that reached the Court and were adjudicated with reference to the vulnerability of the applicant. Additionally, the second research step involves the qualitative linguistic analysis of the Court’s reasoning. Due to the fact that the text of the Convention is silent about vulnerability, the rigorous qualitative interrogation will show how judicial reasoning can create the scope and content of standards of protection for the vulnerable.

<sup>36</sup> Margaria, A., *Vulnerability and the ECHR System: Is it a Framing or a Substantive Issue?*, Workshop on Vulnerability and Social Justice, 17 - 18 June 2016, Leeds University, Leeds, 2016, pp. 3, 5.

<sup>37</sup> Peroni, L.; Timmer, A., *op. cit.*, note 24, p. 1056; Timmer, A., *A Quiet Revolution: Vulnerability in the European Court of Human Rights*, in: Fineman, M.; Gear, A. (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Farnham, Burlington, 2013, p. 147-170.

Another aim of the present study is to single out the evolving trends in defining these standards, and with critical analysis, to investigate the connection between the concept of vulnerability and the already established doctrinal institutes in ECtHR jurisprudence, e.g. the margin of appreciation and positive obligations. The literature on the interpretative mechanisms of ECtHR case law reveals that the said concept has been placed in the centre of its doctrinal discourse, however, what is less clear are its repercussions on classical ECtHR institutes.<sup>38</sup> The combined quantitative and qualitative methods form a new set of blended methodologies already applied in different studies discussing the ECtHR's adjudicative practice in a wider context.<sup>39</sup>

The first quantitative method mentioned above is well grounded in the body of academic research. For example, Al Tamimi's methodological approach was based on a systematic keyword analysis of an established online database that provides access to the case law of the Court (HUDOC). The database was searched using keywords "vulnerability", "vulnerable", and "vulnérabilité". The query revealed that the Strasbourg authority had discussed substantially issues related to vulnerability and protection of vulnerable individuals in 557 cases adjudicated until January 2014.<sup>40</sup> The very first case in which vulnerability was invoked was *Dudgeon v. the United Kingdom*, 1981,<sup>41</sup> and since then, the vulnerability jurisprudence of the ECtHR has evolved significantly.<sup>42</sup> Relying on Al Tamimi's quantitative methodological steps, identical keywords were used to build the query accepting, as it was shown above, that a core etymological meaning of the vulnerability concept inevitably entails the vulnerability / *vulnérabilité* of the applicants. The research period is extended from January 2014 to April 2021 to capture the effect of vulnerability context on Court's judicial review and decision-making. Creating the methodological mosaic in this fashion is a tried and tested way to enhance the research results reported in previous studies and gain a complete phenomenological insight into the ECtHR's vulnerability narrative. During the keyword search stage, it was sought to eliminate factors that may impact the retrieval of cases from the HUDOC caselaw collection. The keywords were entered individually

<sup>38</sup> Rittossa, D., *Strengthening the Rights of Sexually Abused Children in Front of the European Court for Human Rights - A Tale of Justice, Fairness and Constant Normative Evolution*, ECLIC - EU and Comparative Law Issues and Challenges Series, Vol. 4, 2020, p. 550.

<sup>39</sup> *Ibid.*, p. 529 - 556; Faye Jacobsen, A., *Children's Rights in the European Court of Human Rights - An Emerging Power Structure*, International Journal of Children's Rights, Vol. 24, 2016, pp. 548 - 574; Al Tamimi, J., *The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights*, European Journal of Human Rights, Vol. 5, 2016, pp. 561 - 583.

<sup>40</sup> *Ibid.*, p. 562.

<sup>41</sup> Judgement *Dudgeon v. the United Kingdom* (1981).

<sup>42</sup> Truscan, I., *op. cit.*, note 26, p. 71.

or in combination using the Boolean operator “AND”. In the interest of maintaining the strongest possible methodological consistency, repeated and irrelevant cases were excluded, and subsequently, the query revealed that there had been 196 judgments in which the Court precisely devoted a part of its reasoning to discuss, accept and develop arguments related to vulnerability.

The analysis has confirmed that only a minority of judgments on the issue held that there was no violation of the Convention (23 out of the total number of cases). The infringement of relevant Convention Articles was found in 148 ECtHR rulings. More precisely, the infringing acts had given rise to violation of applicant’s right to life (Article 2; Article 1 of Protocol No. 6), right to personal integrity and dignity (Article 3), right to be free from slavery and forced labour (Article 4), right to liberty and security (Article 5), right to a fair trial (Article 6) as well as privacy rights as provided in Article 8 of the Convention. The Court’s case law on vulnerability also includes judgments that establish breaches of freedom of expression (Article 10), freedom of assembly and association (Article 11), prohibition of discrimination (Article 14), collective expulsion of aliens (Article 4 of Protocol No. 4), property rights (Article 1 of Protocol No. 1), and the right to education (Article 2 of Protocol No. 1) coupled with an effective remedy for a violation of a right (Article 13) and with the right of individual petition to the Strasbourg Court (Article 34). The results implicate that the vulnerability momentum in the ECtHR’s practice has been decisive to determine the content and the nature of civil-political and socio-economic rights as well. Such conclusions are similar to those of Palmer and Hansen who believe that both categories overlap to a certain extent and that in recent cases the Court expressed the firm willingness to explore different aspects of rights of vulnerable claimants.<sup>43</sup> The third category of cases represents rare judgments where the Court confirmed a violation and no violation of rights protected under the Convention depending on the stage of criminal justice process,<sup>44</sup> the assessed period of time, or other existing circumstances of the case.<sup>45</sup> The fourth group of rulings concerns concurring and dissenting opinions in part or in whole that substantially questioned the majority’s holding relying on vulnerability criteria as a tool for providing greater protection for individual rights (20 out of the sampled cases).<sup>46</sup> In 3 remaining judgments the issue of vulnerability

<sup>43</sup> Palmer, E.; Hansen, H. C., *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Bloomsbury Publishing Plc, London, 2009, pp. 65 - 66, 72.

<sup>44</sup> Judgement *Simeonovi v. Bulgaria* (2017).

<sup>45</sup> Judgement *Rooman v. Belgium* (2019).

<sup>46</sup> Judgement *Ertuğ v. Turkey* (2014); *I.S. v. Germany* (2014); *Georgia v. Russia (I)* (2014); *Hämäläinen v. Finland [GC]* (2014); *A.V. v. Ukraine* (2015); *Adžić v. Croatia* (2015); *Adam v. Slovakia* (2016); *Borg v. Malta* (2016); *D.L. v. Bulgaria* (2016); *Kocherov and Sergejeva v. Russia* (2016); *Mironovas and Others v. Lithuania* (2016); *V.M. and Others v. Belgium [GC]* (2016); *Ahmed v. the United Kingdom* (2017);

was raised, however, surprisingly, it seems that it did not affect the Court's conclusion as to the existence of a human rights infringement in any decisive manner. Although not so crucial but quite clear argumentative reasoning was constructed through a narrative telling of the applicant's personal characteristics and concluding that "no other particular circumstance can be noted which would indicate that the applicant was in a greater state of vulnerability"<sup>47</sup> or that "there is no indication that the applicants in the present case were more vulnerable"<sup>48</sup> than any other person in their place. It appears that the state of vulnerability has been habitually acknowledged to suspects questioned by the police or to asylum seekers, nevertheless, in recent court practice the vulnerability bar is raised across criterion groups, making it harder for the applicants to argue the case. The noted shifts in vulnerability assessment call for more intense scrutiny.

### 3.2. Phenomenological Distribution of Vulnerability in ECtHR's Vulnerable Groups' Narrative

A robust body of human rights literature shows that the vulnerability criteria is commonly associated with the group context of vulnerable members of society.<sup>49</sup> In each individual case, the Strasbourg authority evaluates the factual circumstances and legal arguments to determine whether the applicant belongs to a group of people who are vulnerable in the eyes of the Court. It is worth noting that the Strasbourg authority explicitly acknowledges the group approach by explaining that "the applicant may be considered to fall within the group of 'vulnerable individuals' entitled to state protection...".<sup>50</sup> Since *Dudgeon v. the United Kingdom*, a lack of maturity, mental disability and the state of dependence have been recognised as sources of vulnerability.<sup>51</sup> The results of the present study confirm the initial starting points of vulnerability reasoning showing that "vulnerable" is an adjective attached to children,<sup>52</sup> persons with disabilities<sup>53</sup> and to those who suffer

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*Lopes de Sousa Fernandes v. Portugal [GC]* (2017); *Correia de Matos v. Portugal [GC]* (2018); *A and B v. Croatia* (2019); *M.A. and Others v. Lithuania* (2019); *Pryanishnikov v. Russia* (2019); *S.S. v. Slovenia* (2019); *Vovk and Bogdanov v. Russia* (2020).

<sup>47</sup> Judgement *Beuze v. Belgium* (2018).

<sup>48</sup> Judgement *Ilias and Ahmed v. Hungary* (2019); See also *Mahamed Jama v. Malta* (2016).

<sup>49</sup> Sajó, A., *Victimhood and Vulnerability as Sources of Justice*, in: Kochenov, D.; de Búrca, G.; Williams, A. (eds.), *Europe's Justice Deficit?*, Oxford, 2015, pp. 344 - 345; Al Tamimi, *op. cit.*, note 39, p. 563-568; Timmer, A., *op. cit.*, note 37, p. 152; Peroni, L.; Timmer, A., *op. cit.*, note 24, pp. 1056-1057.

<sup>50</sup> Judgement *Opuz v. Turkey* (2009), § 160.

<sup>51</sup> Judgement *Dudgeon v. the United Kingdom*, *op. cit.*, note 41, § 47.

<sup>52</sup> See *infra* Part 3.3.

<sup>53</sup> Judgement *Krajnc v. Slovenia* (2018); *Lengyel v. Hungary* (2017).



from mental disorders.<sup>54</sup> Moreover, the Court is responsive to the fact that certain personal characteristics may create a vulnerability cohort and, therefore, acknowledges the vulnerability of mothers of a newborn baby,<sup>55</sup> HIV positive patients,<sup>56</sup> patients suffering from other serious illness<sup>57</sup> and those who underwent gender reassignment surgery.<sup>58</sup> Apart from the inherent vulnerability, the Court applies vulnerability reasoning in cases concerning specific external circumstances that generate different situations within the ambit of vulnerability. The research has shown that vulnerability is conceptualized in the Court's case law regarding the nature and scope of the rights of asylum seekers,<sup>59</sup> refugees,<sup>60</sup> suspects and accused offenders in criminal proceedings,<sup>61</sup> prisoners<sup>62</sup> as well as juvenile offenders.<sup>63</sup> A considerable number of enumerated cases concerns issues related to detention, and this leads to the conclusion that Timmer's paradigmatic image of the vulnerable applicant who cannot protect himself from the power of the state is still a dominant leitmotiv in the vulnerability jurisprudence of the ECtHR.<sup>64</sup> The current study also shows that an applicant's vulnerability may be the result of having no legal status<sup>65</sup> or being recognized by the law as a victim of domestic violence,<sup>66</sup> victim of a crime<sup>67</sup> or a member of certain minority. Deployments of vulnerability

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<sup>54</sup> See for example *Association for the Defence of Human Rights in Romania – Helsinki Committee on Behalf of Ionel Garcea v. Romania* (2015); *Boukrourou and Others v. France* (2017); *Evers v. Germany* (2020); *Fernandes de Oliveira v. Portugal [GC]* (2019); *Gheorghe Predescu v. Romania* (2014); *M.S. v. Croatia (No. 2)* (2015); *Pranjić-M-Lukić v. Bosnia and Herzegovina* (2020); *R.E. v. the United Kingdom* (2016); *S.H. v. Italy* (2016).

<sup>55</sup> Judgement *Dupate v. Latvia* (2021).

<sup>56</sup> Judgement *Novruk and Others v. Russia* (2016).

<sup>57</sup> Judgement *Paposhvili v. Belgium* (2016).

<sup>58</sup> Judgement *S.V. v. Italy* (2018).

<sup>59</sup> See *Abdi Mahamud v. Malta* (2016); *F.G. v. Sweden [GC]* (2016); *J.K. and Others v. Sweden* (2016); *L.M. and Others v. Russia* (2016); *M.K. and Others v. Poland* (2020).

<sup>60</sup> Judgement *Tanda-Muzinga v. France* (2014).

<sup>61</sup> See *A.T. v. Luxembourg* (2015); *Anatoliy Rudenko v. Ukraine* (2014); *Chukayev v. Russia* (2016); *Dumikyan v. Russia* (2017); *G. v. Russia* (2016); *Ibrahim and Others v. the United Kingdom* (2016); *Ivko v. Russia* (2016); *Kanciat v. Poland* (2019); *Kondakov v. Russia* (2017); *Sitnikov v. Russia* (2017); *Turbylev v. Russia* (2016).

<sup>62</sup> See *Aggerholm v. Denmark* (2020); *Drăgan v. Romania* (2016); *Helhal v. France* (2015); *Kondrulin v. Russia* (2017); *Sergey Antonov v. Ukraine* (2016).

<sup>63</sup> Judgement *Ateşoğlu v. Turkey* (2015); *Blokhin v. Russia* (2016); *Bouyid v. Belgium* (2015); *I.E. v. the Republic of Moldova* (2020).

<sup>64</sup> Timmer, A., *op. cit.*, note 37, p. 154.

<sup>65</sup> Judgement *Kurić and others v. Slovenia* (2014).

<sup>66</sup> Judgement *Bâlşan v. Romania* (2017); *J.D. and A v. the United Kingdom* (2020); *Levchuk v. Ukraine* (2020); *T.M. and C.M. v. the Republic Of Moldova* (2014); *Talpis v. Italy* (2017); *Volodina v. Russia* (2019).

<sup>67</sup> See *Al Nashiri v. Poland* (2015); *Beizaras and Levickas v. Lithuania* (2020).



are traditionally recognized in cases concerning Roma,<sup>68</sup> other ethnic minorities<sup>69</sup> and LGBTI persons,<sup>70</sup> however, the analysis has proven that the Court took a step further by recognizing the vulnerability of earthquake victims in Turkey.<sup>71</sup>

Although the Court's vulnerability reasoning has acknowledged a number of different groups as vulnerable thus disclosing a clear evolutive potential, the fact remains that it creates the system of identity categories and opens the door for exclusion of others who do not fit the criteria of group membership from state protection. For example, if acknowledging groups with shared vulnerability is considered to be the basis for claims of reparative justice, then, Sajó argues, the notion of vulnerability should apply only to those who were historically subjected to prejudice with long-standing consequences.<sup>72</sup> Thus, relying on moral grounds of justice and group-context vulnerability may create more narrow confines of vulnerability reasoning. Not surprisingly, the Strasbourg approach to the recognition of group vulnerability has been subjected to strong criticism in human rights discourses. Theoreticians argue that vulnerability portrays an experience rather than an identity of certain group.<sup>73</sup> Amongst other things, the vulnerable group concept is powerless when confronted with the task to eliminate material, social, and political inequalities that exist across groups.<sup>74</sup> There is a simple truth which the said concept ignores: not everybody is alike. Accordingly, the groups of vulnerable individuals cannot be considered as a homogeneous unity.<sup>75</sup> Furthermore, group categories unfortunately carry negative connotations with stigmatizing potential.<sup>76</sup> Clustering applicants into vulnerable groups, Timmer explains, is a classical example of liberalism's "others" subjected to marginalization. There is a thin line between the notion of group vulnerability and the gloomy conclusion that the Court "is doomed to reinforce the marginalization of the very people it seeks to protect."<sup>77</sup>

A more intensive insight into the analytical distribution of cases by vulnerable group categories has revealed that the applicants subject to arrest, police custody,

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<sup>68</sup> Judgment *Behar and Gutman v. Bulgaria* (2021).

<sup>69</sup> Judgment *Budinova and Chaprazov v. Bulgaria* (2021).

<sup>70</sup> Judgment *Berkman v. Russia* (2021); *Identoba and Others v. Georgia* (2015); *M.C. and A.C. v. Romania* (2016).

<sup>71</sup> Judgment *M. Özel and Others v. Turkey* (2016).

<sup>72</sup> Sajó, A., *op. cit.*, note 49, p. 346.

<sup>73</sup> Truscan, I., *op. cit.*, note 26, p. 70.

<sup>74</sup> Fineman, M. A., *op. cit.*, note 27, p. 4.

<sup>75</sup> Florencia, L., *Elucidating the Concept of Vulnerability: Layers Not Labels*, International Journal of Feminist Approaches to Bioethics, Vol. 2, No. 1, 2009, p. 123.

<sup>76</sup> Fineman, M. A., *op. cit.*, note 34, p. 357.

<sup>77</sup> Timmer, A., *op. cit.*, note 37, p. 162.

pretrial detention, and imprisonment have experienced and continue to experience the most frequent violation of their rights making up one third (33,2%) of all retracted cases. Recent bodies of scholarship have acknowledged the significant impact of the Court's judgments in children's rights development.<sup>78</sup> With this in mind, it is of no surprise that the recent surge of court cases has confirmed the vulnerability of children (13,8% of all cases). Vulnerability as a condition or situation was significantly related to persons suffering from mental disorders (9,7%) and criminally victimised applicants (5,1%). In the remaining cases, the vulnerability of applicants was almost incidental in vulnerable groups' narrative. The research results clearly indicate that the vulnerability scenario is an issue that disproportionately dominates ECtHR's adjudication processes. The vulnerability practice has been highly fragmented and the probable cause of this phenomenon lies in the fact that the institute of vulnerability is not regulated by the Convention, and the initial decision whether or not to proceed with the group vulnerability reasoning rests solely with the ECtHR. The unequal distribution of vulnerability reasoning concretized through Court's case law regarding vulnerability subgroups is a considerable methodological obstacle for qualitative analysis. In order to overcome those limits and strike the balance among the cases that the Court focused on in light of the vulnerability logic, the qualitative analysis will be conducted as a subgroup analysis concentrating on ECtHR's judgments that endorsed the vulnerability of children, victims of family violence and individuals who struggle with mental difficulties. Moreover, a more narrow application of the qualitative analysis is considered to be a suitable means to capture evolving trends in defining normative parameters of vulnerability standards.

#### **3.4. The Vulnerability of Children as an Inherent Vulnerability Due to Young Age**

Child vulnerability is an issue that has been significantly discussed in scholarly literature. Children have special physiologic, psychological, and other developmental characteristics and special needs which make them constitutionally different from adults. Relying on legal scholarship and empirical findings, Weithorn argues that there are two important themes in constitutional jurisprudence of children's vulnerability: children's status as not-yet-fully-developed persons and children's nature as persons undergoing an exceedingly rapid process of maturation. Those aspects hold a clear jurisprudential potential to invoke the vulnerability narrative emphasising, for example, that children are more susceptible to harm, influence, pressure, coercion than the adults. The youngest members of society have

<sup>78</sup> Faye Jacobsen, A., *op. cit.*, note 39, p. 549.

immature decisional and self-protective capacities and they are placed under the authority and control of others.<sup>79</sup> Furthermore, due to the inherent dependency, the position of children in the social context is well-recognised as being a vulnerable one. Children are inevitably dependent on their caregivers and this fact raises different types of duty of care, protection, support, and general justice towards children. Imposing legal duties on parents, guardians, educators, and different state agents has been perceived as a necessary remedy for “a disadvantage everyone suffered and would outgrow”.<sup>80</sup> Children’s need for assistance, nurturing, material and emotional care will diminish over a lifespan, however, it may increase under the unique, internal and external circumstances, and result in heightened vulnerability.

In recent years, the characterisation of children as vulnerable has been considerably cited by the ECtHR in the context of its attempts to construct higher Convention standards for rights protection in its jurisprudence relating to childhood. The analysis conducted for the purpose of this study leads to the conclusion that the Court in Strasbourg employs assertions about children’s vulnerability in a variety of cases that call for interpretations of the Convention. The vulnerability of children has been specifically acknowledged in child sexual abuse cases. Apart from being expressly transported from national criminal legal provisions or international documents,<sup>81</sup> the vulnerability of children as very young persons was the cornerstone for the Court’s assessment of the state’s duty to provide effective protection from sexual abuse.<sup>82</sup> In *V.C.L. and A.N. v. the United Kingdom*, a ground-breaking case where the Justices elaborated on the state’s decision to prosecute a (potential) child victim of human trafficking as an Article 4 issue, children were labelled as “particularly vulnerable”.<sup>83</sup> The Court has also shown a particular understanding of the vulnerability of children in five cases against Norway and a case against Georgia that concern child’s placement in care on emergency basis.<sup>84</sup> Moreover, the vulnerability assertion was voiced in domestic abuse cases in-

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<sup>79</sup> Weithorn, L. A., *A Constitutional Jurisprudence of Children’s Vulnerability*, Hastings Law Journal, Vol. 69, No. 1, 2017, pp. 185 – 186.

<sup>80</sup> Fineman, M. A., *op. cit.*, note 33, p. 140.

<sup>81</sup> Judgement *X and Others v. Bulgaria* (2021), § 115, 127, 131, 133; *I.C. v. Romania* (2016), § 43; *M.G.C. v. Romania* (2016), § 38; *Y. v. Slovenia* (2015), § 58, 70, 71.

<sup>82</sup> Judgement *X and Others v. Bulgaria*, *ibid.*, § 177, 182, 195, 197; *Z v. Bulgaria* (2020), § 69, 70, 82; *M.M.B. v. Slovakia* (2020), § 60, 61, 65; *V.C. v. Italy* (2018), § 61, 83, 84, 89, 99, 102, 110, 111; *I.C. v. Romania*, *ibid.*, § 51, 55, 56; *M.G.C. v. Romania*, *ibid.*, § 54-56, 73; *O’Keeffe v. Ireland* (2014), § 144-146.

<sup>83</sup> Judgement *V.C.L. and A.N. v. the United Kingdom* (2021), § 161.

<sup>84</sup> Judgement *M.L. v. Norway* (2021); *Abdi Ibrahim v. Norway* (2020); *A.S. v. Norway* (2020); *Strand Lobben and Others v. Norway* (2019); *Jansen v. Norway* (2018); *N.T. and Others v. Georgia* (2016).

volving children<sup>85</sup> and minors who lost their lives in suspicious circumstances.<sup>86</sup> Placing children in state-run social care institutions,<sup>87</sup> educational institutions<sup>88</sup> or in police custody<sup>89</sup> create environmental conditions that may trigger the violation of rights guaranteed under the Convention, and the assessment of applicant's vulnerability, the analysis has shown, is an integral part of the Court's reasoning. According to the Strasbourg authority, children with disabilities share a particular vulnerability which cannot be overlooked when discussing their rights to education.<sup>90</sup> Notions of children as vulnerable were integrated into the Court's analysis to challenge the legislative presumption that children are susceptible to external influence and should not be exposed to "the propaganda of non-traditional sexual relations".<sup>91</sup> Specific concerns of children's vulnerability were included in relevant legal tests to scrutinise the state's responsibility for its policies and actions that resulted in the infringement of children's rights in the immigration context.<sup>92</sup>

The vast diversity of cases arising before the Strasbourg Court shows a clear potential for developing a progressive judicial interpretation of children's rights in order to firmly position the institute of vulnerability among judicial tools for remedying those rights violations. Yet, for the potential to be achieved in its fulness, it is vital that the Court provides sufficiently clear and transparent guidance, logical coherence and consistency of vulnerability reasoning. The crucial issue which has to be illuminated is, therefore, what is the true meaning of vulnerability in the Strasbourg jurisprudence? What does the Court mean when stating that children are vulnerable? Regrettably, the precise wording employed by the Court in reference to children's vulnerability does not elucidate the raised question. References to the vulnerability in focus are constructed by building sentences around the term "children and other vulnerable persons / individuals"<sup>93</sup> or by acknowledging that children are placed "in a vulnerable position / situation"<sup>94</sup> and belong to a "category of vulnerable individuals."<sup>95</sup> In the analysed cases, the Court has never provided a concrete definition of vulnerability or reasons that support referring to children as vulnerable. A glimpse of guidance is offered in *A.P. v. Slovakia* and the Court's

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<sup>85</sup> Judgement *D.M.D. v. Romania* (2018); *M. and M. v. Croatia* (2015).

<sup>86</sup> Judgement *Hakim Aka v. Turkey* (2019).

<sup>87</sup> Judgement *L.R. v. North Macedonia* (2020).

<sup>88</sup> Judgement *V.K. v. Russia* (2017).

<sup>89</sup> Judgement *A.P. v. Slovakia* (2020); *Zherdev v. Ukraine* (2017).

<sup>90</sup> Judgement *Çam v. Turkey* (2016).

<sup>91</sup> Judgement *Bayev and Others v. Russia* (2017), § 3.

<sup>92</sup> Judgement *G.B. and others v. Turkey* (2020); *Khan v. France* (2019); *S.F. and Others v. Bulgaria* (2018).

<sup>93</sup> Judgement *O'Keeffe v. Ireland*, *op. cit.*, note 82, § 144.

<sup>94</sup> Judgement *V.C.L. and A.N. v. the United Kingdom*, *op. cit.*, note 83, § 195.

<sup>95</sup> Judgement *V.C. v. Italy*, *op. cit.*, note 82, § 84.

tactical move to elaborate on the vulnerability of juveniles in the context of Article 3.<sup>96</sup> Although at first the judicial reasoning technique used by the Court may have seemed quite promising, it narrowed down the application of the vulnerability concept confining it exclusively to the boundaries of the right to personal integrity and dignity. Acknowledging the dignity of children as a precondition for their growth as full members of the community, the European Court condemned all forms of violence against children and underlined their “potential and vulnerability, their dependence on adults”.<sup>97</sup> Taking the same view, academic literature confirms that the unavoidable reliance on others to meet one’s basic needs generates vulnerability.<sup>98</sup> Psychophysical growth and the dependency upon the care of others appear to be the distinctive features of every child’s uniqueness. The fact that the age could be a disempowering factor preventing children to lodge an application with the ECtHR is an additional argument to label them as vulnerable on account of their age.<sup>99</sup> Aside from that, the implied construct of children’s vulnerability relies on doctrinal conclusions that exposing children to adverse experiences in childhood increases the likelihood of negative developmental outcomes.<sup>100</sup> Following the same argumentation line, the Strasbourg authority held that a five-year-old boy who experienced developmental trauma as a small child is vulnerable, and if exposed to stress, is at risk of serious harm to his mental health.<sup>101</sup>

Further indications of a possible vulnerability puzzle solution can be found in *X and Others v. Bulgaria* where the Court determined a set of special identifiers of a particular vulnerability. The majority concluded that “the applicants, owing to their young age and their status as children left without parental care and placed in an institution, were in a particularly vulnerable situation.”<sup>102</sup> Developmental factors combined with external circumstances have suddenly become a useful tool for vulnerability gradation. Most notably, age is an intrinsic and universal source of human vulnerability and if additional vulnerability factors are triggered, the child has to be considered as a particularly vulnerable person. The process of quantifying vulnerability is recognised in theoretical perspectives on human rights as “com-

<sup>96</sup> Judgement *A.P. v. Slovakia*, *op. cit.*, note 89, § 62.

<sup>97</sup> Judgement *D.M.D. v. Romania*, *op. cit.*, note 85, § 50.

<sup>98</sup> Herring, J., *Vulnerability, Childhood and the Law*, Springer, Oxford, 2018, p. 31.

<sup>99</sup> Judgement *N.Ts. and Others v. Georgia*, *op. cit.*, note 84, § 53.

<sup>100</sup> Hunt, X.; Tomlinson, M., *Child Developmental Trajectories in Adversity: Environmental Embedding and Developmental Cascades in Context of Risk*, in: Hodes, M.; Shur-Fen Gau, S.; de Vries, P. J. (eds.), *Understanding Uniqueness and Diversity in Child and Adolescent Mental Health*, Elsevier Academic Press, London, 2018, p. 156.

<sup>101</sup> Judgement *A.S. v. Norway*, *op. cit.*, note 84, § 28-30, 65; A similar scenario prevailed in the case of *Abdi Ibrahim v. Norway*, *op. cit.*, note 84.

<sup>102</sup> Judgement *X and Others v. Bulgaria*, *op. cit.*, note 81, § 193.

pounded vulnerability” or “intersectional acquired vulnerability”.<sup>103</sup> In line with this argument, the Court concluded that the intellectual disability of a 14-year-old allegedly raped victim has placed her in a heightened state of vulnerability.<sup>104</sup> In *L.R. v. Macedonia*, the Court held that an 8-year-old mentally disabled deaf boy who could not speak was particularly vulnerable because he could not express any wishes or views regarding his needs and interests or complain at all about his treatment.<sup>105</sup> Depending on vulnerability factors, particular or heightened vulnerability can be increased even further and the applicant may gain a status of an extremely vulnerable individual. The Court held that extreme vulnerability of children has manifested itself in situations in which the child was unlawfully deprived of their liberty for 3 months in an immigration detention facility with unsuitable living conditions. Feelings of anxiety suffered by the applicant were another decisive element to conclude that the child was extremely vulnerable.<sup>106</sup> Even if the immigration detention of children in inhuman and degrading conditions is relatively short, lasting between 32 and 41 hours, it renders them extremely vulnerable at the time.<sup>107</sup> The extremely vulnerable children, as for example a twelve-year-old foreign unaccompanied minor and irregular migrant who lived in a hut, fall into the category of “the most vulnerable individuals in society”.<sup>108</sup>

Even though the logic behind vulnerability gradation would be hard to contest, the structure of vulnerability subtypes due to the level of associated harm, risk, or danger has not been consistently followed in the Court’s jurisprudence. Thus, for example, the fact that children were 15 and 16 years old was a sufficient reason for the Court to conclude that they were particularly vulnerable “due to their young age”.<sup>109</sup> On the other hand, in *Jansen v. Norway*, a toddler who had encountered substantial instability and disorder in her first year and suffered attachment problems that required treatment was, in the Court’s view, a “vulnerable child”.<sup>110</sup> Additional confusion arises from the fact that in certain judgments the Justices perceive children to be vulnerable and at the same time conclude that national authorities have given little or no weight at all to the “particular vulnerability of young persons”.<sup>111</sup> A boy who suffered grave and life-threatening neglect during

<sup>103</sup> Truscan, I., *op. cit.*, note 26, p. 70.

<sup>104</sup> Judgement *I.C. v. Romania*, *op. cit.*, note 81, § 56.

<sup>105</sup> Judgement *L.R. v. North Macedonia*, *op. cit.*, note 87, § 48, 80.

<sup>106</sup> Judgement *G.B. and others v. Turkey*, *op. cit.*, note 92, § 111.

<sup>107</sup> Judgement *S.F. and Others v. Bulgaria*, *op. cit.*, note 92, § 84-93.

<sup>108</sup> Judgment *Khan v. France*, *op. cit.*, note 92, § 92.

<sup>109</sup> Judgment *Hakim Aka v. Turkey*, *op. cit.*, note 86, § 41.

<sup>110</sup> Judgment *Jansen v. Norway*, *op. cit.*, note 84, § 100.

<sup>111</sup> Judgment *M.G.C. v. Romania*, *op. cit.*, note 81, § 55, 73; A similar ambiguity is noted in *M.M.B. v. Slovakia*, *op. cit.*, note 82, § 60, 61.



the first three weeks of his life was at the same time a “vulnerable” and a “particularly vulnerable child”.<sup>112</sup> All said and done, few would disagree with the notion that the Court has furthered our understanding of different aspects of children’s vulnerability. Yet, the analysis of judicial reasoning employed in the vulnerability jurisprudence shows a considerable fragility of interpretation. This accords with past research, which confirms that judicial activism has been a prime mover in the evolution of standards of children’s rights protection, however, the judicial reasoning techniques used by the Court are susceptible to criticism.<sup>113</sup> The concept of vulnerability is rather vague and still clouded by the Court’s individualistic and centralised focus on human rights. It seems that the ECtHR is attentive to setting the standard and resolving a particular case, and the issue related to standard implementation is left to the judgment of national authorities. The court should go beyond such narrow focus because otherwise the children’s interests might be left outside of legal arena. The qualitative analysis of the Court’s judgments in cases relating to persons with mental difficulties will explore whether the vulnerability concept is explained with a higher amount of judicial precision or simply wrapped up in judicial sound bites.

#### **3.4. The Biopsychosocial Vulnerability of People with Mental Disorders**

Different studies, research initiatives and public discussions have been conducted on mental health patients’ experiences and emotions in an attempt to understand the human mind and its illness. When asked what kind of significance mental problems have for her, a female patient suffering from depression and schizophrenia compared her mental condition with a piece of mouldy bread, stressing that patients should seek help and treatment, or otherwise it will get worse and eventually everyone will reject them and throw them away.<sup>114</sup> The metaphorical description used to depict psychiatric patients’ personal perspectives and needs most accurately explains the core of their vulnerability. Arguments describing this particular group vulnerability have rightfully shown that it is intrinsic and has the potential to generate severe, unwanted consequences for psychological stability and wellbeing of the individual. Those who struggle with mental health issues are vulnerable due to their compromised capability to make informed decisions. McCradden and Cusimano further supported this notion, showing that decisions made during an acute phase of the disorder may not correspond to patients’ true

<sup>112</sup> Judgement *Strand Lobben and Others v. Norway*, *op. cit.*, note 84, § 218-219.

<sup>113</sup> O’Mahony, C., *Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations*, International Journal of Children’s Rights, Vol. 27, 2019, p. 668-669.

<sup>114</sup> Institute of Mental Health, *Mental Wellness*, [<https://www.imh.com.sg/wellness/page.aspx?id=1249>], Accessed 21 April 2021.



beliefs and convictions.<sup>115</sup> Apart from being associated with cognitive and behavioural dysfunctions, vulnerability also has its external dimension due to the fact that it manifests itself in the form of negative reactions from the social environment. People with mental difficulties have experienced past injustices facing additional social handicaps and distress as a result of prejudice. The stigma around mental illness and the fear of those who suffer from it are historically intertwined, and together they create the situation of inequality and social exclusion as lasting consequences.<sup>116</sup>

Bearing in mind the empirical and doctrinal arguments described above, it is perhaps not surprising that the vulnerability narrative has long been in the Strasbourg vocabulary of applicants who cope with mental issues. The analysis conducted for this study confirms that the vulnerability discourse is employed across a range of factual substrates correlated with the violation of the rights of persons with mental health conditions. The Court acknowledged vulnerability claims in *Pedersen and Others v. Norway* raised by a mentally ill married couple who objected the Supreme Court's decision to deprive them of parental rights authorising their son's adoption. The applicants' argumentation under Article 8 of the Convention was firmly positioned on the assumption that their mental illness had placed them "in a vulnerable situation", however, the authorities failed to fulfil their positive duty to take appropriate measures to facilitate family reunification.<sup>117</sup> In another recent case that questioned the restriction on father's contact rights on the basis of his mental disorder in respect of his four-year-old daughter, the Strasbourg Court reaffirmed the assumptions that articulate vulnerability stemming from mental health issues. The Court, relying on its previous case law, took the position that mentally ill persons represent a vulnerable group whose rights merit special consideration.<sup>118</sup> It appears that the Court's vulnerability reasoning has not improved considerably in last few years and that Truscan's criticism of the Court's static, deductive reasoning still well describes the judicial pitfalls.<sup>119</sup> The standard vulnerability group test was assessed as the appropriate one in cases concerning a detained Albanian national who was exempted from criminal responsibility on account of paranoid schizophrenia.<sup>120</sup> The vulnerability of a detainee who suffered from mental health problems was evaluated through the constitutional lens

<sup>115</sup> McCradden, M. D.; Cusimano, M. D., *Questioning Assumptions About Vulnerability in Psychiatric Patients*, *AJOB Neuroscience*, Vol. 9, No. 4, 2018, p. 221.

<sup>116</sup> Sajó, A., *op. cit.*, note 49, p. 346.

<sup>117</sup> Judgement *Pedersen and Others v. Norway* (2020); identical arguments were raised, and subsequently, acknowledged by the ECtHR in *S.H. v. Italy* (2015), *op. cit.*, note 54.

<sup>118</sup> Judgement *Cința v. Romania* (2020).

<sup>119</sup> Truscan, I., *op. cit.*, note 26, p. 74.

<sup>120</sup> Judgement *Strazimiri v. Albania* (2020), § 110.

in the immigration context and, taken together with the duration of detention, amounted to the violation of applicant's right to liberty and security.<sup>121</sup>

It is of no dispute that the selection and application of judicial reasoning techniques rests entirely in the hands of the Court being the master of the characterization to be given in law to the facts of any case before it. However, the approach taken by the Strasbourg judicial interpretation raises serious concern. The inconsistencies noted in the Court's judicial review methodology in children's rights cases are persistent and spill over other closely related vulnerability case law. For example, in *Rooman v. Belgium*, the Grand Chamber of the ECtHR confirmed the *ratione materiae* right to obtain psychiatric treatment and effective care because, among other reasons, due regard has to be extended to the "applicant's vulnerability and his diminished ability to take decisions". The applicant was diagnosed with a severe mental disturbance making him incapable of controlling his actions and he was therefore put in compulsory detention in a specialised, French-speaking facility on continuous basis although he himself communicated only in German. He was then faced with linguistic obstacles that prevented him from receiving the necessary treatment and, due to his mental health condition, was more vulnerable than ordinary detainees. The vulnerability factors were both situational and intrinsic in nature, and they triggered different layers of vulnerability that surpassed the threshold of ordinary severity elaborated in the Council of Europe Recommendation REC (2004) 10. Even though the Strasbourg authority has substantially relied on the wording and conclusions of the international document in focus when deliberating on the dignity of persons with mental disorders and their human rights protection, surprisingly, it concluded that "the applicant is a vulnerable individual on account of his health condition and his detention".<sup>122</sup> The conclusion reached by the Court clearly contradicts its specific elaborations, according to which an intersectional effect of mental disorder and detention (hospitalization) under state control furthermore accumulates moral and legal merits of the particular vulnerability. Mentally ill individuals who are deprived of their freedom of movement are placed in a position of inferiority and powerlessness which is

<sup>121</sup> Judgement *V.M. v. the United Kingdom (no. 2)* (2019), § 38.

<sup>122</sup> Judgement *Rooman v. Belgium, op. cit.*, note 45, § 145, 164; A similar wording was present in *Frančiška Štefančič v. Slovenia* (2018) and *Boukrourou and Others v. France* (2017). The Court held that Mr Štefančič was "vulnerable" although "his vulnerability was compounded by a defenceless situation in which he found himself during the (police) intervention". In parallel, the Court has found that M.B., a psychiatric patient "who clearly did not understand" the meaning of police arrest he was committed to, was in a "vulnerable situation owing both to his psychiatric illness and to his status as a person deprived of his liberty".

typical of more heightened vulnerability.<sup>123</sup> Another puzzling moment that defies reasoning logic is noted in the Court's decision to introduce the notion of special vulnerability. According to the Court, the applicant who suffered from permanent psychological illness and was subjected to inhuman and degrading treatment by the police officers while being escorted to involuntary psychiatric examination had a special vulnerability.<sup>124</sup> Yet, the Court was silent as to the nature of the special vulnerability and its indicators, and possible overlapping scenarios that could occur between the special and particular vulnerability. The question of difference across the full spectrum of vulnerability thesis was left unresolved.

### 3.4. Family Violence as a Source of Context-specific Situational Vulnerability

Apart from inherent vulnerability due to age and mental health problems, legal doctrine and political thought accept other specific conditions in the external context that create new subgroups of human vulnerability. Dunn and colleagues suggest that the situational vulnerability is context-specific, and surges from personal, social, economic, and cultural circumstances that depict different stages of our lives as humans.<sup>125</sup> The situational vulnerability, thus, relies on Fineman's conclusions on universal vulnerability applying theoretical ideas to a variety of external settings. Considering that family violence is a highly complex, multi-casual, negative phenomenon that cuts across social, cultural, political, and economic boundaries, situational vulnerability of such victims becomes a common thread that runs through violence in family settings. A range of threatening and other violent behaviours among family members may be associated with psychological harm, physical injury, violation of sexual integrity, economic deprivation, controlling and coercive behaviour leading to vulnerability.<sup>126</sup> Recent findings have expanded our understanding of aetiological factors related to family violence underlining the role of COVID-19 pandemic as a social stressor. In the time of pandemic, situational vulnerability and its correlation with family violence is fostered particularly by economic disadvantages, disaster-related instability, increased exposure to exploitative relationships, and reduced access to formal support.<sup>127</sup> It might well

<sup>123</sup> Judgement *Fernandes de Oliveira v. Portugal* [GC] (2019), *op. cit.*, note 54, § 113, 124; *I.N. v. Ukraine* (2016), § 48; *M.S. v. Croatia* (no. 2) (2015), *op. cit.*, note 54, § 76; *Mifobova v. Russia* (2015), § 54, 59; On the other hand, the facts of the case related to the applicant diagnosed with anxiety syndrome who was serving military service were assessed as determinants of a common, regular mental vulnerability. *Placi v. Italy* (2014).

<sup>124</sup> Judgement *Pranjić-M-Lukić v. Bosnia and Herzegovina* (2020), *op. cit.*, note 54, § 80.

<sup>125</sup> Dunn, M. C.; Clare, I. CH.; Holland, A. J., *To Empower or to Protect - Constructing the Vulnerable Adult in English Law and Public Policy*, Legal Studies, Vol. 28, No. 2, 2008, p. 241.

<sup>126</sup> Judgement *Volodina v. Russia*, *op. cit.*, note 66, § 128.

<sup>127</sup> Usher, K. *et al.*, *op. cit.*, note 12, p. 549.

be important to stress that, in such times of global suffering and uncertainty, the recognition of vulnerability of family violence victims is the first necessary step to adequately address their cases. In order for the judicial system to provide an effective implementation of family violence victims' rights, vulnerability analysis has to be included in courtroom discussion.

The Court has provided further insights into the concept of vulnerability in a few cases involving family violence by elucidating the role of environmental factors in the vulnerability aetiology. According to the Strasbourg authority, those who endured violence at the hands of a family member have a vulnerable status, and considering that the consensus of the international human rights community accepts family violence as a form of gender based violence, the advancement of gender equality supports the status recognition.<sup>128</sup> The phenomenon in focus is a human rights violation deeply rooted in abuse of power, stereotypes, and presupposed roles that cause gender inequality. The gender sensitive approach, therefore, affirms the criminological point of view that women and girls are abused within the family environment on the basis of their gender identity as well as statistical conclusions that they are considerably more affected by family violence than men. A gender sensitive interpretation of applicants' rights guaranteed under the Convention opened the path for increased protection and recognition of victims' particular vulnerability. In *Volodina v. Russia* the Court held that the victims may experience feelings of fear and anguish and lose their moral and psychological resistance. Their particular vulnerability calls for *ex officio* investigations of family violence cases as a matter of public interest.<sup>129</sup> A gender sensitive perspective also takes into account the particular circumstances in which family violence occurs and reoccurs. A mapping of the context of abuse has shown that a survivor of abuse often fails to report incidents being financially, emotionally, or otherwise dependent on the abuser and under the psychological effect of the risk of repeated harassment, intimidation, and abuse.<sup>130</sup> As expected, the compounding effect of criminological and victimological factors in cases relating to violence against women has led the Court to conclude that the victims are in a situation of extreme vulnerability.<sup>131</sup> The extreme psychological, physical, and material insecurity is a firm predictor of the highest vulnerability and has to be assessed in a due manner. The implicit recognition of the extreme vulnerability of applicants opens the door

<sup>128</sup> Judgement *J.D. and A v. the United Kingdom* (2020), *op. cit.*, note 66, § 89, 93.

<sup>129</sup> Judgement *Volodina v. Russia*, *op. cit.*, note 66, § 98, 99.

<sup>130</sup> Judgement *T.M. and C.M. v. the Republic of Moldova* (2014), *op. cit.*, note 66, § 60; *Levchuk v. Ukraine* (2020), *op. cit.*, note 66, § 80; *Bălşan v. Romania* (2017), *op. cit.*, note 66.

<sup>131</sup> Judgement *Talpis v. Italy* (2017), *op. cit.*, note 66, § 130.

to a more creative conceptualisation of the vulnerability institute and the possible evolving effect in imposing standards of protection of the vulnerable.

### 3.5. The Vulnerability Narrative in the Judicial Activism of the Strasbourg Court

Vulnerable individuals are entitled to effective protection of their rights and fundamental freedoms within the Council of Europe. Relying on the dynamic interpretation of the Convention and the idea of “practical and effective” not “theoretical and illusory” rights, the Strasbourg judicial body plays a pivotal role in setting the standards of protection and securing their collective enforcement. The judgments examined above show that the Court’s main constitutional tool in fulfilling this task is the application of the doctrine of positive obligations. According to the Court’s notion of positive obligations, the state has to act proactively to prevent and protect the vulnerable from human rights abuses being particularly attentive to their vulnerability.<sup>132</sup> For example, in *Bălşan v. Romania* the Court has affirmed that positive obligations flowing from the applicant’s particular vulnerability may often overlap consisting of “the obligation to take reasonable measures designed to prevent ill-treatment of which the authorities knew or ought to have known and the (procedural) obligation to conduct effective official investigation where an individual raises an arguable claim of ill-treatment”.<sup>133</sup> The substantive and procedural positive duties imposed upon states may considerably vary with respect to their typology and purpose to prevent human rights violations, and if they already occurred, to reply to, investigate and remedy any abuse no matter how “trivial the isolated incidents might be”.<sup>134</sup> This is consistent with the principle of subsidiarity and the margin of appreciation providing states with a certain discretionary latitude when deciding on steps to be taken. If the primary duty to proactively secure the Convention rights within their national boundaries rests upon the states, the national authorities should have a certain space for manoeuvre depending on cultural factors, social circumstances and legal traditions. On account of the vulnerability status of the applicants, the margin of appreciation in positive obligation cases has to be narrowed down and explained by refined constitutional arguments. Regrettably, studies have found that cases involving judicial constructions of vulnerability rely on a wide margin of appreciation which is quite ambiguous on what is the precise amount of the state’s discretion. Moreover, a lack of clarity in the Court’s reasoning on other “classical” constitutional tests and institutes (e.g. the significant flow test, the accepted level of protection standard, effective investiga-

<sup>132</sup> Zimmerman, N., *Legislating for the Vulnerable? Special Duties under the European Convention on Human Rights*, Swiss Review of International and European Law, Vol. 25, No. 4, 2015, p. 553.

<sup>133</sup> Judgement *Bălşan v. Romania*, *op. cit.*, note 66, § 57.

<sup>134</sup> Judgement *Levchuk v. Ukraine*, *op. cit.*, note 66, § 80.

tion test, the standard of reasonableness, etc.) adds to the noted ambiguity that clouds the positive obligation standards in the ECtHR vulnerability case law.<sup>135</sup> No matter the shortcomings, the doctrine of positive obligations has proven itself to be an effective tool to extend the rights of the vulnerable subjects in evolutive manner.

Scholars maintain that the vulnerability reasoning is mainly used by the Strasbourg authority through the doctrine of positive obligations to deepen the existing rights and extend them into the socio-economic domain.<sup>136</sup> The constructive potential of the Court's judicial activism can clearly be seen in recent rulings concerning child sexual abuse cases. In *X and Others v. Bulgaria*, a groundbreaking case that sheds light on the standards of protection of "some of the most vulnerable of applicants that have come before (the) Court", a tight majority has found a violation of the procedural limb of the right to personal integrity and dignity.<sup>137</sup> The judgment holds doctrinal value and merits scholarly attention, not only for the fact that for the first time in its practice, the Strasbourg Court examined allegations of sexually abusing children in institutional settings, but also for the scrutiny applied throughout. Firmly stressing that it is not up to the Court to establish the facts of the case instead of the domestic authorities or to resolve the question of the alleged offender's criminal responsibility, the majority has in a meticulous way elaborated exactly what makes for an effective investigation. In order for the investigation to be effective, the Court suggested a number of constitutional tests. Relying on sufficient thoroughness, reasonable measures, serious attempt test, the requirement of promptness and reasonable expedition, the Court expounded constitutional demands insisting on the victim's effective participation in the investigation. The right of the child to be heard is the cornerstone of child friendly justice, a concept forged within the international child rights framework as to empower children to enforce their rights in modified judicial and administrative systems according to their best interests and needs. To conclude, children's particular vulnerability taken together with the effective implementation of their right to treat their best interest as a primary concern has considerably altered demands for compliance with positive obligations widening the standards of protection.

A similar evolutive line of human rights standards is observed in mental vulnerability cases. Persons suffering from mental disorder belong to a "particularly vulnerable group in society that has suffered considerable discrimination in the past"

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<sup>135</sup> Rittossa, D., *op. cit.*, note 38, pp. 552 – 553.

<sup>136</sup> Timmer, A., *op. cit.*, note 37, p. 167.

<sup>137</sup> Joint partly concurring, partly dissenting opinion of Judges Spano, Kjølbrot, Lemmens, Grozev, Vebabović, Ranzoni, Eicke and Paczolay in *X and Others v. Bulgaria*, *op. cit.*, note 81.



and “the state’s margin of appreciation is considerably narrower”. Restrictions imposed upon fundamental rights have to be justified by “very weighty reasons” and without discriminatory grounds. In *prima facie* cases of discrimination against persons with difficulties, the burden of proof shifts to the respondent state because, otherwise, the applicants would be faced with an extremely difficult task to prove that the restriction was discriminatory in nature.<sup>138</sup> There is a strong indication that the Court’s powerful reasoning arguing for better protection of mentally ill persons has been presumably motivated by the model of inclusive equality. In recent doctrinal and political thought, mental disability, apart from being inherent and personal, is also a social construct which has to be addressed with a series of special measures recognising the value of diversity as a matter of human dignity and promoting diversity inclusion in society. Not surprisingly, a coherent and multidisciplinary approach is needed to provide specific and individualised care for particularly vulnerable members of society.<sup>139</sup>

The evolution in the Strasbourg Court’s judicial reasoning towards vulnerability of family violence victims has been supported by the fact that violence against women has become a public justice issue. Positive obligations, thus, have to be tailored to the needs of victims in the context of situational vulnerability. In order to further develop its vision, the ECtHR has applied the gender sensitive interpretation of the Convention, as it was shown above, and concluded that the burden of proof shifts onto the authorities.<sup>140</sup> The particularly vulnerable applicants are entitled to demand that the state meets more challenging obligations, first and foremost, to change the general perceptions that violence against women is committed by private individuals in their intimate sphere of life, and therefore, does not merit a judicial response. The vulnerability theses embraced by the Court leaves no room for authorities’ passivity by blurring the line between private and public in the family violence case of *Bălșan v. Romania*.<sup>141</sup> Applied in this way, the vulnerability theory has revealed its utmost potential providing mechanisms for building resilience through Fineman’s more responsive state.

#### 4. CONCLUSION

The challenging months behind us have taught us lessons about vulnerability and how important it is to have a comprehensive range of effective measures to quickly and adequately respond to COVID-19 outbreak. Swift and determined solutions

<sup>138</sup> Judgement *Cința v. Romania*, *op. cit.*, note 118, § 41, 79.

<sup>139</sup> Judgement *Rooman v. Belgium*, *op. cit.*, note 45, § 119, 250.

<sup>140</sup> Judgement *Volodina v. Russia*, *op. cit.*, note 66, § 111.

<sup>141</sup> Judgement *Bălșan v. Romania*, *op. cit.*, note 66.



are needed to diminish the devastating consequences and restore balance in the areas of social life traditionally reserved to the state authority. While scholars and policy makers were assessing the detrimental impact of the COVID-19 crisis on health and well-being, educational growth, social care, and economic stability, research soon showed that even though we are all vulnerable under the attack of the pandemic, vulnerability and ensuing risks have not been equally shared across society. There are different levels of vulnerability, i.e. the global, social vulnerability and the individual one, and forces behind them create a social environment in which those who were vulnerable are now more vulnerable than ever. If we succeed in comprehending the different layers of vulnerability and its drivers, the vulnerability theme might be rightfully placed within the human rights spectrum seeking greater protection for vulnerable individuals. The first prerequisite for understanding vulnerability is understanding its true meaning. However, the analysis has demonstrated that the notion of vulnerability has a transcendent significance, and although invoked by many, it is still burdened by vagueness and ambiguity. It is often forgotten that the notion of vulnerability has to be placed, first and foremost, in legal context in order to capture its potential to redefine human rights standards.

In recent years, the ECtHR has accepted the challenge to include the vulnerability thesis in its reasoning. The European judicial authority has embraced the term, redefined its meaning, and empowered it with the normative authority designed to impose upon states explicit obligations to reduce vulnerability and to protect the vulnerable. There are no specific written rules that would guide the Court while performing this task. In each individual case the Court decides whether the applicant is “in a vulnerable position” or whether he or she “falls into a vulnerable group”. Although implemented in a purely pragmatic and flexible manner in the Court’s legal reasoning, the vulnerable group concept was not accepted without criticism. Critics argue that the concept itself has become intolerably broad and open-ended. As expected, the Court in Strasbourg has succeeded in putting under the same roof children, mothers of a newborn baby, victims of domestic violence, psychiatric patients, those who suffer from other serious illness, HIV positive persons, asylum seekers, refugees, Roma, prisoners, earthquake victims, and the list is not exhaustive. Another negative aspect of vulnerability group recognition is the possible stigmatizing effect and the inability to capture Fineman’s notion of inherent, universal vulnerability. Paradoxical though it may seem, the Court’s tactic to expend vulnerability beyond groups traditionally recognized as vulnerable is precisely a step further towards the reconciliation with Fineman’s model acknowledging the high probability that we can all become vulnerable. What is even more worrying is the fact that the vulnerability case law is greatly fragmented and the

normative parameters of vulnerability standards are considerably fluid. The Court has never provided a definition of vulnerability or revealed why someone should be considered a vulnerable applicant. An additional source of uncertainty that clouds the true meaning of vulnerability in the Strasbourg jurisprudence arises from the ambiguous and rather imprecise gradation of the applicant's vulnerability. Without clear correlations between the level of associated harm, risk, or danger and the subgroups of ordinary, heightened, particular, and extreme vulnerability, the vulnerability reasoning remains somewhat vague and narrowly focused on individual entitlements claimable on the basis of human rights.

Noted inconsistencies in judicial reasoning notwithstanding, the efforts to include vulnerability considerations in the assessment of a possible violation of a provision of the Convention present an important interpretive development. In its recent judgments, the Court has heavily relied on the doctrine of positive obligations to extend standards of protection within the Council of Europe territory. The vulnerability concept, taken together with the already established legal principles and tests like the child's best interest, gender sensitive approach, and inclusive equality, has opened the door for the evolutive interpretation of human rights standards from the European perspective. Judge Serghides said that the Convention and other international human rights treaties are part of the same legal environment and "...like all living things, the Convention as a living instrument is impacted by the environment in which it flourishes".<sup>142</sup> The vulnerability narrative has echoed and expanded throughout the human rights community from an emerging concept to an international law tool. Recent developments in the Strasbourg jurisprudence affirm that the tool has gained a more substantive understanding as a legal institute whose full creative and transformative potential is yet to be seen.

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## ECHR

### CHILDREN'S VULNERABILITY CASE LAW

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## **VULNERABILITY CASE LAW RELATED TO PERSONS WITH MENTAL ILLNESS**

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