

Vulnerability in the context of human rights

Policy brief

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Introduction

Vulnerability has become a buzzword in public, academic and political debates. It has been used in human rights policy documents, reports and jurisprudence as well as in a diversity of policy fields where human rights issues play an important role, such as development cooperation, climate change, humanitarian aid, asylum and migration, equality and non-discrimination or in the context of the health system. The deployment of the concept is often assumed to enhance the protection of human rights, especially with regard to the principles of equality and non-discrimination. This assumption, however, has also attracted criticism and the concept has been questioned as it might have problematic effects when put into practice.

There has been some academic discussion on the substance, implications and application of the concept from a human rights perspective. Yet a comprehensive and comparative exploration of the concept as well as the analysis of the relationship, ambiguities, delimitations or even inconsistencies of vulnerability with the concepts of (in)equality and (non-)discrimination based on empirical research was missing. The research project ‘The concept of vulnerability in the context of human rights (P32130-G31)’, funded by the Austrian Research Funds (FWF), which was implemented between April 2019 until October 2023, aimed at contributing to fill this gap by

a) undertaking a thorough review and assessment of the academic debate on this concept and systematically analysing different dimensions of the concept of vulnerability based on theoretical analysis as well as empirical research and, thus, contributing to

the clarification of the concept(s) of vulnerability and the objectives of its/their application(s);

b) analysing the concept of vulnerability in relation to and delineating it from other ‘competing’ concepts or concepts with similar objectives in order to grasp the different meanings, implications, and benefits or challenges of the different concepts. In addition, the project aimed at analysing the potentials, challenges, and problems of the concept of vulnerability from a human rights perspective;

c) carrying out empirical research on the application of the concept on the basis of case studies in three policy fields: asylum law and policies, environment/climate change-related mobility, and equality and anti-discrimination.

The case studies focus on cases at the international, the regional (European) and the national (Austrian) level: The case study in the field of climate change and mobility analysed how the concept of vulnerability is applied in UN human rights documents focusing on climate change and climate change-related mobilities published by different UN human rights institutions and bodies. The case study selected for the field of anti-discrimination and equality focused on the concept of vulnerability in anti-discrimination case law of European courts. Finally, the case study in the field of asylum elaborated on how the concept of vulnerability is used in case law on international protection at Austrian level.

In the following, the main conclusions of the research project and policy recommendations will be presented:

Main Conclusions of the Project

The right to equality and the prohibition of discrimination are fundamental principles of the international and regional human rights systems and also of regional human rights instruments. Over time, the conceptualisation of the right to equality and the right to non-discrimination has been increasingly refined and expanded. The initial focus on achieving formal equality, equal (legal) treatment and abolishing direct discrimination was extended by incorporating perspectives of difference and notions of substantive equality as well as indirect and structural forms of discrimination. Moreover, in recent decades the concepts of equality and non-discrimination have been challenged and advanced by approaches of diversity and intersectionality. The concept of vulnerability can be located in the latter context, where the discomfort with and critique of monolithic conceptions of identity categories, such as the understanding of women as a homogeneous group, became important. The vulnerability approach is suggested to provide for a 'post-identity' inquiry which goes 'beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality.'¹ From our research project, we can draw the following most important conclusions concerning the relationship and differences between the concepts of equality and non-discrimination on the one hand and the concept of vulnerability on the other hand:

- Compared to the concepts of equality and non-discrimination, the concept of vulnerability is neither included in human rights instruments nor is there a precise and unambiguous legal understanding and definition of the concept.
- The objectives, motivations and added value for introducing and using the concept of vulnerability are not clear. The concept does not lead to new legal requirements and has no legal added value. Instead, certain problems including forms of structural and intersectional inequalities and discrimination are now framed as vulnerabilities of certain persons or groups. This is problematic insofar as it transfers the problem from the structural level to the individuals, respectively to the groups identified as vulnerable.
- In practice, vulnerability approaches do not lead to post-identity inquiries. Instead, the concept is frequently attached to certain groups (e.g. women, children, persons with disabilities). There is a lack of objective and comprehensible criteria which serve as a basis for deciding who is classified as vulnerable. The analysis shows that often a focus is laid on phenotypical characteristics in this context. Although group-based approaches are also sometimes used in the context of non-discrimination and equality law and policies, most of the legal frameworks such as the European Convention on Human Rights (ECHR) or the International Covenant on Civil and Political Rights (ICCPR) refer to grounds of discrimination (e.g. gender, age, ethnic origin) instead of certain groups and contain open lists of such grounds. In addition, the concepts of multiple and intersecting forms of discrimination are increasingly used by international human rights bodies.
- The application of the concept of vulnerability mobilizes problematic and stereotypical (e.g. sexist, ableist, racialized, ageist, classist) narratives. It is a loaded and value-laden concept and refers to a somatic metaphor. The concept contributes to a stereotypical representation of individuals and groups, which is problematic for achieving substantive equality and abolishing structural discrimination.
- Individuals and groups labelled as vulnerable are often presented as those with special needs requiring particular protection or priority attention. Yet, the often-times prioritisation of certain individuals and groups in the context of the vulnerability approach is at odds with proactive measures required by anti-discrimination and equality law in the context of human rights, demanding clear-cut, transparent and reasonable criteria.
- Vulnerability is often understood as being negatively connected to the right of equality and non-discrimination or even hampers the achievement of equality and the abolishment of discrimination.

Recommendations

The foundation for these recommendations is a human rights-based approach, which understands all human beings as rights-holders and aims at realizing human rights of people ‘rather than the needs of beneficiaries’ⁱⁱ based on international human rights standards. A human rights-based approach ‘gives importance not only to outcomes, but also to the processes.’ⁱⁱⁱ Important principles of a human rights-based approach are participation, equality and non-discrimination, and accountability.

Recommendation 1

A human rights-based approach requires the respect and fulfilment of international human rights standards. As the concept of vulnerability is not defined or even mentioned in human rights instruments, it is recommended to rely instead on codified and well-developed human rights standards, in particular on the rights to equality and non-discrimination.^{iv} Non-discrimination law and policies are characterized by an elaborated toolset of definitions and concepts to describe and respectively address discrimination.^v For individual cases the concepts of direct and indirect discrimination are adequate and sufficient to identify unequal treatment as they also prohibit adverse effects of structures or measures for persons or groups of persons based on specific grounds such as age, gender,

race or others without any reasonable legitimisation (see, for example, definition of discrimination against persons with disabilities in the box below).^{vi} In addition, in order to overcome structural barriers that some might face on their path to equality, the concepts of reasonable accommodation^{vii} and proactive measures (see Recommendation 5) are widely acknowledged as adequate and necessary tools.

Recommendation 2

It is important to evaluate if concepts used in legal and political processes – such as vulnerability – have an added value that contributes to the enhancement of rights, in particular the enhancement of equality and non-discrimination. If there is no legal added value it is important to clarify objectives and motivations for using such concepts and evaluate whether the framing effect of concepts contributes to combating structural and intersectional inequalities. It is therefore recommended to analyse if the motivations for using the concept of vulnerability are in line with a rights-based approach to non-discrimination and adequate for reaching the aim of reducing structural inequalities.

*‘The **duty to prohibit “all discrimination”** includes all forms of discrimination. International human rights practice identifies four main forms of discrimination (...): (a) “**Direct discrimination**” occurs when, in a similar situation, persons with disabilities are treated less favourably than other persons because of a different personal status in a similar situation for a reason related to a prohibited ground. Direct discrimination includes detrimental acts or omissions based on prohibited grounds where there is no comparable similar situation. (...) (b) “**Indirect discrimination**” means that laws, policies or practices appear neutral at face value but have a disproportionate negative impact on a person with a disability. (...) “**Denial of reasonable accommodation**”, (...), constitutes discrimination if the necessary and appropriate modification and adjustments (that do not impose a “disproportionate or undue burden”) are denied (...). (d) “**Harassment**” is a form of discrimination when unwanted conduct related to disability or other prohibited grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.’ (CRPD General Comment No. 6)*

Recommendation 3

Group-based approaches are increasingly contested as they neglect intra-group diversity and disregard differences, pluralism and complexity within a particular 'group'. Vulnerability approaches do not automatically lead to the abandonment of group-based approaches, but can on the contrary lead to one-dimensional perceptions of groups. Although several specialized UN human rights treaties focus on a specific ground and some also on a specific group at risk of discrimination, they acknowledge diversity within these groups and increasingly also use the concept of intersectionality (see definition in box below). In addition, the ICCPR as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) prohibit 'discrimination of any kind' and refer to a number of grounds (not groups) including 'other status'.^{viii} In order to avoid the problematic consequences of group-based approaches such as conceptualising women as a homogeneous group with shared problems and similar concerns and interests, it is thus recommended to focus on grounds or categories of discrimination and inequality (such as gender, age, race) instead of groups. This is already provided for in most international as well as regional (in particular the European) human rights frameworks, which rely on different grounds of discrimination instead of groups.

'Discrimination can be based on a single characteristic, such as disability or gender, or on multiple and/or intersecting characteristics. "Intersectional discrimination" occurs when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status.'

(CRPD General Comment No. 6)

Recommendation 4

International human rights instruments include the requirement to address and avoid racist, ableist, sexist and other forms of stereotypes and stigmatisation as it constitutes a form of

'States Parties undertake to adopt immediate, effective and appropriate measures: (...) b. To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life (...).'

(Art. 8 CRPD, compare also Art. 5 and CRPD General Comment No. 6)

discrimination. Thus, the stereotypical implications of the vulnerability concept do not comply with human rights law. It is recommended to get aware of the legal obligations with regard to addressing any form of stereotypical language and prejudices against persons and groups and of the risks the vulnerability approach constitutes in this regard.

State Parties should '[t]ake resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "noncitizen" population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large'

(CERD General Recommendation No. 30)

Recommendation 5

One of the main purposes of using the vulnerability concept is to argue for special consideration of the situation of those considered as vulnerable. There are, however, other tools that are more adequate to reach this aim in a way that also complies with a rights-based approach to non-discrimination and which are recommended to use instead. The commitment to proactive measures such as positive action or temporary special measures is an important element of modern non-discrimination and equality law. Proactive measures aim at systematic change and address institutional and structural forms of inequality – '[r]ather than determining a breach of the law, the focus is on identifying systemic discrimination and

creating institutional mechanisms for its elimination'.^{ix} Yet, it is also crucial that such proactive measures comply with criteria, which are laid down in international human rights

'Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.'
(Art. 4.1 CEDAW)

documents or EU law, in order not to be considered as unlawful discrimination.^x

Recommendation 6

The right to equality and non-discrimination is a central and foundational principle of international human rights law. Yet, there is often limited understanding of equality and non-discrimination law, concepts and principles among legal practitioners, policy makers, academics, political activists and other stakeholders. Thus, it is recommended to raise awareness and increase knowledge in this context. This could also include enhanced exchange between social science experts and the judiciary.

ⁱ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 1.

ⁱⁱ UNFPA, 'The Human Rights-Based Approach' (24 November 2014) <<https://www.unfpa.org/human-rights-based-approach>> accessed 10 October 2023.

ⁱⁱⁱ WHO and OHCHR, 'A Human Rights-Approach to Health' (undated) <https://www.ohchr.org/sites/default/files/Documents/Issues/ESCR/Health/HRBA_HealthInformationSheet.pdf> accessed 10 October 2023.

^{iv} See, for example, 'International Convention on the Elimination of All Forms of Racial Discrimination'; 'Convention on the Rights of Persons with Disabilities'; 'Convention on the Elimination of All Forms of Discrimination against Women'; 'International Covenant on Economic, Social and Cultural Rights'; 'International Covenant on Civil and Political Rights'; Committee on the Rights of Persons with Disabilities, 'General Comment No. 6 (2018) on Equality and Non-Discrimination, CRPD/C/GC/6'; Committee on the Elimination of Racial Discrimination, 'General Recommendation XXX on Discrimination against Non-Citizens'; Committee on Economic, Social and Cultural Rights, 'General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)'; Human Rights Committee, 'General Comment No. 18: Non-Discrimination'; Committee on the Rights of Persons with Disabilities.

^v See also relevant EU non-discrimination directives.

^{vi} The 'International Convention on the Elimination of All Forms of Racial Discrimination' (4 January 1969) was the first international human rights treaty that included a definition of discrimination in Art. 1, which comprised direct as well as indirect forms of racial discrimination. Subsequently, this definition was also included – with corresponding adjustments – in other specialized international human rights treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) or the Convention on the Rights of Persons with Disabilities (CRPD) and/or the definition was endorsed by other treaty bodies such as the Human Rights Committee or the Committee on Economic Social and Cultural Rights (ESCR Committee).

^{vii} According to Art. 2 of the Convention on the Rights of Persons with Disabilities "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'

^{viii} See, for example, Committee on Economic, Social and Cultural Rights (n 4); Human Rights Committee (n 4).

^{ix} *ibid* 3.

^x See, for example, CEDAW Committee, 'General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures' (2004).