

# 15. Vulnerability as an Underlying Norm for Children's Rights: Conclusions and Further Outlook

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The intention with this project was to obtain insight into how vulnerability as an underlying norm and logic for children's rights is understood and how this can affect the safeguarding of rights. To achieve this aim, theories about vulnerability are used to explore the connection between vulnerability and children's rights. Based on the findings in this book, we are convinced that the theories of vulnerability and the diverse ways of understanding this phenomenon bring added value to the discussions about children and children's rights. Read as a whole, the chapters shed light on how vulnerability has different meanings and paradigms; the way in which vulnerability is understood could influence the safeguarding of rights, both children's rights in general and specific rights for children in specific contexts. Since there is no common definition of vulnerability, when referring to the concept one should try to make clear which understanding one's argumentations are built upon.

Foster and Herring describe two types or understandings of vulnerability.<sup>1</sup> The first type they call "particularly deficient vulnerability". Here vulnerability is "seen as an undesirable condition suffered by particular individuals or groups of people", which should be eliminated or alleviated as much as possible.<sup>2</sup> Such a negative view, where vulnerability is seen as "an undesirable condition", is a logical result of the connection between discrimination and vulnerability. A second type of vulnerability that Foster and Herring embrace is termed "universal beneficial vulnerability": vulnerability seen as a desirable attribute of all humankind.<sup>3</sup> This understanding is associated with Fineman's theories.

1 Charles Foster and Jonathan Herring, "Thriving, Care and Vulnerability," in *Human Thriving and the Law*, eds. Charles Foster and Jonathan Herring (Springer, 2018), 57–67, 58.

2 Foster and Herring, "Thriving, Care and Vulnerability," 57–67, 58.

3 Foster and Herring, "Thriving, Care and Vulnerability," 57–67, 58.

While some authors in this book mostly build on the first type, others, especially *Herring*, build more on the second type of vulnerability. However, there are also other paradigms on vulnerability in this book. Those different paradigms can be divided into the *universal vulnerability* paradigm, the *traditional child rights* paradigm – where children are seen as a particularly vulnerable group, and some children are believed to be even more vulnerable – and *societally created vulnerability*. In some chapters, these paradigms are used simultaneously. The different paradigms and views on vulnerability lead to different answers to the crucial questions about which are the benefits and pitfalls of considering children or groups of children as specifically vulnerable. And further, what are the risks for children if they are defined as vulnerable?

Our opinion is that all humans – and, therefore, children – are vulnerable. However, since children, like adults, are positioned differently, their vulnerability is both universal and particular. In addition, children – some more so than others – are met by adults, institutions, and regulations in ways that make them more exposed to harm and having their rights violated. As many of the authors effectively illustrate, external conditions such as legislation and policy, formed by adults, expose children to such risks.

While the idea of defining a child as vulnerable and belonging to a special vulnerable group is to strengthen the human rights of the child, with the “vulnerable child” in the traditional child rights paradigm there is also a risk. Lining up groups assumed to be particularly vulnerable leads to the risk of stereotyping, marginalisation, and biases. If combined with a view of children as lacking in competence, this might increase the elements that are often used as a reason for seeing children as more vulnerable than adults, rather than pointing at the factors leading to rights violations, including discrimination. As shown in this book, child law researchers are increasingly challenging such a one-sided approach to children as vulnerable. In most of the chapters, there is a consensus that individual vulnerability in the traditional paradigm has some problematic side effects. The vulnerability paradigm on which the CRC is based potentially obscures the state's role in creating vulnerability and can contribute to the stigmatisation of children or groups of children.

Although the paradigms seem to be difficult to fully harmonise, there are elements in all the paradigms that bring important nuances to the discussion about children, rights, and vulnerability. As Timmer et al. state, “[a]s part of the human condition, vulnerability is here to stay”.<sup>4</sup> They further elaborate that because the

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4 Alexandra Timmer, Mortiz Baumgärtel, Louis Kotzé and Lienneke Slingenberg, “The Potential and Pitfalls of the Vulnerability Concept of Human Rights,” *Netherlands Quarterly of Human Rights*, vol. 39(3) (2021): 190–197, 196.

concept is malleable and recognises the connections between humans and their surroundings, “vulnerability has at least the potential to rise to the status of a guiding principle of human rights law comparable to dignity or equality”.<sup>5</sup>

Although all the authors deal with both vulnerability and children’s rights, there are different starting positions in the debate on how rights in general can be safeguarded. One direction is to highlight autonomy as a central value, while another approach is to emphasise vulnerability, as an inherent virtue of being human, as opposed to autonomy. In the first direction, ensuring children’s right to participation is of fundamental importance for safeguarding children’s rights. As *Lundy* shows, one of the major ways in which children are left vulnerable to harm is the fact that they are often not considered competent to make decisions in their own interests and consequently have most decisions not only made for them but also made without their input. Information and support for children’s competence is, as *Daly* emphasises, a necessary means to ensure participation, reduce harm, and safeguard rights. Measures that are instituted due to an understanding of children as vulnerable subjects, to protect the child, can have the opposite effect and contribute to increased vulnerability, as shown by *Lundy*. On the other hand, measures that do not really consider vulnerability render children even more vulnerable, as argued by *Kilkelly* and *Moldenæs*.

The gap between having rights and having those rights fulfilled highlights that for children to have access to justice, we need child-friendly information and complaint mechanisms. Rights without remedies are not sufficient to meet the vulnerability created by society. Children’s rights are built upon a multilevel legal framework, and it is necessary to bring it all together to make real progress. Without enforcement mechanisms and the possibility for children to hold the state accountable, and without access to justice, there will continue to be a gap between rights and reality. It must be up to states to create institutions, policies, and measures to implement children’s rights. The acknowledgement of children as right holders must not be overshadowed by an image of the child as a vulnerable subject. The ability to seek a remedy for violations of one’s rights is a prerequisite for being recognised as a true rights holder. As Michael Freeman argues, “we must get beyond rhetoric. Rights without remedies are symbols, nothing more”.<sup>6</sup>

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5 Timmer et al., “The Potential and Pitfalls,” 196–197.

6 Michael Freeman, “Why It Remains Important to Take Children’s Rights Seriously,” *The International Journal of Children’s Rights*, vol. 15(1) (2007): 5–24, 8; Conor O’Mahony, “Constitutional Protection of Children’s Rights: Visibility, Agency and Enforceability,” *Human Rights Law Review*, vol. 19(3) (November 2019): 401–434.

As a field of law, children's rights is young and dynamic, and there is a need to constantly reflect and rethink. In reference to the workshop that led to this book, the saying "the path is made in the walking" seems fitting. Let us all keep walking!

## BIBLIOGRAPHY

- Foster, Charles, and Jonathan Herring. "Thriving, Care and Vulnerability." In *Human Thriving and the Law*, edited by Charles Foster and Jonathan Herring, 57–67. Springer, 2018.
- Freeman, Michael. "Why It Remains Important to Take Children's Rights Seriously." *The International Journal of Children's Rights* 15, no. 1 (2007): 5–24.
- O'Mahony, Conor. "Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability." *Human Rights Law Review*, vol. 19(3) (November 2019): 401–434. <https://doi.org/10.1093/hrlr/ngz017>.
- Timmer, Alexandra, Moritz Baumgärtel, Louis Kotzé and Lieneke Slingenberg. "The Potential and Pitfalls of the Vulnerability Concept for Human Rights." *Netherlands Quarterly of Human Rights*, vol. 39(3) (2021): 190–197. <https://doi.org/10.1177/09240519211048009>.