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TAILORING STATE OBLIGATIONS REGARDING 'THE RIGHT TO EQUAL TREATMENT' IN TIMES OF FLUCTUATING SUPER-DIVERSITY: A TURN TO RELATIVE VULNERABILITY?

Against the background of ever increasing and fluctuating population diversity in ever more countries due to intense and multiple migration patterns, the question arises of how governments should address the resulting fluid cultural diversity in their societies, also in the light of the incessant rise of right-wing movements. The 'new' reality of a mobile world implies that while some migrants still opt to settle in the country where they migrated to, others choose to move on to another country, or move back to their country of origin. Consequently, the population diversity in countries is 'fluctuating' at a rate that is difficult for governments to predict. In other words, the reality of the 'mobile world' adds to the complexity of the cultural diversity that governments are confronted with, and thus increases the challenges that governments are faced with in this respect.

This paper aims to explore the potential of 'vulnerability' as a relevant marker for the development of government policies in relation to fluctuating super-diversity. To this end, the paper starts by sketching the frame of overarching governmental goals and commitments, as well as the type of policy questions governments are faced with in relation to population diversity in general. In the latter respect governments juggle their overarching concern with 'integration', and the ideal of an 'integrated society', with their commitment to respect fundamental rights in all their policies and practices. The concerns of population groups with 'different' ethnic identities and the corresponding governmental policies can be roughly grouped into three categories: 1) an effective protection against invidious discrimination grounded on the different ethnic identity,

2) preventing the separate identity from amounting to a hurdle for effective access to rights, institutions, and participation more generally through measures of reasonable accommodation, and 3) the active protection and promotion of the separate ethnic identities concerned.

Secondly, the paper provides a close analysis of the first two categories of measures and policies in relation to population groups with different ethnic identities, namely the prohibition of invidious discrimination and duties of reasonable accommodation, and considers where in the related human rights analysis 'vulnerability' could play a role. These so-called 'attachment points' are identified with special reference to (the supervisory practice of) the European Convention on Human Rights. This may concern a regional instrument (the Council of Europe), and the extensive and solid jurisprudence of the European Court of Human Rights is generally considered a source of inspiration for other human rights courts.

Thirdly, the paper conjectures on the way in which 'vulnerability' could be used to 1) evaluate and strengthen the effectiveness of the protection against discrimination, and 2) delineate the appropriate ambit of duties of reasonable accommodation in the current complex diversity settings. Regarding the former, special attention goes to so-called intersectional discrimination (and its relation to super-diversity). When determining the fair scope of duties of reasonable accommodation, various relevant considerations are identified that are relevant when balancing reasonability (from the perspective of those who need to accommodate) and vulnerability (of those that seek the accommodation). While regard is had to the extent to which vulnerability already features in the supervisory practice of ECtHR, the emphasis in this paper is especially on how 'vulnerability' could be used in a way that allows an appropriate response to be made to the multicultural question in a mobile world, and its fluctuating super-diversity.

I. Framing the 'multicultural question': governmental concerns and commitments versus the 'needs' of population groups with a separate 'cultural' identity

Governments always need to juggle various concerns. When confronted with cultural diversity, population groups with different, distinctive cultural identities, governments in liberal democracies are committed to respect fundamental rights, while pursuing an integrated society, a society in which the distinctive population groups are integrated.[1] When taking a closer look at 'integration',

[1] See also E. Anderson, *The Imperative of Integration*, Princeton 2010; T. Hadden, *Integration and Separation: Legal and Policy Choices in implementing Minority Rights,* [in] *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, eds N. Ghanea & A. Xanthaki, Leiden 2004, p. 200.

and the related academic literature, it becomes clear that there is considerable overlap between these two respective concerns. Traditionally, four integration dimensions have been distinguished, namely structural, social, cultural and identificational integration.[2] Structural integration is particularly relevant here since it revolves around questions of rights and status, and is thus primarily concerned with guaranteeing proper access (inter alia to education, employment, social services) and, more generally, participation in society. The prohibition of discrimination tends to be considered essential in this respect, and the effective protection against discrimination is more generally considered a linchpin for successful integration.[3] The literature on segmented integration[4] notwithstanding, structural integration and the effective protection of a range of rights are often considered a pre-condition for the other dimensions of integration. It is indeed through effective access to education and employment that one gets opportunities to interact and establish relationships with people (social integration), and thus also to share (to some extent) the dominant culture and values (cultural integration), ultimately leading to a sense of belonging and identification with the society at large.[5] There are ongoing controversies with regard to the multicultural question. The central question, which is the source of considerable discord, is whether full, successful integration is possible when people maintain a separate cultural identity, or whether all distinctiveness should be discarded in favour of assimilation.[6]

While the focus in this paper is predominantly on the human rights paradigm, and the demands it imposes on governments in relation to population groups with a distinctive cultural identity living on its territory, integration perspectives can and do find their way into human rights analysis, more particularly in the assessment of limitations to human rights and the related balancing of interests.

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[2] These dimensions of integration are often used in the sociological analysis of integration processes. See also the Migration Integration Policy Index discussed in *Legal Frameworks for the Integration of Third-Country Nationals*, eds J. Niessen & T. Huddlestone, Leiden 2009.

[3] Inter alia T. Hadden, *Integration and Separation: Legal and Political Choices in Implementing Minority Rights*, [in] *Minorities, Peoples and Self –Determination: Essays in Honour of Patrick Thornberry,* eds N. Ghanea & A. Xanthaki, Leiden 2004, pp. 173–192; and the work done on the construction of the Migrant Integration Policy Index (J. Niessen, *Construction of the Migrant Integration Policy Index*, [in] *Legal Frameworks for the Integration of Third Country Nationals*, eds J. Niessen & T. Huddleston, Leiden 2009, pp. 2–3. See also J. Friedrichs & W. Jagodzinsky, *Theorien Socialer Integration*, "Kolner Zeitschrift fur Sociologie und Socialpsychologie" 1999, no. 33, p. 17.

[4] A. Portes & M. Zhou, *The New Second Generation Segmented Assimilation and its Variants*, "Annals of the American Academy of Political and Social Sciences" 1993, no. 530, p. 74 and next.

[5] See also Hadden 2004.

[6] Inter alia *Towards Assimilation and Citizenship: Immigrants in Liberal Nation-States*, eds C. Joppke & E. Morawska, Basingstoke 2003. See also the discussion of various responses that have been devised over time to address population diversity in society, inter alia in *Constitutional Design for Divided Societies: Integration or Accommodation*, ed. S. Choudry, Oxford 2008.

Human rights, including the prohibition of discrimination, may be called 'fundamental' (rights), but they are seldom absolute. In other words, there is room for states to limit the enjoyment of these fundamental rights. The special status of 'fundamental rights' does imply that such limitations need to respect particular requirements in order to be considered legitimate. The requirements for legitimate limitations can be found in the corresponding limitation clauses of fundamental rights. While there are differences between these limitation clauses, there tend to be requirements pertaining to 'legitimate aims' and a proportionality (between the limitation and the legitimate aim invoked).[7] The proportionality requirement plays a particularly key role in the jurisprudence of human rights courts, and certainly the ECtHR, when evaluating limitations to fundamental rights.[8] Assessing the proportionality requirement implies a balancing of the respective interests, namely the interest on the side of the individual that his/her human rights are respected, and more general public interests on the side of the government.[9]

Notwithstanding the emergence of particular lines of jurisprudence and relevant criteria and parameters to determine the margin of appreciation and assess the proportionality principle, the ECtHR emphasizes that the actual outcome in a case is always determined by all the relevant circumstances.[10] The Court has furthermore developed a steady jurisprudence, following which it grants states a margin of appreciation in the assessment of the proportionality principle. The actual extent of this margin plays an important role in determining the level of scrutiny adopted by the Court, and thus the actual level of protection that is ensuing: a broad margin for states goes hand in hand with a low level of scrutiny and vice versa.[11]

The balancing of interests in terms of the proportionality principle implies an interpretation of this principle. This interpretation is not static but rather evolutive, in that it develops in line with changes in society, in order to remain relevant

[7] This is particularly well developed in the case law of the European Court of Human Rights and of the Human Rights Committee which monitors compliance with the International Covenant on Civil and Political Rights: inter alia N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge 2002.

[8] See also G. Huscroft, B.W. Miller & G. Webber, *Introduction*, [in] *Proportionality and the Rule of Law: Rights, Justifications, Reasoning*, eds G. Huscroft et al., Cambridge 2014, p 1–3, 11.

[9] See also R. Alexy, *A Theory of Constitutional Rights*, Oxford 2001, p. 397; J. Rivers, *Proportionality and Variable Intensity of Review*, "Cambridge Law Journal" 2006, no. 65, pp. 191–201.

[10] See also ECtHR, *Gafgen v. Germany*, no. 22978/05, 1 June 2014, para 88. See also A. Mowbray, *A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights*, "Human Rights Law Review" 2010, no. 10(2), pp. 302–304.

[11] There is an abundance of literature on the margin of appreciation doctrine developed by the ECtHR, see inter alia Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, Antwerp 2002; J.A. Brauch, *The margin of appreciation and the jurisprudence of the European Court of Human Rights: threat to the rule of law*, "Columbia Journal of European Law" 2005, no. 11, p. 113 and next.

and effective.[12] Interpretation is more generally essential for the determination of the actual levels of protection emanating from fundamental rights. Indeed, such rights are often framed in very general language, and the actual scope of application of fundamental rights only becomes visible through the interpretation of these rights in the case law. Hence, the cases before human rights courts often concern questions about what exactly is protected, and to what extent.

The interplay of the margin of appreciation doctrine, the evolutive interpretation principle, and the need to take into account all relevant circumstances, arguably entails some indeterminacy. The related flexibility has the advantage that it can give ample scope to the living instrument doctrine, and thus also allows taking into account new realities like the 'mobile world' and related shifts in demographics, and other developments that may play a role in determining whether a particular 'accommodation for minorities' is still reasonable. The downside of indeterminacy is that it does not sit well with the requirement of legal certainty and predictability, held so dear in liberal democracies under the rule of law.[13]

In other words, liberal democracies are committed to having fundamental rights guide their policies and practices, also in relation to questions pertaining to cultural diversity and integration. The ECtHR has developed a rich jurisprudence which certainly provides such guidance to states. At the same time, this jurisprudence leaves a certain level of indeterminacy. Particularly in relation to cultural diversity and the protection of (persons with) separate cultural identities, the ECtHR's jurisprudence has often erred on the side of indeterminacy, leaving states a considerable margin of appreciation.[14] This paper sets out to investigate whether 'vulnerability' could be used a relevant parameter, thus providing more guidance and improving legal certainty for both states/governments and persons belonging to groups with a distinctive cultural identity.

In order to delineate further the scope of this paper, a distinction can be made between the three categories of measures that can be adopted in relation to three types of human rights threats encountered by persons belonging to groups with different ethnic identities. While the proportionality principle plays a central role in the determination of the ambit of state obligations in respect of all three types of measures, the way in which and the extent to which cultural diversity and separate cultural identities matter differs significantly between the categories.

[12] The European Court of Human Rights has developed its famous 'living instrument' interpretation principle: G. Letsas, *The ECHR as a living instrument: its meaning and legitimacy*, [in] *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, eds A. Føllesdal, B. Peters & G. Ulfstein, Cambridge 2013, p. 106 and next.

[13] On the rule of law, see inter alia T. Bingham, *On the Rule of Law*, London 2011.

[14] See inter alia K. Henrard, *A patchwork of 'successful' and 'missed' synergies in the jurisprudence of the ECHR*, [in] *Synergies in Minority Protection*, eds K. Henrard & R. Dunbar, Cambridge 2008, p. 314 and next.

The analysis below will reveal that 'vulnerability' is more likely to be used in relation to some of these categories of human rights measures than others. Arguably one can be vulnerable in a range of respects,[15] and some vulnerabilities seem to generate a higher level of acceptance and 'currency' than others.

The first category of measures aims at *protecting* groups with different ethnic identities *against invidious discrimination* because of their different identity. In other words, persons belonging to these distinctive cultural groups are protected against disadvantageous treatment grounded in their separate cultural identity, without a reasonable or objective justification. This first category sets out to shield the persons concerned from negative treatment that is causally related to their separate cultural identity.

The second category of measures goes one step further by adopting special measures, attuned to the distinctive cultural identity of groups, in order to prevent that separate identity from blocking their effective access to rights and institutions, and thus hamper their (socio-economic) participation. These special measures do not promote the separate identity because it is considered valuable and important as such, they rather result from *duties of reasonable accommodation.* The reasonable accommodations concerned are meant to address barriers to participation confronting particular (groups of) persons due to the interaction between the physical or social environment on the one hand and the inherent personal characteristics of the persons concerned on the other. Duties of reasonable accommodation are explicitly recognized in international law in relation to disability, but can also be more generally devised for persons with a distinctive language, religion, or cultural identity.[16]

Finally, the third category of measures concerns the *active promotion of the separate cultural identities*, because of the inherent value of cultural diversity. Especially in relation to general fundamental rights, there remains considerable controversy and thus uncertainty about the extent to which such positive state obligations would exist.

This article, and its exploration of the potential role of 'vulnerability' as relevant parameter for the assessment of states' human rights obligations in relation to cultural diversity, particularly in the current 'mobile world', focuses on the

[15] See also A.H.E. Morawa, *Vulnerability as a Concept of International Human Rights Law*, "Journal of International Relations and Development" 2003, no. 6(2), p. 143.

[16] M. Jézéquel, *The Reasonable Accommodation Requirement: Potential and Limits*, [in] *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society,* ed. Council of Europe, Strasbourg 2010, pp. 4–27. See also G. Bouchard & C. Taylor, *Building the Future. A Time for Reconciliation* (abridged report), Quebec 2008, p. 68, where it is emphasised that accommodations are, above all, intended to protect minorities against shortcomings in the laws of the majority, not the opposite. The related forms of different treatment do not amount to granting a privilege, but are meant to engage in a reasonable adaptation to counteract the rigidity of certain rules or their uniform application, regardless of the specific traits of individuals.

first two categories of measures, namely the prohibition of invidious discrimination and the duties of reasonable accommodation.

II. Where in human rights analysis could vulnerability be used as a relevant factor/variable?

Prior to investigating where in the human rights analysis of the prohibition of invidious discrimination and duties of reasonable accommodation (relative) 'vulnerability' could have a place as a relevant marker, some considerations are required concerning the relevance of 'vulnerability' in human rights analysis.

II.A. Vulnerability – why?

Groundbreaking work on 'vulnerability' has been produced in philosophical thinking about the human condition and related thoughts about the 'ethical foundations for law and politics'.[17] Martha Fineman[18] has done important pioneering work in this respect, in which she identified vulnerability as universal because it is central to the human condition. She emphasized that vulnerability could be employed as a heuristic device, more particularly to expose the constructed nature of institutions and ingrained biases towards the dominant norm. Through the critical perspectives that vulnerability enables one to adopt concerning existing institutions and law, vulnerability can act as a tool facilitating substantive equality, leading to equal opportunity and access. Fineman also warns against the adoption of negative associations of dependency and lack of autonomy, and highlights the rather constructive role of vulnerability as indicating the more robust positive obligation of states towards transformation and substantive equality.

Although Fineman's account of vulnerability may explicitly set out to move away from a focus on particular groups and identities, emphasizing the universal nature of vulnerability, she does nevertheless acknowledge that vulnerability is at the same time 'particular', and that persons may be vulnerable to different

[17] The concept 'vulnerability' has also played a central role in discussions on research ethics (inter alia C.H. Coleman, *Vulnerability as a Regulatory Category in Human Subject Research*, "Journal of Law, Medicine and Ethics" 2009, no. 37(1), p. 12–18) and bioethics (inter alia H. Ten Have, *Respect for Human Vulnerability: The Emergence of a New Principle in Bioethics*, "Bioethnical Enquiry" 2015, no. 12(3), pp. 395–408.

[18] M.A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, "Yale Journal of Law and Feminism" 2008, no. 20, pp. 1–23; M.A. Fineman, *The Vulnerable Subject and the Responsive State*, "Research Paper" no. 10–30, Emory University School of Law Public Law & Legal Theory Research Paper Series 2010, no. 60, available at: https://ssrn.com/abstract=1694740.

degrees.[19] While she criticizes the focus of non-discrimination law on particular grounds, granting heightened protection (through higher levels of scrutiny) to some personal characteristics, she does admit that particular groups are especially vulnerable precisely because of bias in institutions and because they have suffered more discrimination.[20]

In the end she does seem to accept that there is also room in her account of vulnerability for the recognition that members of particular social and/or culturally determined groups may encounter clusters of disadvantage and thus are especially vulnerable.[21] Not surprisingly, this special vulnerability of particular groups of persons tends to be considered the reason that category-specific human rights (instruments) have been developed in addition to general human rights, the latter including not only children, women, persons with disabilities but also ethnic minorities and indigenous peoples. [22] Similarly, it has been noted that human rights courts, including the ECtHR, seem to merge the group-based approach with the universal approach advocated by Fineman.[23]

The focus adopted here on relative vulnerability (and then further narrowed down to particular ethnic groups) is also arguably in line with the way Fineman conceives of vulnerability as a heuristic device. Pointing to vulnerability analysis as a means for interrogating the institutional practices that produce identities and inequalities in the first place, seems to contain a hint at duties of reasonable accommodation. She returns to this type of reasoning several times in her work, namely when she points out that a vulnerability analysis should be used by the state to ensure that a vulnerability analysis enables and obliges the state to ensure that institutions and structures within its control do not inappropriately benefit or disadvantage certain members of society,[24] and to address the distor-

[19] See L. Peroni & A. Timmer, *Vulnerable groups: the promise of an emerging concept in European Human Rights Convention law*, "ICON- International Journal of Constitutional Law" 2013, no. 11(4), p. 1058.

[20] M.A. Fineman, Equality, *Autonomy and the Vulnerable Subject in Law and Politics*, [in] *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, eds M.A. Fineman & A. Grear, London 2013, p. 16.

[21] Fineman 2013, p. 21.

[22] See also E. Reichert, *Understanding Human Rights: An exercise book*, Thousands Oaks 2006, pp. 77–78. The groups referred to here would encompass two categories of vulnerability distinguished by Sijniensky, namely intrinsically vulnerable groups (e.g. children) and 'inequality related groups' related to structural discrimination (having historical, social and/or cultural roots): R.I. Sijniensky, *From the Non-Discrimination Clause to the Concept of Vulnerability in International Human Rights Law: Advancing on the Need for Special Protection of Certain Groups and Individuals*, [in] *The Realisation of Human Rights: When Theory Meets Practice*, ed. Y. Haeck, Cambridge 2014, pp. 265–267. Of course, there is an overlap between these two categories, e.g. in relation to persons with a disability, particularly a mental disability.

[23] See also Peroni & Timmer 2013, p. 1061.

[24] Fineman 2013, p. 14 and 20; see also Fineman's research paper *supra* note 18, p. 16 where she

tions that have arisen as a result of privileging some in society at the expense of others.[25]

II.B. Vulnerability – where could it be used (in human rights analysis)?

This paragraph sets out to identify at what junctures in human rights analysis vulnerability could potentially be used as a relevant marker, with specific regard to the prohibition of invidious discrimination on the one hand, and duties of reasonable accommodation on the other. First, the relevant factors and doctrines developed in the jurisprudence of the ECtHR will be identified and discussed. Subsequently, the ECtHR jurisprudence regarding persons belonging to groups with a different ethnic, religious, linguistic identity will be analysed in this light.

II.B.1. The Jurisprudence of the ECHR and ECtHR

The ECtHR case law regarding the prohibition of discrimination has clarified that states do not only have negative state obligations in relation to the prohibition of invidious discrimination but also positive state obligations. Obviously, state officials should not engage in invidious discrimination. In addition, the Court has identified a range of positive obligations for state authorities, including obligations to address invidious discrimination by private parties, and to investigate alleged instances of discrimination (both by private and public parties).[26] Members of groups with a distinct ethnic identity would benefit from effective protection against invidious discrimination on the basis of this separate ethnic identity, whether it originates from public or private parties. While it would be beyond the scope of this article to engage in a discussion on the parameters of 'effectiveness', in relation to the protection against discrimination effectiveness is often linked to the level of scrutiny adopted by supervisory bodies. Indeed, effective protection against discrimination presupposes that a sufficient level of scrutiny is adopted in relation to complaints about discriminatory treatment.[27]

In this respect it needs to be recalled that according to the steady jurisprudence of the ECtHR, (invidious) discrimination concerns disadvantageous treatment without reasonable and objective justification. Differential treatment could be acceptable (justified) as long as it has a legitimate aim and is proportionate to that legitimate aim. The level of scrutiny adopted plays a role particularly in relation to the proportionality requirement, and is inversely related to the margin of

refers to 'systemic and historical inequalities lurking in the status quo.

[25] Fineman 2013, p. 26.

[26] See inter alia ECtHR, *Nachova and Others v. Bulgaria*, Nos. 43577/98 and 43579/98, 6 July 2005, para 168; ECtHR, *Opuz v. Turkey*, no. 33401/02, 9 June 2009.

[27] See also R. O'Connell, *Cinderella comes to the Ball: Art. 14 and the right to non-discrimination*, "Legal Studies" 2009, no. 29(2), p. 224.

appreciation the Court leaves to states in the matter.[28] Put differently, when the ECtHR chooses to scrutinize strictly, it leaves states a narrow margin of appreciation, while granting a wide margin of appreciation implies that the Court opts for light scrutiny.

Over the years, the Court has demanded 'very weighty reasons' in order to justify differentiations on particular grounds, because such differentiations are rarely considered acceptable, and are indeed suspect.[29] The Court has not yet devised a coherent theory on criteria to identify these suspect grounds, but grounds for which the Court tends to demand 'very weighty reasons' include grounds such as gender, race/ethnicity, and sexual orientation.[30] Suspect grounds thus tend to refer to grounds that are (de facto) immutable and that go hand-in-hand with deep-seated prejudice, stereotypes and histories of discrimination.

This enhanced scrutiny of state obligations would apply to negative and positive state obligations alike. For suspect grounds, the Court would not easily accept a justification put forward by state authorities for differential treatment, and at the same time it would be demanding regarding the level of action undertaken by state authorities in relation to their positive obligations.

The traditional focus on the suspect nature of a particular ground of differentiation may allow for evolutive interpretation, in the sense that the grounds that are considered suspect expand, in response to changes in society. Nevertheless, the focus on suspect grounds to determine the level of scrutiny for the prohibition of invidious discrimination might not properly capture the fluidity and flexibility in demographics and the related emergence of prejudices and stereotypes. Furthermore, this focus on a particular (suspect) ground of differentiation does not do justice to the heightened levels of diversity that characterize current societies. Nowadays societies are increasingly characterized as 'superdiverse' and 'mobile', which gives ever more rise to instances of *intersectional discrimination*. Intersectionality refers to the intersection of several group identities,

[28] The margin of appreciation did not feature in the original convention and was a judicial construct (until it was explicitly included in the convention framework in 2013, with protocol 15). Nevertheless, it refers to judicial deference, the Court leaving particular matters to the discretion of the contracting parties. See also A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford 2012, pp. 3, 61–64.

[29] The idea that particular grounds of differentiation are inherently suspect and call for a heightened level of scrutiny derives from the rich jurisprudence of the US Supreme Court. This terminology is not used as such by the ECtHR or the Court of Justice of the EU, but one does find the underlying idea in the stricter or heightened scrutiny that the Court exercises in relation to particular grounds.

[30] See for an overview of lead cases in this regard the chapter on Discrimination Grounds in D. Schiek, L. Waddington & M. Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford 2007; in addition to the ECtHR case law, also CJEU case law and some national case law is included. Admittedly, the list of suspect grounds is not set in stone but rather dynamic or evolutive: so far the list of suspect grounds has only expanded, now also including disability and HIV status: ECtHR, *Kiyutin v. Russia*, no. 2700/10, 10 March 2011, para 63–64.

exposes differences within groups and allows consideration of especially vulnerable groups within groups.[31] In so far as intersectionality highlights the multiplicity of relevant markers that are at play in a given instance, and points to the existence of numerous subgroups within groups, it can be related[32] to the concept 'super-diversity' coined by Vertovec in relation to the diversification of migration, and within migrant groups, along various axes (some of which are related to ethnicity but others, such as migration channel and legal status, are not).[33] However, intersectionality focuses more on the related social inequalities, and has fed into the concept of intersectional discrimination. Crenshaw talks in this respect about 'intersecting patterns of kinds of discrimination'[34] Intersectional discrimination can be understood as referring to discrimination based on several grounds at the same time, with these grounds of discrimination interacting and producing very specific and complex experiences of discrimination.[35] Intersectional discrimination tends to be related to persons/groups experiencing heightened disadvantage, subordination, marginalization, and indeed also vulnerability.[36] As will be argued more fully below, vulnerability, and more particularly relative vulnerability, could play a role in relation to the level of scrutiny

[31] K. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, "Stanford Law Review" 1991, no. 43, p. 1242.

[32] See inter alia R. Humphris, *IRIS key concepts roundtable series: Intersectionality and superdiversity: what's the difference?*, Report of 30 April 2015, *available at:* https://www.researchgate.net/publication/281346702_Intersectionality_and_superdiversity_What's_the_difference. See also K. Arnaut & M. Spotti, *Superdiversity Discourse*, Working Papers in Urban Language and Literacies 2014, Paper no. 122. For an in-depth discussion of how 'intersectionality' has moved across time, disciplines, issues and geographic and national boundaries, see D.W. Carbado, K.W. Crenshaw, V.M. Mays & B. Tomlinson, *Intersectionality: mapping the movements of a theory*, "Du Bois Review" 2013, no. 10(2), p. 303 and next.

[33] S. Vertovec, *Super-diversity and its implications*, "Ethnic and Racial Studies" 2007, no. 29(6), p. 1024 and next. Vertovec and Meissner document the wide variety of ways in which the concept of superdiversity is now used by scholars across disciplines, several of which stray from the original intended meaning: S. Vertovec & F. Meissner, *Comparing Super-diversity*, "Ethnic and Racial Studies" 2015, no. 38(4), pp. 541–555.

[34] *Supra* note 28, p. 1243.

[35] T. Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalised to the Fore*, Turku 2002, p. 9. In his study, Timo Makkonen distinguishes (at p. 10) different types of intersectional discrimination namely multiple discrimination, compound discrimination and intersectional discrimination stricto sensu. Multiple discrimination would refer to 'the accumulation of distinct discrimination experiences'. Compound discrimination would refer to discrimination on the basis of two or more grounds, adding to one another. Intersectional discrimination (sensu stricto) would capture 'a situation involving discrimination which is based on several grounds operating and interacting with each other at the same time, and which produces very specific types of discrimination'. In this paper intersectional discrimination is used in reference to compound discrimination and intersectional discrimination (sensu strictu).

[36] Inter alia Makkonen 2002, pp. 23–28; K. Crenshaw, *Mapping the margins: Intersectionality, Identity Politics and Violence against Women of Color*, Stanford Law Review 1991, no. 43(6), pp. 1247–1250.

adopted for the prohibition of discrimination, also taking into account and doing justice to experiences of intersectional discrimination.

Duties of reasonable accommodation are clearly geared towards substantive equality more particularly related to full participation in society, with its underlying ratio said to be equal opportunities.[37] Indeed, reasonable accommodation measures are intended to even out barriers to such full participation that are due to an interaction between an individual's inherent characteristics and the physical and social environment.[38] Duties of reasonable accommodation thus seem to be firmly embedded in the framework of equality the equality frame. However, such duties can also be conceived in terms of positive state obligations aimed at the effective enjoyment of particular fundamental rights. Good examples of the latter would include rights pertaining to education, employment, healthcare and social services, with duties of reasonable accommodation aiming at effective and equal access to these rights.[39] Put differently, duties of reasonable accommodation could also be grounded in particular substantive rights.

In so far as duties of reasonable accommodation would be put in the equality frame, here questions of intersectionality could also arise, thus opening the door for arguments about relative vulnerability as relevant for the determination of the level of scrutiny for the proportionality requirement. In so far as duties of reasonable accommodation are based on the interpretation of substantive rights, and more particularly positive state obligations under these articles, questions of vulnerability could similarly influence the fair balance test under the proportionality requirement. The increased vulnerability of particular persons and/or groups would then go hand in hand with a higher level of positive state obligations.

The jurisprudence of the ECtHR has only recently recognized duties of reasonable accommodation as a dimension of the prohibition of discrimination, and so far only in relation to disability.[40] This explicit recognition was preceded by a de

[37] See inter alia M. Jezequel, *The Reasonable Accommodation Requirement: Potential and Limits*, [in] *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society,* ed. Council of Europe, Strasbourg 2010, pp. 4–27. See also J. Jackson-Preece, *Emerging Standards of Reasonable Accommodation towards Minorities in Europe?*, [in] *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society*, ed. Council of Europe, Strasbourg 2010, pp. 111 and 123; E. Bribiosa, J. Ringelheim & I. Rorive, *Reasonable Accommodation for Religious Minorities: A Promising Concept for European Anti-Discrimination Law*, Maastricht Journal 2010, no. 17, pp. 147–148.

[38] P. Bosset & M.C. Foblets, *Accommodation Diversity in Quebec and Europe: Different Legal Concepts, Similar Results?*, [in] *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society*, ed. Council of Europe, Strasbourg 2010, p. 37.

[39] Inter alia M. Jézéquel, *The Reasonable Accommodation Requirement: Potential and Limits*, [in] *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society* ed. Council of Europe, Strasbourg 2010, pp. 24–27.

[40] ECtHR, *Guberina v. Croatia*, no. 23682/13, 22 March 2016, concerned the lack of accommodation of the special housing needs of a family with a disabled child and ECtHR, *Cam v. Turkey*, no. 51500/08, 23 February 2016, the denial of a place at a music academy of a disabled child due to lack of facilities.

facto identification of duties of reasonable accommodation, mainly in relation to persons with a disability.[41] While there have been several de facto instances of duties of reasonable accommodation in favour of persons of a particular religion, these are all realized in terms of the right to religious freedom under Article 9 ECHR, and not in terms of the prohibition of discrimination.[42] It remains to be seen to what extent the Court will be willing to extend its case law on duties of reasonable accommodation as a dimension of the prohibition of discrimination to grounds other than disability. The discussion below will reveal whether and to what extent the Court has actually engaged in 'vulnerability' reasoning in its analysis of the related state obligations (so far).

The preceding analysis has clarified that vulnerability could be taken into account by the ECtHR, and human rights courts more generally, in relation to the proportionality principle which is used to distinguish acceptable differential treatment from (prohibited instances of) invidious discrimination, and to demarcate the scope of positive state obligations to provide 'reasonable accommodation' for particular persons (members of particular groups). The relative vulnerability of the person concerned could be a relevant interest to be balanced in the proportionality test, in the sense that increased vulnerability would add weight on the side of the applicant (alleged victim), requiring stronger justifications by the government for disadvantageous treatment or pointing to the increased responsibilities (including positive obligations) of the public authorities. At a minimum, relative vulnerability could trigger a procedural requirement, in the sense that states need to be able to demonstrate that they have taken the particular vulnerability of a person into account.[43] Alternatively, the relative vulnerability of the application could be a relevant factor for the determination of the width of the margin of appreciation left to states, and thus also the level of scrutiny adopted by the Court. In other words, if an applicant were particularly vulnerable (increased vulnerability), the Court would be more demanding in its scrutiny of the justification put forward by the government for a disadvantageous treatment, and of the level of positive obligations adopted by the state.[44]

[41] For a more detailed discussion of earlier developments in relation to the grounds of disability and religion, see K. Henrard, *Duties of Reasonable Accommodation on grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (baby) steps forward and missed opportunities*, ICON – International Journal of Constitutional Law 2016, no. 14(4), p. 961 and next.

[42] Ibidem.

[43] See also Timmer 2013, p. 164 who describes this procedural proportionality requirement as the bottom line that has emerged in the Court's case law .

[44] Inter alia Peroni & Timmer 2013, pp. 1075–1076.

III. Vulnerability as relevant marker for the analysis of the prohibition of invidious discrimination and claims of reasonable accommodation in 'mobile' societies

This section starts with an overall account of the extent to which the ECtHR uses the language of vulnerability in its respective supervisory practice. Subsequently, the analysis turns to the use of vulnerability as a marker in relation to the assessment of the prohibition of invidious discrimination, and subsequently duties of reasonable accommodation. In relation to both categories of measures, the analysis starts with some general, more theoretical considerations, then considers the case law of the ECtHR

III.A. The use of the language of vulnerability in the supervisory practice of the ECtHR

A broader analysis of the ECtHR's case law has revealed that the ECtHR increasingly turns to the language of 'vulnerability' to include the concerns of marginalized people more fully in its analysis. [45] However, the Court has not yet provided a definition of vulnerability, let alone developed a theory of the way in which vulnerability is measured and is actually weighed in its analysis.

Throughout the Court's case law on vulnerability the Court links vulnerability to human dignity, and thus confirms the universal nature of vulnerability.[46] In this respect, it should also be highlighted that the Court does not only use vulnerability considerations in relation to socio-economic rights, but also regularly for civil and political rights, which are after all the core of the ECHR.[47] Finally, vulnerability tends to feature as cause, as one of the causes of human rights violations, or at least as the reason that exacerbates such violations.

Importantly, the Court's case law acknowledges that particular groups are especially vulnerable.[48] The groups recognized as such tend to concern examples of marginalized (socially excluded) and stigmatized subjects that tend to encounter invidious discrimination on account of their group membership. These factors are indeed reminiscent of relevant considerations for the determination

[45] Y. Al Tamimi, *The protection of vulnerable groups and individuals by the European Court of Human Rights*, Master Thesis at Utrecht University 2015; A. Timmer, *A Quiet Revolution: Vulnerability in the ECTHR*, [in] *Vulnerability: Reflections on a New Ethnical Foundation for Law and Politics*, eds M.A. Fineman & A. Grear, Ashgate 2013. The analysis conducted by Al Tamimi reveals that the number of cases of the ECtHR that contain the language of vulnerability has steadily increased from 12 in 2003 to 70 in 2013.

[46] Timmer 2013, p. 150, who refers to Grear, who describes vulnerability as the presuppositional core of human dignity, aligning human dignity with vulnerability.

[47] Timmer 2013, pp. 150–151.

[48] See also Peroni & Timmer 2013, p. 1062.

of suspect grounds of differentiation.[49] Groups that are regularly singled out as especially vulnerable include non-nationals, asylum seekers, people with mental disabilities, people living with HIV, and Roma.[50] However, the Court's haphazard identification of vulnerable groups (so far) has failed to include groups that are similarly vulnerable, such as other national minorities and religious minorities.[51] However, it should be highlighted that the Court also identifies some categories as inherently vulnerable, such as detainees and children, where vulnerability would go beyond the traditional suspect ground approach.[52]

In order for 'vulnerability' to become a factor that can properly be used in human rights analysis, and more particularly the evaluation of the proportionality requirement for the prohibition of invidious discrimination and duties of reasonable accommodation, more consistent and coherent criteria regarding the determination of vulnerability need to be developed. Furthermore, even when a group is considered vulnerable, this does not mean that it is equally vulnerable in all respects. Vulnerability could also be relative in this regard. This more nuanced understanding of vulnerability would be particularly apposite in relation to the current superdiverse and mobile society. In order to make vulnerability operational in the human rights analysis, supervisory bodies should furthermore consider a more principled manner to include vulnerability considerations in the proportionality analysis.

III.B. Effective protection against invidious discrimination in the 'mobile world' era and 'vulnerability'

III.B.1. Theoretical considerations

Effective protection against invidious discrimination is arguably a pre-condition for one's actual inclusion in society, participation in society and thus also to one's integration. As was already hinted at supra, where the various integration dimensions are discussed, structural integration, and the related access rights, provide important opportunities to have contacts and build relationships across population groups, thus having positive implications for social and cultural (and

[49] See also Sijniensky 2014, pp. 263, 266–267.

[50] Inter alia ECtHR, *D.H. and Others v. Czech Republic*, no. 57325/00, 13 November 2007; ECtHR, *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010; ECtHR, *Kiyutin v. Russia*, no. 2700/10, 10 March 2011; ECtHR, *MSS v. Belgium and Greece*, no. 30696/09, 21 January 2011.

[51] Inter alia L. Peroni, *Erasing X, W and Y': Erasing cultural differences*, [in] *Diversity and European Human Rights*, ed E. Brems, Cambridge 2013, p. 445 on Kurds and the use of the Kurdish language in official Turkish documents. Consider also the intervener's invocation of veiled women as a vulnerable minority in France (at para 97), which the Court failed to respond to in its own reasoning.

[52] Examples of case law include ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, 12 October 2006, para 51; ECtHR, *Salman v. Turkey*, no. 21986/93, 27 June 2000, para 99; ECtHR, *G. v. France*, no. 27244/09, 23 February 2012, para 77. See also Al Tamimi 2015, p. 11.

eventually also identificational) discrimination. A close link has indeed been postulated between (structural) discrimination, a lack of structural integration and vulnerability: 'the situation of structural discrimination … that causes vulnerability is usually reinforced by a situation of exclusion due to a lack of empowerment of the group, that is lack of access to positions of power, whether economic or representative, within a certain society'.[53]

Effective protection against invidious discrimination is relevant and important for both the concerns of governments in liberal democracies, namely their commitment to respect fundamental rights and their goal of an integrated society. The effectiveness of the prohibition of discrimination is often linked to the level of scrutiny adopted by (international) courts in this respect. Traditionally, the determination of the level of scrutiny in a particular case greatly depended on the grounds for the differentiation used. Notwithstanding the evolutive nature of the determination of grounds of differentiation that are suspect, reflecting changes in society, ethnicity is firmly recognized as a suspect ground in the jurisprudence of the ECtHR.[54] The mobility of population groups as such is not going to change that, certainly not in the sense that 'ethnicity' would become less suspect.

Nevertheless, there are at least two reasons why it merits investigating whether 'vulnerability' has the potential to develop into an important variable for the determination of the level of scrutiny for alleged instances of invidious discrimination. First of all, while the suspect nature of the grounds for differentiation may be the most important criteria for the level of scrutiny adopted by the Court in relation to discrimination cases, in a range of cases the Court has used other factors to further modify the level of scrutiny.[55] Heightened vulnerability (of persons belonging to a particular ethnic group) may develop into a variable that is systematically used by the Court in this respect. Such a use of vulnerability has particular importance in relation to differentiations based on religion[56]

[53] R.I. Sijniensky, *From the non-discrimination clause to the concept of vulnerability in international human rights law: Advancing the need for special protection of certain groups and individuals*, [in] *The Realisation of Human Rights: When Theory meets Practice: Studies in honour of Leo Zwaak*, eds Y. Haeck, B. McGonigle Leyh, C. Burbano Herrera & D. Contreras Garduno, Antwerp 2014, p. 267.

[54] The ECtHR's traditional reluctance to rule on racial discrimination entailed that initially only tentative indications were given of the suspect nature of the ground 'race', and it was only in the 2005 *Timishev v. Russia* judgment (13 December 2005) that the Court adopted a clear position. For a more detailed analysis, see K. Henrard, *A Patchwork in Successful and Missed Synergies in the Jurisprudence of the ECtHR*, [in] *Synergies in Minority Protection*, eds K. Henrard & R. Dunbar, Cambridge 2008, pp. 325–328.

[55] See inter alia in relation to regulations on parental leave: notwithstanding the long jurisprudence on the suspect nature of gender, the Court nevertheless granted states a broad margin of appreciation in regulations on parental leave because there would not be a European consensus on this particular matter: ECtHR, *Petrovic v. Austria*, no. 20458/92, 27 March 1989.

[56] The ECtHR de facto tends to scrutinize invidious discrimination on religious grounds religion strictly, but avoids as much as possible explicit recognitions of a religion's suspect status: see inter alia

and language, as these grounds are not (yet) recognized as suspect grounds by the Court. Secondly, in current 'mobile' societies and the related high degree of ever shifting population diversity, the focus on particular suspect grounds cannot capture the complex layers of disadvantage and stereotypes.[57]

Furthermore and relatedly, in such societies intersectional discrimination will become ever more prevalent. In relation to intersectional discrimination, it makes less sense to focus on one particular ground and its degree of suspectness. When different grounds intersect in a particular case, it is less obvious for courts to work with levels of suspectness of the differentiation. Hence, the relative vulnerability of an applicant in the particular context in which the contested differentiation occurs may be considered a (more) suitable variable for the level of scrutiny to be adopted. It is worth pointing out that intersectional discrimination has been intrinsically linked to the idea of 'compounded' or enhanced or heightened vulnerability. By way of example, it has been estimated that the convergence of discrimination on different grounds per se entails heightened vulnerability.[58] Hence, it merits reflecting on the potential of 'vulnerability' as a marker in the Court's analysis of the proportionality requirement, particularly for cases of intersectional discrimination concerning persons with a different ethnic identity.

III.B.2. ECtHR case law, the prohibition of (intersectional) discrimination and vulnerability

When considering the Court's case law on alleged discrimination against persons that are recognized by the Court as being vulnerable, the Court has in some cases identified this vulnerability as the reason for reducing the margin of appreciation of the state in the case concerned, and thus to scrutinize the differential treatment more strictly. This type of reasoning was very explicit in *Kiyutin v Russia,* which pertained to a person with HIV who was denied a residence permit because he was HIV positive, where the Court underscored:

> *if a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question*.[59]

ECtHR, *Savez Crkava and others v. Georgia and Russia*, no. 36378/02, 9 December 2010, para 88; ECtHR, *Religiongemeinschaft der Zeugen Jehovas v. Austria*, no. 40825/98, 31 July 2008, para 92. Admittedly, in an isolated case the Court has used the very weighty reasons language it requires for differentiations on suspect grounds, see ECtHR, *Vojnity v. Hungary*, no. 29617/07, 12 February 2013, para 36.

[57] See also the arguments above on some categories of persons being inherently vulnerable, such as children and detainees.

[58] Makkonen 2002, p. 58; Morawa 2003, p. 142.

[59] ECtHR, *Kiyutin v. Russia*, no. 2700/10, 10 March 2011, para 63.

However, the Court has not developed a steady line of jurisprudence that recognizes a direct causal connection between the degree of vulnerability on the one hand and the extent of the margin of appreciation on the other. Instead, the Court's case law regarding the prohibition of discrimination continues to focus on the suspect nature of the grounds involved.

Thus far, the Court has not explicitly engaged with intersectional (or multiple) discrimination, notwithstanding explicit references by interveners.[60] Nevertheless, the Court has acknowledged that persons that combine various characteristics could be considered as 'extremely vulnerable', 'doubly vulnerable' etc. Examples in the case law include cases concerning detainees that are disabled,[61] children that are detained in asylum centres[62] and a Roma who is mentally disabled and HIV positive.[63] Without there being clear criteria, let alone a consistent theory about the legal implications of (enhanced) vulnerability and how this vulnerability factor relates to the question whether a suspected ground of differentiation is in play, it needs to be noted that in some case the Court allows this kind of compounded vulnerability to trump state interests.[64] Unfortunately, the Court does not explicitly address the interplay of the range of relevant grounds that are applicable in a case, or what this interplay means in terms of relative vulnerability for the Court's balancing act (weighing of all relevant interests in the proportionality test).

Operationalizing 'vulnerability' as a factor in the determination of the margin of appreciation and/or the actual balancing exercise in discrimination cases would obviate the need for the Court to juggle intersecting grounds of differentiation, with potentially different degrees of suspectness. Put differently, intersectional discrimination cases could become more manageable for the Court if it found a way to identify the relevant 'vulnerability markers' and the impact these markers should have on determining the margin of appreciation, and thus also on the subsequent weighing exercise.

What does the preceding argumentation imply for the potential usefulness of vulnerability as relevant marker for the proportionality test in cases of alleged discrimination against persons with a different ethnic identity? It has already been highlighted that the Court has so far not been generous in the determination of vulnerable groups or persons on the basis of a specific cultural or ethnic

[60] Inter alia ECtHR, *S.A.S. v. France*, no. 43835/11, 1 July 2014, para 97: 'intersectional discrimination on grounds of religion and sex.

[61] Inter alia ECtHR, *Raffray Taddei v. France*, no. 36435/07, 21 December 2010.

[62] Inter alia ECtHR, *Mubilanzia Mayeka and Kaniki Matunga v. Belgium*, no. 13178/03, 12 October 2006.

[63] ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*, no. 47848/08, 14 July 2014, para 104.

[64] Timmer 2013, pp. 161–162.

identity, whereas these groups surely seem to qualify.[65] Roma may be the notable exception, but even in this case the Court does not always explicitly denote that a Roma claimant is vulnerable.[66]

Furthermore, the Court's case law does not always demonstrate whether vulnerability has an actual impact on the determination of the margin of appreciation, or on the actual balancing. To some extent this is due to the Court simply not making its reasoning explicit. One is then stuck with reading between the lines and drawing inferences from the way in which the Court is actually balancing the relevant interests. To some extent this problem is not unique to 'vulnerability' as potential marker, but is rather one more manifestation of the flawed way in which the Court employs the margin of appreciation doctrine. It has been noted several times that the Court may have identified factors that are relevant for the determination of the margin of appreciation, but it remains impossible to identify a consistent and coherent, and thus a predictable, practice.[67] In other words, and as will be further elaborated upon in the conclusion, for vulnerability to become a meaningful marker in the Court's jurisprudence, several steps need to be taken, some of which imply addressing more general flaws in the doctrines of the ECtHR.

III.C. Duties of reasonable accommodation in the 'mobile world' era and vulnerability

III.C.1. Theoretical considerations

As was clarified above, the focus of duties of reasonable accommodation is clearly on inclusion of the persons concerned, thus building on the achievements of the fight against invidious discrimination. Especially in the current 'mobile world' era, duties of reasonable accommodation deserve renewed attention, particularly in relation to 'the multicultural question', as they are more malleable and can more easily be tailored to the ever changing circumstances and fluctuating population diversity.

Whether duties of reasonable accommodation are grounded on the prohibition of discrimination or on substantive rights, proportionality considerations play a key role either way. Also here the notion of (relative) vulnerability can certainly be argued to be one of the relevant markers that could help identify

[65] See also Peroni & Timmer 2013, p. 1070.

[66] ECtHR, *Aksu v. Turkey*, no. 41029/04, 15 March 2012. See also Peroni & Timmer 2013, p. 1070.

[67] See inter alia S. Greer, *Balancing and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate*, "Cambridge Law Journal" 2004, no. 63(2), pp. 223–225; P. Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, "Human Rights Law Journal" 1998, no. 19(1), p. 1; J. Schokkenbroek, *The Basis, Nature and Application of the Margin of Appreciation Doctrine in the case law of the ECHR*, "Human Rights Law Journal" 1998, no. 19, p. 30 and next.

what is 'reasonable' in a particular situation/setting, in the sense that reasonability is determined also in light of the relative 'vulnerability' of the persons/group concerned.

When demarcating duties of reasonable accommodation in relation to groups with a different ethnic identity in the current 'mobile world' era, the ensuing fluctuating 'ethnic' demographics need to be taken into account in the (fair) balance. More particularly, vulnerability (of the person seeking accommodation) would need to be balanced with reasonability (from the perspective of the persons/institutions who need to make the accommodation). Especially when the accommodation is resource intensive, reasonability considerations would imply having regard to the overall numbers and territorial concentration of the groups for whose benefit the accommodation would work.[68] At first sight, when the numbers of the group concerned would markedly decrease, the level of accommodation that can reasonable be accepted from the public authorities would similarly decrease. However, this actually depends on the type of accommodation measure concerned. When the accommodation measure concerns, for example, the use of a particular language in communication with the authorities, the initial training of the staff etc. may be resource incentive, but the maintenance of such measures much less so. In other words, once a measure is set in place, it is easier to maintain, and it should only be dispensed with if there is a sharp and sustained decrease in numbers. Furthermore, mobility does not necessarily imply a sharp reduction in numbers: indeed, some may leave, but new ones may be arriving.

When the accommodation is not resource intensive, for example because it concerns flexible working hours or accepting particular religiously inspired garments, a mere reduction in numbers of the group availing themselves of the accommodations would not necessarily call for a reduction of these measures from a 'reasonability' perspective. The latter would be particularly unsuitable when the population at large has in the meantime grown used to this type of accommodation. Furthermore, from a 'vulnerability' perspective, the smaller the group becomes, the more vulnerable it is to pressures from the dominant society. Would such heightened vulnerability rather support the maintenance of the accommodation measure, especially in light of the pre-existing capacity, and adaptations that have become part of the norm? Clearly there is not one size fits all answer to the interplay of reasonability and vulnerability, but it merits including considerations underlying both concerns in the relevant decision-making processes.

[68] See in this respect also the formulation of particular minority specific rights that are resource intensive, such as language rights in communication with the public authorities or in topographical indications, see Articles 10 and 11 of the Framework Convention for the Protection of National Minorities.

III.C.2. The ECtHR, duties of reasonable accommodation and vulnerability

It has already been highlighted that the ECtHR has only recently incorporated explicit the language of 'duties of reasonable accommodation' into its jurisprudence, and only in relation to disability grounds. The fragmentary developments in the direction of the recognition of de facto duties of reasonable accommodation on other grounds mostly occur in terms of positive state obligations under substantive rights. However, the comments made above regarding the proportionality principle, and more particularly the margin of appreciation doctrine, also apply here.

Accommodations sought by ethnic (including religious) minorities are often controversial, particularly when perceived to touch/threaten matters pertaining to 'national identity'. The Court then tends to focus on factors that allow it to grant states a broad margin of appreciation, because the accommodations concern either general policy decisions, or 'church-state relations' about which little European consensus exists.[69] As a broad margin for states implies that the ECtHR adopts a very low level of scrutiny adopted, the Court actually does not develop assessment criteria and does not devise guidelines for the contracting states. The latter is clearly visible in relation to case law on Roma and their own way of life (in caravans), and in numerous cases concerning religious minorities.[70]

Morawa rightly points to the seminal *Chapman* judgment[71] as providing a nice theoretical basis for state duties of reasonable accommodation in relation to groups with different ethnic identities.[72] *Chapman* concerns a complaint from Roma who want to live on their own plot of land, in caravans, but are prohibited from doing so due to zoning regulations aimed at the protection of the environment. To some extent this judgment seems to concern positive promotion of the separate ethnic identity concerned, more particularly where the Court identifies a positive obligation on states to facilitate the gypsy way of life (par. 96). Nevertheless, ultimately this case concerns duties of reasonable accommodation since it is all about hurdles to housing (accommodation) due to the interaction between a characteristic of one's identity (a way of life involving caravans) and the

[69] See infra on the *Chapman case* which is one in a string of cases pertaining to Roma's own way of life (in caravans) that conflict with the UK's general zoning regulation, and the succinct overview of the Court's case law pertaining to claims to accommodate on grounds of religion.

[70] For a more detailed discussion with ample references to case law, see K. Henrard, *A critical appraisal of the margin of appreciation left to states pertaining to 'church-state relations' under the jurisprudence of the ECtHR*, [in] *A Test of Faith? Religious Diversity and Accommodation in the European Workplace,* eds M.C. Foblets et al., Ashgate 2012, pp. 59–86; K. Henrard, *A critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, in particular about rights to a traditional way of life and to a healthy environment: A Call for an Alternative Model of International Supervision*, "Yearbook on Polar Law" 2012, pp. 365–413.

[71] ECtHR, *Chapman v. UK*, no. 27238/95, 18 January 2001.

[72] Morawa 2003, pp. 146–147.

general (zoning) regulations of the state. In this respect, the Court made a (now famous statement) that 'the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions on particular cases' (par. 96).

Strikingly, the Court establishes a causal connection between the vulnerable position of a group, the Roma, and the obligation of the public authorities to take that into account in their laws and practice. In other words, the Court seems to consider 'vulnerability' a relevant factor in the determination of the positive obligations of the public authorities in relation to the vulnerable group concerned. In subsequent case law on Roma (also when not concerning caravans), the Court has regularly repeated the *Chapman* theoretical principle about the need to take into account Roma's special needs when making and applying laws, but has, so far, not identified any concrete obligations for states to actually amend a particular (existing) legislative framework.

In the *Chapman* case, the very promising theoretical principle that the Court announced was completely diluted by the operation of the margin of appreciation doctrine. Indeed, the Court focuses on the fact that zoning laws concern general policy decisions, a factor that leads to the grant of a (very) broad margin, while disregarding other factors that point to a narrow margin, such as the extent to which this way of life goes to the very core of the Roma identity of the applicant(s).[73]

Admittedly, in the more recent 'caravan' case of *Winterstein v France*, pertaining to the traveller community in France, the Court actually did reduce the margin of appreciation of France in relation to the expulsion order it has issued, because the rights concerned are crucial for the identity of the persons concerned. The Court further highlights that the national authorities, when balancing the rights of persons belonging to a minority with public interests, need to properly weigh the group dimension of the minority, and the several years of peaceful residence. The illegality of the residence should not be decisive.[74] Hence, the Court's reasoning in *Winterstein* clearly provides a heightened protection against evictions for Roma that are living in caravans that are not placed in accordance with the legal regulations. The Court furthermore explicitly highlights the applicants' vulnerability and highlights that this was not taken into account by the authorities in relation to the eviction procedure (par. 161). Nevertheless, there is no hint at the extent to which States should contemplate developing the legislative framework in a way which provides more legal possibilities for Roma to

[73] For a critical analysis, see inter alia Morawa 2003, p. 147; J. Ringelheim, *Chapman Redux: The ECtHR and Roma Traditional Lifestyle*, [in] *Diversity and European Human Rights: Rewriting Judgements of the European Court of Human Rights*, ed. E. Brems, Cambridge 2013.

[74] ECtHR, *Winterstein et al v. France*, no. 27013/07, 17 October 2013, para 150–152.

live in caravans. Apparently, the Court is not yet ready to use the vulnerability factor to impose concrete positive obligations on states to adapt their legislative framework to accommodate the special needs and concerns of ethnic minorities.

In relation to demands of reasonable accommodation by religious minorities, the Court is not even ready to make a promising theoretical statement of a general nature similar to the one made in *Chapman*. In such cases the Court rather points to the broad margin of appreciation due to states regarding matters pertaining to 'the delicate relations between religions and state' because of the lack of (European) consensus the Court has identified in this respect. A closer analysis of the Court's case law on religious themes conducted elsewhere[75] has revealed that the Court is actually willing to identify de facto state duties to accommodate in matters such as conscientious objection, and the obligation to in principle provide prisoners with food that is in line with their religion's prescripts. It is notable that in regard to these particular religious matters there exists an outspoken European consensus. In relation to accommodations on other religious themes, such as the relative visibility of religions in public institutions, and reasonable accommodations in the work sphere, the Court remains particularly hesitant to interfere with the related state choices.[76] Put differently, the differences in the degree to which the Court is willing to identify de facto duties of reasonable accommodation on religious grounds do not seem in any way related to the enhanced vulnerability of the applicants. The margin of appreciation doctrine plays again a decisive role, but the factor that gets most weight in the determination of the width of the margin is rather attuned to the concerns of State parties and not so much to the nature of the right and its importance for the applicant, elements which could be translated in terms of vulnerability.

IV. Some concluding thoughts on the potential of 'vulnerability' as marker in human rights analysis

The preceding analysis of the practice of the ECtHR has revealed that as yet no doctrine has been developed a pertaining to vulnerability as a relevant marker in human rights analysis.

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[75] Inter alia Henrard 2016.

[76] It has been postulated that the Court's use of the broad margin of appreciation concerning 'church –state relations' allows the Court to avoid pronouncing a position on matters that states consider so closely bound up with their national identity, that they would rebel against interferences by international courts. See inter alia D. Augenstein, *Religious Diversity and National Constitutional Traditions in Europe*, [in] *Law, State and Religion in the New Europe: Debates and Dilemmas,* eds C. Ungureanu & L. Zucca, Cambridge 2012, pp. 261–280. The Lautsi saga forms a good illustration of a case in which states actually rebelled and the Court retreated from its position accordingly.

Notwithstanding the marked increase in the use of vulnerability terminology in the ECtHR's jurisprudence, it is not clear at all how the vulnerability factor plays and actually influences the Court's reasoning. Some of the case law suggests that an applicant's vulnerability leads to the reduction of the state's margin of appreciation, but this is anything but a steady line of jurisprudence. Other case law indicates there is a causal relation between the vulnerable position of an applicant and a noticeable increase in the state's positive obligations in this respect, but no steady pattern can be discerned here either. Nevertheless, some further thoughts and suggestions are in order, both in relation to the evaluation of alleged instances of invidious discrimination and regarding claims for reasonable accommodation

When evaluating alleged instances of invidious discrimination, the Court's level of scrutiny is still predominantly determined by the suspect nature of the ground of differentiation. Admittedly, the Court has so far not developed any set criteria for the identification of suspect grounds, but a history of discrimination on a particular ground, which is not relevant for one's functioning in society, appear to be the common denominator of the grounds the Court has so far recognized as suspect. These characteristics could arguably be framed in terms of vulnerability as well, while 'relative vulnerability' allows the appropriate level of scrutiny to be further fine-tuned, going beyond grounds that have been recognized as suspect. Furthermore, using relative vulnerability as an overarching criterion for the level of scrutiny could also be used for cases regarding intersectional discrimination, with several intersecting grounds of discrimination.

In relation to claims for reasonable accommodation, the case law pertaining to ethnic minorities reveals how the applicant's vulnerability ultimately did not lead to a reduction in the state's margin of appreciation, due to the fact that general policy decisions were in play. Nevertheless, also here some minor developments can be noted, in the sense that the Court in more recent cases appears to be ready to determine the margin of appreciation more in relation to the nature of the right concerned and its importance for the applicant, at times even explicitly referring to the vulnerability of the applicant. While the 'vulnerability' of the applicant (and the group he/she belongs to) has not yet persuaded the Court to oblige states to actually adapt their legislation, the Court seems increasingly swayed to allow vulnerability to influence its balancing in relation to the state's interference.

Overall, the ECtHR's case law appears to contain several pointers that 'vulnerability' could be used more explicitly as marker in human rights analysis for cases on persons with a separate ethnic identity. 'Relative vulnerability' would be particularly helpful as marker to suitably tailor human rights analysis in cases dealing with fluctuating super-diversity. In any event, for vulnerability to actually be used as marker in human rights analysis, more work needs to be done on

the questions of measurement and quantification. Furthermore, the preceding analysis clearly underscored how the current flaws and problems with the margin of appreciation doctrine of the ECtHR also negatively impact on the potential role of 'vulnerability' in the Court's human rights analysis.

Kristin Henrard

TAILORING STATE OBLIGATIONS REGARDING 'THE RIGHT TO EQUAL TREATMENT' IN TIMES OF FLUCTUATING SUPER-DIVERSITY: A TURN TO RELATIVE VULNERABILITY?

This paper explores to what extent 'relative vulnerability' has the potential to assist in fine-tuning the proportionality review inherent in the right to equal treatment so that it better captures the new realities of fluctuating super-diversity (referring to different and intersecting layers and forms of diversity).

Against the background of fluctuating population diversity, due to intense and multiple migration patterns – some migrants settling, others moving on or returning to the country of origin-, the question arises of how governments should address the resulting fluid super-diversity in their societies.

In both respects, the right to equal treatment and the related questions of inclusion and exclusion take center stage. Two dimensions of the right to equal treatment are particularly relevant in relation to fluid population diversity, namely the prohibition of invidious discrimination; and the duties of reasonable accommodation. The former protects persons from exclusion or differential treatment (without reasonable and objective) justification. The latter is similarly aimed at inclusion, but rather by differential treatment, which accommodates the specific needs and circumstances of the persons concerned.

The proportionality review of the *prohibition of invidious discrimination* is traditionally determined by the ground of differentiation: differentiation on so-called suspect grounds – such as race or gender, trigger heightened scrutiny – and are difficult to justify. Courts have used other factors to adjust the level of scrutiny related to the grounds. Here it is investigated whether relative vulnerability could not function more generally as a fine-tuning factor for the level of scrutiny.

Similarly, regarding the positive state obligations, such as *duties of reasonable accommodation,* the fluctuating levels of population diversity render the proportionality review more challenging. The paper explores what considerations can be treated as relevant when balancing reasonability (from the perspective of those who need to accommodate) and the relative vulnerability (of those that seek accommodation).