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Conclusion – A Framework for Using Vulnerability under Article 3 ECHR

Chapter Summary

This chapter connects the practical and theoretical findings that have been made about vulnerability in this volume so far. This means taking an account of vulnerability that is enriched by foundational concepts of human rights law, including human dignity, (substantive) equality and justice, as well as by ancillary ideas such as the capabilities approach and judicial empathy, and evaluating the Court's Article 3 jurisprudence on this basis. An ethical-legal imperative based on both vulnerability and respect for autonomy, as promoted through the capabilities approach, lays the groundwork for a convincing account of human rights that takes real context and various sources of marginalisation and power imbalances into account. This chapter identifies the main risks of the Court's current approach to vulnerability – its vagueness, its selectivity, and the risks of essentialising, paternalising or stereotyping vulnerable people – and seeks solutions from the theoretical perspective that was elaborated in previous chapters.

Keywords: vulnerability heuristic; sources of resilience; legitimacy; human dignity; human rights subject; legal certainty and predictability; risks of vulnerability analysis; stereotyping; judicial coherence; socio-economic rights and vulnerability.

I. Between Theory and Practice: Concerns about the Court's Approach

The Court's notion of vulnerability is autonomous, and it was introduced without explicit justification or clarification. That does not mean, however, that the Court's approach could not be improved or that it cannot learn from other approaches: after all, the Strasbourg jurisprudence is not generated in a vacuum. How, then, does the evolution of the Court's approach to vulnerability measure up to the philosophical and ethical framework surrounding that concept?

A. Universal vs Particular Vulnerability and the Problem with Vagueness

The ECtHR's former Deputy Registrar, Michael O'Boyle, has stated that the Court's vagueness on the definition of vulnerability is intentional, and that the concept should therefore be treated not as a 'doctrine', but as an intentionally open-ended approach that avoids the 'straitjacket of definition' in order to ensure future flexibility.¹ This approach sees vulnerability as an avenue for tailoring the Convention's protection to respond to real-world developments.²

The present volume does not share O'Boyle's level of comfort with the idea of a vague and open-ended concept. The deliberate use of a vague concept, although within the Court's power, not only impacts the predictability of its judgments and the transparency of its case law overall, but is also difficult to reconcile with ensuring equal protection of human rights.

While the Court's concept of vulnerability may originally have served as a loose hypernym for a few select marginalised groups, it has evolved to become an umbrella-style concept with various legal effects. In the Court's case law and in vulnerability theory, the concept serves as a heuristic device: it permits the user to identify hidden biases, inequalities and assumptions,³ requires a more responsive state⁴ and responds to 'the exclusions of human rights law'.⁵ In the concrete context of the prohibition of torture and inhuman and degrading treatment, vulnerability permits the user to identify whether a victim was particularly impacted by a given treatment.

Martha Albertson Fineman sees vulnerability as 'detached from specific subgroups', describing it as a constant and universal part of the human condition.⁶ The Court, on the other hand, singles out vulnerable populations on the basis of their disadvantage, and does not understand vulnerability as a universal human attribute or a uniting trait. In part, this may be due to the nature of the Court's role, which is, first and foremost, to determine whether human rights have been violated in an individual case before it. The Court may also consider recognition of universal human vulnerability unnecessary because this may be understood as already underlying any system of human rights protection, including the Convention. Whatever the reason, the Court's approach to vulnerability is too selective to be seen as one that explicitly addresses all of the realities of human embodiment.

¹ Michael O'Boyle, 'The Notion of "Vulnerable Groups" in the Case Law of the European Court of Human Rights', 2–4.

² Ibid, 4.

³ Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056–85, 1059, citing Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60(2) *Emory Law Journal* 251–75, 266.

⁴ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1–23, 19–22.

⁵ Peroni and Timmer (n 3), 1062.

⁶ Fineman (n 3), 266.

In short, the Court applies a select and flexible approach to vulnerability that allows it to choose context-sensitivity where it sees fit. In doing so, it also allows for cross-fertilisation between certain Convention articles. While there are advantages to this approach, the Court's flexibility risks muddling essential distinctions between various Convention rights. For example, when examining the Article 3 complaint made in *Z.H. v Hungary*, the Court held that interferences with the rights of vulnerable groups require 'strict scrutiny, and only very weighty reasons could justify any restriction'.⁷ The Court based this on its findings in *Alajos Kiss v Hungary*, which however concerned not the application of Article 3, but the proportionality of an interference with Article 3 of Protocol No 1.⁸ The problem with such cross-fertilisation is rather obvious: while states have a margin of appreciation under Article 3 of Protocol No 1, which concerns free elections, there is no such discretion under Article 3 ECHR. It is in other word impossible to justify a restriction of Article 3 rights, no matter how weighty the reasons. The Court should be aware of the risks of such muddling, which could erode the absolute nature of Article 3 far beyond the relativity that is inherent to the provision and visible, for example, in the doctrine of proportionate force.

B. The Selectivity of the Court's Vulnerability Heuristic

The Court's selective approach to vulnerability allows it to understand the mental and material realities of certain applicants and distinguish their case from others. This can trigger a number of adaptations of the Court's case law, for example justifying special state obligations under Article 3 or facilitating a relative ease of access to the Court.

A problem of some importance here is that using vulnerability to focus the Court's attention on certain applicants or groups may lead it to ignore or neglect others. Cases under Article 3 can concern the allocation of limited resources, and – where individuals considered vulnerable are given precedence in access to these resources – the theory of vulnerability as understood by the Court may adversely affect those who do not fall under that category. One example of this stems from the migration context, where the Court seems to struggle with the application of vulnerability reasoning in any general sense. For example, in *Tarakhel v Switzerland*, which concerned the return of an Afghan family to Italy under the EU's Dublin-II Regulation, the Court required assurances that the vulnerable applicants would be provided with adequate accommodation upon their return and would not be separated. Here the Court emphasised the vulnerability of the family's children,

⁷ *Z.H. v Hungary* App no 28973/11, Judgment of 8 November 2012, para 29.

⁸ *Ibid*, citing *Alajos Kiss v Hungary* App no 38832/06, Judgment of 20 May 2010, para 42.

which 'is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant'.⁹ Given that the Court had previously struggled with the determination of whether there was a systemic problem with reception conditions in Italy,¹⁰ reference to the particular vulnerability of children provided a vehicle through which the Court could nonetheless find a (conditional) Convention violation here. Clearly, the Court distinguished the overall vulnerability of asylum-seekers from the 'extreme' vulnerability of children in this situation. While this judgment ensured adequate protection for the applicants concerned, it also raises questions about future applicants who are 'less' vulnerable. Given the often-limited availability of accommodation for asylum-seekers, the fact that precedence is given to particularly vulnerable individuals puts others at a heightened risk of homelessness.

It is problematic that, by applying its vulnerability approach, the Court seems to be labelling the findings made in certain cases as exceptional. The smaller the vulnerable population addressed in a given judgment, the less radical the effect of that judgment for the overall case law. This brings to mind, for example, the *D. v United Kingdom* case. There, the Court – although not using vulnerability reasoning – found that 'the very exceptional circumstances of the case' and 'compelling humanitarian considerations' meant that the removal of the applicant, who was suffering from AIDS, from the United Kingdom to St Kitts would violate Article 3.¹¹ This formulation was likely intended to preclude an avalanche of applications from individuals in similar circumstances. While vulnerability reasoning may have this desired effect, however, it also risks creating piecemeal and unpredictable jurisprudence. In addition, it effectively produces two groups of applicants by creating a binary distinction between the vulnerable and the invulnerable.

The existence of such a dichotomy – in other words, a rigid distinction between the vulnerable and the invulnerable – is visible when comparing the *D. v United Kingdom* with the very similar *N. v United Kingdom* judgment. *N.* has been reinterpreted recently,¹² but it nonetheless serves to illustrate this particular point. In *N.*, the Court noted that it has only the 'flexibility to prevent expulsion in very exceptional cases' to spare states the financial burdens of providing medical care to non-nationals.¹³ The wording of this judgment reveals that there can be a covert balancing exercise at play in politically – or, more specifically, fiscally – delicate

⁹ *Tarakhel v Switzerland* App no 29217/12, Judgment (GC) of 4 November 2014, Reports 2014 (extracts), para 99, citing *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03, Judgment of 12 October 2006, Reports 2006-XI, para 55.

¹⁰ Contrast *M.S.S. v Belgium and Greece* App no 30696/09, Judgment (GC) of 21 January 2011, Reports 2011, particularly paras 249–64, and *Mohammed Hussein and Others v Netherlands and Italy* App no 27725/10, Decision of 2 April 2013, para 78.

¹¹ *D. v United Kingdom* App no 30240/96, Judgment of 2 May 1997, Reports 1997-III, para 54.

¹² *Paposhvili v Belgium* App no 41738/10, Judgment (GC) of 13 December 2016, Reports 2016.

¹³ *N. v United Kingdom* App no 26565/05, Judgment (GC) of 27 May 2008, Reports 2008, paras. 42–44.

cases under Article 3.¹⁴ The effect of this balancing seems to be that the interest in preventing the unwanted political or socio-economic consequences of a violation judgment is permitted to outweigh the need of the applicant concerned to obtain rights protection, except where the concerned applicant can be concerned exceptional and the consequences of the judgment thus kept in check.

While this type of balancing is, again, difficult to square with the absolute nature of Article 3,¹⁵ a similar effect can also be observed in the context of vulnerability reasoning and Article 3. The comparison of two judgments against Malta, *Abdi Mahamud* and *Moxamed Ismaaciil and Abdirahman Warsame*, illustrates this point. These two cases, which were discussed above, are very similar on the facts. They both concern single Somali women who arrived in Malta by sea, who suffered some health-related issues and who brought the same complaints about conditions in the same migrant detention centre to Strasbourg.¹⁶ Both cases were decided by the same composition of judges, just a few months apart. Despite the similarity of the cases, however, their outcomes were radically different. In *Abdi Mahamud*, accepting and reiterating the domestic assessment of the applicant as a vulnerable person, the Court found a violation of Article 3 ECHR.¹⁷ As Judge Sajó noted in his separate opinion, no explanation was given for why the applicant's health made her particularly vulnerable to the combined detention conditions in question. By contrast, in *Moxamed Ismaaciil and Abdirahman Warsame*, no vulnerability and thus no violation of Article 3 was found under very similar conditions.

In this context, it appears that individual vulnerability can and does affect the Court's reasoning in applicants' favour. It could be concluded from this that, where rights are claimed by those who are arguably vulnerable, and thus distinguishable, the perceived potential impact on the underlying State interests is considered more limited and a claim under Article 3 thus more likely to succeed. Like 'exceptionality', therefore, vulnerability separates applicants into two monolithic categories made up of the vulnerable and the invulnerable. At the same time, the idea of an invulnerable human being is an oxymoron. Our physical embodiment and interaction with others in a finite physical space means that human individuals are all vulnerable and dependent.¹⁸

¹⁴ See *Jalloh v Germany* App no 54810/00, Judgment [GC] of 11 July 2006, Reports 2006-IX, para 119; for more, see Hemme Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed' (2009) 22(3) *Leiden Journal of International Law* 583–621.

¹⁵ Stijn Smet, 'The "Absolute" Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?' in Eva Brems and Janneke H Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2013) 273–93, 289.

¹⁶ Compare *Moxamed Ismaaciil and Abdirahman Warsame v Malta* App nos 52160/13 and 52165/13, Judgment of 12 January 2016, esp paras 6–13, and *Abdi Mahamud v Malta* App no 56796/13, Judgment of 3 May 2016, paras 6–9.

¹⁷ *Abdi Mahamud* (n 16), para 89.

¹⁸ Fineman (n 4), 9, and Peroni and Timmer (n 3), 1058.

C. Piecemealism and the Risky Business of Vulnerability Reasoning

It would be next to impossible for the Court to comprehensively address all of the different needs and vulnerabilities and sources of resilience of all potential applicants with a general rule, not least because its judgments address particular cases and are dependent on the nature of the applications brought before it. However, it seems that the Court is more 'friendly' to some kinds of vulnerability than to others. For example, when it comes to the vulnerability stemming from detention, the Court has provided rather comprehensive guidance about states' positive and negative obligations. Of course, this is due in part to the fact that the Court has had more opportunity to refine these obligations, with cases concerning detainees being very plentiful under Article 3. In this context, the nexus to the state as the detaining authority is also more direct, which may also make a difference in the Court's willingness to impose obligations. On the other hand, regarding less straightforward issues – for example the risk of ill-treatment acceptable in expulsion cases or the often socio-economically influenced rights of Roma communities – the Court has provided much less clarity to states regarding what they must or must not do.

Beyond vagueness and the selectivity mentioned above, some authors – especially Lourdes Peroni and Alexandra Timmer – have discussed further risks associated with the Court's approach to vulnerability. They mention the risks of paternalising individuals, stigmatising or victimising them, and essentialising the experiences of many into one.¹⁹ These dangers seem inherent in any vulnerability thesis that singles out particular individuals or groups for special protection. In order to avoid oversimplifying an applicant's circumstances, vulnerability needs to be more than a shortcut in the Court's reasoning: it must become a fleshed-out concept with real standards that are applied and tested in each individual case, and must be enhanced with an awareness of the need to bolster individual autonomy. In the particular context of Article 3, any other approach risks 'othering' vulnerable individuals. Othering, which is precisely the effect that vulnerability scholars seek to prevent by employing vulnerability theory, leads to the failure of members of the in-group to understand out-groups and to show empathy towards them; in extreme case, this leads to dehumanisation, which in turn paves the way for ill-treatment.²⁰ If vulnerability is to be an effective tool, it should be based on an understanding of the equal worthiness of all, and its premise should be to engage with particular setbacks that individuals face in living autonomous lives and exercising their agency.

¹⁹ Peroni and Timmer (n 3), from 1070.

²⁰ Susan T Fiske, 'From Dehumanization and Objectification, to Rehumanization: Neuroimaging Studies on the Building Blocks of Empathy' (2009) 1167 *Values, Empathy, and Fairness Across Social Barriers: Annals of the New York Academy of Sciences* 31–34, 31.

An interesting case regarding the necessity of an individualised examination of vulnerability and the need to protect agency in every case is *Pretty v United Kingdom*. That case concerned a terminally ill woman who sought assurance that her husband would not be criminally prosecuted for assisting her in committing suicide. The applicant argued that the blanket domestic ban on such assistance, which aimed to protect vulnerable individuals, had exposed her to inescapable, intolerable suffering caused by her condition. Mrs Pretty argued that she was not vulnerable, and considered the government's assertion that all terminally ill and disabled individuals who contemplated suicide were vulnerable to be offensive.²¹ The Court ultimately held that, in light of the Convention as a whole, particularly its Article 2, the right to life, the positive obligations under Article 3 did not cover the sanctioning of actions intended to bring about death; it thereby refused to impose a case-by-case examination of vulnerability.²² Effectively, due to assumptions concerning the needs of vulnerable individuals, Mrs Pretty was deprived of the possibility to make an autonomous decision about the end of her life, and the state and Convention authorities deprived her of the ability to end her suffering. The pitfalls of vulnerability and the need for a case-by-case analysis become apparent when faced with individuals, like Mrs Pretty, who wish to shed the 'protections' sometimes afforded by that label.

Of course, while generalisations about the needs of applicants may not be particularly suitable for deciding individual cases, a case-by-case examination of vulnerability comes with its own risks. The above shows that the Court's jurisprudence under Article 3 can accommodate different types of vulnerability, which receive different levels of protection in its case law. As a result, the Court's vulnerability reasoning tends to appear piecemeal, selective or situational. In fact, the Court has found a violation of Article 3 in 87 per cent of the judgments in which it has employed the concept to date, indicating that perhaps vulnerability reasoning is used mainly where the Court needs to distinguish an applicant from others.²³

Indeed, one of the main problems with the Court's approach to date – with the layers and types of vulnerability recognised – may simply be that it lacks clarity: piecemeal jurisprudence is difficult to reconcile with conceptions of equality, and may have a negative impact on the manner in which the Court's judgments are received.²⁴ This is problematic for reasons of legal certainty and exceptionalism.²⁵ If the Court – that is, a majority of judges tasked with deciding a given case – decides what it feels is intuitively 'right' for the applicant in a given case, without reaching this decision in a principled manner, it opens itself up to allegations of moral subjectivism that might detract from the universality of rights and from the

²¹ *Pretty v United Kingdom* App no 2346/02, Judgment of 29 April 2002, ECHR 2002-III, paras 46, 72.

²² *Ibid*, paras 55, 56 and 74.

²³ Based on the author's own research via the HUDOC database.

²⁴ George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007), 130.

²⁵ *CLR on behalf of Valentin Câmpeanu v Romania* App no 47848/08, Judgment (GC) of 17 July 2014, Reports 2014, Concurring Opinion of Judge Pinto de Albuquerque, para 11.

acceptance of the Court as an institution. To borrow once again from Judge Pinto de Albuquerque, it is not enough for the Court to reach 'the right results by unconvincing, awkward means'.²⁶ In other words, the Court would certainly benefit from having regard to the individual circumstances in each case as well as structuring its vulnerability reasoning and applying it consistently and transparently.

D. A Roadmap for the Way Forward

In short, the Court's approach to vulnerability as it stands today does not necessarily depart from the ideal of the autonomous liberal subject. At the same time, it does not necessarily *preclude* such a departure by means of the additional recognition of universal human vulnerability. As exemplified by vulnerability in the detention context – where the Court has recognised both the general vulnerability of all detainees by virtue of detention, as well as the particular vulnerability of some detainees by virtue of, for example, a disability – the Court is willing to employ different incarnations and layers of the concept that approximate an implicit understanding of intersectionality.

The need for the Court to mould its approach to vulnerability into coherent, transparent reasoning that engages with the individual agency and dignity of every applicant is evident. At the same time, it could be argued that employing vulnerability reasoning in every single case under Article 3 is not desirable, because it will inevitably lead the Court to declare that some applicants are *not* vulnerable. Such a finding reinforces the liberal ideal of the independent legal subject and may ultimately also prove detrimental to the case of the particular applicant concerned.²⁷ However, that risk can be avoided if vulnerability is integrated into the Article 3 test so as to form one of several examinatory steps, and not a value judgment or a manner of determining the merit of the case as a whole. In this vein, it is essential to recognise that special consideration for an applicant's vulnerability is necessary for ensuring substantive equality.

The Court's reasoning could benefit from separating vulnerability into the grounds from which it stems. To a certain extent, the Court already determines whether an individual is dependent, or under the sole authority of the state, or a member of a group with a history of discrimination, and so on. Making such a determination in every case concerning a potentially vulnerable individual – or simply in every case – would mean that the Court could move away from using vulnerability as an argumentative shortcut, and develop it into a concept with substance and independent meaning. A willingness to engage explicitly with the factors that generate vulnerability in a particular case, and with the individual

²⁶ *Ibid*, para 16.

²⁷ *Miah v United Kingdom* App no 53080/07, Decision of 27 April 2010, para 14, and *Kostjučenkovs v Latvia* App no 19826/04, Decision of 8 March 2011, para 49.

circumstances of an applicant overall, would need to include engagement with the intersection of various grounds for vulnerability.

In short, the argument made here is that the Court's reasoning should weigh all of the factors of relevance, including not only those that concern the applicant's vulnerability but also those that support vulnerability's complement, namely the applicant's resilience.²⁸ Resilience to violations of Article 3 can take a multitude of forms, as will be explored below. The extent to which these factors actually make an individual applicant resilient to a given instance of ill-treatment will depend on the context, and must be determined in each individual case. Balancing sources of vulnerability and resilience allows for a more responsive and less harmful approach than one that juxtaposes monolithically vulnerable and monolithically non-vulnerable applicants against each other.

II. Bringing Coherence to the Court's Vulnerability Heuristic

Vulnerability before the Court is varied but selective. It has links to universal concepts like dignity and autonomy, and it can help to ensure substantive equality among applicants. But the Court's approach to the concept also lacks foreseeability. Designing a coherent approach to vulnerability means engaging with the concept as such. This requires an honest look at its effects, which here does not mean the various ways in which vulnerability affects the procedural and substantive treatment of a case,²⁹ but instead requires a discussion of the controversial socio-economic entitlements generated by the Convention. The Court's current approach to vulnerability can be understood as a strategy for holding back in this regard when it comes to all applicants who are not described as particularly vulnerable. However, supposed invulnerability can be harmful to affected applicants. A less damaging way of framing vulnerability would be as one part of a spectrum between vulnerability and resilience, on which all applicants fall. This, in turn, requires an examination of what resilience means.

A. Between the Protection of Dignity and a Welfare State

In his dissenting opinion in *M.S.S.*, former Judge Sajó argued that the majority's reliance on vulnerability reasoning approximated the introduction of a welfare state.³⁰ In general, of course, the ECHR – its Protocol No 1, with its rights to property and to education, and its Protocol No 12, including a non-accessory

²⁸ On resilience, see Fineman (n 4), 13–15; see also Peroni and Timmer (n 3), 1074.

²⁹ See chapter four of this volume.

³⁰ *M.S.S.* (n 10), Partly Concurring and Partly Dissenting Opinion of Judge Sajó.

prohibition of discrimination, excepted – emphasises civil and political rights over economic, social and cultural ones. However, the Court's jurisprudence has increasingly shown that the Convention can successfully be invoked in cases fitting the latter category. This includes cases on access to a court for economically disadvantaged individuals,³¹ housing rights,³² health and environmental matters³³ and questions of social security.³⁴ In general terms, the Court provides protection of such rights where this a precondition of respect for Convention rights, particularly Article 8 ECHR. Under Article 3 ECHR, too, some socio-economic elements have found their way into the case law. One main example of this is, of course, the *M.S.S.* case, where the Grand Chamber held Greece responsible under Article 3 for failing to provide shelter and decent living conditions to the applicant, a vulnerable asylum-seeker who was left homeless by the state's inaction.³⁵

Elements of the welfare state already exist under the auspices of the Convention, to say nothing of the domestic legal systems of its Member States. However, while Judge Sajó was not wrong about the fact that the majority's judgment in *M.S.S.* introduced or at least expanded certain welfare obligations, the Court has proven exceedingly reluctant to recognise socio-economic obligations on the part of states in general terms.³⁶ In fact, the few clear obligations on states under Articles 2 and 3 regarding the provision of food, shelter, medical care, and other goods are generally premised on the idea that the persons concerned are particularly vulnerable given their dependence on the state, be it because they are in detention, in a social care home or seeking asylum.³⁷ Under Article 8, too, states have a wide margin of appreciation regarding socio-economic questions,³⁸ and there is no right to access a specific form of housing;³⁹ nor a general obligation to house the homeless.⁴⁰

³¹ Françoise Tulkens, 'The European Convention on Human Rights and the Economic Crisis: The Issue of Poverty' EUI Working Paper AEL 2013/8 (European University Institute, Academy of European Law 2013), http://cadmus.eui.eu/bitstream/handle/1814/28099/AEL_2013_08.pdf?sequence=1, 7, citing *Stankov v Bulgaria* App no 68490/01, Judgment of 12 July 2007, Reports 2001-IX, para 67.

³² *Buckland v United Kingdom* App no 40060/08, Judgment of 18 September 2012, paras 65, 70.

³³ *Di Sarno and Others v Italy* App no 30765/08, Judgment of 10 January 2012.

³⁴ *Czaja v Poland* App no 5744/05, Judgment of 2 October 2012, para 66. In all, see Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (CUP, 2018).

³⁵ *M.S.S.* (n 10), para 263.

³⁶ See, for example, *Van Volsem v Belgium* App no 14641/89, Decision of 9 May 1990, para 1; *Jazvinsky v Slovak Republic* App nos 33088/96 ..., Decision of 7 September 2000; contrast with *Pancencko v Latvia* App no 40772/98, Decision of 28 October 1999, para 2. In all, see Liam Thornton, 'The European Convention on Human Rights: A Socio-Economic Rights Charter?', Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury, 2014), 236–38.

³⁷ See *Nencheva and Others v Bulgaria* App no 48609/06, Judgment of 18 June 2013 (concerning the death by neglect of children in a care home), paras 117–39; *M.S.S.* (n 10), paras 221–22, 232–33, 262–63 (concerning the conditions under which an asylum-seeker was forced to live); *Anguelova v Bulgaria* App no 38361/97, Judgment of 13 June 2002, Reports 2002-IV, paras 125–31 (concerning the delayed provision of medical care to an injured detainee, resulting in death); Thornton (n 36), 236–38.

³⁸ *McDonald v United Kingdom* App no 4241/12, Judgment of 20 May 2014, para 54.

³⁹ *Burton v United Kingdom* App no 31600/96, Decision (Commission) of 10 September 1996, para 2.

⁴⁰ *O'Rourke v United Kingdom* App no 39022/97, Decision of 26 June 2001.

While the Convention may guarantee socio-economic rights to some limited extent where they are interdependent with these and other provisions, this represents an exceedingly bare-bones framework of socio-economic obligations.⁴¹

In other words, the Court's jurisprudence is a far cry from creating an all-inclusive welfare state.⁴² Instead, the Court is using Article 3, along with other provisions of the Convention, to require rudimentary socio-economic protections for certain categories of people. The Court is slow to do this, however: while it has for example been recognised elsewhere that extreme poverty represents a deprivation of both dignity and autonomy, and prevents individuals from effectively enjoying their human rights,⁴³ the Court's willingness to address this issue has been slow, and focused on removing barriers to individual subsistence instead of on providing resources.⁴⁴

At the same time, the Court's case law under Article 3 has recognised that the failure to provide certain socio-economic assets to persons dependent on the state, such as detainees and asylum-seekers without a work permit, places these individuals in situations of suffering, humiliation and frustration that violate the Convention. It also appears that suffering associated with extremes of deprivation may, in and of itself, fall under Article 3; however, the threshold required in this regard seems to be a very high one.⁴⁵

To a rather basic and limited but still non-negligible extent, therefore, socio-economic obligations are part and parcel of Article 3 ECHR. Building upon these arguments, it is possible to imagine an interpretation of Article 3 that vindicates the rights of those who live in abject poverty. Poverty is both a source of discrimination and stigma, and a prime example of a lack of sources of resilience, as will be explored below. Given the fact that it often intersects with other grounds for marginalisation, poverty can thus be seen as both a cause and as an effect of vulnerability.⁴⁶

The Court's current interpretation of the Convention is a far cry from requiring the large-scale redistribution of wealth from rich to poor. At the same time, and without underestimating the effect of material poverty, there may be other ways to combat some of the effects at play. So, for example, a group of Strasbourg judges have remarked that while the Convention does not protect a 'right not to be poor', situations of extreme poverty may breach the Convention.⁴⁷ Thus, poverty-related

⁴¹ See PACE Recommendation 1415(1999) of 23 June 1999 on an Additional Protocol to the European Convention on Human Rights Concerning Fundamental Social Rights, para 13.

⁴² *Salah Sheekh v Netherlands* App no 1948/04, Judgment of 11 January 2007, para 141; *Sarmina and Sarmin v Russia* App no 58830/00, Decision of 22 November 2005.

⁴³ European Committee of Social Rights, 'Statement of Interpretation on the Rights of Refugees under the European Social Charter', 5 October 2015, 6, para 10.

⁴⁴ *Lacatus v Switzerland* App no 14065/15, Judgment of 19 January 2021.

⁴⁵ *Pancenko* (n 36), para 2.

⁴⁶ Sandra Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (2011) 22(3) *Stellenbosch Law Review* 566–90, 567.

⁴⁷ Julia Laffranque, Guido Raimondi, Ledi Bianku, Angelika Nußberger and Linos-Alexander Sicilianos, 'Implementing the European Convention on Human Rights in Times of Economic Crisis',

vulnerability is not only about socio-economic entitlements. It can indeed be about protecting vulnerable individuals from discrimination, stigma, a lack of access to rights and varieties of ill-treatment.

In addition, as the effects of poverty can very well reach the threshold of severity required under Article 3, it would be problematic for the Court to preclude such claims. In the socio-economic context, vulnerability is often used to create a special nexus between an individual and the state, or to limit the scope of a particular finding to keep the Registry's floodgates closed. While this reluctance is understandable to some degree given the caseload crisis and the Court's political environment, there is no reason why Article 3 could not create socio-economic obligations regarding applicants living in abject conditions. If the provision can apply to the suffering caused by negligent automobile accidents⁴⁸ and to relatively minor physical injuries⁴⁹ caused by private individuals, then there is conceptually no reason why the absence of a special nexus of dependency on the state should mean that it cannot also apply here. In this regard, a more detailed and theoretically informed understanding of vulnerability may help the Court to identify those who are effectively deprived of their dignity and agency through poverty, and thereby allow it to maintain a practicable threshold of severity.

B. Emphasising Resilience

Like vulnerability, resilience – its counterpoint – is a term in common use. This means that the idea of resilience crops up in contexts as disparate as self-help books and resources about natural disasters.⁵⁰ It has been argued that many of these narratives are problematic because they blame a person's misfortune, marginalisation, or exclusion not on the underlying socio-political systems that create this situation, but on an affected person's lack of resilience. In the context of racial tensions in the United States, this has meant that 'demands for resilience have become a cleverly coded way to shame those speaking out against injustices'.⁵¹

For present purposes, resilience has a specific meaning: it is the counterpoint to vulnerability, and thus describes the assets that protect human individuals from harms associated with vulnerability. But what, precisely, is resilience? As per Martha Albertson Fineman's description, resilience 'comes from having some

Seminar Background Paper (25 January 2013), www.echr.coe.int/Documents/Seminar_background_paper_2013_ENG.pdf, 1.

⁴⁸ *Kraulaidis v Lithuania* App no 76805/11, Judgment of 8 November 2016, especially the Concurring Opinion of Judges Sajó, Tsotsoria, Wojtyczek and Kucsko-Stadlmayer, paras 2, 7.

⁴⁹ See *İbrahim Demirtaş v Turkey* App no 25018/10, Judgment of 28 October 2014, where an irate villager punched an official, causing a jaw fracture, paras 6 and 8. See also the Joint Dissenting Opinion of Judges Sajó and Keller, especially para 14.

⁵⁰ Sehgal Parul, 'The Profound Emptiness of "Resilience"' *New York Times Magazine* (1 December 2015).

⁵¹ *Ibid.*

means with which to address and confront misfortune.⁵² Resilience is provided by the interplay of systems and institutions that help in ‘lessening, ameliorating, and compensating for vulnerability.’⁵³ Separately and together, these institutions provide vulnerable individuals with ‘assets’: ‘advantages, coping mechanisms, or resources that cushion us when we are facing misfortune, disaster, and violence.’⁵⁴

Fineman identifies five types of resources that build resilience: physical, ecological or environmental, human, social and existential.⁵⁵ Physical assets are the material things that ensure physical well-being, such as shelter, food, and financial capital. Human assets are the abilities that make it easier to work and accumulate resources; they include education, knowledge and experience. Social assets are the social bonds that provide support, particularly those provided by a family, a community or an organisation to which one belongs. Ecological assets allow us to access a hospitable environment and clean water and air. Existential assets are systems of belief, religion, culture, art or politics that ‘help us to understand our place within the world and allow us to see meaning and beauty in our existence.’⁵⁶

The function of resilience is in fact much the same as that of vulnerability – it helps to paint a realistic picture of individual exposure to degradation, suffering and ill-treatment, as well as the degree of impact that this exposure has on people and their ability to prevent or counter it. Effectively empowering vulnerable individuals means responding to the inadequacy of assets and resources where these deprive them of the capability to enjoy and demand respect for Convention rights.

Resilience is, in fact, comparable to the capabilities discussed in the previous chapter.⁵⁷ A capabilities approach ensures that all human individuals enjoy a certain threshold of basic capabilities that allows them to live lives of autonomy and dignity. In the same way, ensuring that human individuals enjoy certain assets that confer resilience makes them able to exercise their rights and safeguards their dignity and autonomy.

The Court has never explicitly referred to resilience in its case law. However, the concept is to some degree implicit in the Court’s analysis: the Court does not consider vulnerability in all cases, and when it does so, applicants are not always found vulnerable. When the Court fails to draw legal consequences from the vulnerability of an otherwise vulnerable applicant, or even where it finds that an applicant is not vulnerable, the Court is thus implicitly finding that vulnerability can be neutralised by other factors. These are covert resilience considerations.

In this regard, it must be made absolutely clear that none of the resources that promote resilience constitute a fail-safe against vulnerability.⁵⁸ Indeed,

⁵² Fineman (n 3), 269.

⁵³ Fineman (n 4), 13.

⁵⁴ Ibid.

⁵⁵ Fineman (n 3), 270.

⁵⁶ Ibid, 271–72.

⁵⁷ Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press, 2011), 20.

⁵⁸ Fineman (n 3), 273.

emphasising resilience, where the wrong aspects are emphasised, also has its own risks. Indeed, an overemphasis of certain aspects that are understood as providing resilience can transfer responsibility for vulnerability to an applicant, unfairly 'privatising' it, or negate that vulnerability altogether. These problems are highlighted by expulsion cases concerning applicants who risk persecution or violence because of their sexual orientation if returned to their home countries. In these contexts, the Court has on occasion emphasised applicants' ability to be 'discreet'.⁵⁹ Similarly, the Court may find that women do not face a sufficiently substantiated risk of gender-related ill-treatment if returned because they have access to 'male protection networks'⁶⁰ or have received a progressive education.⁶¹ A similar style of argumentation is visible where the Court finds that mentally ill persons could access necessary medications in their home state, without taking into account the fact that these may be financially unobtainable.⁶²

Given this background, it becomes urgently necessary to understand that resilience does not necessarily exclude vulnerability, and vice versa. There are no invulnerable human individuals, and it is necessary to consider all of an individual's sources of resilience and vulnerability in determining whether a given treatment is effectively compatible with their dignity and agency or, for example, whether he or she enjoys the capability to bring a complaint in Strasbourg. To create a system that pigeon-holes applicants is to negate the autonomy of the vulnerable and the vulnerability of those deemed autonomous. It thus assumes that those presumed invulnerable – those, thus, who fit the liberal archetype – do not need the protection of the state; liberalism's others, on the other hand, receive state protection at the price of their agency and recognition of their resilience. The resulting bifurcation is obviously artificial. This demands a degree of caution or sensitivity from the Court so that it does not simply negate vulnerability with resilience-related considerations, or vice versa.

C. A Working Typology of the Sources of Resilience

If an individual's location within socio-political systems of privilege and power may compensate for or aggravate vulnerability,⁶³ we can begin to identify sources of resilience. In this regard, an analysis such as the present one walks a fine line. On the one hand, any attempt to list the sources of resilience is certain to be

⁵⁹ *M.E. v Sweden* App no 71398/12, Judgment of 26 June 2014, para 88. The case was later referred to the Grand Chamber, which struck the complaint out of its list without amending this finding (*M.E. v Sweden* App no 71398/12, Judgment (GC) of 8 April 2015 (Struck out of the List)).

⁶⁰ *R.H. v Sweden* App no 4601/14, Judgment of 10 September 2015, para 73.

⁶¹ *Sow v Belgium* App no 27081/13, Judgment of 19 January 2016, para 56.

⁶² *F.N. v United Kingdom* App no 3202/09, Decision of 17 September 2013, para 31.

⁶³ Fineman (n 4), 15–16.

incomplete, and there is a risk of overemphasising resilience in the individual case, with the effect of failing to protect vulnerable individuals. On the other hand, failing to engage with actual sources of resilience largely pre-empts any further discussion, does not address the overemphasis of certain sources of resilience in the Court's case law today, and also trivialises the abilities of those considered particularly vulnerable.⁶⁴ In addition, it is only possible to foster resilience if it is clear what is being talked about. The following will accordingly create a typology of resilience, which – although not claiming to be complete – should provide some further insight into resilience as a counterpoint to vulnerability.

A focus on the sources of resilience, as well as vulnerability, provides a much more complete picture of an individual's situation than looking solely at vulnerability. Such a picture is necessary given that, especially from an intersectional perspective, there will always be some members of a vulnerable group who are more vulnerable than others. Instead of breaking vulnerability down into endless, increasingly specific sub-categories, what is needed is a dynamic approach that balances sources of vulnerability with sources of resilience.

Given that resilience is a counterpoint to vulnerability, the following will focus on three main aspects of the latter: vulnerability as preventing individuals from claiming their rights, vulnerability through dependency, and vulnerability through marginalisation. This is different from the three types of resilience used by Martha Albertson Fineman, who emphasised physical, human and social assets.⁶⁵ Though the structure chosen differs from Fineman's, so as to make it more practically relevant to the Court's analysis, all three of Fineman's types of assets will be embedded within it.

Before turning to that typology, it is essential to recall the argument made above regarding the dangers of 'privatising' or negating vulnerability. It should be recalled, in this regard, that vulnerability is part and parcel of the human condition; as a result, no source of resilience constitutes a fail-safe or antidote against it.⁶⁶ An overemphasis of certain sources of resilience can deprive applicants of adequate protection of their rights. Examples of this can be found in the expulsion context, as argued above, where the safety of LGBTQ+ applicants may be left to their own 'discretion',⁶⁷ and that of female applicants to their male support networks⁶⁸ or their own mental faculties as developed by a progressive education.⁶⁹ In addition, it is necessary to understand resilience as a product not (only) of one's own adaptability but also of one's environment; otherwise, one moves towards the idea that 'some people simply do not have what it takes to overcome adversity, or towards

⁶⁴ Peroni and Timmer (n 3), 1074.

⁶⁵ Ibid, 14, referring to Kirby Peadar, *Vulnerability and Violence: The Impact of Globalization* (Pluto Press, 2006) 55.

⁶⁶ Fineman (n 3), 273.

⁶⁷ *M.E.* (n 59), para 88. On referral, the case was struck out by the Grand Chamber (see n 59).

⁶⁸ *R.H.* (n 60), para 73.

⁶⁹ *Sow* (n 61), para 56.

blaming those who do not possess the characteristics needed'.⁷⁰ Arguments about an applicant's resilience should thus be made with caution, as – like vulnerability – resilience is accompanied with its own series of risks.

i. Resilience as the Ability to Successfully Claim One's Rights

Multiple sources of resilience can counteract obstacles that prevent individuals from claiming their rights. Based on the findings of vulnerability made by the Court so far, as well as the relevant literature,⁷¹ it is possible to provide examples of assets that allow vulnerable applicants to bring a timely complaint, communicate their claims, and be heard.

a. Institutional Support

One example in this context is institutional support. This could be provided by an NGO or a state instance, but also through legal aid, community support and collective action. The assets conferred by such actors can be manifold, and include support in accessing relevant information about available mechanisms and remedies, counselling, and assistance in formulating a complaint. As proceedings to claim rights generally take place before state instances, the willingness of these instances to hear, engage with and empower an individual's claims is one of the main sources of resilience to be noted here. In this regard, for example, the provision of specialised psychological support and assessment can place victims of traumatic crimes such as rape in a better position to make sure that their claims are heard.⁷² In this regard, the Court has previously faulted states for failing to place alleged victims of rape in a position that would allow them to feel comfortable enough to provide a detailed account of events.⁷³

One example here is the legal aid offered to needy applicants by the ECtHR, although these amounts are generally very small.⁷⁴ It is also interesting to consider an institution created in England and Wales, where an 'appropriate adult' is

⁷⁰ Marygold Walsh-Dilley, Wendy Wolford and James McCarthy, 'Rights for Resilience: Bringing Power, Rights and Agency into the Resilience Framework' Conceptual Framework (Atkinson Center for a Sustainable Future, 2013), 20.

⁷¹ Including both Martha Albertson Fineman's work (Fineman (n 4), 15–16) and the work of other scholars cited above, including Walsh-Dilley Marygold et al (n 70).

⁷² *M.G.C. v Romania* App no 61495/11, Judgment of 15 March 2016, paras 70–75.

⁷³ *G.U. v Turkey* App no 16143/10, Judgment of 18 October 2016, para 71.

⁷⁴ Rules of the ECtHR of 1 January 2020, rr 105–10, www.echr.coe.int/documents/rules_court_eng.pdf, referring to 'legal-aid scales'; in practice, the Court's contributions seem to max out at 850 EUR (*Đorđević v Croatia* App no 41526/10, Judgment of 24 July 2012, Reports 2012, para 175). However, there are exceptions (see *Roche v United Kingdom* App no 32555/96, Judgment (GC) of 19 October 2005, Reports 2005-X, para 185, where an applicant received EUR 3,228.72 in legal aid from the Council of Europe in complex proceedings).

assigned to vulnerable adults and minors to provide support during criminal interrogations.⁷⁵ Conceivably, appropriate adults could be specially trained legal counsel, social workers, or, in the case of a juvenile, his or her parents.⁷⁶ The appropriate adult scheme has its own problems, including the dearth of available trained volunteers, a lack of awareness in appropriate adults about the nature and extent of their role, and fears that the support of an appropriate adult will curtail some forms of abuse but not provide real access to rights.⁷⁷ However, even though the implementation of an appropriate adult scheme raises these and other concerns, the idea of assigning an independent observer to advocate for the rights of vulnerable suspects during police interrogations is a relevant example here.

In particular, the appropriate adult scheme is based on the idea that the presence of a third party can moderate othering,⁷⁸ which in turn represents an underlying cause of ill-treatment. Here, the Court could even be seen as the mediating third party. And indeed, through well-reasoned judgments, the Court help identify and provide support for sources of vulnerability. Of course, this cannot be a task for the Court alone, not least because proceedings before the Court usually come many years after a given event, and many cases will never make it that far.

Nonetheless, given that the Council of Europe, including the Court, sets standards that are greatly influential in the area of protecting the vulnerable, it can, itself, provide a resilience-conveying asset by engaging directly with vulnerable applicants and their representatives and designing empowering standards with their participation. In this regard, third-party interventions before the Court perform an important task. Yet, some vulnerable groups or individuals may be diffuse and lack a lobby, and there may thus be decreased awareness about their concrete vulnerabilities. Their voices could be strengthened, for example, through the work of the Council of Europe Commissioner for Human Rights. In particular, the former Commissioner was extensively involved in two of the Court's most influential vulnerability judgments under Article 3 to date, *M.S.S.* and *Valentin Câmpeanu*.⁷⁹ Having an advocate like the Commissioner within the Council of Europe is a potentially very powerful resilience-conveying asset.

b. Individual Assets

A number of other assets increase individuals' ability to claim their rights. These range from the education and literacy of the person concerned, including legal education, to their language skills and residence status. In this last regard, the

⁷⁵ Harriet Pierpoint, 'Taking the Protection of Vulnerable Suspects Seriously: Putting "Appropriate Adults" through their PACES' (2000) 12(3) *Practice* 49–60.

⁷⁶ *Ibid.*, 50.

⁷⁷ *Ibid.*, 52, 54.

⁷⁸ Helene Moglen and Sheila Namir, 'War and the Dis-Eases of Othering' (2006) 3(2) *International Journal of Applied Psychoanalytic Studies* 206–18, 212, 215–18.

⁷⁹ *M.S.S.* (n 10), para 87; *CLR on behalf of Valentin Câmpeanu* (n 25), paras 92–93 and 104–14.

deprivation of all legal status facing certain migrants, which drives them to the margins of society, can be understood as a state-imposed source of vulnerability.⁸⁰ It could also be relevant to consider whether someone enjoys socio-economic security and a degree of mental health and intellectual capacity. In this vein, Lourdes Peroni and Alexandra Timmer have pointed out that when Judge Sajó, in his separate opinion in *M.S.S.*, noted that the applicant 'had money and speaks English', he was identifying sources of resilience that tempered the applicant's vulnerability.⁸¹

Discussing these traits here provides another opportunity to problematise them. In other words, it bears reiteration that none of these individual-based assets necessarily compensate for vulnerability: an individualised assessment of all relevant factors is necessary in each case. Not only do individual abilities evolve throughout life, but none of these traits represents a fail-safe protection against vulnerability or ill-treatment. Thus, it is often difficult to follow the Court's argumentation and understand precisely how, for example, a woman's progressive education can protect her against female genital mutilation,⁸² or how a drug addict's youth and male gender can protect him against the marginalisation that accompanies his addiction.⁸³

ii. Resilience as a Counterweight to Dependency

The case law explored in this volume has shown that an individual or group may be vulnerable due to their increased exposure to ill-treatment. This type of vulnerability is often associated with dependency, including minor age, disability, or deprivation of liberty. Individuals in such situations may face difficulties in claiming their rights. They may also be more exposed to ill-treatment to begin with, given their situation and the ease with which it can be abused. In this regard, a number of assets can foster resilience.

First of all, fostering resilience in dependent individuals means understanding the ways in which their relationships of care and dependency work. This requires an awareness that resilience is not necessarily innate, but produced. It also means understanding that relationships of care and dependency create a potential for abuse, which therefore require strong safeguards. Lastly, it means designing interventions that 'aim to restore, wherever possible, the vulnerable person's sense of herself as an autonomous agent'.⁸⁴

⁸⁰ Sara Iglesias Sánchez, 'Irregular Migrants in Europe: Deprivation of Status as a Type of State-Imposed Vulnerability' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart, 2015) 429–51, 430–31.

⁸¹ Peroni and Timmer (n 3), 1074, referring to *M.S.S.* (n 10), Partly Concurring and Partly Dissenting Opinion of Judge Sajó, fn 8.

⁸² *Sow* (n 61), para 56.

⁸³ *Miah* (n 27), para 14.

⁸⁴ Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability', in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP, 2014) 33–59, 46.

There is certainly a link between autonomy or agency and resilience.⁸⁵ However, in some situations, for example in the detention context, the institutional environment means that vulnerable individuals can make very few meaningful choices. In contexts of severe intellectual disability, too, autonomy and agency as sources of resilience are impacted. This does not mean, however, that agency and autonomy should not be protected and fostered to the largest possible degree in these and all contexts. Indeed, it is precisely because individuals in these situations are to some extent deprived of this major source of resilience that intense scrutiny and strict safeguards are required.

Another source of resilience could lie in the possibility of accessing and obtaining social support – both in the sense of being able to contact and, if necessary, alarm outside actors, and in the sense of obtaining access to information about what one's rights and options are.⁸⁶ In this regard, visibility can be key: for example, a detainee who is particularly affluent or influential may be able to draw more attention to poor detention conditions. The same context – that of detention – also serves to clarify, however, that not all social support can be considered a source of resilience. Indeed, forcing disabled inmates to rely on the kindness of their cellmates for assistance is considered a violation of Article 3 ECHR by the Court, given the humiliation and sense of vulnerability that it entails.⁸⁷

iii. Resilience as a Corrective for Misrecognition

Of course, some individuals are vulnerable to ill-treatment not because they are dependent, but because they belong to a group that suffers from a history of discrimination, exclusion or invisibility – an effect that has been termed 'misrecognition', and is akin to othering.⁸⁸ Here this could apply not only to the vulnerable ethnic Uzbeks who risk torture if returned from Russia to Kyrgyzstan,⁸⁹ but also to the vulnerable groups made up of persons living with HIV/AIDS,⁹⁰ asylum-seekers,⁹¹ the Roma community,⁹² and people with psycho-social disabilities.⁹³

⁸⁵ Martha Albertson Fineman, 'Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20(2) *Elder Law Journal* 71–111, 110.

⁸⁶ MacKenzie (n 84), 46.

⁸⁷ *Kaprykowski v Poland* App no 23052/05, Judgment of 3 February 2009, para 74; *Semikhvostov v Russia* App no 2689/12, Judgment of 6 February 2014, para 84.

⁸⁸ Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Nancy Fraser and Axel Honneth (eds), *Redistribution or Recognition?: A Political-Philosophical Exchange* (Verso, 2003), 7–109, 29. See also Peroni and Timmer (n 3), 1065.

⁸⁹ *Kadirzhanov and Mamashev v Russia* App nos 42351/13 and 47823/13, Judgment of 17 July 2014, paras 91–92; *Khamrakulov v Russia* App no 68894/13, Judgment of 16 April 2015, para 66.

⁹⁰ *Kiyutin v Russia* App no 2700/10, Judgment of 10 March 2011, Reports 2011, para 63, para 64.

⁹¹ *M.S.S.* (n 10), para 251.

⁹² *Sashov and Others v Bulgaria* App no 14383/03, Judgment of 7 January 2010, para 55.

⁹³ *Alajos Kiss* (n 8), para 42.

In these cases, awareness-raising campaigns to combat negative attitudes among the general public can be an essential source of resilience.⁹⁴ The Court itself, through its case law, may be contributing to this. In the long term, correcting misrecognition may counteract vulnerability to some degree and potentially protect members of vulnerable groups from its worst effects. Similarly, as concerns LGBTQI youth, Martha Albertson Fineman has sought ways to build through education.⁹⁵

iv. *The Limits of Individual Adaptability as a Source of Resilience*

Sources of resilience are not limited, of course, to the above. However, in identifying further sources of resilience, it is important these should be about tackling the reasons for and manner of responding to vulnerability-related ill-treatment, and not about making applicants able to bounce back after having been ill-treated. The focus here is not, in other words, on whether individuals can survive ill-treatment and thrive despite it.

That said, the Court does show a certain willingness to consider individual adaptability as a source of resilience in particular contexts. For example, in expulsion cases, the possibility for applicants to adapt to their situation by moving elsewhere in their home state – the so-called ‘internal flight’ option – is often cited as a reason for why they would not be vulnerable.⁹⁶ In such cases, in the absence of clear information about the risks concerned and the possibility of avoiding them, the Court may decide a case to an applicant’s disadvantage.⁹⁷ A recent case in this regard, however, found that because a particular applicant’s family – who were the source of the alleged risk in that case – was politically influential and could track her down in the home state, it was not possible to return her.⁹⁸ This development is to be welcomed given that, if adaptability is to be considered as a source of resilience, it needs to engage with the real possibility of such adaptation. In this regard, it is useful to recall the Court’s *Salah Sheekh v Netherlands* judgment. There, it examined whether the applicants could be expected to integrate in a ‘safe’ area given local dynamics, and found that they would instead likely end up occupying a ‘marginal, isolated position in society’.⁹⁹

v. *Conclusion*

In the words of Martha Albertson Fineman, ‘[r]esilience is the essential but incomplete antidote to our vulnerability’.¹⁰⁰ And indeed, resilience is not a fail-safe: every

⁹⁴ Martha Albertson Fineman, ‘Vulnerability, Resilience and LGBT Youth’ (2014) 23(2) *Temple Political and Civil Rights Law Review* 307–329, from 325.

⁹⁵ Fineman (n 95), 328.

⁹⁶ See *Salah Sheekh* (n 42), para 141; compare also the rejection of that option in *R.D. v France* App no 34648/14, Judgment of 16 June 2016, para 43.

⁹⁷ *G.J. v Spain* App no 59172/12, Decision of 21 June 2016, paras 45–53.

⁹⁸ *R.D.* (n 96), para 43.

⁹⁹ *Salah Sheekh* (n 42), para 140.

¹⁰⁰ Fineman (n 95), 320.

human individual is and remains vulnerable, no matter how many resilience-bestowing assets they accumulate. To give an example, it can be noted that '[e]ven the most wealthy and resourceful asylum seeker cannot grant their own refugee status nor give themselves access in law to the host society; they are dependent on state action for this.'¹⁰¹

Resilience to vulnerability can take a variety of forms. It can be related to the individual applicant in a case – thus, concern innate, medical or psychological factors – be related to the socio-economic assets available to that person – which can be cultural, environmental, financial or educational – or be conveyed by institutions, and thus represent specific assistance and counselling, an ease of access to proceedings, and individual empowerment to claim rights. However, it is easy to overestimate the effect of some sources of resilience, and to thereby slip back into the idea of the liberal legal subject who can independently overcome or avoid ill-treatment. Applying resilience considerations in the context of ill-treatment can thus overestimate the abilities of applicants to avoid such acts, unfairly privatising the responsibility for avoiding them. While a balancing of all aspects that contribute to vulnerability and resilience should certainly be the way forward for the Court's analysis in individual cases, it should proceed with caution in this regard.

What the preceding comments have not addressed is how resilience and the capabilities approach relate to each other. In this regard, some authors have written about the need to complement vulnerability reasoning with a capabilities approach,¹⁰² but the relationship of resilience and capabilities remains underexplored. Given the above considerations concerning resilience, and understanding capabilities according to Martha Nussbaum's theory, which sees them as the answer to the question '[w]hat is this person able to do and to be?',¹⁰³ there seems to be a close connection between the two. In other words, guaranteeing a sufficient minimum threshold of capabilities means ensuring that all human individuals enjoy the ability to live lives of autonomy and dignity. In the same way, ensuring that human individuals enjoy certain assets that confer resilience and that compensate, to some extent, for their vulnerability makes them able to exercise their rights and safeguards their dignity and autonomy. While perhaps somewhat oversimplified, this makes it possible to argue that there is a significant degree of overlap between a capabilities approach and an approach to vulnerability complemented by an understanding of the assets necessary for resilience.

¹⁰¹ Gina Clayton, 'Asylum Seekers in Europe: M.S.S. v Belgium and Greece' (2011) 11(4) *Human Rights Law Review* 758–73, 769.

¹⁰² MacKenzie (n 84).

¹⁰³ Nussbaum (n 57), 20.

III. Revolutionising the Revolution: Vulnerability Theory and its Guidance for the Court

As argued throughout this volume, the concept of vulnerability has a significant potential to affect – albeit often hesitantly or selectively – the Court’s jurisprudence under Article 3. The Court’s approach is by no means perfect, however, and it could be improved by taking some lessons from vulnerability theory. The following will provide recommendations for revolutionising this quiet revolution, making it a louder but also a more inclusive, sustainable, just and agency-promoting one.

A. Moving from the Invulnerability-Vulnerability Binary to a Spectrum of Vulnerability and Resilience

Developing a sound approach to vulnerability requires an explicit discussion of why and how the vulnerability of certain applicants and groups is considered relevant for the purposes of a judgment. This should replace the discussion of whether applicants are vulnerable or not. No applicant is invulnerable, or not vulnerable, because no human individual is entirely free of vulnerability. Indeed, if the Court’s case law shows anything, it is that vulnerability can stem from a wide range of sources, many of which vary over a person’s lifetime. Thus, the division of applicants into two categories – vulnerable and invulnerable – should be dropped entirely, and be replaced with a more nuanced approach, as outlined below.

Mainstreaming vulnerability considerations does not mean that the Court must find a violation of Article 3 in every case, given the vulnerability of every applicant. Instead, the Court should understand vulnerability as a spectrum, and take a holistic approach to both applicants’ vulnerability and their resilience in order to determine where they fall on that spectrum. This allows it to determine whether there are gaps in their protection and hurdles in their access to justice for which it needs to compensate.

B. Adopting a Minimum Content of Vulnerability

The Court’s approach to vulnerability, to date, has been to identify vulnerable groups and individuals in an ad hoc manner, and without defining the concept. It is perhaps true that a definition of vulnerability is not per se necessary or even productive. On the other hand, however, it is necessary to understand what the concept means – only in this way can states have some certainty about what is required of them, and individuals claim their vulnerability in Strasbourg. In this regard, it is useful to understand vulnerability as a deprivation of the capabilities and resources that allow human individuals to live autonomous lives of dignity and agency. Understanding the concept in this way ensures that it will not be

abused to justify paternalistic interventions and that there is a minimum content to the concept that allows for the identification of further vulnerable groups and individuals.

C. Maintaining a Reasonable Scope for Article 3

The above has expressed unease with the idea that every offence to an individual's dignity should necessarily and automatically fall under the absolute Article 3. Similarly, the Court should build its vulnerability-related case law with care, in the knowledge that the provision does not necessarily provide the adequate forum in which to address all possible inequalities and vulnerabilities. This case law should leave a reasonable scope of application to other Convention provisions, such as Articles 8 and 14.

Of course, this should not mean that the concept or vulnerability is not relevant for the scope of Article 3. Indeed, as Manfred Nowak has argued, the very insidiousness of torture stems not (only) from the gravity of the force employed and the injuries caused, but originates primarily in the powerlessness and vulnerability of the victim.¹⁰⁴ The question, thus, is to assess those factors – particularly by examining the context holistically, and allowing considerations of vulnerability and resilience to inform the analysis – so as to ensure a responsive but sustainable scope for Article 3.

D. Addressing Selectivity and Promoting Inclusiveness

As concerns the particular suffering related to vulnerability, the Court should take care to display understanding or empathy only for applications who are relatable or who appear deserving of the Court's engagement. In the same vein, it should not deploy selectivity to the detriment of other applicants. Of course, the pool of potential applicants to the Court is an immensely vast one. However, if vulnerability is used to pick out some groups and individuals whose claims require special attention – say, asylum-seekers – and then to narrow this pool down further again – say, to child asylum-seekers, or even again, to unaccompanied minors – then it enhances manageability, but it does a disservice to the very salient claims that may be brought by those who do not receive priority on this hierarchy of vulnerability. Vulnerability should, accordingly, not be a way to cherry-pick those applicants whose claims are to be heard while blinkering the Court's judges about wider issues.

As far as the inclusiveness of the Court's vulnerability case law is concerned, it is highly likely that there are other reasons, beyond those identified by the Court

¹⁰⁴ Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' (2005) 23(4) *Netherlands Quarterly of Human Rights* 674–88, 677–78.

to date, to find that a group or individual is vulnerable. The present analysis has recommended some further additions to this list, including victims of trafficking and those living in poverty or homelessness, as well as a further exploration of the vulnerability of LGBTQI people and the elderly. Individual vulnerability is constantly in flux, given that it varies over the course of a human life span and is context-responsive. For this reason, it is unlikely that there will ever be a definitive list of who is vulnerable. Having a sense of what vulnerability means – a deprivation of certain capabilities, powerlessness, an inability to claim one's rights, dependency, etc – makes it easier to identify those whose vulnerability may not yet have attracted the attention of the Court or of other actors.

E. Respecting and Mainstreaming Agency

Allowing a legal concept of vulnerability to exist without any definitional contours and without an integrated understanding of the need to promote individual autonomy is risky: it means that vulnerability can be abused so as to further interests that have little to do with empowering individuals. One example is the creation of laws that discriminate against LGBTQI people on the premise of safeguarding the rights of vulnerable young people. In fact, such a use of vulnerability can be found in the Court's own case law. Namely, when considering a challenge against laws that criminalised consensual same-sex sexual contacts between adults in Northern Ireland, the Court recognised 'that one of the purposes of the legislation is to afford safeguards for vulnerable members of society, such as the young, against the consequences of homosexual practices.'¹⁰⁵ Other conceivable examples of this are bans on the wearing of religious symbols, notably the hijab, where this is based on argumentation concerning the protection of women as vulnerable to being pressured into wearing such an item.¹⁰⁶

Using vulnerability as a blanket justification for measures that drastically affect the rights of marginalised individuals on the basis of the judgment that they are dangerous to children or lack agency, without any further evidence in this regard, is entirely unacceptable. Real arguments are needed in this regard instead of lax references to presumed vulnerability. One possible safeguard against abusive reliance on vulnerability is to emphasise agency. The measures referred to in this section are paternalistic ones, and an emphasis on agency-building and autonomy – as well as, in these specific contexts, the unacceptability of perpetuating negative stereotypes – can therefore allow for the identification of abusive vulnerability-based measures.

¹⁰⁵ *Dudgeon v United Kingdom* App no 7525/76, Judgment of 22 October 1981, Series A45, paras 47, 49, 60 and 62, as noted in Francesca Ippolito, '(De)Constructing Children's Vulnerability under European Law' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart, 2015) 23–47, 23.

¹⁰⁶ Compare the rationale for the contested ban in *S.A.S. v France* App no 43835/11, Judgment (GC) of 1 July 2014, Reports 2014, paras 17 and 42, and also PACE Recommendation 1927 (2010) of 23 June 2010 on Islam, Islamism and Islamophobia, para 3.13.

F. Providing Procedural Justice

When it comes to providing procedural justice to victims of alleged ill-treatment, this is most relevant as regards torture, which particularly reduces individuals to positions of extreme distress and helplessness and can have lasting cognitive, emotional and behavioural consequences,¹⁰⁷ but it is relevant for all forms of ill-treatment, and indeed for all violations of human rights. In this vein, an appropriate, empathetic and context-responsive attitude can provide victims with feelings of recognition and offer ‘some relief from the experience of alienation.’¹⁰⁸ Where the Court’s vulnerability reasoning means recognition of or at least engagement with the suffering of victims of ill-treatment, it allows individuals to experience procedural justice even where the outcome of their application may not be a ‘success’ in the sense of a violation finding. As noted above, being able to participate in the proceedings, the perceived neutrality of the judges involved with hearing the case, a feeling of being treated with respect by the system and of being able to trust the decision-making authority increase individuals’ satisfaction with human rights adjudication and can also have a beneficial effect for the Court’s acceptance.¹⁰⁹

Furthermore, experiencing proceedings that are perceived as just may also be a step on the road to recovery from the feeling of powerlessness that results from an act of torture.¹¹⁰ In this regard, a foreshortened vulnerability assessment that ultimately negates the vulnerability of an applicant without engaging in the arguments presented by them is not a neutral act, but a harmful and potentially re-traumatising one.

G. Awareness of the Potential for Paternalism, Stereotyping and Essentialism

Group-based approaches carry a risk of essentialising that group by flattening and standardising the experiences of its diverse members. In this regard, for example, Kirsten Sandberg has found it impossible to exclude that the approach to vulnerability of the Committee on the Rights of the Child, no matter how well thought

¹⁰⁷ OHCHR, ‘Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (revised edn, 2004) HR/P/PT/8/Rev 1, www.ohchr.org/Documents/Publications/training8Rev1en.pdf, 45, with further references, and 46–47.

¹⁰⁸ See *ibid*, 46.

¹⁰⁹ *Ibid*, 180–85 and throughout.

¹¹⁰ Eva Brems and Laurens Lavrysen, ‘Procedural Justice in Human Rights Adjudication: The European Court of Human Rights’ (2013) 35(1) *Human Rights Quarterly* 176–200, 182, citing Tom R Tyler, ‘Procedural Justice and the Courts’ (2007) 44(1/2) *Court Review: The Journal of the American Judges Association* 26–31, 26.

out, will be transformed into punitive or paternalistic responses by States given the fact that it uses a groups-based approach at all.¹¹¹

This can be a double-edged sword.¹¹² Mentioning the vulnerability of particular groups may essentialise their members while failing to mention it negates patterns of disadvantage, marginalisation, inequality and powerlessness. In this regard, the former option is preferable. Sandberg agrees: regarding the group-based approach to children, she finds that while ‘the particular vulnerability of each child within such groups may vary ... if the characteristics or situations that make children particularly vulnerable are not pointed out to the states, children in such situations are easily overlooked – whether by lack of awareness or by unwillingness – and so is their need for adapted measures’.¹¹³

Similarly, the risks of paternalism and stereotyping are difficult to eradicate from a vulnerability-based approach altogether. Certainly, emphasising dignity and agency is one corrective measure. Another is to focus on the ways in which certain specific people are rendered vulnerable, and why, instead of employing vulnerability as a label.¹¹⁴ Understanding and paying due attention to the fact that vulnerability is complex, and made up of a whole range of disempowering or empowering circumstances, is another corrective.¹¹⁵ In addition, it is essential to overcome the idea that ‘normal’ people are not vulnerable, and that only certain groups – such as asylum-seekers, detainees, etc – can be described as such. As long as this idea is permitted to persist, it will continue to stigmatise those who are vulnerable and render them other.¹¹⁶ In this regard, the Court’s approach should shift from one that categorises applicants as vulnerable or not vulnerable, to one that evaluates an applicant’s situation more holistically and in an individualised way. The outcomes in many cases may be the same, but – for the reasons set out above – the reasoning deployed here matters as well.

IV. Final Thoughts

To conclude, it is possible to state that vulnerability has become a core concept of the Court’s Article 3 ECHR case law, and that it has the potential to create closer engagement with cases – both as concerns the concrete circumstances and experiences of applicants and the underlying systems of privilege and power – by the Court. As has been argued in this volume, however, there are some lessons

¹¹¹ Kirsten Sandberg, ‘The Convention on the Rights of the Child and the Vulnerability of Children’ (2015) 84(2) *Nordic Journal of International Law* 221–47, 236–37.

¹¹² *Ibid.*, 237.

¹¹³ *Ibid.*, 237.

¹¹⁴ Peroni and Timmer (n 3), 1073.

¹¹⁵ *Ibid.*, 1074.

¹¹⁶ Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013) 147–70, 162.

that the Court could learn from a theoretical account of vulnerability in order to prevent a range of problems from materialising as it applies its vulnerability heuristic. In particular, it should be aware both of the fact that Article 3 should not be considered a panacea for all possible dignity-related harms, and that it is necessary to ensure that Article 3 remains applicable in practice. Neither, however, is selectivity a viable guiding principle for the concept; this only fragments the Court's case law and harms its reputation while failing to provide states with necessary guidance. One way forward would be for the Court to adopt a minimum content for its approach to vulnerability, so as to prevent abuses. This should include respect for agency and safeguards against risks such as essentialism and paternalism. By following these steps, the Court has the possibility to build a vulnerability heuristic that will continue to foster context-sensitive and human-centric judgments respectful of the core values of Article 3 ECHR: the dignity and agency of the individual.