

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 –
BULGARIAN ACADEMY OF SCIENCES
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The Newest Europeans

children’s legal status
as a guarantee of
their well-being

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Is law useful?

Who are legal rights useful for?
Are legal rights useful / needed
for children?

Are children's legal rights
enforceable? Should they be?

should people have legal rights?

*if so, should children?
or is family law enough?*

*must rights be enforceable?
(what is family law for?)*

enforcing legal rights

legal rights, protected by court enforcement

access to the legal system restricted by ...

- lack of standing in family cases
- legal disability under a certain age
- lack of individual capacity
- lack of money

children's legal disability

- | • Rationalisations | • Result |
|---|--|
| <ul style="list-style-type: none">• children are protected by their parents• children are naturally incapable• children don't have legal responsibilities so they shouldn't have legal rights | <ul style="list-style-type: none">• children are more vulnerable legally as well as physically |

effects of children acting in the legal system through parents

- children's rights are equated with their best interests
 - perceptions may differ, and interests may be less respected than rights
- children may lack the protection of the law from excesses of
 - parents
 - state

results of incapacity

equation of

- legal disability / incapacity (not being able to use the legal system)

with

- lack of legal personality (recognition as a legal person)

international protection for children

the United Nations Convention on the Rights of the Child

- - protective
 - Arts. 3, 4, 17, 20 onwards
- - family / parents' rights
 - Arts. 5, 9, 10, 18
- - right to be heard
 - Art. 12: but see European Convention on the Exercise of Children's Rights
- - assertive
 - Arts. 12, 13, 14, 15, 16, 28-29
- unenforceable?

international protection for persons

- human rights
 - European Convention on Human Rights
- economic actor rights
 - European Community and European Union law

family rights outside family law

what do children want?
... good families to look after them

what should the law provide for?
...families to be able to look after children

(is this what family law is for? !)

Strasbourg jurisprudence: the European Convention on Human Rights

- *Article 3: no inhuman or degrading treatment*
- *A v UK* (1998) 27 EHRR 611

- *Article 8: respect for family and private life*
- *O and OL v UK* (1989) 11 EHRR 46; *Poku v UK* (1996) 22 EHRR CD 94, *PP and others v UK* (1996) EHRR CD 81

Luxembourg jurisprudence: European Union (EC) law

- no discrimination as to nationality
- free movement of capital, goods and labour
- leanings towards fundamental rights ...

Baumbast and R v SSHD C-413/99

- EU migrant workers' rights of freedom of movement of labour ...
 - led to rights for children's education in host country
 - led to rights for children to continue education in host country after EU parent had left
- ... led to rights for non-EU parents to remain as carers of children

*Kunqian Catherine Zhu and Man
Lavette Chen v SSHD C-200/02*

- right of European Union citizen to residence in any member state
 - right exercisable by child regardless of age
 - EU rights are meant to be real, not merely formal
- child citizen has free movement and residence rights, including the right to take non-EU parent with her

Advocate General Tizzano
(Zhu and Chen: Opinion of 18th May 2004)

"... confusion between the capacity of a person to be the subject of rights and obligations (legal personality) and the capacity of that person to take action which produces legal effects (legal capacity). The fact that a minor cannot exercise a right independently does not mean that he has no capacity to be an addressee of the legal provision on which that right is founded."

not just family law ...

- regarding children as
 - citizens
 - rights-holders
 - persons
- achieves
 - protection of children's well-being