Responding to Disadvantage and Inequality through Law

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I INTRODUCTION

Despite the continuing political and legal attention to disadvantage, contemporary societies still display hierarchies and unequal distribution of power and resources. The principles of equality and non-discrimination rest on a deep recognition that all human beings—all individuals—are entitled to the same rights and freedoms, which means that they are concepts that may contribute to counteracting and combating inequality and disadvantage. Today, the principles of equality and non-discrimination are considered fundamental components of international human rights law. They are formalised in nearly all the core international human rights instruments, as well as in regional and domestic legal instruments.

However, the exact meaning of equality is a topic of much debate in the contexts of both policy making and adjudication. The limits of a purely formal understanding of equality and non-discrimination are well recognised: equality before the law is blind to how economic, social and cultural structures create and uphold disadvantage. The prohibition against discrimination is not sufficient to generate change beyond individual cases. The language of equality does not solve the question of which situations are comparable if likes are to be treated alike. The emphasis on prohibited grounds impedes recognition of the many factors that intersect when disadvantage is experienced. And, finally, by demanding comparison when determining whether differential treatment has taken place, it risks upholding perceptions of an ideal liberal legal subject, which in turn may lead to reinforcement of hierarchies and stereotypes.1

In this special issue, we present three articles that offer different responses to such critique. They demonstrate how legal theory, case law and jurisprudence have developed over time to incorporate insights regarding the complex relationship between law, context and disadvantage. Martha Fineman’s article ‘Vulnerability and Inevitable Inequality’ departs from recognition of the limitations of equality in assessing justness in social relationships. The article traces the origins and development of her vulnerability theory, a theory that brings human vulnerability and dependency to the fore in defining State responsibility, and how this theory can shed light on situations where inequality is inevitable. Oddný Mjöll Arnardóttir investigates how a vulnerable groups approach is emerging in case law concerning the prohibition against discrimination embedded in Article 14 of the European Convention on Human Rights (ECHR). Through an analysis that is anchored in the full body of the Court’s jurisprudence under Article 14, she discusses the potential added value of the concept ‘vulnerable group’ for the Court’s reasoning. Henriette Jakobien Liesker offers an historical account of how the protection for sexual minorities has developed under the ECHR. A detailed analysis of case law since 1980 demonstrates how several provisions have functioned as stepping stones for the significant progress in the protection for this group, including Article 14 on non-discrimination, but also Article 8 on the right to private and family life and Article 12 on the right to marry and found a family.

The articles shed light on the potentials—as well as pitfalls—of relying on equality and non-discrimination as frameworks for policy making and adjudication that aim at combating disadvantage. While the three articles can be read independently, we will in the following present some reflections on how the approaches to disadvantage that they display may overlap, challenge and complement each other.

The discussion pursues three themes. In section 2, we present how ‘vulnerability’ may be conceptualised in different ways—as a general human condition, or a characteristic of some groups of people. We then turn to how the different conceptions of vulnerability also play into how likeness and difference between individuals and groups are framed and approached, see section 3. Next, in section 4, we discuss how societal structures and institutions are increasingly included into legal reasoning, which can be seen as signs of equality and non-discrimination law moving in a similar direction to that of Fineman’s vulnerability theory. Finally, in section 5 we take the Nordic welfare state context as our point of departure for reflecting on possible ways forward for developing a systematic approach to the role of law in addressing and combating disadvantage.
The term ‘vulnerability’ is receiving increased attention in legal practice as well as theory. However, there is no unified approach to how ‘vulnerability’ is conceptualised. Vulnerability theory and non-discrimination law differ in how they circumscribe the situation that merits attention.

Non-discrimination law tends to use the term ‘vulnerable group’, thus making vulnerability an attribute only of persons belonging to certain groups. This corresponds well with the general structure of non-discrimination law. Although it is the rights of the individual to equality which is the central concern, this is operationalised through linking inequality or differential treatment to certain characteristics: sex, age, ethnicity or—in the case of ECHR Art. 14—‘other status’. As Arnardóttir demonstrates, in the case law concerning ECHR Art. 14, the concept of ‘vulnerable group’ serves to offer heightened scrutiny, while limiting the margin of appreciation of states in the treatment of groups that are already found to have some of these other characteristics or common identity markers. Arnardóttir describes the approach of the European Court of Human Rights (ECtHR) as an ‘identity plus’ approach, which is based on a combination of recognised discrimination grounds and disadvantageous social contexts. On this basis the concept has been used in relation to, inter alia, people with mental disabilities, people living with HIV, LGBTI, Roma, and asylum seekers. Arguably, the concept of ‘vulnerable group’ makes more nuanced distinctions possible, expanding the range of categories available and facilitating integration of the historic and social context experienced by the group.

However, the use of the term ‘vulnerable group’ has met critique for a perceived lack of consistency and systematic analysis of what it covers. Regarding the work of the UN Committee on Economic, Social and Cultural Rights, it has been argued that it ‘does not offer a clear-cut conception or definition of vulnerability or related terminology. Nor does it provide criteria for identifying which individuals or groups qualify as vulnerable or disadvantaged in general or in specific contexts.’

Another challenge relates to whether the term ‘vulnerable group’ serves not only to remedy disadvantage, but also to uphold the categories themselves. Critics have argued that the reliance on groups can serve to reinforce stereotypes and stigma. It may reinforce the notion that people sharing some common characteristics are all equally vulnerable,


3. Arnardóttir, this issue. See also Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Fineman and Grear (eds.) (n 2) 160.


5. Peroni and Timmer (n 2) 1070.
and overshadow their autonomy and their similarities with others. As a response to such critique, the UN Committee on the Rights of the Child has recently changed its wording from ‘vulnerable groups of children’ to ‘children in vulnerable situations’, in order to avoid labelling the child, focusing instead on the situation he or she is in. Moreover, it has been argued that group-based approaches can form the basis for identity politics that pits vulnerable groups against each other: who is most repressed? Adding the concept of ‘vulnerable group’ seems to do little to address these concerns.

In contrast, Fineman’s vulnerability theory refuses to delineate some groups as ‘vulnerable’. Vulnerability is understood as ‘the primal human condition’. There is no position of invulnerability, as all human beings experience susceptibility to change in their well-being. The vulnerable person is thus a more realistic (and inclusive!) understanding of personhood than the prototypical idealised, non-existent, independent and invulnerable individual. Therefore, it is the vulnerable person who should serve as the starting point for policymaking.

While there is a common concern that vulnerability needs to be addressed in order to reduce disadvantage, the different ways in which vulnerability is conceptualised plays directly into how likeness and difference between individuals and groups are framed and approached.

3 APPROACHES TO LIKENESS AND DIFFERENCE

How does vulnerability theory and the non-discrimination approach deal with questions of likeness and difference between individuals and groups?

Under non-discrimination law, there has to be carried out an assessment of whether two individuals are relevantly alike, so as to merit consistent treatment. As pointed out by Fredman: ‘Not every distinction is discriminatory. … It is quite legitimate to distinguish between high-income and low-income groups for taxation reasons. On the other hand, for many years it was thought to be legitimate to distinguish women from men, blacks from whites.’ Dynamic interpretations by human rights courts and supervisory bodies, which have taken account of societal developments, have been one path to changing which distinctions are considered legitimate under the law. Liesker’s article demonstrates this type of development in the case law under the ECHR. The earliest case law concerning criminalisation of homosexuality held back from framing the rights of sexual minorities as possible discrimination, instead relying on the protection against interference in private life. Later, however, the ECtHR has found same-sex and different-sex activities to be ‘relevantly similar’, and therefore assessments under Article 14 on non-discrimination have been carried out.
Fineman’s theory takes a different starting point. Rather than discussing which distinctions are legitimate and what situations are comparable, she introduces two categories for mapping differences that influence ‘the manifestations of vulnerability’ that everyone is subject to: embodied and embedded difference. Differences that are ‘embodied’ cover the intrinsic variations among individuals—some of which are relatively permanent over a life course, e.g. race, while others are shifting over time, such as the bodily needs for care. In contrast, ‘embedded difference’ points to how individuals are situated within relationships that significantly shape their options and opportunities. Such relationships can be of social, economic, or institutional types—it can be the family where one grows up, the employer one has, or the state in which one lives. Both forms of individual difference are relevant in a vulnerability approach, as they draw attention to ‘distinct facets of social organization and activities’, and they ‘require distinct legal and policy approaches’. Moreover, she points out how some social relationships, such as parent/child or employer/employee, are inherently, even desirably, unequal relationships. This further reduces the value of ‘equality’ as a measure for justness.

How does the non-discrimination approach deal with Fineman’s two categories of difference? Some types of embodied differences are recognised as prohibited grounds of discrimination, e.g. sex, race and increasingly also sexual orientation and gender identity. The embedded differences have been less easily accommodated in non-discrimination frameworks, although the lists of discrimination grounds in treaty texts include, for example, social origin and property. The emerging focus on intersectionality and multiple forms of discrimination may also go some way in drawing attention to how inequality involves combinations of embodied and embedded characteristics. However, the concept of ‘vulnerable groups’, as employed by the ECtHR, directly emphasises historical prejudice and social exclusion. It thus seems well suited as a pathway for recognising the extent to which difference and disadvantage is a social and relational construct, not merely a reflection of identity markers.

4 THE NEED TO ADDRESS SOCIAL STRUCTURES: A FIELD OF CONVERGENCE?

Disadvantage and injustice is more than a series of individual choices and events: it is also a product of historical, social and economic structures. Thus, addressing disadvantage requires attention to the structural level. In this field, current developments in equality and non-discrimination law may seem to be moving in the same direction as the vulnerability theory.

Legal adjudication in individual cases involving discrimination is seeking to remedy instances of injustice that have already occurred. The prohibition against discrimination

10. Fineman, this issue, section 2.2.
11. Ibid.
12. Examples include national and social origin, birth and property, see ECHR Article 14, ICCPR Articles 2 and 26 and ICESCR Article 2. The CEDAW also mentions marital status, cf Article 1.
can therefore be said to be *reactive* rather than *preventive* in its approach towards injustice and disadvantage. However, the legal protection against discrimination has developed significantly over time, through the practices of, and interaction between, supervisory organs on international, regional and domestic levels. Today, the dominant understanding is that legal prohibitions against discrimination aim for *substantive equality*.

Substantive equality is a concept that includes not only a reactive approach towards inequality; it also goes beyond formal equality. Rather, it acknowledges that:

> eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.

Accordingly, State Parties must ‘adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.’

The objective of ‘substantive equality’ can influence law in two ways: it can function as a compass for new policymaking, and it can influence the interpretation of prohibitions against discrimination in adjudication.

In relation to policy making, it is not always clear what substantive equality requires, as the multidimensional nature of the concept involves complex considerations as to the objectives to be promoted and the means to be taken. However, it clearly requires conscious efforts at policy level to address structural disadvantage.

Also, when courts and supervisory bodies interpret the negatively formulated prohibitions against discrimination, their interpretations may contain ‘many glimmers of substantive equality’. Arnardóttir’s article clearly illustrates the breadth in the application of Article 14 ECHR: the provision not only requires that likes shall be treated alike. Article 14 has expanded from formal protection of equality, also to include indirect discrimination, reasonable accommodation and positive obligations to investigate, protect and prevent different situations of violence. Case law that concludes that the prohibition against discrimination has been violated due to a lack of positive steps carried out by the State Party, draws attention to the effects that societal structures and customs may have on different groups and individuals. Thus, jurisprudence in individual cases can incorporate the role of structures and institutions in combating disadvantage.

Although Fineman’s vulnerability theory can appear to be ‘almost in opposition to a rights discourse’, here the two seem to pull in the same direction. Vulnerability theory

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14. Ibid.
15. Ibid.
18. Arnardóttir, this issue, section 1.
19. Sandberg (n 2) 223.
identifies societal organisations ‘and institutions’, roles as providing ‘the critical, but incomplete solution to our vulnerability’, namely the creation of resilience.20

Resilience is ‘what provides an individual with the means and ability to recover from harm, setbacks, and the misfortunes that affect our lives’. In Fineman’s understanding, this is what constitutes the counterpoint to vulnerability. While resilience can be provided in both public and private arenas, a just and responsive state ensures that institutions are mediating vulnerability and building resilience.

5 MOVING FORWARD

The vulnerability theory is often considered particularly relevant in contexts where there is political resistance to an active role for the state in securing the livelihood situations of individuals. This has particularly been the case in the U.S., which formed the initial backdrop of the theory. However, this is also increasingly significant in other parts of the world, as financial crises put more pressure on the state. The theory can clearly also have a bearing on analyses of the Nordic welfare state context.

The Nordic welfare states are generally considered to be responsive to vulnerability, through systems where the state has primary responsibility for the welfare of the population. However, critics argue that in the Nordic context, too, insights from the vulnerability theory go unnoticed.21 Cuts in state expenses do not apply evenly across the board: The ‘workfare’ trend implies that the burden of welfare cuts is disproportionately carried by individuals who experience genuine and insurmountable obstacles when the idealised full time employee is a prerequisite for maximum welfare benefits. Accordingly, trends in social security law include an increasing number of ‘activation duties’ as conditions for benefits, as well as changes in pension rights that are disadvantageous for those who have worked part time or spent time outside paid employment. Thus, those who are not conforming to the prototypical legal subject promoted by the workfare trend, due to, for instance, single parenting that hinders full time work, prioritisation of child care over work, taking care of family members with disabilities etc., are left with less resilience than others. Often, they are women. As argued by Bjørnholt, the introduction of a dual breadwinner model in the Nordic countries has led to greater autonomy for women in terms of income from paid work. However, it has also ‘led to a loss of rights and entitlements related to care, both from the state and from men, which has led to new economic disparities between men and women, and to a reduced valuation as well as a deficit of care’.22

Disadvantage and inequality can be combated both through policy making and through adjudication. The three articles in this issue touch upon both, and they demonstrate that focusing on ‘vulnerability’ opens up fruitful paths for analyses—both when it is conceptualised as a permanent human condition that the state must be responsive to in its policy making, and when it is used as a group-oriented characteristic in adjudication concern-

20. Fineman, this issue, section 2.2.2.
22. Ibid at 35.
ing issues of non-discrimination. All three articles move beyond formal understandings of equality and discrimination, and illustrate how jurisprudence, case law and theory have developed over time to include insights into the asymmetrical ways in which privilege and disadvantage operate. Alongside the idea of ‘substantive equality’, this allows for new ways of analysing law and policy.23

In order to move forward conceptually, there are elements embedded in both non-discrimination law and in the vulnerability theory that suggest productive ways of targeting disadvantage and inequality. Therefore, the non-discrimination approach should not be reduced to a legal construct detached from policy making and political theories like the vulnerability theory. Further, the vulnerability theory should not be seen as a political theory without relevance to non-discrimination law.

The non-discrimination approach draws attention to how group characteristics may serve a crucial role when combating disadvantage, as it makes it possible to connect singular events of differential treatment to a pre-defined legal framework. The list of discrimination grounds is not only relevant in individual cases on discrimination. Many of the same grounds also form points of departure for positive measures that aim at accelerating de facto equality, such as the use of temporary special measures. In addition, group characteristics can facilitate benchmarks and indicators, thus pointing to the direction of policy-making and measures: how many women sit in boardrooms, or in Parliament? How many fathers take leave when their child is born? Group characteristics undoubtedly have a key role to play in the struggle against disadvantage, both in political spheres and in relation to adjudication.

Through the vulnerability theory, attention is brought to the universality of vulnerability, as the theory includes both personal characteristics that may be constant or that may change over time (embodied difference) and social relationships as they play out in different contexts (embedded difference). This displays a need to further theoretical thinking and analyses within non-discrimination law on how to expand the concept of non-discrimination in a way that is responsive to the many ways in which disadvantage and context intertwine. The vulnerability theory enables us to get better sight of the way the prohibitions against discrimination fail to include many facets of inequality.

The application by the ECtHR of an ‘identity plus’ approach, combining discrimination grounds and disadvantageous social contexts, is a start. Yet, this is not sufficient because the approach remains constricted by the traditional list of discrimination grounds. Some of the UN treaty bodies can be seen as having come some way in a more inclusive direction as they, through their general recommendations and comments, have broadened their approach by identifying combinations of characteristics that may lead to disadvantage. For instance, particular attention is put on the situation of disabled women; the situation of older women; women migrant workers; the situation of Roma people; the situation of non-citizens; and the situation of people of African descent.24

23. Fredman (n 17).
There is no quick fix to disadvantage. However, we believe that the articles found in this special issue highlight key themes for developing a more inclusive approach for legal responses to disadvantage. Both embodied and embedded differences need to be included in the analyses, alongside scrutiny of the historical, social and economic structures that have led to, and continue to lead to, inequality and disadvantage for particular groups. Such a comprehensive point of departure can bode well for improving both policy making and adjudication.

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