

WELLCHI Network

Workshop 2

“Which are the provisions in Family Law that foster children’s well-being and which kind of reforms should be envisaged in this respect”

**INSTITUTE FOR LEGAL STUDIES
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Abstracts of papers

Individualisation and Child Poverty in Southern Europe

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Abstract

In the last decades we have witnessed new social developments across Europe as increasing female labour market participation has favoured a transition towards a model based on dual-earner households for a larger majority of families with dependent children. This has meant in general more prosperity and a good life for most families, in particular more economic independence and social protection for working women and besides, by bringing into question the traditional sexual division of labour, has uncovered a number of gender disparities and thus has made apparent a need for conciliation between work and family. On the other hand, these developments have been accompanied by a trend towards individualisation connected with the rise of more marital instability, the growth of the number of children born outside marriage and the spread of lone parent households that result in a relative impoverishment for households with a single breadwinner.

In the context of general EU patterns, the paper especially deals with the emergence of problems associated with lone parenthood in Southern European countries where the accumulation of class and family structure risks is bringing about high rates of child poverty. Although it is true that such countries have been lagging behind in these processes, in the last few years one may detect an emerging trend towards cross-class divorce that is probably associated with the intense growth of single parenthood. Data show that Southern European societies have the least child-friendly systems of social protection in the EU, suggest the deterioration of the well-being of children and their families (with the notable exception of Greece) and make one wonder whether high rates early school leaving and low educational achievement in such nations are not clearly related with this situation.

Parental education, public education – a shifting balance. Some remarks on recent developments in Germany

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Abstract

- Education, care, schooling - how the relationship between parental rights and obligations and state intervention changed over time
- Education and care for children below school-age in Germany between public provision and maternal education: the factual situation and the legal framework
- Change is needed – but very slow and continuously blocked: the case of the ‘Day Care Development Act 2005’ in the FRG
- Why is this the case? Some remarks on particular institutional features: the importance of federalism and the strong position of the Federal Supreme Court

To educate and socialize children is a primary task of parents, and legally it is a main obligation of parents and a central aspect of ‘parental responsibility’. However, to socialize children is also a societal task, and through the introduction of obligatory schooling, starting in the second half of the 19th century, the state intervened into parental rights and limited them. Changing societal needs of qualifications and competences of individuals in a so-called ‘knowledge-based society’ where life-long learning is required, have not only lead to comparative empirical evaluation of pupils performance through studies like PISA and TITMUSS – and their results caused public concern, since the FRG was quite behind in the ranking. But also early childhood education of children below school age has attracted more and more public attention over the last years - the OECD-study ‘Starting strong’ (2001) can be taken as an indicator, and finally also the FRG participated, as the 19th country study.

Although the subject of early childhood education has gained publicity in debate in the FRG, political and institutional change is very slow. In the old Länder, the provision of child care is seen primarily as a maternal task, and public places for children under three or full-day places in kindergarten for those above three years are scarce. The new Länder display different patterns of provision; although serious cut-backs have taken place after reunification, the offer of full-day places for children of all age-groups below school-age meets in general the demand and is exceptional (OECD 2005). In order to improve the situation mainly in the old Länder of the FRG and to strive for compliance with the EU benchmarks to provide places for 33% of all young children up to the year 2010, in 2004 a draft statute was brought into parliamentary debate which involved reforms of public daycare provision as well as reforms of youth welfare law. Only part of it was implemented by 1st of January 2005 as law, which brings about only modest reforms in the provision of public childcare: the central part of the Act is that minimum standards for the number of places are formulated explicitly (mainly related to both parents being employed or involved in training measures or full-time education). The whole parliamentary procedure was dominated by quarrels over financing structures and the distribution of competences between the Federal State, the Länder and municipal communities, which blocked further progress. The governing Socialdemocrat-Green coalition refrained even from more far-reaching initiatives in the ‘shadow’ of the case-law of the Federal Supreme Court on restrictions of legislative competences of the Federal State under the rules of the German Basic law.

The paper argues that a change in the relation (and regulation) of private (mainly maternal) and public education for young children in the FRG is urgently needed, but very slow or even blocked due to legal and institutional features, and explores these institutional aspects more in depth.

Children's Narratives of Post-Divorce Family Life: From individual experience to a new social ethic'

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Abstract

This paper will draw on interviews with 60 children and young people (whose parents have divorced) to explore how they construct narrative accounts of post-divorce family life. Rather than seeking to describe children's experiences, the focus of the paper will be on how young people position themselves in their narratives and the extent to which they depict themselves as victims and/or blame their parents. The conclusion turns to the question of whether these individual accounts can give rise to a social ethic in which children's experiences can inform how to divorce 'in the proper manner'.

Securing a relationship between children and their carers - trial and error in England

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Abstract

This paper considers the need for those caring for children, who are not parents to have a legal status, and examines the varying processes which have been used in English law to secure such a status. It discusses whether recognition of the responsibility of caring for a child might provide a better basis for giving carers powers than formal orders or agreements conferring 'parental responsibility.' It addresses 2 questions:

- 1) Is formal recognition of non-parental carers necessary?
- 2) What are the appropriate mechanisms for providing such recognition?

In doing so, it makes comparisons with unmarried fathers who are recognised as parents but do not automatically have parental responsibility under English law.

The recognition and protection of a child's relationships with carers (and vice versa) is required under the ECHR. 'Family life' can exist with unrelated carers, and where it does, the interests of the child and the carers may require that their rights are respected, and even given priority over those of a parent. It is not sufficient that the State refrains from interfering with such relationships, the positive obligation in art 8 requires the State to secure the relationship appropriately.

English law still separates parenthood from parental responsibility, the powers and responsibilities over a child. Mothers and married fathers have parental responsibility automatically. Unmarried fathers and others may gain parental responsibility in a variety of different ways, but those who are neither parents nor guardians can only obtain the same legal position as parents by adopting the child.

The concept of parental responsibility (previously termed legal custody) is not clearly defined in English law. The Children Act 1989, s.3(1) provides that it 'means all the powers, responsibilities and authority which by law a parent has in relation to a child and his property.' Although family law text books identify the rights parents are recognised as having, these are largely overridden by duties which are also not clearly defined. Parental rights are always subject to the rights of the child and others under the ECHR, the power of the courts to make orders on the basis of the child's best interests and the duty of the local authority to intervene to protect the child from significant harm. The limits of parental responsibility are such that John Eekelaar has argued that granting it to fathers makes very little difference in law.¹

English law also allows people other than parents and guardians to obtain parental responsibility for children without formally ending the relationship with parents as occurs through adoption. These are relatively modern developments which were originally introduced for three main reasons: -1) a perceived need to formalise caring relationships in order to secure stable families for children; 2) the rejection of adoption as a mechanism for creating legal relationships after remarriage or within extended families; and 3) a wish to remove artificial barriers to court orders in favour of non parents. The requirements of the ECHR were not a factor in the original development of recognition for carers and others.² A variety of different status orders have been created – *custodianship* and *joint custody* (now both replaced with the *residence order*) and *special guardianship*. Until recently, giving parental responsibility to a non-parent necessitated court proceedings, ensuring that the court maintained its oversight of formal arrangements for children. However, under the Adoption and Children Act 2002,

¹ J. Eekelaar, 'Rethinking parental responsibility' [2001] Fam Law 426-430. Eekelaar nevertheless stated that he supported proposals to give all fathers parental responsibility automatically.

² The ECHR was considered when the Children Act 1989 was drafted and custody and custodianship were replaced by residence orders.

(to be implemented in autumn 2005) step-parents will alternatively be able to obtain parental responsibility by agreement with the child's parents.

Carers already have some automatic recognition in English law. First, the relationship between a married couple and any child (except a foster child placed by the local authority) who is treated as a member of their family is recognised as having legal consequences. The child is 'a child of the family'³ and this gives the adults rights to apply for residence or contact, and obligations to maintain the child if they separate. Other carers cannot apply for court orders in respect of children without permission of the court unless they have the consent of everyone with parental responsibility or have been caring for the child for 3 years.⁴ This protects the parents from interference but could leave the relationship between the carer and child unprotected. Secondly, carers can take action and make decisions about the children they are caring for; 'anyone with care of a child may do what is reasonable for the purpose of safeguarding and protecting the child's welfare.'⁵ Thirdly, where applications are made under the Children Act 1989 the child's current carers must be notified.

There is little evidence that carers feel the need for formal powers, or experience difficulties in the ordinary course of life if they do not obtain them. Schools frequently require a signed consent form for specific activities *e.g.* taking children on trips, or for medical examinations or vaccinations. However, it is common practice to send a letter home to be signed by 'a parent or carer', or sometimes 'a parent or guardian' without any apparent recognition of the differences between these formulae, nor checks that the person signing has parental responsibility. Similarly, doctors and clinics assume that a person bringing a child for treatment can give the necessary consent. Few carers seem prepared to engage with the family justice system in order to obtain formal powers. Custodianship and joint custody orders were rarely sought. Residence orders are more common, but it seems that the majority of carers manage without. For foster carers, obtaining parental responsibility has the advantage of ending the control of the local authority but this also carries the disadvantage of less financial and social work support. It is easier to see legal and financial advantages for the local authority than for the carers, and for the carers rather than the children. At a social or psychological level, normalisation through ending the involvement of the local authority may be positive for both carers and child.

³ Children Act 1989, s.105(1).

⁴ Children Act 1989, s.10.

⁵ Children Act 1989, s. 3(5)

Changing family forms in Bulgaria: In pursuit for a policy response

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Abstract

This paper first presents a brief overview of the main demographic changes in Bulgaria related to marriage, family and fertility, which have happened since the early 1990s: postponement of family formation (both marital relationship and entering parenthood), postponement of adulthood and youth emancipation, decrease in fertility, rise in out-of-wedlock births, and growth of cohabitations (both before marriage and in between marriages). Based on official statistics and additionally calculated data, the main trends have been demonstrated: the number and types of households and families, living arrangements of young people, the number of cohabited and single-parental couples, divorced and actually separated couples. The author tries to reveal the main determinants of the new family patterns: increase of students in higher education, limited labour market and high youth unemployment, uncertainty, the challenges of consumer society.

In the second part of the paper the author elaborates on the main principles of the present-day social policy in Bulgaria directed towards family and children. The range of measures for bearing and raising children have been delineated: maternity and parental leave, children's allowances, childcare facilities, working arrangements for parents, costs for children's education and care as a percentage of GDP, etc. The main conclusions drawn from the analysis concern inefficiency of social policy, imbalances in reconciliation of work and family life for young people, overburden of family members with care responsibilities to infants, aged, sick and disabled people. Effective state social and family policy directed towards development and stability of the family unit and the well-being of its members should include a set of legal and institutional resources as well as restructuring of public expenditures for families and children.

Maintaining the relationship between children and their imprisoned parent.

The French experience of ‘*Relais Enfants-Parents*’

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Since 20 years, the aim of the NGO ‘Relais enfants-parents’ is to support contacts between children and their imprisoned parent. It is assumed that, for the children whose parent is in jail, truth is better than lies; that they should not be deprived of the presence of this parent, for any reason, and that they will benefit, for their development, of continuous contacts with him/her. In this presentation, I will present the experience of Relais enfants-parents and discuss it using data coming from observations and from a small study conducted amongst prisoners.

1) Maintaining contact between children and their parents, a new sociolegal norm

2) The intervention of Relais enfants-parents

- Workshops in prison
- Accompanying children to meet their parent
- Nurseries

3) Discussion

- The characteristics of the intervention of REP
- The effects of the intervention: prisoners consider as parents
- A new ideology and its limits

The Newest Europeans: children's legal status as a guarantee of their welfare

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Children's rights were the topic of the moment fifteen or twenty years ago, giving rise to the United Nations Convention on the Rights of the Child in 1989. It was an era when the recognition of a child's legal personality was held to be good for the child. In 1985, in the *Gillick* judgement, the highest court in the UK found that an underage child of sufficient personal maturity could consent to medical treatment without her parents' knowledge or agreement. Speaking in 1988 of the investigation of alleged child sexual abuse, Lord Justice Butler-Sloss famously asserted that "the child is a person, not an object of concern". The idea of children's rights as individuals, including their right for their own views to be heard, was reflected in domestic legislation in Britain, especially the Children Act 1989. Regulations were made to implement the principle of children's personality within family proceedings. Children's best interests were claimed as an imperative.

The subsequent reality has however proved at best equivocal, at least in the UK. The *Gillick* judgement turned out to be principally protection for doctors. Children's best interests were equated with the integrity and privacy of the biological nuclear family, and despite a later retreat in 2000 from routinely making contact orders in favour even of particularly violent parents, the courts still proved particularly unwilling to allow children access to the legal process to vindicate any rights they might have.

At the European level, the rights to be heard that children appeared to have won through Article 12 of the UNCRC were weakened by the interpretation confirmed in the European Convention on the Exercise of Children's Rights, that children's views are to be heard through the filter of social workers and their interpretation of the child's interests. Philosophical debate justifying children's legal disability and state parentalism suggested that children should not have rights because they should or did not have responsibilities and that their remedy for any legal disability is to grown up. In many or most cases this exclusion of the law may be appropriate, but it leaves children without any remedy for real wrongs.

The European Convention on Human Rights is supposed to give everyone protection from state interference, or from non-state interference to which the state turns a blind eye. But the Strasbourg jurisprudence may not protect children when their individual rights conflict with parental rights. In the UK context, the ECtHR has not allowed children to resist assault by parents or those acting in their place by using the provisions of Article 3, relating to inhuman and degrading treatment, even though similar assaults on adults would be a criminal offence. Nor has it allowed children to use the provisions of Article 8, the right to respect for one's family life, to keep foreign parents with them in the country. The latter has meant that children have been effectively, if informally, expelled from their own countries.

The jurisprudence of the European Court of Justice appears an unlikely source of assistance to children because its origins are firmly based in free market ideas within which children are not likely actors or persons. Nevertheless the remit of the ECJ does include dealing with cases that fall within the usual sphere of child law, such as the enforcement of maintenance, and it has recently taken decisions that put children at the heart of family as well as citizenship rights. Its approach has included giving children greater rights than adults because of their greater vulnerability. In doing so, it suggests a legal model that can further both children's rights and children's interests.