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## Equality and shared parental responsibility: the role of fathers

### Report<sup>1</sup>

Committee on Equality and Non-Discrimination

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### Summary

In Europe, there have been striking changes in the ways in which responsibilities are shared between women and men within families, and notably a shift towards a more even balance. However, laws, practices and gender stereotypes about the roles of women and men can sometimes cause fathers to be deprived of sustained relationships with their children. For a parent and child, the ability to be together is an essential part of family life, which is protected by the European Convention on Human Rights. Parent-child separation should only be ordered by a court and only in exceptional circumstances entailing grave risks to the interest of the child.

Child residence and access rights can prove particularly sensitive and may become a source of conflict when parents separate. States are called upon to introduce or, as appropriate, to make greater use of shared residence arrangements, which are often the best way to preserve contact between children and their parents. However, shared residence must be used discerningly, and always bearing in mind the interests of the child. Enforcement of residence and access decisions must also be better ensured by the States.

Greater use should be made of family mediation and equal rights of parents should be ensured, regardless of their marital status. Lastly, it is recalled that while parents certainly have rights, they first and foremost have duties and responsibilities towards their children.

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1. Reference to committee: [Doc. 13443](#), Reference 4039 of 11 April 2014.

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## A. Draft resolution<sup>2</sup>

1. The Parliamentary Assembly has consistently promoted gender equality in the workplace and in the private sphere. Major improvements in this field, while still not sufficient, can be observed in most member States of the Council of Europe. Within families, equality between parents must be guaranteed and promoted from the moment the child arrives. The involvement of both parents in their child's upbringing is beneficial for his or her development. The role of fathers vis-à-vis their children, including very young children, needs to be better recognised and properly valued.
2. Shared parental responsibility implies that parents have certain rights, duties and responsibilities vis-à-vis their children. The fact is, however, that fathers are sometimes faced with laws, practices and prejudices which can cause them to be deprived of sustained relationships with their children. In its [Resolution 1921 \(2013\)](#) "Gender equality, reconciliation of personal and working life and shared responsibility", the Assembly called on the authorities of the member States to respect the right of fathers to enjoy shared responsibility by ensuring that family law foresees, in case of separation or divorce, the possibility of joint custody of children, in their best interest, based on mutual agreement between the parents.
3. The Assembly wishes to point out that respect for family life is a fundamental right enshrined in Article 8 of the European Convention on Human Rights (ETS No. 5) and numerous international legal instruments. For a parent and child, the ability to be together is an essential part of family life. Parent-child separation has irremediable effects on their relationship. Such separation should only be ordered by a court and only in exceptional circumstances entailing grave risks to the interest of the child.
4. Furthermore, the Assembly firmly believes that developing shared parental responsibility helps to transcend gender stereotypes about the roles of women and men within the family and is merely a reflection of the sociological changes that have taken place over the past fifty years in terms of how the private and family sphere is organised.
5. In the light of these considerations, the Assembly calls on the member States to:
  - 5.1. sign and/or ratify, if they have not already done so, the Convention on the Exercise of Children's Rights (ETS No. 160) and the Convention on Contact concerning Children (ETS No. 192);
  - 5.2. sign and/or ratify, if they have not already done so, the 1980 Hague Convention on the Civil Aspects of International Child Abduction and to properly implement it, ensuring that the authorities responsible for enforcing it co-operate and respond promptly;
  - 5.3. ensure that parents have equal rights vis-à-vis their children under their laws and administrative practice, guaranteeing each parent the right to be informed and to have a say in important decisions affecting their child's life and development, in the best interests of the child;
  - 5.4. remove from their laws any difference based on marital status between parents who have acknowledged their child;
  - 5.5. introduce into their laws the principle of shared residence following a separation, but under no circumstances in cases of sexual or gender-based violence, with the amount of time for which the child lives with each parent being adjusted according to the child's needs and interests;
  - 5.6. respect the right of children to be heard in all matters that affect them when they are deemed to have a sufficient understanding of the matters in question;
  - 5.7. take shared residence arrangements into account when awarding social benefits;
  - 5.8. take all necessary steps to ensure that decisions relating to children's residence and to access rights are fully enforced, including by following up complaints with respect to failure to hand over a child;
  - 5.9. encourage and, where appropriate, develop mediation within the framework of judicial proceedings in family cases involving children, in particular by instituting a court-ordered mandatory information session, by ensuring that mediators receive appropriate training and by encouraging multidisciplinary co-operation based on the "Cochem model";
  - 5.10. ensure that the professionals who come into contact with children during court proceedings in family cases receive the necessary interdisciplinary training on the specific rights and needs of children of different age groups, as well as on proceedings that are adapted to them, in accordance with the Council of Europe Guidelines on child-friendly justice;

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2. Draft resolution adopted unanimously by the committee on 10 September 2015.

- 5.11. encourage parenting plans which enable parents to determine the principal aspects of their children's lives themselves and introduce the possibility for children to request a review of arrangements that directly affect them, in particular their place of residence;
- 5.12. introduce paid parental leave available to fathers, with preference being given to the model of non-transferable periods of leave.

## B. Explanatory memorandum by Ms Hetto-Gaasch, rapporteur

### 1. Introduction

*“We also recognize the need to address the changing role of men in society, as boys, adolescents and fathers, and the challenges faced by boys growing up in today’s world. We will further promote the shared responsibility of both parents in education and in the raising of children, and will make every effort to ensure that fathers have opportunities to participate in their children’s lives.”*

*(United Nations General Assembly Resolution S-27/2, A world fit for children, 2002).*

1. In recent decades there have been striking changes in the sharing of responsibilities between women and men within families, with a shift towards a more even balance. Equality between partners has been fundamental in freeing women from the patriarchal model which kept them confined to the home. However, national authorities do not always pay sufficient attention to the position of fathers vis-à-vis their children, not least because of the persistent stereotypes about the roles of women and men in relations with children.

2. While men’s greater involvement in the home and family is generally viewed as a good thing, I find that when couples separate the role of the father in his children’s lives is often regarded as secondary to that of the mother. It seems as if the father’s involvement, so desirable and valued when the family is a unit, ceases to be so once the couple separates. Consequently, in practice, the exercise of parental responsibility is most commonly granted to the mother, sometimes to the detriment of the father, in cases of divorce and separation.

3. In compiling this report, I have listened to many fathers for whom separation from their children is extremely painful. From their stories, I have also heard of children caught in the crossfire of parental conflict, used sometimes as a bargaining chip and cut off from contact with one or other parent. In these cases the interest of the child, so often held up as paramount, was in reality ignored.

4. Reactions to my report, whose original title made reference to “the rights of fathers”, have been highly instructive. I have often been told that shared residence should not be allowed in cases of manifest domestic violence, that fathers must be made to pay maintenance, that fathers do not have “rights” to their children and that due consideration must be given to the child’s interest in family cases. I entirely agree. Domestic violence is certainly indicative of a high-conflict situation in which shared residence, which implies that the parents agree on the living arrangements for their children, is not appropriate. Obviously, parents must comply with child maintenance obligations. But it must be borne in mind that the father’s role is not simply to provide for their material needs – the children’s personal relationship with their father must also be preserved. I would also impress upon fathers the need to play their full role and fulfil their responsibilities towards their children, including when their family or personal circumstances change.

5. This report is built entirely on the child’s interest. I am convinced that, except in particularly serious circumstances, it is in the interest of children to maintain links with both their parents. Working towards increased consideration for fathers in this field is a means of achieving full equality between men and women and transcending gender stereotypes. My main aim in this report is therefore to identify good practices and propose balanced measures to promote gender equality when exercising shared parental responsibility, while ensuring that the child’s interests are safeguarded.

### 2. Recent trends in the area of shared parental responsibility

6. In Europe, the division of roles between men and women has undoubtedly shifted towards greater equality. In its Recommendation CM/Rec(2007)17 on gender equality standards and mechanisms, the Committee of Ministers of the Council of Europe said that the “social significance of maternity and paternity and the role of both parents in the upbringing of children must be taken into consideration to ensure that both women’s and men’s human rights are fully and equally respected”. The family sphere “must secure women and men the same parental rights and responsibilities, irrespective of marital status, including provisions on economic maintenance for children, parental responsibilities and contact with children in cases of separation”.<sup>3</sup> The development of the idea of shared parental responsibility reflects this change in approach.

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3. Paragraph 23.vii.

## 2.1. Definitions

7. The concept of shared responsibility has been developed at the Council of Europe and other international organisations to mark the shift in recent decades towards increased sharing of responsibilities between women and men in the household. The development of this concept is part of the more general framework of the work on children's rights and parenthood.

8. Article 18 of the United Nations Convention on the Rights of the Child states the principle that both parents have common responsibilities for the upbringing and development of the child. A prerequisite of shared parental responsibility is that parents should be equal before the law. There has been a clear shift towards parental equality in most member States of the Council of Europe since the 1970s. It is interesting to note here that in 1975, Article 7 of the European Convention on the Legal Status of Children Born out of Wedlock (ETS No. 85) stated that "[w]here the affiliation of a child born out of wedlock has been established as regards both parents, parental authority may not be attributed automatically to the father alone". The objective in 1975 was therefore to safeguard the rights of the mother. At that time, the French Civil Code included the concepts of "head of family" (*chef de famille*) or "paternal power" (*puissance paternelle*), and English law considered the father to be "the natural guardian of his legitimate child".<sup>4</sup> Nowadays we find that in most European countries parental authority tends to be vested in both parents. Iceland is a perfect example of this shift: whereas in 1994, parental authority was exercised jointly in only 10% of cases following a separation, in 2011 the figure was 90%.<sup>5</sup>

9. Back in 1984, the Committee of Ministers adopted Recommendation No. R (84) 4 on parental responsibilities in which it stressed the need to improve the legal systems in place in order to protect children and promote their development while guaranteeing legal equality between parents. In this recommendation, parental responsibilities were defined as "a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property". This definition has been refined over many years of work and research, but the fundamental principles remain the same.

10. Accordingly, parental responsibilities relate to a collection of rights and duties aimed at promoting and protecting the child's rights and welfare. It should, however, be pointed out that certain member States prefer to use the term "parental authority", for example Germany (*elterliche Sorge*), Italy (*potestà genitoriale*) or France (*autorité parentale*), or even "custody" as is the case in Canada and the United States. Other countries, the United Kingdom for example, use the term "parental responsibility". The Swiss legal system has both concepts: "parental responsibility" is used as a generic term referring to all the obligations of parents towards their children and includes both parental authority and the maintenance obligation. In this context, "parental authority" comprises all the rights and duties of parents towards children. These differing terminological approaches complicate comparisons of the legislation and practices in force, and make it more difficult to draw up common rules for the Council of Europe member States.

11. For the purposes of this report, I shall opt for a generally accepted definition of the concept of parental responsibility, as given in a recent recommendation of the Committee of Ministers. This identifies a "collection of duties, rights and powers, which aim to promote and safeguard the rights and welfare of the child in accordance with the child's evolving capacities".<sup>6</sup> These duties, rights and powers include the child's health and development, his or her personal relationships, education and legal representation, decisions on his or her habitual place of residence and the administration of his or her property. In this report, therefore, I will endeavour to use the term "parental responsibility". When examining practices in certain member States, however, I will employ the terminology commonly used in those countries, such as "parental authority" in the case of France and Germany.

12. The present report deals extensively with shared residence for children following separation or divorce. For the purposes of this report, "shared residence" means an arrangement whereby the child lives alternately with each parent for more or less equal amounts of time, which may be fixed in days or weeks, or even months.

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4. The legal provision that "A father is the natural guardian of his legitimate child" was dropped in 1989 (Children Act).

5. Under Law No. 73/2003 on Children, as amended in 2006 by Law No. 69/2006, parents automatically acquire joint parental authority following a divorce or the breakdown of a registered cohabitation, unless otherwise decided (Article 31). Prior to 2006, parents had to come to an agreement in order to exercise joint parental authority. Otherwise, it was granted to only one of them.

6. Recommendation CM/Rec(2015)4 of the Committee of Ministers on preventing and resolving disputes on child relocation, adopted on 11 February 2015.

Other terms are used to refer to this type of living arrangement: shared custody, alternating custody, or even equal or joint residence. In the case of “sole” residence, on the other hand, it is decided that the child is to live with only one of the parents, with the other parent being allowed a defined amount of access.

13. Terminological clarity is not aided by the fact that some legal systems use the terms “custody” to mean parental responsibility or authority, which may be either “joint” or “sole”, and “shared custody” (Canada) or “joint physical custody” (United States) to refer to the child’s living arrangements. The concept of custody (in the sense of “residence”) needs to be distinguished from that of parental responsibility or authority, however. Just because a child lives with only one of the parents does not mean that parent has sole parental authority. The fact that a child lives with one parent must not deprive the other parent of his or her right to have a say in the important decisions affecting the child’s life, for example in matters of health or schooling. In order to avoid any confusion, therefore, I will endeavour to use, as far as possible, the term “shared residence” rather than “custody”.

## **2.2. The child’s personal relationships following a separation**

14. In Europe, there are more than 10 million children whose parents have divorced. The question of these children’s personal relationships with their parents is of paramount importance for them. The 2003 Council of Europe Convention on Contact concerning Children (ETS No. 192) accordingly underlines the right of children and their parents to maintain personal relations and regular direct contact. The European Court of Human Rights has also ruled on many occasions that for a parent and child, the ability to be together is an essential part of family life which must be safeguarded under Article 8 of the European Convention on Human Rights (ETS No. 5).<sup>7</sup>

15. Shared residence is defined as an arrangement whereby the children of separated or divorced parents spend almost the same amount of time with each parent following the separation, in other words at least 35% (or in some cases 50%) with one parent. One question I sought to clarify was whether or not there was a real benefit for children who spend at least 35% with each parent, as compared with those who live primarily with their mother and spend less than 35% with their father. This led me to consider which type of arrangement was the best for children.

16. To find answers to these questions, I looked at Dr Linda Nielsen’s summary of 40 studies on this subject,<sup>8</sup> and various analyses carried out in Belgium, France, Germany and Switzerland. It should be pointed out that Dr Nielsen states that these 40 studies had their limitations, in particular regarding the claim that children whose parents have a comfortable level of income and between whom there are fewer conflicts will probably have fewer problems after their parents’ separation. Only 16 of the 40 studies took these factors into account, so it would be wrong to conclude that these two factors mattered more than the shared residence factor.

17. The positive effects of shared residence have been highlighted in numerous studies. In the United States, the most significant study on this subject, carried out in the 1980s (the *Stanford Custody Project*), analysed over a four-year period the situation of 1 386 children aged between 4 and 16, from 1 100 divorced families. The study concluded that in comparison with children living primarily with their mother, those living under a shared residence arrangement were less prone to depression, were well adjusted, were less likely to be stressed as they did not feel obliged to take care of their mother, were less agitated, were more able to deal with conflicts, were more balanced and happy, had fewer health problems and had a better relationship with their two parents. Their fathers attended school events more frequently and the children felt that both parents had the same level of authority.

18. Similar results emerge from studies carried out in Belgium, France, the Netherlands, Norway and Sweden. In Australia, a 2009 study found that 70% to 80% of parents who had opted for shared residence were satisfied with their choice, but above all that shared residence benefits both parents and children and children derived real benefit from this arrangement.<sup>9</sup>

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7. For a recent judgment see *Kuppinger v. Germany*, Application No. 62198/11, judgment of 15 January 2015, paragraph 99. See also: *Monory v. Romania and Hungary*, Application No. 71099/01, judgment of 5 April 2005, paragraph 70; *Tsikakis v. Germany*, Application No. 1521/06, judgment of 10 February 2011, paragraph 74.

8. L. Nielsen, “Shared Residential Custody: Review of the Research”, *American Journal of Family Law*, 2013.

9. Australian Institute of Family Studies, “The AIFS evaluation of the 2006 family law reforms. A summary”, R. Kaspiew et al., 2009.

19. In Germany, Professor Hildegund Sünderhauf-Kravets found that 40% of children lose contact with the parent with whom they do not live some years after the separation or divorce and that 93% of young adults who had tried shared residence stated that this was the best solution for them.<sup>10</sup>

20. At the hearing held by the Committee on Equality and Non-Discrimination on 20 March 2015, Professor Sünderhauf-Kravets said that shared residence ensured, on the one hand, that one parent was no longer excluded and, on the other, that legal, educational and practical responsibilities were shared. She commented that living with only one parent (usually the mother) perpetuated outdated parental roles by placing too much of the responsibility on the woman. Accordingly, the effects of shared residence were for the most part positive, both for the child and for the parents. Sociological studies have found that when residence was shared the child often fared as well as in a united family, and the child's attachment to each parent was the same. These studies also showed that because both parents were able to work, they were able to earn more. So it seems that in most cases shared residence is the best way of preserving contact with the father and safeguarding the rights of both parents.

21. On the matter of the child–father relationship, a World Health Organization (WHO) study which looked at the situation of children aged 11, 13 and 15 in various countries concluded that the children's level of satisfaction was closely linked to how easy they found it to communicate with their fathers, regardless of the family situation (intact, shared residence, financial situation, etc.).<sup>11</sup> Accordingly, it is very important to acknowledge the role of fathers in the harmonious development of their children.

22. A previous study by Dr Nielsen also shows that the relationship between fathers and daughters suffers more following a divorce than the relationship between fathers and sons. It would appear that shared residence has a bigger impact on girls than on boys. Although girls are more quickly involved in the conflicts of their parents, the fact of living regularly with their father makes them feel less responsible for their mother's well-being. Boys find it easier not to become involved in their parents' disputes. A study in the Netherlands also showed that in families with high conflict potential, shared residence was more suited to boys than to girls.

23. In general, it can be said that shared residence is more beneficial than living with just one parent, in terms of psychological, emotional and social well-being, physical health and stress-related illnesses. Moreover, and more importantly perhaps, children have a deeper relationship with their fathers and are more easily able to communicate with them.

24. The question often arises whether there is a beneficial or detrimental effect on very young children (0-4 years of age) who spend the night alternately with each parent. A study in Australia clearly showed that "overnighting" had no negative effect on the very young and that there was a beneficial effect for children aged 4 to 6, especially girls. Well-organised and strictly observed shared residence, together with a good relationship with each parent, has greater impact than the fact that children spend the night with both parents.

25. In preparing this report, I also wanted to hear from those who are critical of shared residence. In the case of children below the age of 4 years, it is sometimes argued that the child's proper emotional development requires fostering a stable bond with the mother and avoiding repeated and prolonged separations between mother and infant as much as possible, although the father may still have frequent contact with the child.<sup>12</sup> I am very interested to note that these criticisms do not totally rule out, however, the possibility of shared residence, or even recourse to a plan whereby the amount of time a parent has his or her child to stay gradually increases as the child develops<sup>13</sup> and which must be rigorously adhered to by both parents.

26. The criticisms levelled at shared residence arrangements are often robust and centre on the claim firstly that such arrangements are not in the interests of the child and secondly that they have a destabilising effect. It has, however, been observed that "the latest research shows ... that it is not so much the type of custody that matters as how it is applied ... The context and family dynamics need to be assessed on a case-by-case basis as no single custody model is right for everyone".<sup>14</sup>

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10. H. Sünderhauf, *"Shared parenting, psychology - law - best practice"*, Springer VS, Wiesbaden, 2013.

11. C. Currie et al., eds., "Social determinants of health and well-being among young people. Health Behaviour in School-aged Children (HBSC) study: international report from the 2009/2010 survey", Copenhagen, WHO Regional Office for Europe, 2012 (Health Policy for Children and Adolescents, No. 6), p. 23 et seq.

12. C. Frisch-Desmarez, M. Berger, *Garde alternée : les besoins de l'enfant*, Editions Fabert, Brussels, 2014, p. 17.

13. *Ibid*, pp. 18 and 57 et seq.

14. F. Cyr, "Sortir d'une vision manichéenne pour penser la complexité", in G. Neyrand and C. Zaouche Gaudron (dir.), *Le livre blanc de la résidence alternée*, Editions Eres, 2014, p. 33.



27. Going from one parent to the other is never easy and the atmosphere in which this handover takes place is very important for the children.<sup>15</sup> I was shocked to hear of parents undressing their children just outside their former spouse's home so as not to share the children's clothing. I appreciate the fact that separation is a painful time for couples and that shared residence requires parents to see one another on a regular basis and can open old wounds. At the same time, however, parents have to act responsibly and treat their children with respect and take account of their needs.

28. To conclude on this point, I should mention that in certain circumstances, the benefits of shared residence decrease though do not entirely disappear. This is the case:

- where the parents are in constant conflict. In such cases, girls in particular feel caught between the two parents, but nonetheless feel close to their father and do not feel obliged to take care of their mother;
- where there is a poor relationship with the father or the mother;
- for adolescents who complain of the disadvantages of having to live in two homes. All the same, they also say that these inconveniences are worth it, because the situation enables them to maintain contact with both parents;
- where the geographical distance between the two homes is too great.

29. Consequently, while factors such as family income, the parents' level of education, the quality of the parent-child relationship or the level of conflict between the parents all influence the situation, I am convinced that shared residence has a decisive impact on the child's well-being. I would also emphasise that children living under a shared residence arrangement have deeper and more lasting relationships with their father. For while we may all agree that it is not the amount of time spent that is crucial in the bonding process but rather the quality of the relationship, the fact is, to quote the clinical psychological Gérard Poussin, "in order for there to be some quality to the relationship, there has to be a relationship! In other words, a certain minimum amount of time below which it is not possible to initiate a bonding process. We cannot very well claim to respect the role of the father if, at the same time, we make it impossible for him to develop a relationship with his child".<sup>16</sup> As pointed out by Francine Cyr in the White Paper on shared residence, "a certain frequency and regularity of contact is essential if a sense of familiarity and security is to develop between parent and child".<sup>17</sup>

### 3. Family law and practice in the Council of Europe member States

30. The right of children to maintain relations with their parents is enshrined in several international legal instruments. Article 9 of the 1989 United Nations Convention on the Rights of the Child highlights the right of children not to be separated from their parents unless it is in their best interests and to maintain personal relations with the parent or parents from whom they are separated.

31. Nevertheless, despite the international and national texts advocating the maintaining of the child's links with his or her parents, there is no doubt that residence and access rights can suffer in cases of separation in which there is a high degree of conflict. Women may see a violation of their rights, as found by the European Court of Human Rights in a recent case against the Republic of Moldova.<sup>18</sup> However, fathers are particularly affected by the failure to uphold their rights to maintain contact with their children. The fact that a couple is not married can sometimes exacerbate the situation regarding parental responsibility.

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15. See, *inter alia*, C. Zaouche Gaudron, "Toutes nos réponses sont limitées", in G. Neyrand and C. Zaouche Gaudron (dir.), cited above, pp. 29-30.

16. G. Poussin, "Le père est-il une mère suffisamment bonne?", in G. Neyrand and C. Zaouche Gaudron (dir.), cited above, p. 48.

17. F. Cyr, cited above, p. 32.

18. European Court of Human Rights, *Tocarenco v. Republic of Moldova*, Application No. 769/13, judgment of 4 November 2014. In this case, the spouse and parents-in-law of the applicant prevented the latter from having any contact with her young son for more than two years. The Court found against the Republic of Moldova for failing to take the necessary measures to ensure contact between the applicant and her child and, thereby, allowing a process of breaking the parental link to the detriment of the applicant, in so doing violating her right to respect for family life guaranteed by Article 8 of the Convention (paragraph 67).

### **3.1. The living arrangements of children of separated parents**

32. In its [Resolution 1921 \(2013\)](#) on gender equality, reconciliation of private and working life and co-responsibility, the Parliamentary Assembly called on the public authorities of Council of Europe member States to uphold the right of fathers to enjoy shared responsibility by ensuring that family law provides, in the event of separation or divorce, for the possibility of joint custody of children, in their best interests, based on mutual agreement between the parents, while clearly stating that it should never be imposed.

33. With only a few exceptions, the legislation of Council of Europe member States provides for the possibility of shared residence arrangements for children following a separation or divorce. In practice, sole residence is granted to the mother in the vast majority of cases. It should be pointed out that this often reflects the fact that relatively few fathers request permission for their children to reside solely with them, particularly when the children are very young.

34. In Luxembourg, there is no legal basis for shared residence. Custody is awarded to one parent and the other parent will be allowed a defined amount of access. After divorce, moreover, joint exercise of parental authority is not guaranteed by law and requires a court order. This means that courts sometimes refuse to grant joint parental authority, including in cases of divorce by mutual consent.<sup>19</sup> In a judgment handed down on 12 December 2008, however, the Constitutional Court of Luxembourg ruled that certain articles of the Civil Code were not compatible with the principle of equality contained in Article 10 bis (1) of the Constitution inasmuch as they did not allow divorced parents to jointly exercise parental authority over any children they might have together. Despite this ruling, the said articles of the Civil Code have not been brought into line with the Constitution. In practice, therefore, the courts continue to decide on a case-by-case basis which of the two parents will be assigned parental authority, especially where the divorce is not amicable. In such cases, parental authority will be assigned to the custodial parent, usually the mother.

35. At my meetings in Luxembourg on 27 February 2015, I was told that introducing shared residence and removing “non-custodial parent” status from the Civil Code would have the effect of putting both parents on an equal footing. “Non-custodial” parents in Luxembourg were seen as facing severe discrimination in day-to-day life. For even if non-custodial parents have parental authority, in practice they have no say in the most important decisions affecting their child: often they do not receive letters from the school and nor do they have automatic access to the child’s medical records.

36. There is no doubt that Luxembourg society is ready for a change in the laws on divorce and affiliation. Same-sex marriage and adoption have been permitted since 1 January 2015, proof, if it were needed, of the country’s open-minded attitude to societal and family issues. But concepts such “legitimate/illegitimate child”, “custodial/non-custodial parent” and rules such as the one whereby parental authority automatically devolves upon the mother in cases where an unmarried couple separates or whereby the child resides with one parent and the other has only visiting rights, no longer have any place in the legislation. I welcome the Justice Minister’s announcement that a new divorce bill is to be tabled. This reform is particularly important as it will affect a large number of people. According to estimates, 54% of couples in Luxembourg divorce. It is important, however, that due consideration also be given to the case of unmarried couples with children who separate.

37. In France, shared residence was introduced by law in 2002. Under Article 373-2-9 of the Civil Code, it may be decided that a child is to reside alternately with each of the parents or with one of them. According to a survey by the Ministry of Justice,<sup>20</sup> a decision on shared residence is given in 17% of divorce or separation proceedings, one of the highest rates in Europe. In 80% of cases, moreover, it is the result of an agreement between the parents.

38. At a hearing of the Committee on Equality and Non-Discrimination on 20 March 2015, Ms Anne Solaz from the French National Institute for Demographic Studies (INED) and who is one of the authors of a recent INSEE study on the living arrangements of children following a divorce,<sup>21</sup> said that two thirds of divorces in France involved minors and that residence with the mother was the norm in 75% of cases. This study showed that shared residence was more common in more affluent circles, due to certain financial constraints such as the need for each parent to have accommodation with enough room when the children came to stay. But shared residence was on the rise in France. It had doubled since its introduction in 2002. Ms Solaz emphasised to the committee the symbolic significance of shared residence for the equality of rights between both parents and specifically for the preservation of contact between fathers and their children.

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19. ORK (Ombuds-Committee for Children’s Rights), 2014 report to the Luxembourg Chamber of Deputies, pp. 51-53.

20. Ministry of Justice (France), Directorate of Civil Affairs (France), “La résidence des enfants de parents séparés; de la demande des parents à la décision du juge”, November 2013.

21. INSEE, “Les conditions de vie des enfants après le divorce”, Insee Première, No. 1536, February 2015.

39. When asked by the television channel Arte in 2013 about shared residence, French judges said that while it was increasingly being applied in France, it would probably never become the general rule because it was not feasible in many situations, either for practical reasons, where the parents' places of residence were too far from each other or where their working hours were too restrictive, or because of the parents' extremely confrontational relationship.<sup>22</sup> Shared residence was generally considered an option where both parents agreed. In order to avoid any veto by one of the parents, the French courts can impose shared residence in the interests of the child. However, in most cases, the courts do not order shared residence where one of the parents is not in favour. For example, when the father seeks shared custody and the mother sole residence, the father obtains his wish in only 25% of cases, as against 40% of cases the other way round. This tendency has been criticised as particularly unfavourable, if not discriminatory, to the father.<sup>23</sup> It leads to an imbalance between parents and is likely to discourage fathers from seeking shared residence, perpetuating the perception of a legal system that is largely unfavourable to fathers.

40. On 24 June 2015, I interviewed Ms Josiane Bigot, Chamber President at the Court of Appeal of Colmar, about her experience, as a judge, of shared residence arrangements. Ms Bigot told me that shared residence was introduced in France on the basis of the United Nations Convention on the Rights of the Child which states that a child has the right not to be separated from its parents. Increasingly, however, shared residence is becoming a parental arrangement, if not a parental right, and the child's interests merely a secondary consideration. In Ms Bigot's view, children should not only be consulted when the decision about where they are to live is being made, but should also be able to apply to the family court for a review of the decision if it does not suit them, or no longer suits them. In my opinion, it is very important to be able to adapt children's living arrangements according to individual circumstances and over time.<sup>24</sup> Likewise, the way children divide their time between the parents should be adjusted according to the capacities of the child. Lastly, I firmly believe that shared residence should be about a child's right to have a relationship with both parents, and not a parental entitlement.

41. It is essential, in my view, that the right of children to be heard should be respected in all matters that affect them as soon as they are deemed to have a sufficient understanding of the matters in question. This requirement is enshrined in numerous international legal instruments, in particular the European Convention on the Exercise of Children's Rights (ETS No. 160) which states that in judicial proceedings children should receive all relevant information, should be consulted and express their views and should be informed on the possible consequences of compliance with these views and the possible consequences of any decision (Article 3). The Council of Europe Guidelines on child-friendly justice, adopted in 2010, also usefully pointed out that "a child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case".<sup>25</sup> All professionals involved in family proceedings should be guided by these principles.

42. I should like to conclude on this point by saying that, in addition to Luxembourg, some other member States do not provide for shared residence in their legislation, such as Albania, Greece and Poland. Elsewhere, in Italy and Portugal for example, although shared residence is provided for by law, it is rarely used.<sup>26</sup> I hope this report will serve as an incentive for these countries to start thinking about introducing shared residence into their legal systems or to encourage its use by the courts.

### **3.2. The enforcement of child residence and access decisions**

43. Most member States provide for sanctions for the failure to hand over children. In my country, Luxembourg, failure to hand over children is punishable by severe criminal penalties, but it would appear that prosecutions are not systematically brought and this tends to create a sense of impunity among parents who fail to respect the other parent's rights of access. It is true that this is a sensitive area and it is not always easy to find the right judicial solution. Consequently, although a legal framework seems to be in place in a large majority of Council of Europe member States, many cases oblige us to conclude that court decisions on custody or access rights are not sufficiently complied with.

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22. Arte, "Affaires familiales: la parole aux juges", 2013.

23. V. Vezzetti, "European children and the divorce of their parents", Colibri (European Platform for Joint Custody, Co-Parenting and Childhood), 2013, p. 6.

24. See also: G. Neyrand and C. Zaouche Gaudron (dir.), *Le livre blanc de la résidence alternée*, Editions Eres, 2014.

25. Guidelines on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, paragraph 47.

26. In Italy, as in Portugal, shared residence is ordered in only 3% or so of cases, even though it has been available in Italy since 2006 and in Portugal since 1995.

44. The European Court of Human Rights has had to deal with a large number of family cases regarding the enforcement of child residence and access decisions. In a 2006 case, the Court found against the Czech Republic for failing to take all the necessary steps to enforce the applicant's right of access.<sup>27</sup> The same year, the Court once again found against the Czech Republic for failing to allow the applicant to challenge a decision withdrawing his right of access to his children after the national authorities had taken no action to enforce the decision granting him such access.<sup>28</sup> In a case against Italy in 2013, the Court ruled that "whilst coercive measures affecting children are not desirable in this sensitive area, the imposition of penalties must not be ruled out where there has been manifestly unlawful behaviour on the part of the parent with whom the child is living".<sup>29</sup> If the national authorities fail to take action, this may make it impossible to build a stable relationship between a parent and child.

45. Residence and access questions can be particularly complicated in the case of couples of two different nationalities where the legislation and judicial authorities of several countries are applicable. This difficulty is illustrated by the *Shaw v. Hungary* case brought before the European Court of Human Rights in 2009 concerning a child born to an Irish father and a Hungarian mother, both of whom resided in Paris. The divorce judgment delivered in 2005 granted the parents joint parental authority, stipulating that the child would remain in France so that the father could exercise his parental responsibilities. However, in 2007, the mother decided to move to Hungary with the child and not return to France. The father initiated proceedings before the Hungarian courts which acknowledged that the child's habitual place of residence was in France. The mother refused to comply with this decision and disappeared with the child. The father brought proceedings in Hungary in vain and subsequently in France where, in 2008, an order was given for the child to be returned to France. The Hungarian courts refused to implement this decision. As a result, the father was deprived of all contact with his daughter for three and a half years. In a 2011 judgment, the European Court of Human Rights found that there had been a violation of Article 8 of the European Convention on Human Rights concerning respect for family life on the ground that Hungary had failed to take appropriate and effective measures to enforce the child's return to her father. Two weeks after this judgment, the Hungarian police located the girl at her maternal grandparents' home. She has since been living in France with her father.

46. At a hearing of the Committee on Equality and Non-Discrimination on 28 January 2015, Mr Shaw described the many obstacles he had had to overcome in order to secure his daughter's return. He had initiated some 70 sets of proceedings, some of which were still ongoing. He had shown remarkable perseverance and it would be entirely understandable if other fathers in similar circumstances were discouraged by the amounts of energy, procedures and money required. Mr Shaw stressed the need for a prompt response by the authorities when the unlawful removal of a child was reported. Indeed, time is of the essence in getting the child back and for preserving the relationship between the parent and the child. The European Court of Human Rights has pointed out on several occasions that the passage of time can have irremediable consequences for the relationship between child and parent when they do not live together.<sup>30</sup>

47. At this hearing of 28 January 2015, Maître Thuan dit Dieudonné, Mr Shaw's lawyer, urged member States to implement The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. This convention, very widely ratified,<sup>31</sup> establishes a system of co-operation between central authorities and an accelerated procedure for the prompt return of the child to his or her State of habitual residence after having been abducted by his or her father or mother. The principle of immediate return, central to this convention, is intended as a deterrent which the convention sees as being in the child's general interest. The decision to return a child is therefore designed to restore the status quo which existed prior to the wrongful removal or failure to return the child and to deprive the abducting parent of any advantage obtained thereby. The convention specifically lists exceptions to the requirement to return a child. These include situations where there is a grave risk of exposure to physical or psychological harm, the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views, or where more than one year has elapsed and the child is settled in his or her new environment. This last point shows how vital it is for national authorities to react fast. But the case law of the European Court of Human Rights is full of cases where the time taken to secure a child's return has been abnormally long, resulting in a breach of the family rights of the applicants, fathers and mothers alike.<sup>32</sup>

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27. *Koudelka v. Czech Republic*, Application No. 1633/05, judgment of 20 July 2006.

28. *Fiala v. Czech Republic*, Application No. 26141/03, judgment of 18 July 2006.

29. *Nicolò Santilli v. Italy*, Application No. 51930/10, judgment of 17 December 2013, paragraph 72.

30. See recent judgments, including *Kuppinger v. Germany*, Application No. 62198/11, judgment of 15 January 2015; *Ferrari v. Romania*, Application No. 1714/10, judgment of 28 April 2015.

31. As at 1 August 2015, 93 States were Parties to this Convention, including 43 member States of the Council of Europe, that is all member States except Azerbaijan, Liechtenstein, the Republic of Moldova and San Marino.

### 3.3. Family mediation

48. My research and conversations during the preparation of this report, along with the accounts I was able to obtain from parents convinced me of the importance of developing mediation on child residence in family matters following a separation. Several Council of Europe instruments underline the importance of seeking agreement between the parents. One such is the 1996 Convention on the Exercise of Children's Rights (ETS No. 160), Article 13 of which encourages the provision of mediation or other processes to resolve disputes.<sup>33</sup> All member States should ratify this convention and implement this essential provision on mediation.

49. Mediation is a way of empowering parents by getting them to decide themselves what their children's living arrangements will be after separation. During my conversations in Luxembourg on 27 February 2015, Ms Lydie Err, the Luxembourg Ombudsperson, referred to "bespoke" mediation arrangements as opposed to the kind of "off-the-peg" solution favoured by the courts when parents fail to agree, namely "every other weekend and half the school holidays".<sup>34</sup> The law in Luxembourg provides for a free information session on mediation and broader use should be made of this option for the courts to order a meeting of this kind in all cases of litigation.

50. In the United Kingdom, powerful incentives to use mediation have been introduced. For example, a "mediation information and assessment meeting" became compulsory in April 2014 for all separating couples with children, except where there has been domestic violence. The issue of recourse to mediation in domestic abuse cases has prompted debate in European countries. As in the United Kingdom, it is prohibited in Spain under Organic Law 1/2004 on measures for comprehensive protection against gender-based violence. The Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210, "Istanbul Convention") does not prohibit recourse to mediation but does prohibit countries from making it mandatory (Article 48). Accordingly, in Austria, recourse to mediation is permitted but is accompanied by victim protection measures, such as the victim's express consent to mediation, the absence of any obligation to meet the abuser, and the right to be accompanied by a lawyer from the women's support centre (*Intervention Centre*).

51. One of the benefits of mediation is that it often enables parents to start talking to each other again and work together to find the best possible solution to their dispute in the interests of the child. Such arrangements almost always prove viable in the long term because they are designed by the two parents themselves, rather than imposed by a court. It has also been noted that there is greater compliance with the maintenance requirement where the parents have concluded an agreement. It appears that the payment of maintenance depends more on the quality of the parents' relationship than on the earnings of the parent who has to pay maintenance.<sup>35</sup>

52. There are various models of mediation. I would mention here the "Cochem model", named after a town in Germany where a family court judge, Jürgen Rudolph, introduced a system of co-operation between the judicial authorities, the Bar Association, the youth protection office and counselling services that helps parents find amicable solutions to meet their children's needs.

53. In an interview I had with Professor Rudolph on 18 May 2015, he told me that the Cochem model is designed primarily to convince separating or divorcing parents that they have a joint responsibility towards their children. Accordingly, the various individuals, specialists and institutions involved in the procedure work together in an interdisciplinary fashion to get the parents to talk to one another and to accept that the child has a relationship with both parents. During the interview, Professor Rudolph criticised what he saw as a tendency to focus overly on the parents, to the detriment of the children. Assuming that a child loves both parents, the most important thing, in his view, is to maintain the child's links with each of them and to enable the child to continue these relationships after the parents have separated.

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32. Factsheet on international child abductions produced by the Registry of the European Court of Human Rights, February 2015.

33. See also Recommendation No. R (98) 1 of the Committee of Ministers on family mediation and the Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, prepared in 2007 by the European Commission for the Efficiency of Justice (CEPEJ).

34. In 2003, Ms Err was rapporteur for the Parliamentary Assembly on "Family mediation and equality of the sexes" ([Doc. 9983](#)). On the basis of her report, the Assembly adopted [Recommendation 1639](#) (2003) to which I would refer you for further information on the main features of family mediation.

35. Catherine Collombet, "Consensus et médiation dans les séparations parentales en Europe", *Politiques sociales et familiales*, No. 117, September 2014, pp. 75-79.

54. Under the Cochem model, the parents have to talk to one another and confer on all matters relating to their child, including even minor issues. The child's perspective determines how decisions are made and how the different competences of the various parties involved fit together, and the framework that is agreed upon must be rigorously adhered to. Professor Rudolph has spoken out in favour of mandatory consultation sessions with a mediator in divorce cases. Such consultation may be arranged by a court, with the parents being required to attend.

55. Several features of the Cochem model can be seen in the new German law on proceedings in family matters and in matters of non-contentious jurisdiction of 17 December 2008,<sup>36</sup> and in particular Article 155 on the accelerated procedure (the hearing takes place at the latest one month after the proceedings have been instituted), Article 156 on information concerning the opportunities for counselling and mediation and Article 163 on the expert's report which must be directed towards finding a solution.

56. An accelerated family procedure (*Das beschleunigte Familienverfahren*) was developed in Berlin by the Bar Association and family courts, based on the Cochem model. Launched in April 2007, this initiative has been very successful and in 2014 was awarded the "Crystal Scales of Justice" prize by the European Commission for the Efficiency of Justice (CEPEJ). This accelerated family procedure was prompted by the realisation that children need stable and harmonious relationships with both their parents and that the quality of those relationships cannot be imposed by a court. The aim was therefore to find a solution worked out jointly by both parents, which both of them can keep to. The three principal arms of this approach are formed by a specific procedure underpinned by multidisciplinary teams (judges, lawyers, youth services) which think along the same lines and send the same message to parents.

57. Thanks to this procedure, 70% of parenting plans are arrived at by mutual consent, with no need for a court order. It has also been noted that this procedure prevents any worsening of parental conflicts and increases the level of mutual comprehension amongst professionals. The results of this procedure are very impressive. In Berlin alone, it involves 100 family court judges and close on 14 000 lawyers, 12 child protection services and 600 social workers. I would add that these results were achieved with very limited financial and human resources, because it was in fact a matter of redeploying existing resources effectively. This model should be a source of inspiration to the other member States of the Council of Europe.

58. Other countries have developed groundbreaking practices, such as Canada where mediation allows parents to agree on a parenting plan that covers the most important aspects of the child's life, such as where they live, which school they attend, after-school activities, etc. This plan can be amended by agreement between the parents themselves, via mediation or, if the parents cannot agree, by the courts.<sup>37</sup> Similarly, in Croatia, the Civil Code provides for a shared parenting plan detailing the various aspects of a child's life, for example where he or she lives, how much time is spent with each parent, and how much maintenance is paid by the parent with whom the child is not living. Very interestingly, the Civil Code requires parents to acquaint the child with the content of this shared parenting plan and to seek the child's opinion, depending on his or her age and maturity. This emphasises the importance of involving children in decisions directly affecting them.

59. These very positive examples of mediation should be developed further in our member States as a way of calming relations between parents and making them act more responsibly towards their children. I believe it is vital to support mediation mechanisms and encourage parenting plans which enable parents to determine the principal aspects of their children's lives themselves. This is in the interest of the children, who all too often become a pawn in dealings between their parents. Lastly, I believe that mediation allows couples to focus on their relationship as parents after their conjugal relationship has come to an end.

#### **4. Continuing discrimination and stereotypes based on sex or marital status**

60. The media have reported on practices which discriminate against fathers, for example the refusal by a firm to allow its male employees to work part-time<sup>38</sup> or a court decision refusing to cancel the adoption of a child whose mother had opted to give birth anonymously and refusing to place the child with his biological father.<sup>39</sup> I view these cases as a perpetuation of the stereotypical roles attributed to men and women in their relationship with the family and with children. Entitlement to parental leave is especially significant here, as is the situation in certain member States with regard to unmarried fathers.

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36. Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG, *Bundesgesetzblatt* 2008 I, S. 2586 bis 2743.

37. For more information, see the website of Canada's Department of Justice: [www.justice.gc.ca](http://www.justice.gc.ca).

38. *The Telegraph*, "Father wins sex discrimination case after request to work part-time rejected", 4 November 2014.

39. *Le Monde*, "Enfant né sous x: la justice refuse de le restituer à son père biologique", 24 November 2014.

61. In the course of my research, I also identified a number of practices followed by the administrative authorities in our countries which help to perpetuate stereotypes and to relegate fathers to the sidelines. For example, information sent home from school is frequently addressed only to the mother. This is especially true where the parents are separated. In this case, the parent with whom the child is not living is treated differently. A recent study in Denmark has likewise shown that, in most cases, information about crèches, doctor's visits and school attendance is sent by the local authorities to the mothers only, even though 85% of parents agree that it should be sent to both parents.<sup>40</sup> Another example: in Luxembourg, the social security card is not issued to both parents. Likewise, in France, despite the growing popularity of shared residence, social benefits are often poorly adapted to this kind of arrangement, particularly when it comes to childcare or housing benefit which can only be given to one parent.

#### 4.1. Parental leave

62. Several Council of Europe member States grant paid parental leave only to mothers, despite the many international instruments which place an obligation on States to ensure gender equality in the field of family rights and responsibilities. According to a recent study by the Organisation for Economic Co-operation and Development (OECD), Cyprus, the Czech Republic, the Slovak Republic, Switzerland and Turkey do not grant paid parental leave for fathers.<sup>41</sup>

63. A recent case before the European Court of Human Rights illustrated how parental leave can sometimes be reserved for women despite the repeated recommendations of the Council of Europe. In the *Markin v. Russia* case, a member of the armed forces, father of three children and divorced, had agreed with his former spouse that the children would reside with him. As one of the children was very young, the applicant asked to be granted three years' parental leave, which was refused on the ground that such leave was granted only to female military personnel. He was, however, granted three months' leave. The Court found that there had been a violation of Article 8 of the Convention concerning respect for family life in conjunction with Article 14 of the Convention which prohibits all forms of discrimination. It held that "the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from the entitlement to parental leave. ... gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation".<sup>42</sup>

64. I gather that since the *Markin* judgment the Russian authorities have been considering an amendment to the law, authorising fathers who are servicemen to take parental leave of up to three years. I welcome this development.

65. It is interesting to note that this judgment against Russia reversed the Court's previous case law (in particular the *Petrovic v. Austria* judgment of 1998), in the light of trends observed in Council of Europe member States regarding the sharing of child-rearing responsibilities between men and women, and in particular the role of the father vis-à-vis young children. The Court also pointed out that "references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex".<sup>43</sup> Legal theorists note that with this judgment the European Court of Human Rights has shown courage in attacking the stereotypes that persist in many societies about the proper roles of men and, by extension, of women.<sup>44</sup>

66. The Court relied here on a change of approach initiated by the Court of Justice of the European Union in a case concerning "breastfeeding leave" in Spain. Mothers with employee status were entitled to this leave, and fathers with employee status were also entitled provided the mother of their child had that same status. In the case brought before the Court of Justice, a father with employee status challenged the refusal to grant him this leave on the ground that the mother of his child was a self-employed professional. In a judgment of 2010 the Court of Justice first held that the effect of "breastfeeding leave" was to change working hours and was not limited to breastfeeding as such since fathers with employee status were also entitled to it. It stated that "to hold ... that only a mother whose status is that of an employed person is the holder of the right to qualify for the leave at issue in the main proceedings, whereas a father with the same status can only enjoy this right but not be the holder of it, is liable to perpetuate a traditional distribution of the roles of men and women by keeping

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40. The Danish Institute for Human Rights, *Hvem får posten? Analyse af kommuners information til forældre* (in Danish only), May 2015; summary provided by Equinet, 16 July 2015.

41. OECD Family database, PF2.1 Key characteristics of parental leave systems, 13 May 2015, p. 6.

42. *Markin v. Russia*, Application No. 30078/06, judgment of 22 March 2012, paragraph 143.

43. *Ibid.*, paragraph 127.

44. L. Burgorgue-Larsen, *Actualité de la Convention européenne des droits de l'homme*, AJDA, 2012, p. 1 726.

men in a role subsidiary to that of women in relation to the exercise of their parental duties”.<sup>45</sup> The Court of Justice found that the measure at issue was not compatible with the 1976 Directive on equal treatment for men and women as regards access to employment. The Spanish Labour Code was amended in February 2012 and employed parents of both sexes are now equally entitled to this leave in Spain.

67. In Greece, on the other hand, paid parental leave can be granted to male civil servants only if their wife does not work, whereas female civil servants are eligible for it whatever their spouse’s occupational status. In a judgment handed down in July 2015, the Court of Justice of the European Union held that this provision of the Greek Civil Service Code introduces direct discrimination on grounds of sex, contrary to European regulations on equal treatment between men and women in matters of employment.<sup>46</sup>

68. In its [Resolution 1274 \(2002\)](#) on parental leave, the Assembly stated that the latter was “closely linked to that of the role of men in family life, since it permits a genuine partnership in the sharing of responsibilities between women and men in both the private and the public sphere”. In 2013, in its [Resolution 1939 \(2013\)](#) on parental leave as a way to foster gender equality, the Assembly called on member States to introduce parental leave schemes which should “reserve a part of the leave for fathers, which cannot be transferred to the other parent and is lost if it is not used, unless there are exceptional circumstances, and provide a system of bonuses for cases where both parents take parental leave, as a way of creating an incentive for the take-up of parental leave by fathers”.

69. Good practices can be seen in certain Council of Europe member States which could be a source of inspiration for other countries.

70. In Iceland, Law No. 95/2000 on maternity/paternity leave and parental leave was passed in 2000 and had two aims: firstly, to ensure that the child received care from both parents; and, secondly, to enable both men and women to strike a balance between their working and family lives. This leave, which was initially for six months, is now for nine months and is shared between both parents: three months for the mother, three months for the father and an additional three months to be shared between both parents. It is interesting to note that the three months granted to each parent are not transferable. In addition, salaries are maintained at a level of 80%.

71. According to a study published in 2013, this law has helped bring about a more balanced sharing of parental responsibilities within families and greater involvement of fathers in the care of their children.<sup>47</sup> Approximately 90% of Icelandic fathers take their non-transferable three months’ parental leave and there has been a steady increase in the number of fathers who use the part of the leave that is shared between both parents. However, it would appear that fathers who do not live with the mother of their child make little use of their parental leave.

72. The impact on the child of greater paternal involvement is deemed positive on a number of counts.<sup>48</sup> In particular, it has been observed that when parents do not conform to the stereotypical male and female roles, children are less likely to have gender-stereotyped attitudes. In addition, the presence of both parents stimulates the cognitive development of the child who interacts with two individuals rather than just one. It is also claimed that it is beneficial to the relationship between the parents and reduces conflict, with each parent being able to develop both their relationship with the child and their professional life. In this way, equality and the interest of the child can go hand in hand. Finally, it was recently noted that fathers who took paternity leave following their child’s birth were more involved in child-rearing than those who, for example, only attended antenatal classes or were present during birth.<sup>49</sup>

73. Progress can be seen in many Council of Europe member States that have adopted rules on parental leave for both parents. In Poland, for example, the Labour Code was amended in 2013 introducing new parental leave schemes. It provides that parental leave of 26 weeks, granted in addition to maternity and paternity leave, can be taken either by the mother or the father. However, there is no provision for a non-transferable portion to be reserved for the father. Yet we have seen the incentive effect of such measures in

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45. CJEU, *Pedro Manuel Roca Alvarez v. Sesa Start España ETT SA*, C-104/09, 30 September 2010, paragraph 36.

46. CJEU, *Konstantinos Maistrellis v. Ypourgos Dikaioynis, Diafaneias kai Anthropon Dikaioaton*, C-222/14, 16 July 2015, paragraph 52.

47. Ásdís A. Arnalds, Guðný Björk Eydal, Ingólfur V. Gíslason, “Equal rights to paid parental leave and caring fathers – the case of Iceland”, *Icelandic Review of Politics and Administration*, Vol. 9, Issue 2, p. 327.

48. *Ibid*, p. 330.

49. “The dad dividend”, *The Economist*, 16 May 2015, p. 53.



Iceland and the Nordic countries. In the United Kingdom, however, parental leave of 18 weeks may be taken, but it is not transferable. The percentage of fathers taking up this entitlement to parental leave is very low (estimated at between 2% and 7%), chiefly because it is not paid leave.<sup>50</sup>

#### **4.2. The specific case of children born to unmarried couples**

74. Several member States stipulate in their legislation, or did so in the past, that in the event of the separation of an unmarried couple, parental authority shall be automatically vested in the mother. This remains the case in Greece and Luxembourg.

75. That was also the case in Germany up to 2013. Before that, Article 1672a§2 of the German Civil Code provided that joint parental authority over a child born out of wedlock could be obtained only by marriage, joint declaration or court order. Otherwise, sole parental authority was assigned to the mother. The German authorities justified this provision on the ground that the sharing of parental responsibility against the mother's wishes would be contrary to the child's best interests. In *Zaunegger v. Germany*, a father who had been refused joint exercise of parental authority on the basis of Article 1672a§2 of the Civil Code because of the mother's objection, complained before the European Court of Human Rights of the discriminatory nature of German legislation vis-à-vis unmarried fathers. The Court agreed with him and found a violation of Article 8 (right to respect for family life) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights.<sup>51</sup>

76. Following this judgment, the Federal Constitutional Court ruled in July 2010 that this provision in the German Civil Code was unconstitutional, firstly because it deprived the father in principle of his right of custody if the child's mother objected, and secondly because the father could not obtain any judicial review of the custody ruling. In this decision, the German Constitutional Court also instructed the family courts, pending an amendment to the Civil Code, to grant, on the request of one parent, custody of the child to both parents, or indeed to the father, provided that this was compatible with the interests of the child. The German Civil Code was finally amended to this effect in May 2013. I welcome this decision and call on the other member States concerned, including my own country Luxembourg, to take steps to follow suit.

77. In Luxembourg, in the case of children born out of wedlock, Article 380 of the Civil Code stipulates that even if the unmarried father and mother have both acknowledged the child, parental authority is exercised by the mother. It can, however, be exercised jointly by both parents if they make a joint declaration to this effect before the guardianship judge. In a judgment handed down on 26 March 1999, the Constitutional Court declared this provision to be contrary to Article 11 of the Constitution inasmuch as it assigns parental authority exclusively to the mother, even where the child has been acknowledged by both parents. In a judgment delivered on 7 June 2013, the Constitutional Court reiterated its view and ruled that Article 380 of the Civil Code had not been brought into line with the Constitution.

78. A bill on parental responsibility was drafted by the Luxembourg Government and laid before the Chamber of Deputies in April 2008. This bill notes developments in other countries of Europe and standards formulated at international level and seeks to introduce a system of shared parenting which places parental responsibility jointly on the father and the mother, regardless of whether they are married and, where such is the case, after the couple have separated. The legislative procedure is still ongoing.

## **5. Conclusions**

79. Despite the positive developments observed in the field of shared parental responsibility, questions concerning child residence and access rights can prove particularly sensitive when parents separate. In this area, the maintenance of relations between children and their father can be problematic, as precedence is often given to the mother. I would, however, point out that respect for family life is one of the rights enshrined in the European Convention on Human Rights and that for a parent and child, the ability to be together is an essential part of family life.

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50. European Network of Legal Experts in the Field of Gender Equality, "The Implementation of Parental Leave Directive 2010/18 in 33 European countries", European Commission, 2015, p. 226.

51. *Zaunegger v. Germany*, Application No. 22028/04, judgment of 3 December 2009.

80. I am convinced that fathers are important attachment figures for children. Like mothers, they are “active agents in the construction of boys’ and girls’ gender identity”.<sup>52</sup> Shared residence should become the rule for parental arrangements for children of all ages, including the very young. Underpinning it, however, must be the child’s right to see both parents and the ability to adapt the arrangement to individual circumstances, with care being taken to ensure that shared residence does not turn into a parental entitlement.

81. As I have pointed out, shared residence is beneficial for children of all ages, regardless of the financial situation of their parents. Shared residence has fewer positive effects if there are frequent disputes between parents, or if the father–children or mother–children relationship is poor. Shared residence would certainly not be appropriate in family situations where there is sexual abuse, violence, drug addiction, alcoholism or mental illness. However, it is important to bear in mind that only a very small percentage of divorced or separated couples fall into this category. Accordingly, shared residence is an approach that ought to be extensively promoted in our member States, although it must be used discerningly and always bearing in mind the interests of the child.

82. Separations and issues relating to children’s living arrangements after a separation are very often painful, for the parents and children alike. Parents are responsible for their children, however, and in my view, they should be able to continue performing their parental role, in the interest of their children, even if they themselves are no longer together. Mediation is a way of restoring dialogue and taking the heat out of relationships. Mediation has had a very positive impact in those places where it has been tried and all the member States should provide for the possibility of mediation in their legal systems.

83. Lastly, I should like to conclude by pointing out that while parents certainly have rights, first and foremost they have duties and responsibilities towards their children. Fathers must play a full role vis-à-vis their children, from the time they are born, seeing to their upbringing and contributing to their maintenance. States must take all necessary steps to stop the perpetuation of stereotypical male and female roles in the private and family sphere and acknowledge more widely the role of fathers in bringing up their children, whether by granting paid parental leave or by implementing or, where appropriate, introducing shared residence. I am convinced that changes to the relevant laws and administrative practices are needed in order for attitudes to change too.

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52. C. Zaouche Gaudron, “Toutes nos réponses sont limitées”, in G. Neyrand and C. Zaouche Gaudron (dir.), *op cit.*, p. 29.