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ARTICLE

Special Issue: Breaching the Boundaries of Law and Anthropology: New Pathways for Legal Research

Lost in Translation? The Promises and Challenges of Integrating Empirical Knowledge on Migrants' Vulnerabilities into Legal Reasoning

Luc Leboeuf[1]

[1]Law & Anthropology Department, Max Planck Institute for Social Anthropology, Halle/Saale, Germany
Corresponding author: leboeuf@eth.mpg.de

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Abstract

The concept of "vulnerability" has become all-pervasive in EU asylum law and the ECtHR case law on asylum seekers and migrants, where it has acquired various legal meanings and functions. But many controversies remain on the legal nature, definition, and consequences of "vulnerability." Based on lessons learned in the process of establishing the overall research design of the Horizon 2020 VULNER project and coordinating its implementation, this article identifies the contribution that anthropological knowledge can bring to ongoing legal debates and reflects on the conceptual and practical challenges that emerge when engaging in such an endeavor.

First, the article shows the potential of anthropological research methods and concepts to shed light on the experiences of vulnerability as they are lived by migrants, and to reveal and question the underlying social and political dynamics behind the increased success of vulnerability in legal reasoning. Second, it argues that anthropology can only bring a useful contribution to legal debates on "vulnerability" if the knowledge it produces is adequately translated into legal reasoning—which requires acknowledging the differences between the goals of anthropological analyses, which are all-encompassing and seek to depict human experiences in all their complexities, and legal conceptualizations, which require establishing clearly defined notions that can be operationalized in—relatively—certain ways by decision-makers on the ground and that allow them to strike a balance between competing interests.

Keywords: Human rights law; asylum and migration law; EU law; vulnerability; interdisciplinarity; humanitarianism; legal anthropology

A. Introduction

It has become increasingly common for legal scholars to search for ways of engaging in interdisciplinary research and incorporating findings and methods from other disciplines into legal

Luc Leboeuf Head of Research Group in the Law & Anthropology Department at the Max Planck Institute for Social Anthropology and Visiting Professor in the Law Faculty of the Catholic University of Louvain (UCLouvain). This article was funded as part of the VULNER project, which has received funding from the European Union's Horizon 2020 research and innovation program under grant agreement No. 870845 (www.vulner.eu). The author would like to thank the VULNER project partners (François Crépeau, Andreas Edel, Marie-Claire Foblets, Winfried Kluth, Hilde Liden, Sabrina Marchetti, Delphine Nakache, Sylvie Sarolea, Maha Shuayb, and Dagmar Soennecken) for their feedback and input when drafting the VULNER project application.

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research. Such an endeavor is not without challenges, however. It requires entering into dialogue with other disciplines that have developed their own conceptualizations, research methods, and research objectives, as well as their own understandings of valid scientific research, data, and analysis. In turn, this dialogue confronts lawyers with uncertainties surrounding the meanings of "legal research" on the definition of which there is no consensus, and which often rests on implicit research methods.[1]

Despite the uncertainties regarding the exact definition of "legal research," the interdisciplinary dialogue has one common consequence for lawyers: It calls into question the internal perspective on the law that is implied in positivist legal scholarship.[2] Legal scholars traditionally seek to identify the legal norms that are applicable to a given situation and develop legal conceptualizations that can be operationalized by legal actors in a way that strengthens the functioning of the legal system by, for example, guaranteeing its internal coherence and consistency. Their main objective is not to think about the law as a social object or how it interacts with other social factors and circumstances—as in other disciplines, such as legal anthropology, where the law is addressed as an external object of study among broader social dynamics.

In this contribution, I reflect on the challenges that arise when combining law with anthropology, and when employing methods and concepts that originate in qualitative empirical research more broadly. To do so, I draw on lessons I have learned during the design and implementation of the ongoing Horizon 2020 VULNER research project, which I am coordinating from the Law & Anthropology Department at the Max Planck Institute for Anthropology. The VULNER project seeks to document and analyze the growing success of the concept of "vulnerability" in asylum and migration law from a critical perspective and with a focus on its implementation in the practices of local actors.[3] My objective is to contribute to the broader thinking launched by this special issue on how to conduct interdisciplinary research that involves law and anthropology, while drawing from both disciplines' analytical and conceptual strengths.

Anthropology has the potential to deepen legal analyses of the current trend of increased reliance on asylum seekers' and migrants' "vulnerability" in legal reasoning, which needs to be addressed from a critical perspective—part B. It provides additional methodological and conceptual tools that allow us to discuss and question the concrete consequences of the increasing use of "vulnerability" in EU and international human rights law: What transformations does "vulnerability" undergo when transposed into domestic law and implemented by judges and public servants? How is it mobilized by the actors involved, including migrants and asylum seekers? How does it relate to and reveal broader trends in how migration and refugee movements are governed through law?

Fulfilling that potential requires addressing various challenges, including conceptual ones that relate to the adequate translation of empirical knowledge into legal research—part C. Anthropology not only helps address and overcome these challenges; it also contributes to the generation of empirical knowledge that supports the refinement of legal conceptualizations of

[1]Frédéric Rouvière, *Qu'est-ce qu'une recherche juridique?, in* L'ÉVALUATION DE LA RECHERCHE EN DROIT 117–137 (Alexandre Flückiger & Thierry Tanquerel eds, 2014); Torben Spaak & Patricia Mindus, *Introduction, in* THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM 1–36 (Torben Spaak & Patricia Mindus eds, 2021).

[2]Antoine Bailleux & François Ost, *Droit, Contexte et interdisciplinarité: Refondation d'une Démarche*, 70(1) RIEJ 25–44 (2013).

[3]The geographic scope of the VULNER project—Vulnerabilities under the Global Protection Regime: How Does the Law Assess, Address, Shape, and Produce the Vulnerabilities of the Protection Seekers?—covers three EU Member States—Belgium, Germany, and Italy—Norway, Canada, Lebanon, Uganda, and South Africa. This allows us to compare domestic legislation and practices in the EU with those in Norway and Canada. Norway is part of the Schengen area and has developed an asylum system similar to the EU member states. In Canada, there is a longstanding tradition of emphasizing, in the policy discourse, the need to care for vulnerable migrants—and various guidelines have been adopted to guide the action of asylum authorities. In Lebanon, Uganda, and South Africa, there is a long-standing practice of mobilizing "vulnerability" as a conceptual tool to design and implement humanitarian and aid programs that benefit refugees. This gives useful lessons on the practical and conceptual challenges that arise when assessing "vulnerabilities" and addressing them.

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"vulnerability" and of legal reasoning in cases involving "vulnerable" persons. Finally, an anthropological approach leads to a better understanding of the underlying social and political dynamics that preside over the surge of "vulnerability" in migration and asylum law—part D.

B. Enriching Legal Conceptualizations and Theory with Empirical Knowledge: The VULNER Project's Endeavor

Numerous legal studies have pointed out the increased reliance on "vulnerability" in the ECtHR reasoning on cases involving migrants and asylum seekers[4] and in the provisions of the EU directives on asylum and migration[5]—to the point that it has become a "hot topic" among legal scholars across Europe. The trend is further reinforced by the UN Global Compacts for Migration and on Refugees, both of which call on states to address the vulnerabilities of migrants and refugees,[6] and which prompted legal scholars to inquire about the concrete consequences of such a call.[7] However vague it may remain in its legal definition, "vulnerability" is thus increasingly acquiring some kind of legal significance—Section I.[8] This raises, in turn, challenges related to identifying the concrete legal meanings and consequences of "vulnerability," which has been conceptualized as a flexible and highly contextual notion that reflects a shared human condition—Section II.

[4]*See, e.g.*, Corina Heri, Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR (2021); La vulnérabilité (Association Henri Capitant ed., 2020); Francesca Ippolito, Understanding Vulnerability in International Human Rights Law (2020); Moritz Baumgärtel, *Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights*, 38(1) N.Q.H.R. 2020, 12–29 (2020); Jean-Yves Carlier, *Des Droits de l'Homme Vulnérable à la Vulnérabilité des Droits de l'Homme, la Fragilité des Équilibres*, 79(2) R.I.E.J. 175-204 (2017); Céline Ruet, *La Vulnérabilité dans la Jurisprudence de la Cour Européenne des Droits de l'Homme*, 102 Rev. trim. dr. h. 317–340 (2015); Samantha Besson, *La Vulnérabilité et la Structure des Droits de l'Homme: L'Exemple de la Jurisprudence de la Cour Européenne des Droits de l'Homme*, *in* La Vulnérabilité Saisie par les Juges en Europe 59–85 (Laurence Burgorgue-Larsen ed., 2014); Youssef Al-Tamini, *The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights* 5 J.E.D.H./E.J.H.R. 561–83 (2016); Nesa Zimmermann, *Legislating for the Vulnerable? Special Duties Under the European Convention on Human Rights*, 25(4) S.R.I.E.L. 539–562 (2015); Lourdes Peroni and Alexandra Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11(4) Int. J. Const. Law 1056–1085 (2013); Nicolas Chardin, *La Cour Européenne des Droits de l'Homme et la Vulnérabilité*, *in* Le Droit à l'Épreuve de la Vulnérabilité 367 (Frédéric Rouvière ed., 2011).

[5]*See, e.g.*, Cathryn Costello & Emily Hancox, *The Recast Asylum Procedures Directive 2013/32/EU: Caught Between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee*, *in* Reforming the Common European Asylum System: The New European Refugee Law 375–445 (Vincent Chetail, Philippe de Bruycker, & Francesco Maiani eds, 2016); Lyra Jakuleviciene, *Vulnerable Persons as a New Sub-Group of Asylum Seekers?*, *in* Reforming the Common European Asylum System: The New European Refugee Law, 353–373 (Vincent Chetail, Philippe de Bruycker, & Francesco Maiani eds, 2016); Joanna Pétin, La vulnérabilité en Droit Européen de l'Asile (PhD dissertation, University of Pau, 2016); Ulrike Brandl & Philip Czech, *General and Specific Vulnerability of Protection-Seekers in the EU: Is There and Adequate Response to Their Needs?*, *in* Protecting Vulnerable Groups: The European Human Rights Framework 247–270 (Francesca Ippolito & Sara Iglesias Sánchez eds., 2015); Laurence De Bauche, Vulnerability in the European Asylum Law (2012).

[6]Global Compact on Refugees, U.N G.A. Res. 73/12 (2018); Global Compact for Safe, Orderly and Regular Migration, U.N. G.A. Res. 73/195 (2018). The UN Global Compact for Migration requests that states address the "vulnerabilities" of migrants in the implementation of its objectives, including enhancing legal pathways—Objective 5—preventing smuggling and human trafficking—Objectives 9b and 10—coordinating the management of borders—Objective 11a—and providing access to basic services—Objective 15b. It also asks states to "review relevant policies and practices to ensure they do not create or unintentionally increase vulnerabilities of migrants" —Objective 7. The UN Global Compact on Refugees similarly calls on states to address the specific needs of vulnerable refugees, paying particular attention to age, gender, and disabilities. *see* U.N. G.A. Res. 73/195 ¶¶ 50–60 (2018).

[7]Idil Atak, Delphine Nakache, Elspeth Guild, & François Crépeau, *Migrants in Vulnerable Situations and the Global Compact for Safe, Orderly and Regular Migration*, 273 Queen Mary University of London, School of Law, Legal Studies Research Paper (2018). The UN Global Compacts are not legally binding instruments.

[8]The article's objective is not to delve into a sophisticated analysis of the relevant legal provisions and case law, which have been extensively discussed in other legal commentaries (*supra* note 5 and note 6), but to set the scene with an overview of the main legal functions that "vulnerability" seems to have acquired thus far in international and EU law.

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I. The Multiple Legal Meanings and Functions of "Vulnerability"

"Vulnerability" is not a fully-fledged, legally binding concept that produces legal obligations that can be clearly identified. It is, nevertheless, increasingly commonly mobilized in European asylum and migration law, where it manifests itself in different ways. First, it serves as a flexible—and often implicit—tool of interpretation that guides the individualized assessment required to implement the law in specific cases by drawing attention to disadvantaged positions. Second, it supports the establishment of a legal obligation to address the special needs that some groups of asylum seekers may have, pending a decision on their application for asylum.

The first function of "vulnerability" is well exemplified in the ECtHR case law on migrants and asylum seekers, which concerns claims of violations of Article 3 ECHR. In those cases, "vulnerability" assessments serve to identify whether the severity threshold required to find inhumane and degrading treatment was met. Such assessments are most often implicit, for example, when determining the level of risk of torture and inhumane and degrading treatment in the home country. Evaluating exposure to a risk of ill-treatment requires that the applicants' individual profiles be considered alongside other relevant circumstances that contribute to exposing them to such a risk—including age, ethnicity, etc.—thereby evaluating how vulnerable they are.

In some of these cases, the ECtHR makes explicit reference to the applicant's vulnerability to support its finding of an Article 3 ECHR violation. What these few cases have in common is that they concern applicants who are deprived of their liberty,[9] or who complain of inadequate state assistance pending the examination of their asylum application[10] or the complete lack thereof.[11] In the former cases, the vulnerabilities identified relate to the applicants' age—minors—and to their health. In the latter cases, emphasizing the applicants' "vulnerability" served to justify expanding the scope of Article 3 ECHR in such a way that it requires states to establish a reception system for all asylum seekers, irrespective of additional vulnerabilities.[12] The Court famously underlined that it "attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection."[13]

In the ECtHR case law on asylum and migration, the explicit assessment of the applicants' "vulnerability" is thus limited to some specific cases that concern individuals who are more dependent upon the state because of the coercion it exercises over them either directly, through the deprivation of liberty, or indirectly, through the legal constraints placed upon asylum seekers who do not have a residence permit or access to the labor market pending a decision on their application for asylum. In most cases, "vulnerability" comes across as an integral—and often implicit—part of legal reasoning. When used explicitly, it serves to refer to and highlight positions of increased weakness that must be considered when identifying the extent of state obligations in individual cases.

Some EU directives take a similar legal approach to "vulnerability," as they require EU member states to consider the "vulnerabilities" faced by some migrants and asylum seekers when implementing them. The Return Directive requires EU member states to take the specific needs of vulnerable migrants into consideration when implementing return procedures.[14] The Qualification

[9]Mubilanzila v. Belgium, App. No. 13178/03, Eur. Ct. H.R. (Oct. 12, 2006); Rahimi v. Greece, App. No. 8687/08, Eur. Ct. H.R. (Apr. 5, 2011)—detention of minor children, Article 3 ECHR violation; Stanev v. Bulgaria, App. No. 36760/06, Eur. Ct. H.R. (Jan. 17, 2012)—detention of a mentally disabled individual, Article 3 ECHR violation.

[10]Tarakhel v. Switzerland, App. No. 29217/12, Eur. Ct. H.R. (Nov. 4, 2014)—family with minor children, Article 3 ECHR violation; Ilias and Ahmed v. Hungary, App. No. 47287/15, Eur. Ct. H.R. (Nov. 21, 2019)—no specific vulnerabilities, no violation of Article 3 ECHR; R.R. and others v. Hungary, App. No. 36037/17, Eur. Ct. H.R. (March 2, 2021)—deprivation of liberty *de facto* in a transit center.

[11]M.S.S. v. Belgium and Greece, App. No. 30696/09, Eur. Ct. H.R (Jan. 21, 2011) [hereinafter *The M.S.S. case*]; N.H. and others v. France, App. No. 28820/13, 75547/13, and 13114/15, Eur. Ct. H.R. (July 2, 2020) [hereinafter *The N.H. case*].

[12]*Id.*

[13]*Id.* ¶ 251.

[14]Eur. Parl. & Council Directive 2008/115 of Dec. 16, 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 3(9), 2008 O.J. (L 348) 98 (EC).

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Directive requires that the rights of international protection beneficiaries be implemented when considering the "specific situation" of vulnerable persons.[15]

But other EU directives take a different legal approach to "vulnerability," which illustrates its second legal function. The Asylum Procedures Directive (APD)[16] and the Reception Conditions Directive (RCD)[17] set an obligation to address the special procedural and reception needs of "vulnerable" asylum seekers. Article 15 APD requires that due consideration be given to the special needs of "vulnerable" asylum seekers when conducting interviews, and Article 31(7)(a) RCD allows the EU member states to prioritize the examination of the applications introduced by vulnerable asylum seekers. Article 21 RCD requires the EU member states to assess the "special reception needs" of "vulnerable" asylum seekers. Article 17 RCD requires the EU member states to consider these needs when identifying the services that asylum seekers should benefit from in order to guarantee them adequate living standards, pending a decision on their application. Finally, Article 11 RCD extends that obligation to asylum seekers who are detained and requires "regular monitoring and adequate support taking into account their particular situation, including their health."[18]

Neither directive specifies clearly what the "special needs" are, nor who should be considered "vulnerable." Rather, they opt for an open-ended and category-based approach, which focuses on personal characteristics—such as being a minor, a pregnant woman, a victim of torture and violence, etc. These categories are listed by way of example, and not in an exhaustive way.[19] The list of examples can vary slightly, depending on the instrument in question. The RCD offers the most elaborated list of examples, which includes:

> [M]inors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.[20]

No matter which legal approach to "vulnerability" is adopted, however, a similar observation can be made: There is no clear and shared understanding in law of what "vulnerability" means and implies. The legal definitions, consequences, and concrete implications of "vulnerability" remain unclear: Who are these "vulnerable" asylum seekers, refugees, and migrants? What vulnerabilities do they face? How should their vulnerabilities be identified, assessed, and addressed? How and to what extent does the finding that a refugee, asylum seeker, and/or migrant finds themselves in a particularly vulnerable position affect a state's obligations toward them? Section II shows how empirical knowledge can help in addressing these challenges.

II. The Need for Improved Legal Conceptualizations of "Vulnerability"

The proliferation of references to "vulnerability" in asylum and migration law can be connected to broader societal developments, including the mounting success of feminist theories of equality,

[15]Eur. Parl. & Council Directive 2011/95 of Dec. 13, 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, art. 20(3), 2011 O.J. (L 337) 9 (EU).

[16]Eur. Parl. & Council Directive 2013/32 of Jun. 26, 2013, on common procedures for granting and withdrawing international protection, 2013 O.J. (L 180) 60 (EU).

[17]Eur. Parl. & Council Directive 2013/33, *supra* note 18, 2013/33 of Jun. 26, 2013, laying down standards for the reception of applicants for international protection, 2013 O.J. (L 180) 96 (EU). The proposed recast of the RCD, which is currently under discussion, scraps any reference to "vulnerable" persons. It refers to "applicants with special reception needs" instead. COM, 2016, 465 final, art. 2, 13. This follows a trend reflected in the provisions of the UN Global Compact on Refugees.

[18]Eur. Parl. & Council Directive 2013/33, *supra* note 18, art. 11.

[19]Eur. Parl. & Council Directive 2013/32, *supra* note 17, at art. 2(d), 15(2)(a), 31(7)(b); Eur. Parl. & Council Directive 2013/33, *supra* note 18, art. 21, 22.

[20]Eur. Parl. & Council Directive 2013/33, *supra* note 18, at art. 21.

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such as the ethics of care. The ethics of care advocate attention to and solicitude for others as the main ethical paradigm.[21] They lay the groundwork for a theory of justice, which considers and accounts for the "vulnerabilities" of each member of society. From that perspective, "vulnerability" provides a moral justification for legal and policy prescriptions aimed at correcting some social disadvantages and weaknesses, with a view to guaranteeing equality.

According to Fineman, for example, "vulnerability ... is a powerful conceptual tool with the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality."[22] In Fineman's theory of "vulnerability," the emphasis should be on those who find themselves in positions of "vulnerability" that affect their abilities to develop their own resilience strategies.[23] From that theoretical perspective, state action should aim at strengthening resilience and at putting individuals in a position where they can lead their own independent lives.[24]

But legal concepts and categories require—relatively—clear definitions leading to—relatively—clear legal consequences; they must be able to be operationalized in similar ways by the various state actors involved. If not, they risk generating uneven, if not arbitrary, state practices that are based on each state actor's conception of "vulnerability." If "vulnerability" is bound to have a meaningful role in asylum and migration law, then it needs to be clearly defined and conceptualized. As argued by Carlier, a failure to do so might even have counter-productive effects from a human rights perspective, as it might "substitute human rights with a vague charity, and weaken [their legal effects]."[25] In other words, the introduction of vague notions into human rights law may have the effect of lessening their legal status to mere moral obligations the fulfillment of which depends on the discretionary will of state authorities.

An empirical study of migrants' and asylum seekers' experiences of vulnerability could produce scientific knowledge that would support legal developments and reasonings that counter such risks. It could provide a deeper understanding of how migrants experience their own vulnerabilities, and of how these experiences are impacted in turn by the state measures adopted to address them. It could also allow legal scholars and practitioners to better understand how migrants relate to and mobilize legal understandings of their vulnerability to support their own strategies.

It has actually become relatively common, in empirical research, to mobilize "vulnerability" as an analytical framework to reach a better understanding of migrants' experiences—especially in studies conducted by international organizations such as the International Organization for Migration (IOM).[26] By improving knowledge of migrants' main life challenges, this kind of

[21]Rosemarie Tong & Nancy Williams, *Feminist Ethics, in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018); Adela Cortina & Jesus Conill, *Ethics of Vulnerability*, *in* HUMAN DIGNITY OF THE VULNERABLE IN THE AGE OF RIGHTS: INTERDISCIPLINARY PERSPECTIVES 45–61 (Aniceto Masferrer & Emilio Garcia-Sanchez eds., 2016); JOAN TRONTO, UN MONDE VULNÉRABLE: POUR UNE POLITIQUE DU CARE (2009); VIRGINIA HELD, THE ETHICS OF CARE (2005).

[22]Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20(1) YALE J.L. & FEMINISM 1–23 (2008). In Fineman's theory, "vulnerability" serves both to draw attention to our shared human condition as vulnerable beings (as all of us can end up in a position where we need the care of others) and to underline our shared moral responsibility to guarantee universal access to care.

[23]Martha Fineman, *Vulnerability and Inevitable Inequality*, 133(4) OSLO L. REV. 133–49 (2017).

[24]Fineman's vulnerability theory has also been criticized for placing the emphasis on individuals, who are expected to be responsive, and for overlooking the broader constraints that stem from the overall social conditions in which they evolve. For example, see Benjamin Davis & Eric Aldieri, *Precarity and Resistance: A Critique of Martha Fineman's Vulnerability Theory*, 36(2) HYPATHIA 321 (2021); Alyson Cole, *All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique*, 17(2) CRIT. HORIZ. 260 (2016).

[25]*See* Carlier, *supra* note 5; PÉTIN, *supra* note 6.

[26]*See, e.g.,* Katia Kuschminder & Anna Triandafyllidou, *Smuggling, Trafficking, and Extortion: New Conceptual and Policy Challenges on the Libyan Route to Europe*, 52(1) ANTIPODE 206 (2019); Annalisa Busetta, Dario Mendola, Ben Wilson & Valeria Cetorelli, *Measuring Vulnerability of Asylum Seekers and Refugees in Italy*, 47(3) J.E.M.S. 596-615 (2019); *Migrant Vulnerability to Human Trafficking and Exploitation: Evidence from the Central and Eastern Mediterranean Migration Routes*, INT'L ORG. MIGRANTS (2017) https://publications.iom.int/system/files/pdf/migrant_vulnerability_to_human_trafficking_and_exploitation.pdf; *Reducing vulnerabilities and Empowering Migrants: The Determinants of Migrant Vulnerability model as an Analytical and Programmatic Tool for the East and Horn of Africa*, INT'L ORG. MIGRANTS

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empirical research provides background information that can guide legal reasoning. As argued by Baumgärtel, the empirical literature can be a useful resource for a more consistent consideration, in legal reasoning, of the "cluster of objective, socially induced, and temporary characteristics" that contribute to produce migrants' vulnerabilities.[27]

To support legal reasoning, such empirical knowledge should also help in reaching a better understanding of how vulnerabilities are experienced in relation to the law: Experiences of vulnerability are continuously shaped through social interactions and, thus, also through the encounters between migrants and the state actors in charge of implementing the law. Moreover, migrants are not passive in the face of legal norms, which they seize and mobilize in the exercise of their agency.[28]

The principal aim of the VULNER project is to have a deeper and more systematic look at the complex relationship between experiences of vulnerability and the law, with a view to ultimately supporting the emergence of legal conceptualizations and reasonings that account for migrants' experiences. We therefore make use of a three-tier approach that aims to combine and ultimately integrate legal and empirical perspectives. In the initial research phase, which is complete at the time of writing, we studied the legal framework and the implementation practices in each of the countries that fall within the VULNER project's geographic scope.[29] The objective was to reach a better understanding of how the somewhat vague injunction to consider the specific needs of vulnerable asylum seekers is translated into domestic legislation and practices. Drawing inspiration from the anthropology of bureaucracies,[30] we therefore combined a legal analysis of the domestic legal frameworks with interviews with decision-makers—social and aid workers, civil servants within asylum authorities, and asylum judges.

In the second research phase, which is ongoing, we are conducting ethnographic fieldwork among asylum seekers[31] in state-run reception centers and informal places where they meet, such as the central square of some Italian villages. The objective is to collect empirical data and evidence that will allow us to document and analyze the main life challenges that asylum seekers are facing, and how and to what extent these are shaped—and at times even produced—by law. In the third and last research phase, we will think back on the data collected and analyses made during the two phases to develop a critical perspective on the increased reliance on "vulnerability" in legal reasoning and to suggest ways to improve the quality of legal reasoning.

Figure 1 below illustrates the VULNER project's overall methodological approach, and how the knowledge acquired at each research phase should relate to and feedback into an overall critical approach:

(2018) https://reliefweb.int/attachments/9eadbd57-818c-34c0-9219-6e365fa84173/DoV%20in%20EAHA%20for%20WEB.pdf; Maria Aysa-Lastra & Lorenzo Cachon, *Introduction: Vulnerability and Resilience of Latin American Immigrants During the Great Recession*, *in* Immigrant Vulnerability and Resilience: Comparative Perspectives on Latin American Immigrants During the Great Recession 1–21 (Maria Aysa-Lastra & Lorenzo Cachon eds., 2015).

[27]*See* Baumgärtel, *supra* note 5.

[28]Composer avec les Normes: Trajectoires de vie et Agentivité des Migrants Face au Cadre Légal (Laura Merla, Sylvie Sarolea and Bruno Schoumaker eds., 2021); Anna Triandafyllidou, *Beyond Irregular Migration Governance: Zooming in on Migrants' Agency* 19(1) E.J.M.L. 1 (2017).

[29]The VULNER project's geographic scope covers three EU member states—Belgium, Germany, and Italy—Norway, Canada, Lebanon, Uganda, and South Africa, see *supra* note 4.

[30]Thomas Bierschenk & Jean-Pierre Olivier de Sardan, *How to Study Bureaucracies Ethnographically?*, 39(2) Crit. Anthropol. 243 (2019).

[31]Our focus is on "protection seekers" more broadly, which, following Noll's approach, we define as any asylum seeker or migrant seeking protection, be it the refugee status or another protection status, such as subsidiary protection or humanitarian protection status. *See* Gregor Noll, *The Non-Admission and Return of Protection Seekers in Germany*, 9(3) I.J.R.L. 415 (1997). The advantage of such a broad definition is that it allows the researchers on the ground to collect empirical data when meeting with migrants who identify themselves as in need of protection without having to first determine their legal status to identify whether they fall within the scope of the study.

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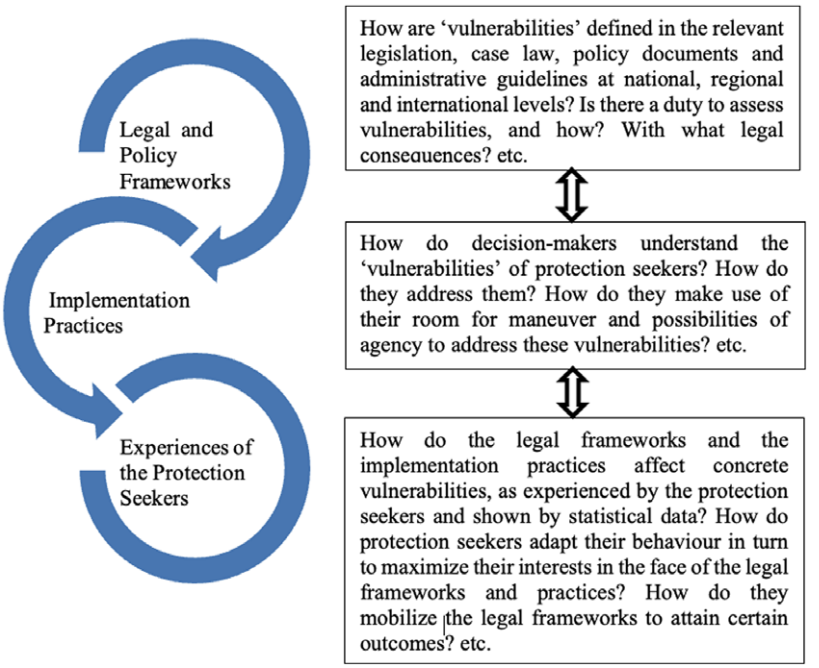

Figure 1. Studying the interactions between the legal and policy frameworks, implementation practices, and experiences of protection seekers.

Both the research design of the VULNER project and the implementation of the research tasks have required that we address serious challenges that result from the different, and at times competing, perspectives between legal and empirical research. These challenges are explored in the next section, with a focus on those that result from the combination of legal and anthropological methods and concepts, and on the concrete solutions that have been identified as part of the VULNER project.

C. The Challenges of Interdisciplinary Research: Juggling Law and Anthropology

During hallway chats, researchers engaged in interdisciplinary research have all heard, depending on the interlocutor's academic background, "There is no scholarship in law," or "Anthropology is not science, but leftist politics." While none of these assertions have any basis in facts, and they result from a misunderstanding and lack of knowledge of the work produced in other disciplines, they nonetheless reflect different understandings of what "scientific" research is—and should be. This results in various challenges that appear at different stages of the research process, from the data collection to the data analysis to the presentation of the research results.

This section highlights some of the main challenges that have emerged in establishing the overall conceptual and methodological framework of the VULNER project and in implementing the corresponding research tasks, and some of the solutions that have been adopted to address these challenges as part of the VULNER project.[32] There are three broad sets of challenges, of a conceptual—Section I—, legitimacy—Section II—, and practical—Section III—, nature.

[32]The perspective I am taking here is thus focused on research design. In other words, I build on the experience acquired in establishing the VULNER project and guiding its implementation; I am not attempting an exhaustive identification of the challenges that are likely to arise when combining legal and empirical research methods.

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I. Juggling Legal and Empirical Conceptualizations

It is often expected from legal research that it will contribute to more accurate legal conceptualizations through a more profound understanding of existing legal categories and their interpretation—especially when the research addresses cross-cutting concepts that guide legal reasoning in different contexts, such as "proportionality" or, as in the VULNER project, "vulnerability." From that perspective, legal categories are essential to legal research. They allow lawyers to identify the applicable rules, to situate them within the multi-level legal system and interacting legal orders, and to evaluate them in terms of internal coherence and consistency. There can be no rigorous legal research without appropriate knowledge of existing legal categories, their definition and scope of application, their position within the legal system, how they interact with other norms, and their legal consequences.

Anthropology, on the contrary, seeks to reach a more profound understanding of human experiences in their manifold aspects. Anthropologists therefore put the perspective of the individuals and groups they are studying at the center of their research. As argued by Chatty, for example, one of the main contributions of anthropology to migration studies is to bring in the perspective and voices of the migrants.[33] For that reason, legal anthropologists are wary of invoking legal categories as a constitutive element that guides the scope of their research and plays a central role in the analysis.

In their anthropological work on the 2015 European refugee "crisis," for example, Crawley and Skleparis warn against "categorical fetishism,"[34] that is, the blind spots and misconceptions regarding migrants' everyday realities that result from a focus on some groups that are defined on the basis of legal criteria—such as refugees or asylum seekers. Migrants' experiences cannot be properly understood without first acknowledging the limitations of the legal categories in reflecting them. For example, when it comes to identifying the drivers behind migration movements, numerous empirical studies have shown that the distinction between "forced" and "voluntary" migration, which underlies the distinction between the refugee status and other humanitarian protection statuses, is indeed far from clear-cut: The decision to migrate rests on complex factors that mix elements of constraint and choice.[35]

These different research objectives are reflected in the conceptualizations that are produced, which pursue fundamentally different purposes. On the one hand, empirical conceptualizations often aim to document and reflect on the multiplicity of human experiences, including how these are produced through numerous and ever-evolving social interactions and power dynamics. The objective is to contribute to a better understanding of the complexities of the realities on the ground, as lived and experienced by the various actors involved. On the other hand, conceptualizations in legal research seek to establish elaborated but somewhat abstract categories, the intrinsic quality of which is assessed not only on the basis of their ability to reflect realities on the ground, but also in terms of internal coherence and consistency—do they preserve the unity of the relevant legal systems, and legal certainty? do they create the conditions for the law to be implemented in predictable ways?

These diverging approaches of legal and empirical conceptualizations quickly confront the researcher engaging in interdisciplinary research with a fundamental dilemma that relates to

[33]Dawn Chatty, *Anthropology, and Forced Migration*, *in* The Oxford Handbook of Refugee and Forced Migration (Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, & Nando Sigona eds, 2014).

[34]Heaven Crawley & Dimitris Skleparis, *Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Nounding in Europe's "Migration Crisis,"* 48 JEMS 48 (2018); see also Mazzocchetti's anthropological work, in which she argues that there is an overall policy focus on protecting "suffering bodies," that is, on offering protection to those who can establish biological suffering, which transcends legal categories: Jacinthe Mazzochetti, *Le corps Comme Permis de Circuler: Du corps-héros au corps-souffrant dans les trajectoires migratoires et les possibilités de régularisation*, 9 Parcours Anthropologiques 133 (2014).

[35]*See, e.g.*, Nicholas van Hear, Rebecca Brubaker, & Thais Bessa, *Managing Mobility for Human Development:The Growing Salience of Mixed Migration*, 19202 MPRA Paper (2009).

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defining the research scope and the analytical angle: Should the research focus be defined with reference to existing legal categories so that the collected data can produce research results that fit back into legal reasoning, or with reference to empirical realities, so that it can produce research results that improve their understandings? Should the research material be analyzed from an internal perspective, thereby considering and contributing to legal conceptualizations—with their inherent limitations when it comes to reflecting empirical realities? Or should it be studied from an external perspective, in which legal norms and systems are approached as one set of human practices among many others?[36]

Answers to these questions will depend on the research objectives, and they will thus most likely vary depending on each researcher's perspective and vision of the research results they would like to produce. For lawyers engaging in interdisciplinary research, the questions will include: Do they wish to analyze the law from a specific analytical angle—such as how it produces vulnerability—as is commonly the case in critical legal studies and, more recently, in new legal realism?[37] Or do they wish to enrich legal reasoning and conceptualizations with a more thorough understanding of the context in which they are being applied? Or both?

The VULNER project opts to combine the two objectives, with the overall purpose of reaching a better understanding of the concrete effects of the increased focus on "vulnerable" migrants and refugees on the ground, while having a critical look at that trend. The proper identification of migrants' experiences of vulnerabilities thus requires that we include an external analysis, whereby we identify the extent to which and how these experiences are also produced by the legal framework in place, based on the empirical data collected through ethnographic fieldwork. But there is not much legal interest in such external analysis if it merely highlights the consequences of migration control mechanisms on migrants—which can in any case be inferred, and of which most lawyers already have an overall sense, especially those who have experience in legal practice. A broader analysis that connects these findings with a study of how "vulnerability" is defined in law is thus also required to engage in interdisciplinary research that can improve legal reasoning—as is further detailed in Section D below.

The combination of the two approaches also generates challenges, however, as it requires entering into dialogue with research communities that have thus far remained very distinct and rather distant from one another, and that have developed different—and at times competing—understandings of and approaches to "valid" research methods and results.

II. Facing a Different Research Ethos

Empirical researchers attach great importance to the research methodology, which they expect to be clearly outlined and critically reflected upon. It is common for anthropologists, for example, to reflect on their own positionality in the field and how this may affect the data collection process.[38] Moreover, empirical research often makes a clear distinction between the collected data and their analysis based on a theoretical framework that mobilizes empirical conceptualizations—which is also the reason why legal analysis tends to be perceived as one data point among others, even though its observation requires additional technical skills—with legal debates sometimes being viewed as mere technicalities that should not necessarily be delved into to produce adequate empirical findings.

[36]*See* John Comaroff, *Does Anthropology Matter to Law? Reflections, Inflections, Deflections*, 2(2) J.L.A. 72-78 (2018).

[37]Susan B Coutin, *Transgressing Boundaries through new Legal Realist Approaches: Affinity and Collaboration within Ethnographic Research on Immigration Law and Policy*, *in* Research Handbook on Modern Legal Realism 148-60 (Shauhin Talesh, Elizabeth Mertz & Heinz Klug eds, 2021).

[38]Anthropology has produced abundant work reflecting on researchers' positionality and how it should be managed. *See, e.g.*, Jean-Pierre Olivier de Sardan, *La politique du terrain. Sur la production des données en anthropologie*, 1 Enquêtes 71 (1995).

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In legal research, on the contrary, the methodology is often implied.[39] It is very uncommon for lawyers to discuss it, in part because it is assumed that the reader is trained in law and has the required background knowledge. It is also very uncommon to include reflections on the researchers' positionality, probably because of one of the foundational fictions of legal positivism: Legal science should be disconnected from political choices, and therefore the law should be treated as objective material that can be analyzed through objective tools leading to objective solutions—following a somewhat mathematical approach.

These various understandings of what research data are, and which research methodologies are valid result in additional challenges when discussing and presenting the research results: How to convince anthropologists of the value of a proper and rigorous legal analysis? How to convince legal audiences that studying the broader social context in which legal norms operate and are created is also useful to the legal analysis?

There is probably no other solution to these issues than being upfront regarding the research methods used, which should be detailed in greater length and detail than is usually the case in legal research, and on the added value of the legal analysis. In the first research phase of the VULNER project, for example, the legal manifestations and consequences of "vulnerability" in each country under study were analyzed with a view to reaching a better understanding of state practices that relate to the identification and assessment of vulnerabilities. This is a prerequisite for reaching a proper understanding of how public servants and judges seize and mobilize "vulnerability" when dealing with migrants and asylum seekers on a daily basis—which is a question that was studied through semi-structured interviews with them. To achieve transparency regarding methods, all of the VULNER research reports include a methodology section.

III. Juggling Research Temporalities

The last challenge is a practical one, which relates to different temporalities in the implementation of the research tasks. In legal research, the data collection process is relatively straightforward, as it can be done through desk research. A lawyer with adequate knowledge of the relevant legal databases and journals, and/or who has the adequate connections within courts and legal practitioners' networks, will gain relatively easy access to the legal material that needs to be investigated. Most of the research time will thus be spent analyzing the legal material, and it is relatively easy to collect additional legal material should it be necessary to strengthen some points of the legal analysis. Hence, quite often the data collection and the data analysis phase are not clearly distinguished.

By contrast, anthropologists conduct ethnographic fieldwork, which requires them to immerse themselves in the groups or societies they are studying. Their objective is to collect empirical data not only through interviews, but also through casual encounters and observations—allowing for a deeper qualitative analysis than that which could be achieved through surveys. But gaining access to the field and the trust of the research participants so that they agree to open up is a major challenge. It can only be overcome by spending sufficient time in the field, thus affecting the amount of time that can be devoted to the data analysis.

This temporal dimension is important to consider when designing a research project, and even more so if deliverables are expected throughout the project duration. In the VULNER project, the solution was to start with a legal analysis, which is combined with semi-structured interviews with state actors in charge of implementing the relevant norms on a daily basis. This approach presented two advantages: First, the legal analysis could be refined from the outset, as the expertise of the actors interviewed allowed the researchers to identify the most important sources and to give more depth to their own legal analyses. Second, the preliminary contacts could be established

[39]Ellen Desmet, *Methodologies to Study Human Rights Law as an Integrated Whole from a Users' Perspective: Lessons Learnt*, *in* Fragmentation and Integration in Human Rights Law: Users' Perspectives 12-38 (Eva Brems & Saïla Ouald-Chaib eds., 2018).

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in view of preparing the upcoming ethnographic fieldwork, especially with respect to fieldwork to be conducted in state-run settlements for asylum seekers.

D. Toward a Deeper Understanding of the Law, Its Implementation, and Its Underlying Dynamics?

The combination of legal and anthropological research methods and concepts bears the promise of generating research results that integrate a deeper understanding of the social context into legal reasoning, including the concrete effects of legal norms on the ground and the main underlying social and political factors that drive legal developments. This part highlights the concrete gains of this approach, based on the VULNER project's intermediate findings.[40]

The first section shows how empirical analyses from the legal anthropology literature support a deeper understanding of the daily implementation of legal standards set at the supranational level, such as "vulnerability"—Section I. The second section shows how the literature in legal anthropology can help in understanding and questioning the main driving logics of asylum and migration law, which preside over legal developments but which often remain implied in legal research—including the reasons why "vulnerability" is becoming an increasingly popular label in asylum and migration law—Section II.

I. The "Fuzzy" Law and Its Implementation

In her analysis of international criminal law, legal theorist Delmas-Marty argues that the multi-leveling of the legal framework through the development of supranational legal orders has given rise to increasingly "fuzzy" legal concepts.[41] She notes that international human rights law often produces overarching legal concepts—such as "fair trial" or "inhumane and degrading treatment," etc.—that leave a relatively wide margin of appreciation to the legal actors who implement them in concrete cases on a daily basis. In their study of how international legal norms protecting women's rights are implemented by local actors, legal anthropologists Levitt and Merry further argue that there is a "vernacularization" phenomenon at play as international legal standards are transformed through their integration into local practices, where they meet with broader social and institutional dynamics.[42]

Both theories share a focus on the legal and social transformations of supranational legal standards that result from their implementation in a local context that is driven by its own

[40]For a presentation of these intermediate findings, see Luc Leboeuf, *Humanitarianism and Juridification at Play: "Vulnerability" as an Emerging Legal and Bureaucratic Concept in the Field of Asylum and Migration*, VULNER Research Report 2021 (2021) https://www.vulner.eu/85193/VULNER_WP1_IntroReport.pdf. For further presentation, see also VULNER research reports: Chaden El Daif, Maha Shuayb, & Maria Maalouf, *The Vulnerability of Refugees amid Lebanese Law and the Humanitarian Policies,* VULNER Rch. Proj. Rep. n. 45 (2021) https://www.vulner.eu/78656/VULNER_WP7_Report1.pdf; Midori Kaga, Delphine Nakache, Melissa Anderson, François Crépeau, Anthony Delisle, Nicholas Fraser, Edit Frenyo, Anna Purkey, Dagmar Soennecken & Ritika Tanotra, *Vulnerability in the Canadian Protection Regime: Research Report on the Policy Framework*, VULNER Rch. Proj . (2021) https://www.vulner.eu/78545/VULNER_WP6_Report_1.pdf; Winfried Kluth, Helene Heuser, & Jakob Junghans, *Addressing Vulnerabilities of Protection Seekers in German Federalism*, VULNER Rch. Proj. (2021) https://www.vulner.eu/78672/VULNER_WP3_Report1.pdf; Hilde Liden, Jessica Schultz, Erlend Paasche, & Helene Wessmann, *Vulnerable Protection Seekers in Norway: Regulations, Practices, and Challenges*, VULNER Rch. Proj (2021) https://www.vulner.eu/79583/VULNER_WP5_Report_1.pdf; Sabrina Marchetti & Letizia Palumbo, *Vulnerability in the Asylum and Protection System in Italy*, VULNER Rch. Proj (2021) https://www.vulner.eu/78645/VULNER_WP4_Report1.pdf; Sylvie Sarolea, Francesca Raimondo, & Zoé Crine, *Exploring Vulnerability's Challenges and Pitfalls in Belgian Asylum System, Research Report on the Legal and Policy Framework and Implementing Practices in Belgium*, VULNER Rch. Proj (2021) https://www.vulner.eu/80233/VULNER_WP2_Report1.pdf.

[41]Mireille Delmas-Marty, Le Flou du Droit: Du Code Pénal aux Droits de l'Homme (2004).

[42]Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India, and the United States*, 9(4) Global Networks 441 (2009).

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social, institutional, and legal dynamics. Legal research offers some tools to better understand these transformations through the study of domestic legal norms. Based on the analysis of legal sources, it can answer questions such as: How are international legal standards transposed into national law? How are they interpreted by domestic courts? How do they relate to other national legal norms, and, if there are conflicts, how are these managed by domestic legal actors?

But the legal research tools do not allow researchers to understand the law in its living dimensions. They do not encapsulate the practices of domestic actors, including how they make use of their margin of appreciation when mobilizing legal concepts to decide on concrete and individual cases. Such practices are often left in the dark, if not artificially presented as the result of an automatic thinking process broadly referred to as the "legal syllogism." The proliferation of "fuzzy" legal concepts has the effect of giving a wider margin of appreciation to legal actors within the legal syllogism.

The collection of empirical data, by contrast, gives the means to zoom into the legal syllogism to better understand the various factors that influence it, and to better forecast its concrete effects.[43] Such knowledge supports the development of legal thinking that incorporates an understanding of how international legal standards are transformed through their implementation, and which does not develop legal arguments and analyses that are disconnected from empirical realities on the ground.

The first research phase of the VULNER project, for example, shows that the rather "fuzzy" requirement to consider the vulnerabilities of asylum seekers, as it has emerged in the ECtHR case law and in EU asylum law, has two main practical effects. The first is a focus on immediate and practical needs, which are the easiest to identify, given the time constraints public servants are confronted with and the fragmentation of state intervention across different actors at different stages of the procedure—for example, at the registration of the asylum application, in the reception centers for asylum seekers, at the asylum interview, at the asylum hearing before the court, etc. The second effect is to grant to decision-makers a certain amount of leeway to make adaptations to existing rules when individual circumstances call for it—which is a practice that mainly benefits those applicants who manage to trigger feelings of compassion and, thus, also has an important emotional aspect.[44]

But anthropology is about more than providing the research tools to better understand empirical realities and, as lawyers often put it, discussing the "law in context": Dissociating "law in the books" from "law in action" may not make much sense, as "law" is also produced in a given social context.[45] As I show below, the knowledge produced in legal anthropology is also of direct relevance in identifying, discussing, and reflecting on the law's driving logics and underlying tensions more broadly.

[43]In his ethnographic work within asylum courts, for example, Good shows how perceptions of what constitutes "expert evidence" may influence judges' reasoning. *See* ANTHONY GOOD, ANTHROPOLOGY AND EXPERTISE IN THE ASYLUM COURTS (2007).

[44]For an ethnographic account of how emotions play a role in the implementation of migration law by street-level bureaucrats, see Lisa Marie Borrelli & Annika Lindberg, *The Creativity of Coping: Alternative Tales of Moral Dilemmas Among Migration Control Officers*, 4(3) I.J.M.B.S. 163-78 (2016).

[45]Marie-Claire Foblets, *RIEJ, Désormais Plate-Forme pour l'Analyse Contextuelle du Droit ? Attention aux Cures de Jouvence qui Rétrécissent le Champ de vue!*, 70(1) R.I.E.J. 84-91 (2013). As argued by Vetters, Eggers, and Hahn with respect to German administrative law, for example, "the doctrinal construction of *Rechtsstaatlichkeit* as a *Staatsstrukturprinzip* and underlying ordering principle of administrative law can be reconceptualized as the product of social interactions and ascriptions of (contested) meanings by different actors." *See* Larissa Vetters, Judith Eggers, & Lisa Hahn, *Migration and the Transformation of German Administrative Law: An interdisciplinary Research Agenda*, 188 MAX PLANCK INST. SOC. ANTHROPOLOGY WORKING PAPER 32 (2017).

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II. Revealing—and Questioning—the Underlying Social and Political Dynamics of Asylum and Migration Law

The translation of empirical realities into legal categories necessarily implies that these realities become encapsulated, that is, reduced to criteria that are relatively strictly defined in abstract ways through the legal text, and that therefore do not fully account for contextual specificities. This juridification process is not neutral; it results from implied political choices, power relations, and understandings of these realities. As argued by Barbou des Places, for example, the legal categorization of migrants is accompanied by restrictions on navigating among these categories and their corresponding rights and advantages in a way that also fits within the broader policy objective of increasing state control over migration movements.[46] In her historical work on how the legal category of "refugee" is constructed over time, Akoka similarly notes major transformations, depending on the overall social and political context, that have culminated in our present-day focus on individualized circumstances throughout the refugee status determination procedure.[47] This trend is also illustrated by the increased focus on "vulnerabilities," the main legal effect of which is to guide the individualized assessment of the specific circumstances of the case—as shown above.

Studies in legal anthropology can thus contribute to a deeper understanding of the various underlying social and political realities that guide legal dynamics, in a holistic way that also considers how these realities are impacted in turn. For example, in his work on "humanitarian reason," Fassin highlights the connection between the development of the welfare state and the increased use of humanitarian concepts to justify exercising control over people, as the objective of caring also legitimizes state interventions in their controlling dimensions.[48] The trend has not escaped migration policy, as Ticktin has demonstrated in her ethnographic work on migrants claiming a protection status on humanitarian grounds in France. She argues that the available humanitarian protections also legitimize the exclusion of migrants who cannot found their claims on protection needs—which are evaluated on the basis of individual assessments that focus on the biological condition.[49]

Such work is particularly relevant to understanding what the increased focus in law on migrants' "vulnerabilities" reveals of the underlying logics of contemporary legal developments in the field of asylum and migration. "Vulnerability" is indeed a humanitarian concept at heart: There is a long-standing tradition of designing aid and development programs on the basis of vulnerability assessments, with the objective of identifying the target groups.[50] In this context, "vulnerability" serves to identify and overcome obstacles to self-reliance, so that aid recipients can be empowered to lead their own independent lives and are not destined to remain dependent on international aid.

The surge of the humanitarian concept of "vulnerability" within the field of asylum and migration law is thus accompanied by certain side effects that are inherent in humanitarian concepts. Tensions necessarily emerge as "vulnerability" evolves from a diagnostic concept that allows empirical researchers to better understand the human condition into a tool of selection that allows state actors to identify those who will benefit from state intervention. This is likely to generate, in turn, a "vulnerability competition," that is, a fierce fight among individuals who seek to present themselves as more vulnerable than others—as Nakueira has documented in her ethnographic

[46]Ségolène Barbou des Places, *Les Étrangers "Saisis" par le Droit : Enjeux de l'Édification des Catégories Juridiques de Migrants*, 128(2) Migrations Société 33-49 (2010).

[47]Karen Akoka, L'Asile et l'Exil : Une Histoire de la Distinction Réfugiés/Migrants (2020). On the complex relationships between the legal categories of "refugee" and "migrant," see Claire Brice-Delajoux, Droit des Étrangers, Droit de l'Asile: Entre Attraction et Repulsion (2021).

[48]Didier Fassin, Humanitarian Reason: A Moral History of the Present (2011).

[49]Miriam Ticktin, Casualties of Care: Immigration and the Politics of Humanitarianism in France (2001).

[50]For example, see the 2030 UN Agenda for Sustainable Development, U.N. G.A. Res. 70/1, ¶ 23 (Oct. 21, 2015); The UN Guiding Principles on Extreme Poverty and Human Rights, U.N. H.R.C. Res. 21/11.

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work on a refugee camp in Uganda, where refugees compete to be labeled "vulnerable" in order to gain access to resettlement programs.[51]

Moreover, disagreements will arise when defining vulnerability categories—as is usually the case when it comes to defining humanitarian concepts that allow aid workers to identify aid beneficiaries. In his critical, ethnography-based work on humanitarianism in Jordan, for example, the anthropologist Lewis Turner emphasizes that aid beneficiaries may feel estranged from the vulnerability categories that are established by aid organizations, especially if they are not involved in their definition.[52]

This body of anthropological literature usefully highlights the connection between "vulnerability" and other broader policy objectives that relate to the governing of migration and asylum and the controversies that are likely to arise as a result. It sustains broader legal thinking on why some legal concepts are being developed, which tensions are likely to arise as a result, and how they can be channeled through the legal system. It also gives tools to better grasp and understand how current tensions and disagreements on how to address migration and refugee movements are being addressed through law—with an overall emphasis on humanitarian concepts that assist in achieving the delicate equilibrium between individual and collective interests while respecting fundamental rights.

E. Conclusion: The Quest for Bridging the Gap between the Law and Empirical Realities

In this article, I have attempted to reflect on how an interdisciplinary approach that seeks to include anthropological knowledge in legal reasoning can enhance legal scholarship. In doing so, I have offered some concrete illustrations based on the VULNER project design and intermediate research results. I have demonstrated that the empirical knowledge generated through ethnographic fieldwork is centered on migrants' and refugees' experiences and the practices of state actors in charge of implementing the law on a daily basis. I have argued that such knowledge can contribute to legal debates by allowing law scholars and legal practitioners to reach a more profound understanding of the social dynamics that guide the implementation of the law in individual cases, including how state actors make use of their margin of appreciation when implementing legal norms in individual cases, as well as how legal norms are being produced.

It can be expected that a greater understanding of empirical realities can, in turn, assist legal scholars in devising legal conceptualizations that are closer to the empirical realities they seek to reflect, and in diagnosing some of the main social logics and tensions that underpin legal developments. When it comes to the legal conceptualization of "vulnerability," for example, there is much to gain from developing it in a flexible way that serves as an entry point through which legal practitioners can better consider empirical realities on the ground when deciding on individual cases.

For such a dialogue between law and anthropology to be meaningful, however, there needs to be adequate translation of empirical concepts into legal scholarship. The external perspective on law developed in anthropology, and in empirical research more broadly, does not serve a normative purpose. As argued by Gill and Good, "the ethnographic approach to law is descriptive, and inherently comparative and relativistic."[53] Some translation will thus be necessary, including thoughtful consideration of other interests and values that the law also seeks to reflect and that are expressed through competing legal concepts.

[51]Sophie Nakueira, *Governing Through Paperwork: Examining the Regulatory Effects of Documentary Practices in a Refugee Settlement*, 3(2) J.L.A. 10-28 (2019); Sophie Nakueira, *Unpacking Vulnerability: An Ethnographic Account of the Challenges of Implementing Resettlement Programmes in a Refugee Camp in Uganda*, in HUMANITARIAN ADMISSION TO EUROPE: THE LAW BETWEEN PROMISES AND CONSTRAINTS 241-270 (Marie-Claire Foblets & Luc Leboeuf eds., 2020).

[52]Lewis Turner, *The Politics of Labelling Refugee Men as "Vulnerable,"* 28(1) SOC. POLIT. 1 (2019).

[53]Nick Gill & Anthony Good, *Introduction*, *in* ASYLUM DETERMINATION IN EUROPE 1-26 (Nick Gill & Anthony Good eds., 2018).

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It is illusory to believe that the gap between law, on the one hand, and empirical realities and human experiences as documented and conceptualized in anthropology, on the other, will ever be completely erased. But a better understanding of these realities and experiences in relation to the law nonetheless bears the promise of improving the legal norms and the legitimacy of the legal system—which is the very primary condition for its proper functioning.

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