



Behind the shield of protecting minors: can vulnerability justify inequality?

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Understanding vulnerability in legal context

- Academic Debate: Increasingly discussed as a way to redefine individuals' roles in society.
- Fineman's Approach:
 - Vulnerability is intrinsic to all individuals.
 - Linked to dependency on others (parents, partners, caregivers).
 - Cannot be "solved"; requires social, economic, and legal safeguards to prevent exploitation.
- Expansion Beyond Family Law:
 - Applied to human rights, consumer law, data protection, migration, and environmental law



Challenges and Criticisms

- Equality vs Vulnerability:
 - Goes beyond formal equality (equal treatment assumption).
 - Adds nuance compared to substantive equality (acknowledging differences).
- Risks:
 - Concept remains vague, leading to unpredictability.
 - Potential for oversimplification and reinforcing power structures.
 - **Case Example: C-769/22 European Commission v Hungary:**
 - Vulnerability used to justify limiting rights of other groups (e.g., LGBT+).
- Goal:
 - Ensure inclusive, rights-based safeguards without creating hierarchies among vulnerable groups.



Minors as Vulnerable Individuals in EU Law

- Traditional View:
 - Minors seen as structurally fragile → paternalistic approach.
 - Example: Italian Civil Code → absolute incapacity to act.
- EU Evolution:
 - Article 24 CFR:
 - Protection & care for well-being.
 - Right to be heard according to age/maturity.
- Principle of evolving capacities (UN CRC):
 - Protection + autonomy in proportion to maturity.



Case C-769/22

- June 2021: Hungary adopted Law LXXIX of 2021 (“Child Protection Act”).
 - Law aimed at stricter measures against paedophilia but included provisions restricting LGBTQ+ content :
 - Prohibits minors from accessing content promoting or portraying gender identities different from sex at birth, sex reassignment, or homosexuality
 - Related advertising and media services require classification of such content as Category V (broadcast only between 22:00–05:00)
- EU Response
 - 2022: Commission launched infringement procedure.
 - Case referred to CJEU
 - Alleged violations: Articles 2 & 10 TEU, Articles 1, 7, 11, 21 CFR.
 - Directives: Audiovisual Media Services, e-Commerce, Services Directive.
 - Article 56 TFEU (freedom to provide services).



Case C-769/22

- Does invoking child protection justify restrictions that discriminate based on sexual orientation and gender identity?



Case C-769/22 - Advocate General's Opinion

- Legitimate Aim:
 - Child protection is valid under EU & international law.
- Conditions:
 - Measures must respect proportionality, necessity, and non-discrimination (Articles 2, 10 TEU; Articles 11, 14, 21 CFR).
- Key Points by AG Capeta:
 - No margin of appreciation for cultural/moral censorship.
 - Prohibiting positive LGBTQ+ representation = inherently discriminatory.
 - Child protection ≠ moral censorship → minors need critical understanding, not exclusion.
- Conclusion:
 - Hungarian law violates equality, freedom of expression, and internal market principles.



Reframing Vulnerability - 1

- Core Tension:
 - Protection vs autonomy → minors are vulnerable but also evolving agents.
- Risks:
 - Blanket exclusion reinforces stigma & discrimination.
 - Misuse of vulnerability concept can entrench power structures.



Reframing Vulnerability - 2

- Proposed Approach:
 - Context-sensitive, non-stigmatising, rights-based.
 - Recognise evolving capacities (Article 24 CFR; UN CRC).
 - Combine protection with empowerment:
 - Digital literacy, critical thinking, identity affirmation.
- Positive Obligations:
 - Design inclusive systems (AI Act, DSA):
 - Age-appropriate moderation, inclusive algorithms.
- Education as Key:
 - Foster pluralism & civic participation (ECtHR, BIK+ Strategy).