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# Shared parental responsibilities and the best interests of the child

Perspectives in Spain, England & Wales, and Switzerland with a special focus on the influence of media

weblaw

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## TABLE OF ABBREVIATIONS

- AB: Official Bulletin of the Swiss Parliament (Amtliches Bulletin)
- Abs: Abschnitt (paragraphs in articles in Switzerland)
- AC: Appeal Cases (England and Wales)
- ACA 2002: Adoption and Children Act 2002
- AGNA: Non custodial parents Association in Switzerland (Associazione genitori non affidatari)
- AJPC: Association for the coparentality in Switzerland (Association jurassienne pour la coparentalitè)
- App: Application
- App no: Application Number
- art/Art: article
- AS: Official Bulletin Schweiz (Amtliche Sammlung Schweiz)
- BBI: Swiss Federal Journal (Bundesblatt)
- BFS: Bundesamt für Statistik (Switzerland)
- BGer: not published Swiss Federal Court Decisions
- BGE: Swiss Federal Court Decision (Bundesgerichtentscheid)
- BOCG: Official Bulletin of the Spanish Parliament (Boletín Oficial de las Cortes Generales)
- BOE: Spanish Official Bulletin (Boletín Oficial del Estado)
- BV: Swiss Constitution (Bundesverfassung)
- BverfGe: Swiss Constitutional Court (Bundesverfassungsgericht)
- BvL: Concrete controls of standards, judge's referral (German High Court, Konkrete Normenkontrollen)
- BvR: Constitutional Appeal (German High Court, Verfassungsbeschwerdeverfahren)
- c (followed by number): chapter (from Acts in England and Wales)
- ch: chapter
- CA: Children Act 1989
- Cafcass: Children and Family Court Advise and Support Service (England and Wales)

- CAO: Children Arrangements Order
- CC: Spanish Civil Code (Codigo Civil)
- CCS : Swiss Civil Code (French Translation : Code Civil Suisse)
- CE: Spanish Constitution
- CEFL: Commission on European Family Law
- CETS: Council of Europe Treaty Series
- CF (followed by number): Intervention on the England and Wales Parliament
- CFA: Children and Families Act
- CJ-FA: Committee of Experts on Family Law (Council of Europe, European Committee of Legal Cooperation)
- CGPJ: General Council of the Judiciary Spain (Consejo General del Poder Judicial)
- cit: cited
- Civ: Civil Division (England and Wales Court of Appeal, Civil Division)
- CJ-FA: Council of Europe. Committee of Experts on Family Law
- CM: European Council of Ministers (European Union)
- CM: Spanish Cabinet of Ministers (Consejo de Ministros)
- CM/Rec: Reccomendation of the Committee of Ministers (Council of Europe)
- CRC: Convention on the Rights of the Child
- CRC/C/GC/: General Comment Committee on the rights of the child.
- CRC/GC: General Comment Committee on the Rights of the Child
- DRC: Declaration of the Rights of the Child (1959)
- DS: Parliament Session's Record in Spain (Diario de Sesiones del Congreso de los Diputados)
- E.: Ersatz (paragraph Court Decisions Switzerland)
- Rz: Paragraph (for doctrine in Switzerland)
- EC: European Commission (EU)
- ECECR: European Convention on the Exercise of Children Rights
- ECHR: European Convention on Human Rights and Fundamental Freedoms
- ed/eds: editor/editors
- edn: edition
- ERA Forum: Journal of the Academy of European Law
- ERC: Republican Party of Catalonia (Esquerra Republicana de Cataluña)
- Et al : et alia (and others)

- EtCHR: European Court of Human Rights
- EU: European Union
- EWCA Civ: Court of Appeal Civil division (England and Wales)
- EWFC: Court of Appeal Family Court Division (England and Wales)
- EWHC: High Court Administrative division (England and Wales)
- Fam: Law Reports, Family Division (England and Wales)
- FCR: Family Courts Reports (England and Wales)
- FJR: Family Justice Review (England and Wales)
- FLR: Family Law Report (England and Wales)
- Fund: Fundamento juridico (Courts of Spain, grounds of the decision)
- GC: General Comment
- HC: High Commissioner (in international chapter)
- HC: House of Commons (on documents of England and Wales)
- HL: House of Lords
- Ibídem: the source cited in the preceding note.
- ICCPR: International Covenant on Civil and Political Rights
- ICESCR: International Covenant on Economic, Social and Cultural Rights
- INE: Instituto Nacional de Estadística (Spain)
- KESB: Child Protection Agencies in Switzerland (Kinderschutzbehörde)
- Mo: Parliament Motion (Switzerland)
- N: column in Swizterland (Commentaries and Doctrine)
- No/no: Number
- NZZ: Newspaper from Zürich (Neue Zürcher Zeitung)
- OAU: The Organization of African Unity
- ONS: Office of National Statistics (UK)
- OJ: Official Journal
- para: paragraph
- PSOE: Socialist Party in Spain (Partido Socialista Obrero Español)
- Res: Decision (Spain: Resolución)
- Re: In the matter of (Judgements England and Wales)
- RJ: Spanish Case Law Directory (Repertorio de Jurisprudencia)
- RK: Commission for Legal Issues (Kommissionen für Rechtsfragen, Swiss Parliament)

- s/sec: section
- S: Seite, page (Switzerland)
- SAP: Decision of the Spanish Regional Court (Sentencia de la Audiencia Provincial)
- Sched: Schedule
- SNF: Schweizerische Nationalfonds zur Förderung der Wissenschaftlichen Forshung
- STC: Decision of the Spanish Constitutional Court (Sentencia del Tribunal Constitucional)
- STS: Decision of the Spanish High Court
- Sz: Paragraph in Swiss Doctrine.
- TC: Spanish Constitutional Court (Tribunal Constitucional)
- TS: Spanish High Court
- UK: United Kingdom
- UN: United Nations
- UNDHR: Universal Declaration Human Rights
- UNGA Res: General Assembly Resolutions
- UNGA: United Nations General Assembly
- UNICEF: United Nations Children‘s Fund
- UNTS: United Nations Treaty Series
- U.S: United States
- v/vs: versus (case law)
- VeV: Responsible fathers and mothers association in Switzerland (Verantwortungsvoll erziehende Väter und Mütter)
- Vol: Volume
- Vot: Votum in Parliament (Switzerland)
- ZGB: Swiss Civil Code (Zivilgesetzbuches

# 1 INTRODUCTION

This dissertation examines the transformation of the interpretation of the best interests of the child in Spain, Switzerland and the United Kingdom during the introduction of the joint exercise of parental responsibilities in relation to the role of the media. This research seeks to demonstrate the influence of the media – specifically newspapers – and their interconnectedness with social movements and lawmakers on new developments in family law in the three countries.

Following the idea of Coglianese[1], it can be said that actions of social movements and lawmakers have a great impact on public opinion through the media and on the media itself. How this interconnectedness between these three actors during the approval of the joint parental responsibilities have affected to the transformation of the legal concept of the best interests of the child will be one of the main goals of the study.

Usually, the media cover legal issues surrounding parents and childcare from a child-protection perspective. Media laws prioritize and have as a main aim the child privacy and seek to shield children from possible mature-themed media content. However, the media influence public opinion and therefore also the development of the best interests principle[2], the main legal principle directed to protect children. Even before the widespread of media and digital technologies, the theories about their influence in public opinion emerged, especially when social movements promote certain issues[3]. The media and journalists are interpreters of society through news, messages, and opinions they publish. They are a powerful actor who set the agenda for what the public consumes and frame the conversation, thus shaping societal debate on any given topic and how law-making bodies address these. There is no aspect of society that is not covered by the media[4]. Law is no different in this regard and can be considered as one of the main areas of the media's influence.

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1 Cary Coglianese, 'Social movements, Law and Society, The Institutionalization of the Environmental Movement' (2001) 150 (1) University of Pennsylvania Law Review 85, 85.

2 Diana Papademas, *Human Rights and Media* (Emerald 2011) 7-14.

3 Bodislaw Dumitru Alexandru, Marcela Antoaneta, Carmen Valentina Radulescu, 'Are 2020's Social Movements Proof of the End of Globalization?' (2021) 92 SHS Web of Conferences 1, 2.

4 Papademas, 7-14.

The Universal Declaration of Human Rights (henceforth UDHR) states: 'all children, whether born in or out of wedlock, are entitled to special care and assistance in our societies'[5] and considers that the family is 'the natural environment for the growth and well-being of all its members and particularly children'[6]. It is through this 'natural environment' that children first develop their social skills and their personality, experiencing their initial interactions with the world and where they grow in the social and political community[7]. The European Convention on Human Rights and Fundamental Freedoms (henceforth ECHR) gives an essential role to the family, protecting it from interference from the State in its article 8 ECHR[8]. However, there is overwhelming evidence that 'the modern nuclear family household is being reinvented'[9]. Increases in divorce rates, blended families, single parenthood or cohabitation have contributed to the rising of a new postmodern family model[10]. Although the traditional nuclear family remains the most prominent, 'the model of lifelong, a civilly legitimate biological and social unity of father-mother-child is slowly losing its persuasiveness' [11]. This study focuses only on one aspect of this transformation – the pathway from the sole-parental responsibilities legislation to joint parental responsibilities – even though the last decade has introduced other modalities of relationships into the public consciousness.

First of all, there has been an increase of unmarried couples with children. More relaxed attitudes towards marriage and sexual companionship have become increasingly

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5 Universal Declaration of Human Rights (UNDHR) as adopted 10 December 1948 UNGA Res. 217 A(III) art 25 (2).

6 UNDHR, preamble.

7 Johannes Giesinger, *Autonomie und Verletzlichkeit. Der moralische Status von Kindern und die Rechtfertigung von Erziehung* (Transcript 2007) 172 -173.

8 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as amended by Protocols no 11 and no 14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS no 005, art 8.

9 Deborah Chambers, *Representing the family* (SAGE Publications 2001) 18.

10 Chambers, 18.

11 Andrina Hayden, 'Shared Custody: A Comparative study of the Position in Spain and England' (2011) 1 Indret: Revista para el Análisis del Derecho 1, 14.

accepted in Western societies[12]. In many European countries, cohabitation is becoming the regular family arrangement for the majority[13].

Secondly, the distribution of roles in the family model has changed in the last decades, especially concerning housework and childcare. The increasing involvement of women in the workplace and the increased participation of the father in the family, have also changed the roles of the partners[14]. This allocation of roles leads to a very different organization model when a breakdown occurs, when the parents are not married or do not live together[15]. Legal remedies have at times been inadequate[16], resulting in winners and losers in parental responsibility arrangements that has failed to promote the best interests of the child and the equality between the parents.

The best interests of the child is the first criterion in judicial and legal decision-making about a child[17] and 'the leading principle in cases concerning the allocation of parental authority and contact'[18]. In fact, one of the principal questions in the children's rights debate in recent decades, especially in European countries – has been who is responsible for the protection and care of the child daily[19]. Additionally, the consideration of the

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12 Harry Krause, 'Comparative Family Law: Past Traditions Battle Future Trends—and vice versa' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2019) 1114.

13 See more in Krause, Cff 1114.

14 Hayden, 13-15.

15 Dolors Viñas Maestre, 'Medidas relativas a los hijos menores en caso de ruptura. Especial referencia a la guarda' (2012) 3 Indret Revista para el análisis del Derecho 2, 4.

16 Rosa Martins 'Deciding on sole or joint custody rights in the child's best interests' in Katharina Boele-Woelki, *Common core and better law in European Family Law* (Intersentia 2005) 225.

17 United Nations Convention on the Rights of the Child UNGA Res. 44/25 (Adopted and open to signature 20 November 1989, entry into force 2 September 1990) Vol 1577 UNTS 3 (CRC) art 3. We will use the term 'best interests of the child' as redacted in the Convention; Kurki-Suonio, 'Joint custody as an interpretation of the best interests of the child in critical and comparative perspective' [2002] International Journal of Law Policy and the Family 183, 183-184.

18 Christina Jeppesen De Boer, *Joint Parental Authority. A comparative legal study on the continuation of joint parental authority after divorce and the breakup of a relationship in Dutch and Danish law and the CEFL Principles* (Intersentia 2008) 6.

19 Katarina Boele-Woelki, *Common core and better law in European Family Law* (Intersentia 2005) 149.

child as a subject of rights with an independent personality and will[20], has been codified substantively in the legislation and in the legal doctrine across Europe[21].

In the late nineties, the most accepted parental arrangement for children after the parent's divorce or when the parents were not married, was one-parent's exercise of parental responsibilities, which usually was conferred to the mother with visitation rights for the father. Moreover, unmarried fathers at times experienced difficulty getting their rights recognised as carers of their children. However, in recent years the joint exercise of parental responsibilities has gained more ground in most European countries as the best child's arrangement-model, which protects equality between parents while taking into account the interests of the child. The shared exercise of parental responsibilities or co-parenting is considered now 'the ideal arrangement for the child'[22]. This illustrates a common unanimity for the shared parenting of the child of divorced and unmarried parents. Somehow, there seems to be a general understanding that the involvement of the parents is necessary for a child's development and that it is in the best interests of the child to have a constant and stable relationship with both parents. However, the idea that the civil status of the parents should not affect in any way the exercise of their rights and duties towards the child, has been effective in many of the European countries only after the year 2005[23]. The research considers first how this consensus has been made and how the countries studied have incorporated this in their jurisdictions.

The discussion about the best parental responsibilities arrangement for the child has triggered much debate, especially in the media. Before and after legislation changed, the media have provided a public space for the debate between parents for and against

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20 CRC, art 12.

21 Ayslin Parkes, *Children and International Human Rights Law. The Right of the Child to be heard* (Routledge 2015) 11-13.

22 Kurki-Suonio,183-205; see also Boele-Woelki, *Common core and better law in European Family Law,* 149, who states that – according to the reports gathered by the Commission on European Family Law – most systems consider that the separation of parents should not change their position as holders of parental responsibilities.

23 In Spain the shared custody was introduced by the law as a possibility only in 2005 (Ley Orgánica 15/2005 del 18 Julio); in Switzerland in 2000 and 2014 (Divorce Review 2000 and Parental Responsibilities Review 2014); in Germany in 2013 (Reform of 19 May 2013) and in Belgium in 2006 (Child Custody Reform 2006).

shared parenting. The media have been the platform where ideas have been exchanged and even finding their way into the law-making process[24]. These messages have been promoted and driven through a process of lobbying by social movements and by lawmakers. In a way, social movements, the media, and lawmakers feed back into each other, giving rise to messages that are then disseminated to the public.

A social movement is a group of influence which has as purpose a social change. This social change can be done, usually, only through a legal reform on the issue they are interested. Therefore, the social movements need the lawmakers – politicians and deputies as representatives of the citizens – to achieve their main goals[25]. However, their interests on promoting several messages sometimes are not consistent with the main aim of the laws. In the case of the shared parental responsibilities, the main aim of the laws should be the best interests of the child and his/her welfare, the main subject affected by the reform. The changing interpretation about what is the best arrangement for the child, raises legal and sociological questions concerning the rights and responsibilities that need to be taken into account in family law proceedings and how the best interests principle has been interpreted by the judicial bodies and influenced by public opinion.

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[24] We will return to this in another chapter of the research, but just to name some, it can be seen this debate in the *Neue Zürcher Zeitung* in Switzerland: Nadine Jürgensen*,* 'Ein Vater ohne Kinder' *Die Neue Zürcher Zeitung* (Zürich, 09 October 2012) <http://www.nzz.ch/schweiz/ein-vater-ohne-kinder-1.17694641> (last visit 19.04.2021); Claudia Wirz, 'Von Alltags-Mutter und Wochenend-Vater' *Die Neue Zûrcher Zeitung* (Zürich, 27 September 2010) <http://www.nzz.ch/von-alltags-muettern-und-wochenend-vaetern-1.7700465>, (last visit 19.04.2021); Andrea Büchler,. 'Scheidungskinder zwischen Wohnmüttern und Besuchsvätern' *Die Neue Zûrcher Zeitung* (Zürich, 15 July 2006) <http://www.nzz.ch/articleE3UIB-1.46840?reduced=true> (last visit 19.04.2021) ; in the spanish newspaper *El Pais:* Editorial 'Centenares de separados piden la custodia compartida de sus hijos' *El Pais* (Madrid, 20 November 2006) <http://elpais.com/diario/2006/11/20/cvalenciana/1164053886_850215.html> (last visit 18.04.2021); Inmaculada De la Fuente,. 'Hoy con papá, mañana con mamá' *El Pais* (Madrid, 26 June 2005) <http://elpais.com/diario/2005/06/26/sociedad/1119736805_850215.html> (last visit 19.04.2021); and in England and Wales : Owen Bowcot, 'Government backs 'shared parenting after separation' *The Guardian* (London, 6 February 2012) <http://www.theguardian.com/lifeandstyle/2012/feb/06/government-backs-shared-parenting-legislation> (last visit 20.04.2021); David Pearse, 'Divorced fathers to get more contact with their children' *The Guardian* (London, 3 February 2012) <http://www.theguardian.com/law/2012/feb/03/divorced-fathers-children-custody-access.> (last visit 20.04.2021); David Norgrove, 'Children's welfare should not be trumped by parents' rights' *The Guardian* (London, 3 November 2011) <http://www.theguardian.com/law/2011/nov/03/childrens-welfare-comes-above-parents-rights> (last visit 02.01.2022).

[25] See Coglianese, 85; Dumitru, Nicolescu and Radulescu, 3-4.

Therefore, this study aims to illustrate the link between the evolution of the concept of the best interests of the child in parental responsibilities arrangements and the way in which media covers this. The study tries to answer three key questions. First, whether the concept of the best interests of the child has changed in the legal context through the approval of the shared parental responsibilities and how this change has been done in the countries under study, according to the doctrine and the case law. The second question is whether the media bias toward covering parents discussion and debates has led to legislative bodies to relegate the child to a secondary consideration and to what extent. The third question is if the messages of social movements promoted by the media had led to pressure and misunderstandings on Government causing an indeterminacy on the family law outcomes about shared parental responsibilities and the consequences of this in the legal practice towards the child.

Media are called the 'Fourth Estate' because of their influence on the public opinion and their control over governments. But do the media really influence the law-making process? If so, are media the sole influencing actor or are there others setting the agenda for and/or framing the public conversation?

## 1.1 THE RESEARCH: PURPOSE, METHODOLOGY AND STRUCTURE

The project focuses on the transformation of the best interests principle in the legislations of Spain, Switzerland, and the United Kingdom, taking as an example the introduction of the shared parental responsibilities in the three countries under study and how the press has interacted with the social and political bodies, shaping this transformation during the process.

This study seeks to demonstrate the link between the family law and the media, analysing the effects of the media frames and messages on the law and on the policy and legal proceedings. Therefore, the research focuses first on a complete legal comparative study between the three legal jurisdictions and secondly, on the media influence and conceptual approach of the media outlets about the best interests principle during the introduction of the shared parental responsibilities. The study refers to the interaction between lawmakers, media and social movements, during the law-making process of the shared parental responsibilities.

### 1.1.1 METHODOLOGY

The legal component of the thesis will use a comparative functional method, based on the idea that European countries face similar legal questions surrounding the modern family[26]. Therefore, the study covers Spain, Switzerland, and the United Kingdom since these jurisdictions all have recently introduced legislation related to shared parental responsibility. However, they have different cultural and media environments. In order to go more in-depth, it is essential for this study to consider the work of scholars, legislation and case-law surrounding the right of the parents to be equal and of the best interests principle in the shared parental responsibilities arrangements. How these two principles are balanced in case-law and in recent private law legislation in the three jurisdictions under study and how they are covered in the media, will give an overview of the evolution of the legal position of children in society and corresponding shifts in public opinion.

The research is divided into two main parts. The first part seeks to outline the evolution of the best interests principle in the three countries under study, beginning with an analysis of the international common core and the Article 3 of the Convention on the Rights of the Child (CRC) related with Article 8 of the European Convention on Human Rights. The subsequent chapters examine legislation on the best interests of the child and the exercise of parental responsibility in the three legal systems, in each period of interests (between 2000 and 2015).

The second part – chapters 6 and 7 – will examine the influence of the media on the political and legal proceedings of the shared parental responsibility and the actors who participated on these proceedings. An analysis of media coverage, specifically newspapers on the notion of the best interests of the child during the same period (2000-2015) – particularly during the law-making process on each country – will provide necessary background to understand the transformation of the notion and to accurately outline this transformation. The second part of the research first provides an overview of the interrelationship between lawmakers, social movements and media to influence

[26] Krause, 1101; See also Markus Müller Chen, Christoph Müller and Corinne Widmer Lüchinger, *Comparative Private Law* (Dike Publishers 2015) 58.

on public opinion and law-making proceedings. Afterwards, the research composes a conceptual press analysis of coverage from different newspapers of relevant law-making processes during the 15-year period. This part of the study analyses the language used, the frames used by the media to refer to a new law and the political context in which the news appeared.

## 1.2 THE LEGAL DEVELOPMENTS AND LIMITATIONS OF THE STUDY

To conduct a comparison, the systems under study should be sufficiently analogous to make the comparison useful[27]. The Spanish, the Swiss and the English jurisdictions are integrated in the European legal and cultural common frame. These three countries have signed the Convention on the Rights of the Child, they are members of the Council of Europe and have also signed the European Convention on Human Rights and Fundamental Freedoms. The research briefly considers the statements and reports of the Council of Europe and the European Court on Human Rights.

The research uses the definition of 'shared parental responsibilities' given by Nikolina, who considers the shared parenting as 'the joint exercise of parental responsibilities by both parents' which 'requires both parents to be holders of joint parental responsibilities and make decisions about the child's life together in cooperation with each other'[28].

### 1.2.1 THE LEGAL CONCEPTS AND LIMITATIONS OF THE STUDY

Legal language can acquire specific meanings. Therefore, it is necessary to analyse the similarities and differences between three countries under study[29].

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27 Matcheld Vonk, *Children and their parents. A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch Law* (Intersentia 2007) 13.

28 Natalina Nikolina, *Divided Parents, Shared Children. Legal aspects of (residential) coparenting in England, The Netherlands and Belgium* (Intersentia 2015) 6.

29 Barbara Pozzo, 'Comparative Law and language' in Mauro Bussani and Ugo Mattei (eds), *The Cambridge companion to Comparative Law* (Cambridge University Press 2012) 104.

#### 1.2.1.1 Parental responsibilities

Parents are primarily responsible and competent for the welfare of their children[30]. Biological parenthood these days is in constant evolution. However, this study defines a *parent* as the child's legal parent, the person whose parentage has been determined by the law and also includes establishment of parenthood for both married and unmarried parents. This study's definition of parenthood does not include other aspects such as social or genetic parenthood[31]. The research addresses the continuation of shared parental responsibilities after a divorce or where the parents are not married, or they are not living together. This means that the research also considers the changes for unmarried parents and the implications of newly enacted law on those relationships.

The CRC recognises the especial responsibilities, rights, and duties of parents in its article 5 and the right to provide appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention[32]. Also article 18 (1) CRC states

> 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern'.

For the Committee of Ministers of the Council of Europe, parental responsibilities are

> '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'[33].

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30 Frederike Wapler, *Kinderrechte und Kindeswohl* (Mohr Siebeck 2015) 469.

31 See about Ingeborg Schwenzer *Tensions between legal, biological, and social conceptions of parentage* (Intersentia 2007) 1-26.

32 UN General Assembly Convention on the Rights of the Child, UNGA Res. 44/25 (Adopted and open to signature 20 November 1989, entered into force 2 September 1990) Vol 1577 UNTS 3 (CRC) art 5.

33 Council of Europe, Recommendation No (R) (84) 4 on Parental Responsibilities (adopted by the Committee of Ministers on 28 February 1984, at the 367th meeting of the Ministers' Deputies) Principle 1.

Recommendation No 84 is the main definition of parental responsibilities in the European Continent, including in its definition the main duties of the parents towards their children: maintenance, education, personal relationships, and legal representation. The definition does not include the custody and the determination of child's residence as an element of the parental responsibilities. Custody and residence are considered separately in the document[34]. However, each country has their own definition of the concept. The project uses both the plural (parental responsibilities) and the singular term (parental responsibility) with preference for the plural term (parental responsibilities) because it provides the idea of a collection of responsibilities, which includes all the decisions about the child as education, medical assistance, daily matters and maintenance. The term 'parental responsibilities' is increasingly established in Europe, but there are nevertheless different ways to describe the collection of responsibilities[35].

In Spain, the used term is 'parental authority' (patria potestad) and in Switzerland the term 'parental authority' was substituted with the term 'parental care' in 1999[36]. However, in both countries the original meaning of the term, as 'power' of the parents over the child has been changed to 'responsibility' of the parents towards the child[37]. In English common law, long before the Children Act 1989, it was accepted that the interests of parents 'might be better be described as responsibilities or duties'[38].

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34 Council of Europe, Recommendation No (R) (84) 4 on Parental Responsibilities (adopted by the Committee of Ministers on 28 February 1984, at the 367th meeting of the Ministers' Deputies) Principle 8. It refers to the non-custodial parent, considering that the parent 'with whom the child does not live should have at least the possibility of maintaining personal relationships with the child'.

35 Children Act 1989, s 3 (1) defines parental responsibility as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.

36 Schweizerischen Zivilgesetzbuches, Änderung vom 26. Juni 1998 Personenstand, Eheschliessung, Scheidung, Kindesrecht, Verwandtenunterstützungspflicht, Heimstätten, Vormundschaft, Ehevermittlung (AS 1999 1118 ff); Katharina Boele-Woelki and others, *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia 2007) 26-27.

37 Ingeborg Schwenzer and Michelle Cottier in Thomas Geiser and Christiana Fountulakis, *Basler Kommentar zum Schweizerischen Privatrecht Zivilgesetzbuch Band I* (6th edn, Stämpfli 2018) (henceforth BSK-ZGB I) ZGB art 296 N 4.

38 Rebecca Probert and Maehb Harding, *Cretney and Probert's Family Law* (10th ed, Sweet and Maxwell 2018) 243.

Spanish jurisdiction accepts the definition of parental responsibilities given by the High Court in 1975, which states that the 'patria potestad' or parental authority is a function established in the interests of children[39]. According to the Spanish High Court, the content of the parental responsibilities includes maintenance of personal relationships, care and protection, provision of education, legal representation, determination of residence (custody) and administration of property[40]. The legal doctrine considers that the exercise of parental responsibilities is also the exercise of all the rights, powers and duties relating to the person and the property of their children[41].

Swiss Law defines parental responsibilities as comprising the 'physical, mental and moral development'[42], the education[43], the religion of the child[44], the name[45], the legal representation[46], the administration of property[47] and since the new law about parental responsibilities entered into force in 2014, also the decision about the residence of the child[48]. In Swiss legal doctrine, parental responsibilities are considered a 'right – function' or a bundle of rights and duties of the father and the mother regarding the child. They essentially consist of the promotion of the good development of the child towards

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39 Sentencia Tribunal Supremo (STS from the spanish term) de 8 de Abril 1975 states that parental responsibility (patria potestad) is 'the set of rights that the law gives parents about the person and property of the children, while they are minors and not emancipated, for the fulfilment of the duties of support and education that lay upon such parents, and constitutes a central relationship in which radiate a multitude of rights, instituted all, not in the interests of the holder, but in the interests of the child'.

40 Cristina Gonzalez Beilfuss, *National Report: Spain* in Commission on European Family Law, 'Parental Responsibilities' <http://ceflonline.net/country-reports-for-spain/> (last visit 10.11.2021); see also Cristina Gonzalez Beilfuss, Update 2021: Spanish Report <http://ceflonline.net/country-reports-for-spain/> (last visit 10.11.2021).

41 Martins, 235.

42 Schweizerishes Zivilgesetzbuch (ZGB) RS 210, art 302 Abs 2.

43 ZGB, art 302 Abs 2.

44 ZGB, art 303.

45 ZGB, art 301 Abs 4.

46 ZGB, art 304.

47 ZGB, art 318.

48 ZGB, art 301*a*).

greater autonomy and independence. Parental responsibilities therefore evolve with the age and the child's capacity of discernment[49].

In British Common Law, parental responsibility is defined as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'[50]. The ability of a parent to make certain decisions depends on whether he or she has parental responsibility[51]. According to Lowe and Douglas, the duties of the parents are:

- bringing up the child
- having contact with the child
- protecting and maintaining the child
- disciplining the child,
- determining and providing for the child's education,
- determining the child's religion,
- consenting to the child's medical treatment,
- consenting to the child's marriage,
- consenting to the child's adoption,
- vetoing the issue of a child's passport,
- taking the child outside the United Kingdom and consenting to the child's emigration,
- administering the child's property,
- naming the child,
- representing the child in legal proceedings,
- disposing of the child's corpse and
- appointing a guardian for the child[52].

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49 Olivier Guillod and Sabrina Burgat, *Droit des Familles* (5th ed, Helbing Lichtenhahn 2018) 146 Sz 244.

50 CA 1989, s 3 (1).

51 Probert and Harding, 241.

52 Peter Mann Bromley and others, *Family Law Bromley's* (11th ed by Nigel Lowe and Gillian Douglas, Oxford University Press 2015) 337-338.

In the study, it will be considered the differences on concepts of each country and how the new legal reforms changed also the concept and the duties of the parents towards their children.

#### 1.2.1.2 Custody and residence orders

In some European countries, a difference exists between the parental responsibilities and what in England and Wales law is called 'residence orders' and 'contact orders' and in other countries is called 'guardianship', 'legal custody' or just 'custody'.

Spanish law does not include a legal definition of the concepts of 'guarda' (guardianship) and 'custody', which usually go together in legal documents[53]. Also, the law uses different terminologies to convey the same idea. These terminologies include the right of the parents to have their children 'in their company', 'the custody and care of the children' or 'the shared guardianship and custody'[54]. The definition of custody and guardianship remains a subject of debate within legal doctrine. Therefore, in this study the guardianship and custody are considered as an element of the parental responsibilities (patria potestad). This notion includes the right of the parents to have their children 'in their company' – including the legal residence of the child – and the right of the children to be cared for by their parents on a daily basis[55]. The main change introduced in the law of parental responsibilities in Spain in 2005 only includes custody of the child (the determination of residence). As it will be seen on chapter 4, the narrowness of the change has been criticized by the doctrine – and even by social movements – for its ambiguity[56].

The Swiss legal system has experienced significant reform concerning the concept of custody[57] with the revision of the parental responsibilities in 2014. The reviewed article

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53 Spanish Civil Code (henceforth CC) art 92.

54 CC, art 92 para 8 and para 9.

55 Laura Alascio and Ignacio Marin, 'Juntos pero no revueltos: la custodia compartida en el nuevo art. 92 CC' (2007) 3 Indret Revista para el Análisis del Derecho 2, 3.

56 Fabiola Lathrop – Gomez, 'Custodia Compartida y Corresponsabilidad Parental. Aproximaciones Jurídicas y Sociológicas' (2009) 7206 Diario La Ley, 9-10.

57 '*Obhut*' in the German version, '*Droit de Garde'* in the French version and '*custodia*' in the Italian version.

301a of the Civil Code[58] states that the 'parental authority comprises the right to decide the place of residence of the child'[59]. In Switzerland the legal doctrine makes the distinction between the *faktische Obhut* (the *de facto* custody: where the child lives on a daily basis) and the *rechtliche Obhut* (the legal custody or the decision about the residence of the child). The *faktische Obhut* sets with who the child actually lives[60]. When the parents live together, they both have the 'legal custody' and the *faktische Obhut* of the child. When the parents have divorced or do not live together, the judge[61] or the authority for the protection of the child[62] decides the amount time spent with the child and the care of the child if there is no agreement between the parents. Furthermore, the new article 301a states that when the father or the mother wants to change the residence of the child, it is necessary to have the consent of the other parent when the new place of residence is in a foreign country, or the change could affect profoundly the exercise of parental responsibilities of the other parent and the personal contact with the child (*persönlichen Verkehr*)[63].

In England and Wales, the terms 'custody' and 'access' were replaced with the terms 'residence' and 'contact' following the implementation of the Children Act 1989[64]. A contact order is established by a court and requires the person with whom the child is living 'to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other'[65]. A 'residence order' refers to the order awarded by a court, and it sets out with whom a child should live. Parental responsibility is then automatically given to the person in whose favour

58 Henceforth (*Zivilgesetzbuch*) ZGB in the German version.

59 ZGB, art 301a.

60 Heinz Hausheer, Thomas Geiser and Regina Aebi Müller, *Das Familienrecht des Schweizerischen Zivilgesetzbuches* (6th edn, Stämpfli Verlag 2018) N 17.106.

61 ZGB, art 298.

62 KESB in the German version (*Kindeschutzbehörde*) ZGB, art 298d.

63 ZGB, art 301a and ZGB art 273 Abs 3.

64 Janet Walker and Sherril Hayes, 'Policy, Practice and Politics: Bargaining in the shadow of Whitehall' in Hermman Margaret (ed), *The Blackwell Handbook of Mediation, Bringing Theory, Research and Practice* (Wiley Blackwell 2006) 125.

65 Jill Black, Jane Bridge and others, *A practical approach to Family Law* (9th ed, Oxford University Press 2012) 247.

the residence order is made if they do not already have it[66]. However, the Children and Families Act 2014 has merged 'residence' and 'contact' concepts into one order, the 'child's arrangements' order. Also, the Act introduces the concept of 'involvement' when it comes to the decision about shared parenting. The British Government states that the aim of the provision is 'to reinforce the expectation at societal level that both parents are jointly responsible for their children's upbringing'[67].

The main change in the three legal systems included in this study is the consideration that it is in the best interests of the child to have a constant and stable relationship with both parents and that they should be involved in his or her care together, regardless of their civil status. However, this change does not – and the authorities have already pointed that out when the law entered into force[68] – only include the residence and the amount of time the child spends with the parents but has an objective to promote collaboration and equality between the parents. Therefore, this study considers the amendments enacted in this direction in the three countries examined.

#### 1.2.1.3 Best interests or welfare?

There is also a substantive debate in the legal sphere over the differences between 'welfare' and 'interests' of the child. In Spain, the common term is 'the best interests of the child'[69], in Switzerland *Kindeswohl*[70] (translated in the international context as 'well-being'[71]) and in England and Wales 'welfare'[72]. However, from a functional point of view, this study considers the line adopted by the Committee on the Rights of the Child, which considers that the best interests of the child is the 'full and effective

66 Hayden, 6.

67 Department of Education, n 14 in Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' (2015) 46 (3) Victoria University of Wellington Law Review 626, 635.

68 See chapters 3.3.1 for Spain; 4.3.1. for England and Wales and 5.3.1. for Switzerland.

69 Interés superior del niño in the Spanish version.

70 *Kindeswohl* in the German version, *bien de l'enfant* in the french version and *bene del figlio* in the italian version.

71 See Committee on the Rights of the Child, 'Concluding observations on the combined second to fourth periodic reports of Switzerland' CRC/C/CHE/CO/2-4 (26 February 2015) para 26.

72 Children Act (CA) 1989, s 1 (3).

enjoyment of all the rights recognized in the CRC and the holistic development of the child'[73],. This means that the best interests of the child should be interpreted in light of the other articles of the CRC[74]. This study especially considers the rights of the child to be heard[75], to have contact with each parent[76] and to be cared for by the parents[77].

However, each jurisdiction analysed considers the principle of the best interests of the child differently. In the Spanish jurisdiction, it is recognized as the international concept of 'the best interests of the child' or *interés superior del niño*. The protection of children has constitutional level, recognized already in 1978. Spain ratified the CRC in 1990. The principle of the best interests of the child and the welfare of the child is recognized specifically in articles 92, 154 and 170 of the Civil Code and in article 2 of the Law on the protection of children[78]. The introduction of the joint custody[79], amended article 92 of the Civil Code and the conditions to hear the child in divorce proceedings, giving more autonomy to the child to determine his or her future.

The Swiss legal system uses the term *Kindeswohl*, which is the main guiding principle of family law in Switzerland since the sixties[80]. The principle was introduced in 1972 in the Civil Code (henceforth ZGB) with the amendment of the Adoption law[81]. Since then, the concept of *Kindeswohl* has spurred reform of some aspects of child law in the

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73 Committee on the Rights of the Child, 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para.1)' CRC/C/GC/14 (29 May 2013) para 4.

74 Wapler, 236.

75 CRC, art 12.

76 CRC, art 9.

77 CRC, art 18.

78 Ley Orgánica 1/1996 de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil, BOE no 15.

79 CC, art 92 para 1.

80 Michelle Cottier, *Subjekt oder Objekt? Die Partizipation von Kindern in Jugendstraf- und zivilrechtlichen Kindesschutzverfahren. Eine rechtssoziologische Untersuchung aus der Geschlechterperspektive* (Stämpfli 2006) 11.

81 Federal Law on the Acquisition and Loss of Swiss Citizenship, entered into force 1 April 1973 (AS 1972 2819).

country, particularly in the reviews of the Child's protection measures[82]. However, it was only in 1999 when the Constitution (henceforth BV[83]) was reviewed and an article about child protection was included[84]. This constitutional protection is a result of the 1997 CRC ratification and has been essential for the legislation change concerning children in Switzerland[85]. However, according to the Committee on the Rights of the Child, the 'well-being' or *Kindeswohl* of the child is 'different in meaning and application from the best interests of the child as enshrined in the Convention'[86]. To explain the concept, the research considers the interpretation made by Wapler about *Kindeswohl* in Family law. As *Kindeswohl* is also used in Swiss law, Wapler's clarifications on this term in German law is transferrable to the Swiss legal context. According to Wapler, the term should be defined as the well –understood interests of the child. Wapler remarks three important criteria to determine the *Kindeswohl*[87]: the personal bonds[88], the social consciousness[89] and the child's perspective[90].

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82 Alexandra Rumo-Jungo and Pascal Pichonnaz, *Kind und Scheidung* (Schultess 2006) 55.

83 I will use the German translation of the Swiss Constitution, '*Bundesverfassung*' abbreviated as BV.

84 Margot Michel, *Rechte von Kindern in medizinischen Heilbehandlungen* (Schultess 2009) 53; see also Hausheer, Geiser amd Aebi Müller, Sz 15.19; Guillod and Burgat, Sz 58.

85 See for example, Bundesgesetz über die Förderung der ausserschulischen Arbeit mit Kindern und Jugendlichen (Kinder- und Jugendförderungsgesetz, KJFG) vom 30. September 2011 (Stand am 1. Januar 2017) SR 101, or the regulation about the maintenance of children: Schweizerisches Zivilgesetzbuch (Kindesunterhalt) Änderung vom 20. März 2015 BBl 2014 (AS 2015 4299; SR 210 529).

86 Committee on the Rights of the Child, 'Concluding observations on the combined second to fourth periodic reports of Switzerland' CRC/C/CHE/CO/2-4 (26 February 2015) para 26.

87 Wapler, 253.

88 *Innere Bindungen* in the German translation and it refers to the importance of the family and social ties for the best social and emotional development of the child. See Wapler, 252-253.

89 *Soziale Kontinuität* in the German version. The criteria of the social continuousness serves to protect the social attachments of the child, differentiating between the local continuity (neighbourhood, school..) and the affective continuity (family and personal ties) intended to prevent unnecessary changes in the care and upbringing of the child. Continuity in this sense is intended as the continuity of his or her emotional ties. See Wapler, 252-253.

90 *Kindeswille* in the German version. Wapler considers that the child's perspective is also relevant for the realization of the *Kindeswohl.* Wapler, 252-253.

In England and Wales, the law and doctrine refer to 'welfare of the child'. The concept was introduced with the Children Act 1989 and entered into force in 1991, following the 1990 ratification of the CRC. The Anglo-Saxon system is the only one which gives a series of legal criteria[91], which try to compensate the indeterminacy of the principle[92]. Furthermore, the principle is considered in the United Kingdom as a 'paramount consideration' in parental responsibilities issues, which means that where there is a conflict between the interests of parents and the welfare of the child, the public entities should prioritize the child. The checklist applies 'whenever a court is dealing with an application for a special guardianship and in contested private proceedings'[93]. According to Bainham and Gilmore, 'no premium is attached to any of the factors in the list' and 'the weight actually accorded to particular factors will depend on the circumstances of the particular case' and is also attached to the 'amount of discretion'[94] of the judges.

### 1.2.2 PARENTAL RESPONSIBILITIES, CUSTODY AND BEST INTERESTS IN THE MEDIA

The main problem with media analysis in this domain is that sometimes the legal concepts are conflated by journalists. News outlets often cover a story using the terms 'custody', 'parental responsibilities' and 'time spent with the child' – incorrectly thinking these terms mean the same thing. Media coverage of law-making proceedings reports without nuance the lumps into one box the rights of the child, as the right to be cared for and educated by both parents, the right to contact etc. The result is a well-inten-

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91 Children Act 1989, s 1 (1) states that courts should consider the following:
- the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- his physical, emotional and educational needs;
- the likely effect on him of any change in his circumstances;
- his age, sex, background and any characteristics of his which the court considers elevant
- any harm which he has suffered or is at risk of suffering;
- how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- the range of powers available to the court under this Act in the proceedings in question.

92 Dionisio Roda y Roda, *El interés del menor en el ejercicio de la patria potestad. El derecho del menor a ser oído* (Aranzadi, 2014) 36.

93 Andrew Bainham and Stephen Gilmore, *Children, the Modern Law* (4th ed, Family Law 2013) 67.

94 Bainham and Gilmore, *Children. The Modern Law,* 67.

tioned media unintentionally misinforming the public. The references to the best interests of the child are not – obviously – based on the legal term of best interests of the child, but on a social meaning of what it is best for the child and the main rights recognized in the CRC and on the social opinion of their rights. Therefore, the media analysis considers 'welfare' or best interests of the child as any reference to the rights of the child recognized in the CRC (education, care, integrity etc).

Also, for this reason, the study considers the parental responsibilities as a global concept, which also includes custody, the main requirement of the associations of fathers who ask for the shared parenting. The research considers another main right of the child: the right of the child to be heard in all matters[95] and ponders if the child's point of view is at least considered and respected in the public debates about child's arrangements.

## 1.3 THE MEDIA LANDSCAPE AND LIMITATIONS OF THE PROJECT

The second part of the research examines the news appearing from the year 2000 to 2015 about shared parenting, the best interests of the child and the introduction of the joint parental responsibilities in the countries under study. The main purpose of this research is to analyse the situation before and after the change in national legislation on parental responsibilities[96] and how the newspapers balance coverage of the best interests of children, the right of the child to be heard and the equality between the parents in the debates about shared parenting. The research aims to demonstrate the influence of the media in the evolution of the best interests principle and which actors – consciously or unconsciously – were involved on this transformation.

Public authorities, civil society and the international community, as well as media organizations have important roles to play that influence law enforcement, education, monitoring and setting universal standards to ethical conduct and self-regulation. In

95 CRC, art 12 CRC.

96 *Parental responsibility* in England and Wales, *patria potestad* in Spain and *Elterlichesorge or autorité parentale* in Switzerland.

fact, several authors have demonstrated that public opinion of the political atmosphere is shaped by the news in the media[97].

In recent centuries, journalism has changed significantly. First the introduction of the television into most households and then the Internet have diminished the place of newspapers in the media landscape. News and journalism are 'in the midst of an upheaval'[98] that forces newspapers to change the way they operate and interact with the public. However, the press continues to be one of the main information sources for the society and the legislators. The press is not facing extinction, they are reinventing themselves by embracing technological innovations and digital engagement. As Low states, the new technologies have not only shaped the production of newspapers, but they have also made the electronic delivery of papers over the Internet a reality[99]. Some observers consider that newspaper journalists 'working in well-equipped and well-connected newsrooms remain the 'content engines' of other media as radio, Television, blogs and social media'[100].

This study does not cover television and radio, but only the newspapers, as print media are the 'content engines' informing other forms of media and as a reference for the public opinion. Therefore, this study only analyses news, articles and opinions appearing in newspapers on shared parenting. As noted, newspapers have reported on the debates and discussions around parental authority, making them the main source for the public to stay informed in this domain and also a reliable content library for other wider media as a result of their coverage.

From a legal point of view, a newspaper is a publication, usually in sheet form, for general circulation, published at regular intervals and containing intelligence of current events

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97 See Maxwell McCombs and George Estrada, 'The news Media and the Pictures in Our Heads' in Iyengar Shanto Iyengar and Richard Reeves(eds), *Do the Media Govern? Politicians, Voters, and Reporters in America* (Sage Publications 1997) 237; Günter Bentele, Hans Bernd Brosius, Otfried Jarren, *Lexikon Kommunikations– und Medienwissenschaft* (2nd ed, VS Verlag für Sozialwissenschaften, 2013) 13.

98 George Brock,*Out of print, newspapers, journalism, and the business of news in the digital age* (Kogan Page Limited 2013) 1.

99 Linda Low, *Economics of Information Technology, and the Media* (World Scientific 2000) 100.

100 John Keane, *Democracy and Media decadence* (Cambridge University Press 2013) 7.

and news of general interests[101]. Most of the press in not exactly unbiased, because between two-thirds and three quarters of the income comes from advertising. Consequently, the press could be heavily influenced or even controlled by lobbies and governments[102].

Opinion leaders, political and social movements play a central role in shifting public opinion for their interests[103]. For this reason, it will be necessary to expand the comparison and consider the action of social movements in the press. Coglianese considers that social movements act in a multiplicity of contexts in society, including media and law to achieve their goals[104]. Social movements use the media as megaphones to make their demands known to the Authorities and public opinion.

The study will consider how the social groups have used the media to promote their positions and debate in the public sphere[105] and the interrelationship between lawmakers, media and social movements, as main actors on the law-making process. A cooperation between comparative law and sociology is often complementary. If comparative law seeks to understand the similarities and differences between legal systems, a sociological perspective adds an enormous explanatory potential[106].

### 1.3.1 THE MEDIA SYSTEM OF THE COUNTRIES UNDER STUDY

The national press and the media systems are quite different in the three countries under study. The research follows the distinction made by Hallin and Mancini[107].

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101 Robert Picard and Jeffrey Brody, *The newspaper publishing industry* (Alyn and Bacon Incorporated 1997) 7.

102 Low, 99.

103 See more in Marko Kovic, *Agenda-Setting zwischen Parlament und Medien: Normative Herleitung und empirische Untersuchung am Beispiel der Schweiz* (Springer 2017) 29; John Zaller, *The Nature and Origins of Mass Opinion* (Cambridge University Press 1992) 310-313.

104 Coglianese, 85.

105 Some scholars consider that the media-echo have had a great impact in the law-making process and in the definition of the concepts. See, for example Margret Bürgisser, *Gemeinsam Eltern bleiben, trotz Trennung oder Scheidung* (Hep 2014) 389.

106 Mathias Reimann, 'Comparative law and neighbouring disciplines' in Mauro Bussani and Ugo Mattei, *The Cambridge companion to Comparative Law* (Cambridge University Press 2012) 25.

107 Daniel Hallin and Paolo Mancini, *Comparing Media Systems, three models of media and Politics* (Cambridge University Press 2004) Cff 90.

According to these authors, Spain uses the Mediterranean model, where the mass media are intimately involved in the political conflicts and where the development of commercial media markets is very weak, leaving the media often dependent on the State or the lobbies[108]. Even if these patterns are changing, the Spanish media system remains strongly shaped by political parties and special interests[109]. In Spain there are four national newspapers[110]. This study focusses on *El País* and *El Mundo*, the two most-circulated newspapers in the country.

In Switzerland, the media system falls under a Central European or Democratic Corporatist Model[111]. This model is characterized by a high degree of political parallelism[112], a high level of journalistic independence and professionalism and a strong tradition of limits on state power. The democratic system is characterized by an early and strong development of liberal institutions and a strong development of civil society and thus, strong rights of access to government information[113]. In Switzerland a national newspaper does not exist, and the news are more focused on national or even regional issues. In our study we will focus on the *Neue Zürcher Zeitung* (NZZ) and *Le Temps* to consider the two main regions (the German-speaking part and the French speaking part of Switzerland) that most characterise the diversity and the particularity of the Swiss media system. Finally, analyses of these newspapers are of additional value as their coverage of best interests of the child and parental responsibility mirrors that of the national press in Germany and France.

The Anglo-American model identifies the British media system as one of the oldest in Europe. In this model, the press developed early with relatively little state involvement and boasts robust journalistic independence from State and professionalism. In the British press, commercial broadcasting has played a main role in the development of

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108 The European countries that Hallin and Mancini consider characteristic for this model are besides Spain also Italy, Greece and France.

109 Hallin and Mancini, 90.

110 These newspapers are, in order of more distribution: *El Pais*, *El Mundo*, *ABC* and *La Razon*.

111 The European countries besides Switzerland under this model are northern countries like Germany, Austria and Belgium. See for the whole: Hallin and Mancini, 143 – 145 and 196.

112 Which means a high level of press advocacy and a high interaction with other social forces.

113 Hallin and Mancini, 196-197.

the press. In addition, the British press is still characterized by external pluralism and 'has always mirrored the divisions of party politics'[114]. The research focuses on *The Guardian* and *The Times,* as the most distributed newspapers in the country.

The news analysis in this study will concentrate on articles and opinion columns covering the law-making process concerning shared parenting in the three countries under study. How the analysis was covered will be more deeply explained in chapter 7. For now, it is necessary to point out the segments and frames on which the articles will be analysed:

1) articles where the child and his or her interests are omitted.
2) articles where the discussion focusses on the child;
3) news where the information is superficial;
4) articles where the information focusses on the interests of the social groups;
5) articles where the information given is legally accurate

This dissertation will give a wide view of children's rights protection in the family and in society and a vision of how the best interests principle is being protected in the countries examined. Furthermore, the dissertation will demonstrate the relationship between media and democracy, indicating how media acts during the law-making process and how media introduces children and their point of view in the public debate about their care and protection.

[114] See for the whole: Hallin and Mancini, 198-208.

# 2 CHILDREN'S RIGHTS IN THE INTERNATIONAL FRAMEWORK

The concept of family and the principles that govern the relationships between its members has changed substantively in recent decades in Europe. Children's rights have developed a stronger recognition of the role of both parents in the life of the child for his or her welfare and best development. This chapter seeks to illustrate how the best interests principle – recognized in the Convention on the Rights of the Child in 1989 – followed these changes and how shared parental responsibilities have been recognised in the International and European framework.

## 2.1 CHILDREN AND FAMILIES IN EUROPE

International law does not include a specific definition of family, although the family is considered the basic unit of the society and the ideal environment for the well-being of the child[115]. The family is the first social contact of the child, and the traditions or cultural situation of the family contributes to the child's development, shaping the social future of the child and his or her position to enjoy rights[116].

The main international documents use the terms 'family', 'family life' or 'family environment' to describe many different relationships[117]. The CRC uses the term 'family environment', while ECHR uses the term 'family life' in its article 8 [118]. The reason for

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115 Nevena Vuckovic Sahovic, Jaap Doek and Jean Zermatten, *The Rights of the Child in International Law. Rights of the Child in a Nutshell and in Context: All about children's Rights* (Stämpfli 2012) 155; see also United Nations General Assembly 'Guidelines for the Alternative Care of Children' UN Doc A/Res/4/142, 2010, Annex II, A para 3: The family is the fundamental group of society and the natural environment for the growth, well-being and protection of children.

116 Vuckovic Sahovic, Doek and Zermatten, 155.

117 Vuckovic Sahovic, Doek and Zermatten, 156.

118 ECHR, art 8 states:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the Country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

this lack of definition of family is that the family depends on historical, sociological, economic, moral, and legal factors and even depends on the discipline that describes it[119].

In legal terms, the meaning of 'family' has been traditionally connected to the nuclear family: a marriage between a mother, a father, and their children. Parenthood and marriage were for centuries intrinsically connected[120]. However, the normalization of divorce and other models of relationships between adults at the beginning of the 20th Century has changed the whole concept of family. Although the traditional nuclear family remains the most common, this model is slowly losing its appeal[121]. The influence of the equal rights movements and the introduction of women in the workplace has also played a central role in the change of attitudes towards the nuclear family, the role of each member of the family and therefore on the European legislation in its regard[122]. All of the above-mentioned changes have been significant in the three European countries researched in this study. To understand if there was a demand for shared parental responsibilities, it is first necessary to look at the situation of the families within these three countries in proper context.

In Spain there were 91.645 cases of divorce, separation, and annulment in 2019, 3.5% less than the year before. Most of these divorces and separations were agreed mutually between the couples. Of this number, 43% were couples without children, while 44% had minors. In most cases, custody was given to the mother (52%) with only 4.2% given to the father, while a joint custody arrangement was granted to 37.5 %. However, this rate of joint custody decisions was higher than in 2018, when this was granted in 33% of the cases[123].

In Switzerland, the rate of unmarried and married couples living with children is in line with the European average. According to the 'Population Report 2019'[124] most

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119 Vuckovic Sahovic, Doek and Zermatten, 157.

120 Andrea Büchler and Rolf Vetterli, *Ehe Partnerschaft Kinder* (Helbing Lichtenhahn 2018) 10.

121 Büchler and Vetterli, 13.

122 Büchler and Vetterli, 12-15.

123 Instituto Nacional de Estadistica (INE) Nulidades, 'Separaciones y Divorcios' Informe 2019 <https://www.ine.es/dyngs/INEbase/es/operacion.htm?c=estadistica_C&cid=1254736176798&menu=ultiDatos&idp=1254735573206> (last visit 19.01.2022) 1 and 4.

124 Bundesamt für Statistik (BFS), 'Die Bevölkerung der Schweiz 2019' (BFS 2020) see more in Bundesamt für Statistik (BFS) <https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/stand-entwicklung/haushalte.html> (last visit 19.04.2021).

families living in Switzerland were married couples – first marriage – with children (70%) while only 3.3 % were divorced with children. 6.5% were unmarried parents with children, while 16% were single parents with children. According to the 'Erhebung zu Familien und Generationen 2018' Report 72% of citizens over 25 years old were married and most couples with children had a marriage certificate (93%) although within younger generations the number of unmarried parents is moderately larger[125] and is increasing[126]. A total of 13% of parents with children are no longer together with the other parent. Since 2014 – the year when the shared parental responsibility law entered into force in Switzerland – joint parental responsibility arrangements have slightly increased, whereas the rate has not risen so much as to consider that there was a real need to establish shared parenting as the rule. Before 2014, 62% of divorced parents had joint parental responsibility. After the law came into force in 2014, at least 74% of divorced parents have mutual parental responsibility. Within this period is the trend that the younger the child, the higher likelihood they have in living with one parent. Most of the children of separated or divorced parents live principally with the mother for a minimum of three days a week[127].

In 2004 the 11% of dependent children in the United Kingdom lived in unmarried couples, and this increased to 14% by 2014. Over the same period, the percentage of dependent children living in a married couple household fell by three percentage points to 63% in 2014, when the shared parental responsibility law was introduced. The number of children living in single-parent families was 23%, a notably high number[128]. From the children born in England and Wales in 2013, 52.6% were born inside a marriage or civil partnership while the 47.4% were outside of a marriage or civil

125 Between 25 and 34 years old, the percentage of unmarried parents is 15%; between 35 and 44 years old is 11,9% while between 45 and 54 years old is only 5,2%. Bundesamt von Statistik, 'Erhebung zu Familien und Generationen (EFG) 2018' (BFS 2019) 2.

126 Bundesamt von Statistik, 'Erhebung zu Familien und Generationen (EFG) 2018' (BFS 2019) 8.

127 Bundesamt von Statistik, 'FS Demos 1/2020 Scheidungen' (BFS 2020, BFS-Nummer 238-2001) 11.

128 United Kingdom Office of National Statistics (ONS), 'Families and Households Report 2014' (ONS 28 January 2015) <http://www.ons.gov.uk/ons/rel/family-demography/families-and-households/2014/families-and-households-in-the-uk--2014.html#tab-background-notes> (last visit 20.04.2021).

partnership[129]. The fastest growing family type in the United Kingdom between 2004 and 2014 was the cohabiting family, with or without dependent children, increasing by 29.7% in a decade[130]. Even if the married family continues to be the most common, the fastest growing family type over the 20-year period has been the unmarried cohabiting family, doubling the rate from 1.5 million in 1996 to 3.3 million in 2017[131]. Single parents with dependent children represented 25% of all families with children, a rate that has not increased substantially since 2004. However, the rate of women taking lone care of the children were 91% of single parents, while the number of male single parents remained at an extremely low rate of 9%[132].

The lack of information[133] regarding the rate of residence and contact orders made by the courts before the approval of the Children and Families Act 2014 (henceforth CFA 2014) signifies that there is no information on the previous rates of divorce and unmarried families. Therefore, it cannot be analysed if there was a real appeal for shared parenting in the society. However, the report carried out by Harding and Newnham, from the Universities of Reading and Warwick, showed that there was no gender bias in the allocation of children and the recognition of the residence orders before the CFA 2014, but rather that there were already established 'roles' in the family before the

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129 United Kingdom Office of National Statistics (ONS), 'Births in England and Wales 2013' (ONS 16 July 2014) <http://www.ons.gov.uk/ons/rel/vsob1/birth-summary-tables--england-and-wales/2013/info-births-2013.html> (last visit 19.01. 2022).

130 Office of National Statistics, 'Families and Households Report 2014' (ONS 28 January 2015) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2015-01-28#families> (last visit 22 June 2019).

131 Office of National Statistics, 'Families and Households 2017' (ONS 8 November 2017) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017> (last visit 17.01.2022); Éva Beaujouan and Máire Ní Bhrolcháin, 'Cohabitation and Marriage in Britain since the 1970´s' (2011) 145 Office of National Statistics (ONS) Population Trends, 145.

132 Office of National Statistics, 'Families and Households Report 2014' (ONS 28 January 2015) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2015-01-28#families> (last visit 22.04. 2021).

133 Tina Haux, Ruth Cain and Stephen McKay, 'Shared Care after Separation in the United Kingdom: Limited Data, Limited Practice?' (2017) 5 (4) Family Court Review, 575.

divorce[134]. Therefore, the residence orders were given more to mothers than to fathers, as they were the major caretakers of children before the divorce[135].

As these indicators demonstrate, today's children now face significantly different family arrangements than children of prior generations. The number of unmarried parents and cohabiting families has increased since 2000 in the three countries under research. Since the CRC was approved in 1989, multi-parent, single parent and patchwork families are becoming increasingly more mainstream. This proliferation of new forms of cohabitation creates a variety of social values and a need for regulation. To set minimum standards, the national and international legal norms must be flexibly adjusted to this variety of family compositions[136]. However, the question is whether shared parenting laws were necessary, given the low rates of shared parental responsibility agreements made after the law was approved, especially in England and Wales and in Switzerland. The experience in Spain shows that the law – which entered into force in 2005 – can influence the society to welcome these new arrangements.

## 2.2 THE INTERNATIONAL AND REGIONAL CONTEXT OF CHILDREN'S RIGHTS

The idea of children rights is relatively new, only stretching back to the early 20th Century. The first mention of children's rights was the Geneva Declaration of the Rights of the Child (1924) adopted by the League of Nations. It was the first international document that recognized the child as a subject of rights and the responsibility of adults, State, and institutions towards the good development of children. Though it was not legally binding – as most of the international documents – it was the foundation for the further development on children's rights in international institutions. The Geneva Declaration

134 Maebh Harding and Annika Newnham, 'Report: How do county Courts share the care of children between parents' (The Nuffield Foundation 2015) 80; Previously, one of the criticisms about residence and contact orders was that the courts were biased to grant parental responsibilities to the mother.

135 Harding and Newnham, 80.

136 Vuckovic Sahovic, Doek and Zermatten, 155.

comprises only five articles and recognizes that mankind 'owes to the child the best that it has to give, declare and accept it as their duty'[137].

The approval of the Universal Declaration of Human Rights (henceforth UNDHR) was the next stage on the path to the recognition of the child as a subject of rights. The UNDHR – adopted by the 56 members of the United Nations in 1948 – is the first and main document to set out the universal human rights for all people independently of their individual situation[138] and it has inspired similar human rights instruments at regional level[139] including the ECHR.

Some of the provisions of the UDHR concern family and children. Article 16 of the UDHR states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State' and Article 12 protects the respect for private life and no interference with each individual's privacy, family, home or correspondence. Article 26 contains the right to education[140]. Furthermore, Article 25 upholds: 'motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection'[141].

Following the adoption of the Universal Declaration of Human Rights and Fundamental Freedoms, the new United Nations General Assembly approved the Declaration on

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137 Geneva Declaration of the Rights of the Child (adopted 26 September 1924) League of Nations OJ Spec Supp 21 at 43 (1924).

138 Ban Ki Moon, Secretary General of the United Nations, The Universal Declaration of Human Rights. Special Edition 60th Anniversary (United Nations, New York, Geneva 2008), 4. See more in Trevor Buck, *International Child Law* (3rd edn, Routledge 2014) 19.

139 Buck, 20.

140 Universal Declaration of Human Rights as adopted 10 December 1948 UNGA Res 217 A(III) (UNDHR) art 26:
1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

141 UNDHR art 25.

the Rights of the Child in 1959. Importantly, the Declaration is the first international document refer explicitly to the 'best interests of the child'[142], though the content is quite limited given that the document only contains a preamble and 10 articles. It was not until 1979, with the celebration of the Year of the Child that the General Assembly authorized the Commission on Human Rights to draft a Convention focused on the Rights of the Child. The Convention on the Rights of the Child was open to signature on 20 November 1989 and entered into force in 1990. The Convention is the main international document on Children's Rights and is the most accepted international treaty, currently ratified by 193 countries.

Children's rights are now included in the wider human rights debate and various international and regional bodies are increasingly addressing the subject. There is still a lot to be done – as for example the full participation of children in public life and the real protection of children's privacy in a technological world – but several documents and case law from international courts and organisations such as the Children's Rights Committee, are consolidating and developing the international children's law.

### 2.2.1 THE CONVENTION ON THE RIGHTS OF THE CHILD

As the first international treaty specifically created to defend and protect children's dignity and rights, it gives at international organizations and national governments an essential tool for the promotion and protection of the rights of the child[143]. Its widespread ratification indicates a basic acceptance of the premise that children's rights should be protected and promoted, as children are the future of any society. However, there is not yet a universal consensus on the form that protection should take[144].

The preamble of the Convention proclaims that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal pro-

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142 Declaration of the Rights of the Child (DRC) Adopted 20 November 1959, UNGA RES 1386 (XIV) principle 2.

143 Vuckovic Sahovic, Doek and Zermatten, 48.

144 Thoko Kaime, *The Convention on the Rights of the Child. A cultural Legitimacy Critique* (Europa Law Publishing 2011)18.

tection, before as well as after birth'[145]. It also establishes the family as 'the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children'[146]. The CRC establishes the first definition of 'child' as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'[147] and ensures a particular protection to the rights of human beings under the age of 18 years old.

The Convention shows a common core of the rights that all children, independently of their circumstances, should enjoy and enshrines the civil, political, economic, social and cultural rights of the child[148]. Although there is no structural order of the rights recognized in the Convention and the interdependence of all human rights categories is recognized[149], the Committee on the Rights of the Child – the monitoring body of the Convention – identifies some articles as general principles 'for effective implementation of the whole Convention'[150]. These basic principles are the right of non-discrimination (Article 2) the best interests of the child (Article 3) survival and development (Article 6) and the right of the child to be heard (Article 12). In practice, these principles are a precondition for the exercise of all other rights recognized in the Convention, as some authors state[151]. The Committee has added four General Comments to explain the extension and developments of these four general principles, to provide a framework for each country to facilitate their implementation. However, it is evident that the cultural, social, economic, and political circumstances of each country profoundly

145 UN General Assembly Convention on the Rights of the Child (CRC) UNGA Res. 44/25 (Adopted and open to signature 20 November 1989, entry into force 2 September 1990) Vol 1577 UNTS 3, preamble.

146 CRC, preamble.

147 CRC, art 1.

148 Vuckovic Sahovic, Doek and Zermatten, 49.

149 Vuckovic Sahovic, Doek and Zermatten, 48.

150 UN Committee on the Rights of the Child, 'General Guidelines regarding the Form and Content of Initial Reports to be submitted by States Parties Under Article 44(1) (a) of the Convention' [30 October 1991] UN Doc CRC/C/5 1991, para 13-14.

151 Vuckovic Sahovic, Doek and Zermatten, 50; Javaid Reham, *International Human Rights Law* (Longman 2009) 558; Kaime, 17.

affect the implementation and articulation of children's rights resulting in inadequate protection of children.

All four general principles are essential for the implementation of children's rights. However, the best interests principle is an essential element in applying other children's rights[152]. Without first protecting the child's best interests, it is difficult to protect other rights of the child recognised in the Convention. The principle of the best interests of the child sets the child at the centre of all decisions regarding him or her, mandating that any decision concerning him or her, must prioritize the interests of the child over other interests. Since the adoption of the Convention, many legal systems have employed an increasingly child-centred approach, giving the child a principal role in any decisions concerning him or her[153].

#### 2.2.1.1 The Convention on the Rights of the Child and the best interests of the child

The principle of the best interests of the child was recognized for the first time in the preamble of the Geneva Declaration, which stated, 'mankind owes to children the best it has to give'[154]. Thirty-five years later, the United Nations Declaration on the Rights of the Child (1959) emphasized children's protection and recognized the 'best interests of the child' as the 'paramount consideration'. Thus, the second principle of the Declaration of 1959 states that:

> 'The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in

[152] Michael Freeman, *The Best Interests of the Child. A Commentary on the United Nations Convention on the Rights of the Child; Article 3* (Martinus Nijhoff 2007) 32.

[153] Jane Mair Jane and Esin Örücü, 'Harmonising Norms on Parental Responsibilities. Facing Reality' in Jane Mair and Esin Örücü (eds), *Juxtaposing Legal Systems and the Principles of European Family Law on Parental Responsibilities* (Intersentia 2010) 289.

[154] Geneva Declaration of the Rights of the Child (adopted 26 September 1924) League of Nations OJ Spec Supp 21 at 43 (1924).

conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be **the paramount consideration**'[155].

It is important to note the differences between the Declaration of the Rights of the Child (1959) and the subsequent Convention on the Rights of the Child. Recognizing that the best interests of the child should prevail over other rights, the Declaration of the Rights states that superior interests of the child should be a **paramount consideration**. The Convention on the Rights of the Child demote the best interests of the child to '**a primary consideration**', specifying that there are other rights that should be taken into account.

The **Article 3** of the Convention on the Rights of the Child stipulates:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a **primary consideration**.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Other articles in the Convention refer to the best interests of the child, as for example article 18 (parental responsibilities), Article 9 (separation from parents), Article 20 (deprivation of family environment and alternative care), Article 21 (adoption), Article 37 (separation from adults in detention), Article 40 paragraph 2 (procedural guarantees). References are also made in the two Optional Protocols on the Sale of Children, Child Prostitution and Child Pornography and on a communications procedure[156], together

[155] Declaration of the Rights of the Child (DRC) Adopted 20 November 1959, UNGA RES 1386 (XIV) Principle 2.

[156] Committee on the Rights of the Child, 'General comment no 14 (2013) on the right of the child

with the recommendations and General Comments of the Committee on the Rights of the Child.

States parties should recognize that this principle is a primary consideration in all its activities concerning children and that it is established 'within the constitutional framework or within relevant national legislation'[157]. States parties are also required to provide periodic reports to the Committee on the Rights of the Child about the details of how this principle is being applied by the authorities. The Committee observes that the article refers to actions undertaken by 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'[158] and emphasizes that the principle should guide 'the determination of policy-making at both the central and local levels of government'[159].

### 2.2.1.2 The indeterminacy of the best interests of the child

One of the main problems with the best interests of the child is the indeterminacy of the concept. Any international Convention provides a clear definition of what exactly 'best interests' means. Here however, the concept is at the mercy of the interpretation of different societies, cultural and even historical periods. It is a variable, indeterminate legal concept, vague and subject to the personal interpretation of the subjects – judges, institutions and social workers – involved in its definition and the circumstances of the child implied[160]. As the Committee on the Rights of the child holds, the principle of the

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to have his or her best interests taken as a primary consideration (art 3, para 1)' CRC/C/GC/14 (29 May 2013) para 3; Optional Protocol on the involvement of children in armed conflict, Adopted and opened for signature, ratification, and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 (entry into force 12 February 2002) art 5; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002, art 8.

157 Reham, 564.

158 Committee on the Rights of the Child 'General Comment no 5 (2003) General measures of implementation of the Convention on the Righs of the Child (Articles 4, 42 and 44 para 6)' CRC/GC/2003/5 (27 November 2003) para 4.

159 Committee on the Rights of the Child. (Eighth Session) 'Concluding Observations: United Kingdom of Great Britain and Northern Ireland' CRC/C/15/Add.34 (15 February 1995) para 24.

160 Linus Cantieni, *Gemeinsame Elterliche Sorge nach Scheidung. Eine empirische Untersuchung*

best interests of the child is 'a dynamic concept that requires an assessment appropriate to the specific context'[161] and depends on the case, the context, region, and circumstances that it would be applied to. Each country has their own interpretation of what best interests of the child means. This lack of clarity can be seen 'either as a strength or as a weakness'. To determine this requires a cooperation between different disciplines, as well as taking into account the circumstances of the child, his or her social and cultural environment and the relationship of the child with the families[162]. As mentioned in chapter one of this research, the countries in this study have their own differences[163].

The Committee on the Rights of the Child attempts to define the best interests principle in the General Comment number 14 and provides some guidelines for its application. According to the Committee, the set of rights of the Convention provide a framework of interpretation of what a child needs for his or her best interests[164]. The Committee on the Rights of the Child states that the principle is a **substantive right**, which means that the best interests of the child should be taken as a primary consideration when different interests are being deemed. The Committee asserts that the best interests of the child is a fundamental **interpretative legal principle,** which means that if a legal provision is open to more than one interpretation, the interpretation which most efficiently serves the child's best interests should be chosen[165]. Finally, the Committee understands the principle as a **rule of procedure**: whenever a decision is made that affects a specific child, the decision-making process must include an evaluation of the possible impact of the decision on the child or children concerned[166].

A legal analysis of the text can help find an approximation towards a definition. First, the text in the Declaration of 1959 identified the best interests as 'the paramount consid-

(Stämpfli 2007) 19; see also, Dionisio Roda y Roda, *El interés del menor en el ejercicio de la patria potestad. El derecho del menor a ser oído* (Aranzadi 2014) 34-35.

161 CRC/C/GC/14, para 1.

162 Jürg C Streuli, Margot Michel and Effi Vayena, 'Children rights in Pediatrics' (2011) 170 European Journal of Pediatrics 9, 11.

163 See chapter 1 of this research.

164 CRC/C/GC/14, para 6.

165 CRC/C/GC/14, para 6.

166 CRC/C/GC/14, para. 6.

eration', which means that the principle of the best interests was prioritized over other social and adults' rights. However, the further text of the Convention on the Rights of the Child reduces the impact of the best interests of the child and specifies that the best interests should be **a primary consideration** but not the paramount consideration anymore. Therefore, the Convention suggests that also other rights must be considered in the decision-making process. As Alston indicates, in the drafting process it was considered that there were situations in which 'justice and society at large, should be of at least equal if not greater, importance than the interests of the child'[167]. The Committee explains that the child's best interests 'may not be considered on the same level as all other considerations' but has to be weighed 'against other interests, although a larger weight must be attached to what serves the child best'[168].

> 'Viewing the best interests of the child as primary requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned'[169].

The Committee also explains that 'all actions' include decisions, conduct, proposals, services, procedures and measures from the public bodies and failure and inaction should be taken as 'actions' in this case[170]. As Freeman points out, it would make no sense 'to exclude omissions from the ambit of the best interests' principle'[171].

**'Concerning children'** should be applied in a sufficiently broad sense, as the Committee states. In those measures taken about parental care, marriage, family disputes, joint custody and adoption, children are directly affected, and their best interests should be taken into consideration, and should be considered also as a group and not only in particular cases, as children are – specially in family issues – also affected as a group. The term 'children' also implies children as a group. According to the Committee, States

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167 Philip Alston (ed), *The best interests of the child. Reconciling Culture and Human Rights* (Unicef, Clarendon Press 1994) 13.

168 CRC/C/GC/14, para 39.

169 CRC/C/GC/14, para 40.

170 CRC/C/GC/14, para 41.

171 Freeman, *The Best Interests of the Child. A Commentary ...*, 31.

should take into consideration the best interests of children as a group in any measures and decisions to be taken, including legislation about marriage, family, household, financial decisions, and maternity/paternity leave[172].

Although the Convention considers that parents should take the best interests of the child into consideration[173], the Committee reminds member states that the principle refers mainly to the public and private institutions, courts of law, administrative authorities, or legislative bodies. According to the Committee, all public institutions are subject to this principle also in law-making processes, decisions and policies concerning children, directly or indirectly and all States have the obligation to ensure that 'all judicial, administrative decisions, as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration'[174].

To determine what is in the best interests of the child, it is important to bear in mind that the best interests principle is not a temporal concept. It is a notion that is in constant evolution. The public bodies and all subjects called to determine the best interests of the child have to take into account that the decision will be beneficial to the child, not only in the present, but also in the future[175].

#### 2.2.1.3 The main principles for the child in the parental responsibility's discussion

The best interests of the child is a general principle that embraces all the rights of the CRC. As this research focuses on parental responsibilities, we will concentrate only on the general principles related to shared parenting and parental responsibilities as the no discrimination of the child and the right of the child to be heard.

The principle of no discrimination has been the main argument for unmarried parents in the battle for the shared parenting in most of the countries in Europe. As this study

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172 Committee on the Rights of the Child. 'General Comment No 12 (2009) The right of the child to be heard' CRC/C/GC/12 (1 July 2009) para 10 and 12.

173 CRC, art 18 (1).

174 CRC/C/GC/14, Title III (b).

175 Roda y Roda, 42.

will address in the following chapters 3, 4 and 5, it is only in the past decade that shared parenting laws have been enacted in Europe. Prior to this, only the mother held automatic parental responsibility for the children born out of wedlock.

The no discrimination right is stated in Article 2 of the CRC and obliges states parties to respect and ensure the rights 'of any child without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'[176]. Since the end of World War II, the non-discrimination principle is becoming the norm that appears most frequently in international instruments and is recognized in all international human rights treaties[177]. This right is recognized also in articles 2 and 7 of the UDHR[178].

Detrick describes 'discrimination' as 'any distinction, exclusion, restriction, or preference, based on grounds such as the above-mentioned, where the aim is to nullify or impair the recognition, enjoyment or exercise, on an equal footing, of rights and freedoms'[179]. The essence of this right lies on the consideration that the rights of the child apply to every child without exception and the States must provide protection from any form of discrimination[180]. However, Buck retains that the non-discrimination principle and the equal access to rights does not mean identical treatment[181]. The Committee on the

176 CRC, art 12.

177 Vuckovic Sahovic, Doek and Zermatten, 93.

178 UNDHR, art 2:
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
UNDHR, art 7.
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

179 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Nijhoff 1999) 73.

180 Vuckovic Sahovic, Doek and Zermatten, 92.

181 Buck, 131.

Rights of the Child recognizes the positive obligation of states to take the necessary measures to support individuals on the exercise of the relevant rights[182].

The words 'birth or other status' refer to discrimination in relation to children born out of wedlock[183]. The UN Committee on the Rights of the Child considers frequently that the unequal treatment of non-marital children is not in their best interests, even if in some countries this discrimination still exists. It is only in the relatively recent past that countries have moved to remove the 'illegitimacy stigma'[184].

The discrimination between children born within wedlock and children born out of wedlock has been abandoned in most of the national legislations in Europe. This change has been possible also for the interaction between the interpretation of the international instruments and the national legislations[185], as it would be seen later in this study with the changes in national legislations on unmarried parents.

According to Woele-Boelki, the non-discrimination right refers also to the holders of parental responsibilities. Precisely, the unequal treatment of a child in custody cases is often based on a ground relating to a person other than a child[186]. The right of the child must be the primary consideration, no matter who is the holder of parental responsibilities and the relationship between parents. However, the right of the child

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182 CRC/C/GC/14, para 41: The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.

183 Buck, 132.

184 Freeman, *The Best Interests of the Child. A Commentary* ..., 55.

185 Schwenzer Ingeborg, *Familie und Recht. Ausgewählte Beiträge aus 25 Jahre* (Stämpfli 2010) 565; see also Büchler and Vetterli, 14. In recent international instruments on parental responsibilities, no distinction is made between children on grounds of the relationship of the parents. The Brussels II bis Regulation for example, covers all judgments on parental responsibility, including measures to protect the child independently of any matrimonial proceedings. The Regulation states that its aim is to 'ensure equality for all children (...) independently of any link with a matrimonial proceeding'; EU Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 1347/2000 [2003] OJ L 338/1.

186 Katarina Boele-Woelki and others, *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia 2007) 48.

should not be confused with the rights of parents and to not consider that the child is discriminated only because of the situation of the holders of parental rights. The main concern for the public bodies should always be what is best for the child, not the rights of the parents[187].

Another principle affecting the child and the relationship with their parents is article 18 (1) of the Convention. Although in a weakly and fragile approach, the article considers that the best interests of the child must be the parents' 'basic concern'[188]. The Convention also states that parents have the primary responsibility for the upbringing and development of the child[189]. According to Article 18 (1), the first subjects called to determine the best interests of the child are the parents. The second subjects comprise the administration and public bodies and welfare institutions. These institutions include the courts, chiefly responsible for determining the best interests of the child in rights conflicts[190]. In any case, it is up to the judges to take on the difficult task of making a judgement on competing interests between interests of parents and those of the child. The judgement, even if it is based on the child's interests, will not fail in practice to be a subjective decision, dependent upon different factors and circumstances[191] of the case, for example a situation of the parents, the view of the child and the personal influences of the judge.

Moreover, children are also subjects called to determine their own interests. According to Article 12 of the Convention, the States have a responsibility to ensure that the children can protect their own rights, respect the views of the child and taking them into consideration in all matters concerning them[192]. The best interests of the child imply that the child could have the opportunity to participate in decision making regarding his or her future holder of parental responsibilities. However, because of the age and

187 Boele -Woelki and others, *Principles of European Family Law…,* 48.

188 CRC, art 18 (1).

189 CRC, art 18 (1).

190 Roda y Roda, 42.

191 Roda y Roda, 42.

192 CRC, art 12.

development of the child, the active participation of the child in the promotion of their rights is mostly difficult.

The right of the child to be heard is considered a fundamental element and criterion for the best interests of the child. The right is recognized in Article 12 of the Convention and, according to the Committee on the Rights of the Child, is one of the General Principles of the Convention. Thus, its complements and enhances the exercise of all the rights of the child contained in the Convention[193].

Article 12 of the Convention states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law[194].

Article 12 (1) states that the children should be heard, according to their age and maturity, in all matters affecting him/her. Additionally, it provides that the child should be heard in 'any judicial and administrative proceedings' [195]. Certainly, the most remarkable statement of this article is that the child has an opinion and that this opinion should be taken into consideration. It recognizes the child as a part of the society and as an active participant in all matters affecting him or her. Moreover, it recognises that the best interests of the child are also protected by the children themselves, through the recognition and hearing of their views. Not only are the parents and institutions responsible for the best interests of the child, but also the child – with the necessary maturity – is responsible for the protection of his or her well-being through him or her

193 Aislyn Parkes, *Children and International Human Rights Law. The Right of the Child to be heard* (Routledge 2015) 644.

194 CRC, art 12 (1).

195 CRC, art 12 (2).

own opinions. The so-called participation article lies at the core of the Convention and one of the General Principles of the documents, which means that it should be taken into account in the interpretation and implementation of all other rights[196]. The right of the child to be heard means, not only listening to the views of the child, but also to 'share efforts to shape the daily life of the child'[197] and give the necessary weight to the opinions of the child in the decisions regarding him or her.

When we use the expression 'on the right to be heard' we are referring to the right that the law gives to the minor as a subject that needs a special protection. This right considers that the opinion of the child is heard by the person who has the responsibility to decide in a situation that directly, or indirectly, affects the child so that their view can be taken into consideration. In allocation cases, the opinion of the child must be acknowledged, even if it should not be decisive. The opinion of the child must be weighed but does not always correspond to his or her well-being. The purpose is, therefore, that the judge or decision-maker can examine the interests of the child involved[198] and how his or her opinion can be incorporated into the decision.

This article is essential in child's allocation proceedings. The 'participation article' reinforces the idea that the child itself should be able to exert an active involvement[199] in the decision about his or her allocation of parental responsibility. Introducing children and their views in the proceedings means allowing them to have a role in the decisions affecting them and treat them as subject of rights. However, there are two main questions surrounding the right of the child to be heard in allocation proceedings. First, in most instances, the child is heard when the decision is already made by adults or at least, their views are not taken really into consideration. In addition, in terms of the authenticity of child participation, it is necessary to be aware that the influence of adults

196 CRC/C/GC/12, para 3.

197 Lothar Krappman, The weight of the child's view (Article 12 of the Convention on the Rights of the Child)' (2010) 18 International Journal of Children's Rights 501, 502-503.

198 Roda y Roda, 202.

199 Christophe Herzig, 'Die Rolle der Kindsvertretung' (2020) 3 FamPra.ch, Cff 567- 573.

on children is considerable in decision-making processes – whether in the public as in the private sphere – and one or both parents can influence the views of the child[200].

Then again – as we have already stated – many times the child's welfare does not automatically match with the demands of the child and the judges and institutions cannot make decisions solely based on his or her wishes[201]. The main task of judges and representatives is to reach a decision balancing these two rights. This means involving the child in the decisions ensuring that children become 'actively engaged in the decisions being made'[202] and at the same time, deciding for his or her well-being.

The Committee on the Rights of the Child considers that both rights are not incompatible and has referred in its General Comments to the complementary role of Article 3 (1) CRC and Article 12 CRC[203]. According to the Committee, article 3 establishes 'the objective of achieving the best interests of the child' and Article 12 CRC provides 'the methodology for reaching the goal of hearing either the child or the children'[204]. As the Committee states, there is not a correct application of article 3 if article 12 is not respected. Likewise, article 3 'reinforces the functionality of article 12 facilitating the essential role of children in all decisions affecting their lives'[205]. There are no best interests without the involvement of the child in the decisions regarding him or her. Nonetheless, the Committee has determined that states parties should promote, within the family, schools, institutions, as well as in judicial and administrative proceedings, respect for the views of children and their participation in all matters affecting them[206]. According to the Committee, not only the children have to be heard in judicial proceedings, but also in

200 Parkes, 26.

201 Herzig, 567.

202 Parkes, 8.

203 CRC/C/GC/12 (1 July 2009) para 74.

204 CRC/C/GC/12 (1 July 2009) para 74.

205 CRC/C/GC/12 (1 July 2009) para 74. See also Rebecca Thorburn Stern, *Implementing Article 12 of the UN Convention on the Rights of the Child: Participation, Power and Attitudes* (Brill Nijhoff 2017) 60 – 61; Roda y Roda, 202.

206 Committee on the Rights of the Child (Thirty-Fifth Session) 'Concluding Observations. Considerations of Reports Submitted by States Parties under Article 44 of the Convention: India CRC/C/15/Add. 228' (Concluding Observations/Comments, 26 February 2004) para 36.

decision-making processes[207]. The main question for this study is whether the media should be included in the aforementioned institutions that have an indirect impact on protection of children's rights – and whether children are heard and considered in the law-making process regarding parental responsibilities.

### 2.2.2 THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The milestone of the Universal Convention on Human Rights and Fundamental Freedoms prepared the path to the subsequent European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Convention (henceforth ECHR) was approved in 1950 by the Council of Europe, the continent's main human rights organisation[208]. The Council of Europe considers the ECHR to be a treaty designed 'to protect human rights, democracy and the rule of law'[209] in the continent. As there is no specific Convention about Children rights within in the Council of Europe, the rights and freedoms of children are protected specifically by the Convention of Human Rights and through the case law and the doctrine emanated from the European Court of Human Rights (henceforth ECtHR). As previously noted, the ECHR is not to be confused with the European Union Charter of Human Rights.

#### 2.2.2.1 The best interests of the child in the ECHR

Children's rights are protected in Europe under the European Convention of Human Rights. Even if the ECHR was not specifically designed for children as a group of protection, they are protected by the ECHR because they are human beings to whom all

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207 CRC/C/GC/12 (1 July 2009) para 32-34.

208 Council of Europe, Statute of the Council of Europe, CETS 001 (London, 5th May 1949) <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm.> (Last visit, 17.01.2022) art 1.
One should not be confused with the treaties and organisations that are part of the European Union. The Council of Europe is the oldest among other modern organisations and its main aspiration is to 'achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage'. The three countries under this study are members of the Council of Europe but Switzerland and United Kingdom are not part of the European Union.

209 Council of Europe Official Portal, 'About us'. <http://www.coe.int/en/web/about-us> (last visit 17.01.2022).

rights and freedoms are recognised[210]. However, it is clear also that children require more specific rights than adults[211]. For this reason, the doctrine emanated by the European Court of Human Rights and Fundamental Freedoms (henceforth ECtHR) plays an essential role on the development of children's rights in the continent. As several authors observe, the ECtHR's interpretation task of has been essential for the protection of children rights and the enforcement of family law, as the broad approach of the Convention has required an extent jurisprudence from the Court concerning the relationships between the family, the children and the State[212].

Together with other articles, children are protected in Family Law in Europe through article 8 ECHR. The article 8 protects and ensures the right to respect for private and family life and has as its aim the prevention of arbitrary interference from the public authorities in personal and family life of any individual, including children. The ECHR, as a 'living instrument', gives to the Court the function to determine what must be interpreted 'in the light of present-day conditions'[213].

Article 8 ECHR states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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[210] Andrew Bainham and Stephen Gilmore (eds), *Children. The Modern Law* (4th edn, Family Law 2013) 325.

[211] Shazia and Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010) 221.

[212] Geraldine Van Bueren, *Child Rights in Europe: Convergence and Divergence in Judicial Protection* (Council of Europe 2007) 16; see also Eva Brems and Jeanneke Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge Univesrsity Press 2015) 1; Jane Fortin, *Children Rights and Developing Law* (Cambridge University Press 2009) 64; Jeppesen De Boer, *Joint Parental Authority...* 84.

[213] Decision of the ECtHR, *Tyrer v. United Kingdom*, App no 5856/72 (ECHR 25 April 1978) para 31.

Although the ECHR does not refer directly to children's rights, the judgments of the Court are 'clearly informed'[214] by the provisions of the CRC, especially article 3 (best interests of the child) and article 9, 10 and 18 (contact with parents, family reunification and responsibilities of parents) when the Court has to deal with allocation cases and family issues[215]. Also, the ECtHR has already recognised the CRC as a guiding text in the recognition of children's rights in Europe. As a general principle, the European Court states that 'the human rights of children and the standards to which all governments must aspire in realizing these rights for all children are set out in the Convention on the Rights of the Child'[216].

The right of family life is the most relevant to the best interests of the child and the parental responsibilities. Even if the principle of the best interests of the child has been only openly recognized in the European Convention on the Exercise of Children's Rights[217] it has been cited by the European Court several times in the application of article 8 of the ECHR. As Kilkelly states, the principle is a prominent feature of the case law of the ECtHR[218].

As some authors point out[219], ECtHR case law develops an abundant jurisprudence around the article 3 of the CRC. Likewise, the Court has already pointed out the need to place the principle of the best interests of the child 'at the forefront'[220] for a coherent

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214 Ursula Kilkelly, 'Protecting children's rights under the ECHR: the role of positive obligations' (2011) 61 (3) Northern Ireland Legal Quarterly 245, 256; see also Fortin, *Children Rights and Developing Law,* 64.

215 Kilkelly, 'Protecting children's rights …', 256.

216 Decision ECtHR *Sahin v. Germany*, App no 30943/96 (ECHR, 8 July 2003) para 39.

217 Council of Europe, European Convention on the Exercise of Children's Rights (opened to signature 25th January 1996 and entry into force, 1st July 2000) CETS no 160, preamble.

218 Ursula Kilkelly, 'The best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 (2) Human Rights Quarterly 308, 313.

219 See Laura Hernández Llinas, 'Gestación por sustitución internacional e interés superior del menor. Doctrina del TEDH y respuesta de las autoridades españolas' (2020) 107 UNED Revista de Derecho Político 181, 196; Kilkelly, 'The best of Both Worlds…', 313; Fortin, *Children Rights and Developing Law*, 64.

220 Decision ECtHR, *X, Y and Z v. United Kingdom,* App no 21830/93 (ECHR, 22 April 1997) para 47.

system of children's rights protection and family law in the continent. As Sudre states, for the European judge, the principle is of 'particular importance'[221].

The ECtHR's interpretation of the best interests principle is similarly ambiguous with its inherent lack of certainty. The analysis of the jurisprudence where the European Court has applied the best interests principle does not give certainty for a common standard of the Court concerning the application of the principle and primarily focusses on the position of the parents and not the child[222]. Nonetheless, as Van Bueren observes, this lack of certainty is essential in the case-by-case approach 'which the best interests standard requires'[223]. Even if there is no standard interpretation for the best interests principle, the Court has pronounced through its case law a common scope in several cases on custody, access and family life of children.

For instance, in *Hokkanen vs Finland*, the ECtHR 'advised that when interpreting Article 8 (2) of the ECHR domestic courts should consider (…) the interests and rights of all concerned (…) and more particularly the best interests of the child and his or her rights under Article 8 of the Convention'[224]. In *C vs. Finland*, the ECtHR refers to the general principle of the best interests of the child and the paramountcy of the principle, already stated by the Committee on the Rights of the child. The ECtHR argues that 'Article 8 requires that the domestic authorities strike a fair balance between the interests of the child and those of parents and that, in the balancing process, particular importance should be attached to the best interests of the child'[225]. In *Yousef vs. The Netherlands*, the European Court explained 'in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be

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221 Frédérique Sudre, *Droit européen et international des droits de l'homme* (14th edn, Presses universitaires de France 2019) 774, N 510 ; See Decision ECtHR, *Mubilanzila Mayeka and Kaniki mitung v. Belgique*, App no 13178/03 (12 January 2007) para 80-83.

222 As usually are the parents who apply for the protection of the European Court on Human Rights. See for example, Decision ECtHR, *X, Y and Z v. United Kingdom,* App no 21830/93 (ECHR, 22 April 1997); *Hokkanen vs Finland* App no 19823/92 (ECHR, 23 September 1994); *Jansen v Norway*, App no 2822/16 (ECHR, 6 September 2018).

223 Van Bueren, 36.

224 Decision ECtHR, *Hokkanen vs Finland,* App no 19823/92 (ECHR, 23 September 1994) para 58.

225 Decision ECtHR, *C v Finland,* App no 18249/02 (ECHR, 09 August 2006) para 54.

the paramount consideration. More recently, the Court has reiterated that there is 'a broad consensus' of the paramountcy of the principle of best interests of the child. As well, in cases about contact and care of children, the child's interests 'must come before all other considerations'[226].

The right applied in article 8 (1) ECHR to family life plays an important role in child custody, access, and care proceedings. Many applications to the European Court under Article 8 concern the relationship between parents and children after marriage breakdown or another family crisis[227]. Both children and parents have the right to respect for their family life. Nonetheless, States are required to balance children's and parent's rights in every case, keeping the child at the centre. The Court states also that the child's best interests may override those of the parents, but the parent's interests remain a factor when balancing the various interests. According to the Court, it depends on the nature and seriousness of the interests of children[228].

For this reason, the State has the main duty to protect the interests of the child and, according to Article 8 and 3 of the European Convention, to protect the child from emotional or physical abuse[229].However, as some authors state, the applications before the European Court will inevitably be focus on adults and the parent's right to family life, not on the protection of the rights of the child[230]. Adults have main access to the European judges through their applications, while children have their participation right mainly constrained in this aspect. However, the European Judge has already considered that the domestic authorities have the benefit of direct contact 'with all the

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226 Decision ECtHR, *Jansen v Norway*, App no 2822/16 (ECHR, 6 September 2018) para 91 and 92. See also Decision ECtHR *Jovanovic v. Sweden*, App no 10592/12 (ECHR, 22 October 2015) para 77; Decision ECtHR, *Neulinger and Shuruk v. Switzerland*, App no 41617/07 (ECHR, 6th July 2010)para 136.

227 Bernadette Rainey, Pamela McCormick and Claire Ovey, *The European Convention on Human Rights* (8th ed, Oxford University Press 2021) 383.

228 Decision ECtHR, *V.D. and Others v Russia*, App no 72931/10 (ECHR,9 April 2019) para 114; Decision ECtHR *Kocherov and Sergeyeva v Russia*, App no 16899/13 (ECHR, 29 March 2016) para 95; Decision ECtHR, *Kacper Nowakowski v Poland*, App no 32407/13 (ECHR, 10 January 2017) para 75.

229 Decision ECtHR, *K. and T. v Finland*, App no 25702/94 (ECHR, 12 July 2001) para 173; Rainey, McCormick and Ovey, 383.

230 Fortin, *Children Rights and Developing Law*, 65; Sudre, 774 no 510.

individuals concerned' with a better view of the balance between parent's rights and children's rights[231]. As the Court states, their duty is only to review the decisions of the domestic courts on the light of the Convention[232].

Particular attention should be given to the Council of Europe's Convention on the Exercise of Children's Rights (ECECR, entered into force in 2000) which emulates in some of its provisions the Convention on the Rights of the Child and puts special consideration to the participation rights of the child in judicial proceedings. This Convention states also that 'for the purposes of this Convention' proceedings before a judicial authority affecting children 'are family proceedings', especially those involving 'the exercise of parental responsibilities' [233]. The provision remembers specially cases about residence and access, mentioned because of 'their importance in the life of a child' [234]. The ECECR considers that its main objective is to promote the best interests of children granting and facilitating them the exercise of their rights and their participation in proceedings affecting them[235]. The provisions gives the child rights to be informed and to express his or her views in judicial proceedings, which include 'to receive all relevant information; to be consulted and express his or her views and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision'[236]. The ECECR is one of the first Conventions in Europe about the best interests of the child and the participation rights of the child in the Continent[237].

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231 Decision ECtHR, *V.D. and Others v Russia*, App No 72931/10 (ECHR, 9 April 2019) para 113; Decision ECtHR *Jansen v Norway*, App no 2822/16 (ECHR, 6 September 2018) para 91.

232 Decision ECtHR, *V.D. and Others v Russia*, App no 72931/10 (ECHR, 9 April 2019) para 113.

233 ECECR, art 1 (3).

234 ECECR, Explanatory Report para 15.

235 ECECR, art 1 (2).

236 ECECR, art 3.

237 ECECR, art 4.

### 2.2.2.2 The parental responsibilities in the European framework

In the last decade, the Council of Europe has enacted several Conventions related to child issues and parental responsibilities. The most recent are the Convention on the Adoption of Children[238] and the Convention on Contact Concerning Children[239]. However, the most recent main Convention regarding children's rights is the Convention on the Exercise of Children's Rights[240], which promotes the participation of children in the pertinent decisions. The Convention entered into force in Spain as a legally binding Convention in 2015[241] but has not been signed by Switzerland and United Kingdom.

Other Conventions are the Convention on the Recognition and Enforcement of Decisions Concerning Custody[242] and the Convention on the Legal Status of Children Born out of Wedlock[243]. Both Conventions were written before the CRC and some of their articles are dated, but both give the idea of the promotion of children rights and the parental responsibilities in the Council of Europe.

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238 Council of Europe, European Convention on the Adoption of Children (Revised) (Open to signature 27 November 2008, entry into force 1st August 2011) CETS No 202.

239 Council of Europe, Convention on Contact concerning Children (open to signature 15 May 2003, entry into force 1 September 2005) CETS no 192; Signed by Spain in 2015, but not by Switzerland and United Kingdom.

240 Council of Europe, European Convention on the Exercise of Children's Rights (opened to signature 25th January 1996 and entry into force, 1st July 2000) CETS no 160.

241 Boletin Oficial del Estado, Instrumento de ratificación del Convenio Europeo sobre el Ejercicio de los Derechos del Niño hecho en Estrasburgo el 25 enero de 1996, BOE no 45 (21 de febrero de 2015) 14174 – 14189.

242 Council of Europe, Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Open to signature 20 May 1980 and entry into force 1st September 1983) CETS no 105.

243 Council of Europe, European Convention on the Legal Status of Children born out of Wedlock (Open to signature 15 October 1975, entry into force 11 August 1978) CETS no 085.

The Convention on the Recognition and Enforcement of Decisions Concerning Custody[244] was ratified by Spain[245] and Switzerland[246] in 1984 and by United Kingdom[247] in 1986. The Convention protects custody and access rights in international situations, avoiding delays and providing free, prompt, and non-bureaucratic assistance to the authorities in discovering the whereabouts and restoring custody of a child improperly removed[248]. However, for countries – as United Kingdom and Spain – that were part of the European Union, the Convention has been updated by the European Communities Council regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[249].

The Convention on the Legal Status of Children Born out of Wedlock[250] was ratified by Switzerland[251] in 1978 and United Kingdom in 1980, but not by Spain. This Convention's main aim is to 'improve the legal status of children born out of wedlock' and to avoid 'the legal or social disadvantage' of the children born out of wedlock with those born inside a marriage[252]. The Convention states also that 'when the affiliation of a child

244 Council of Europe, Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Open to signature 20 May 1980 and entry into force 1st September 1983) CETS no 105.

245 Boletin Oficial del Estado (BOE) Instrumento de ratificacion de 9 de mayo de 1984, relativo al Convenio Europeo relativo al reconocimiento y la ejecución de decisiones en materia de custodia de menores, asi como al restablecimiento de dicha custodia, hecho en Luxemburgo el 20 de mayo de 1980, BOE no 210 (1 de septiembre de 1984) 25291 a 25295.

246 Bundesamt von Justiz, Europäisches Übereinkommen vom 20. Mai 1980 über die Anerkennung und Vollstreckung von Entscheidungen über das Sorgerecht für Kinder und die Wiederherstellung des Sorgerechtes (AS 1983 1681) BBl 1983 I 101.

247 Child Abduction and Custody Act 1985, entered into force on 25 July 1985.

248 See Council of Europe, Treaty Office, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/105 (last visit 12.01.2022).

249 EU Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 1347/2000 [2003] OJ L 338/1.

250 European Convention on the Legal Status of Children born out of Wedlock (15 October 1975)

251 Bundesamt von Justiz, Europäisches Übereinkommen über die Rechtsstellung der unehelichen Kinder, AS 1978 1232. BBl 1977 II 1523.

252 European Convention on the Legal Status of Children born out of Wedlock (15 October 1975) preamble.

born out of wedlock has been established as regards both parents, parental authority may not be attributed automatically to the father alone'[253].

The most recent Convention about the maintenance of personal relationships in the European framework has been the Convention on Contact Concerning Children[254]. This Convention promotes the need of children to have contact with both parents, 'subject to the interests of the child' and the measures to assist parents and children to fulfil this right[255]. According to the Convention, the child and his or her parents shall have 'the right to obtain and maintain regular contact with each other'[256]. However, this contact may be 'restricted or excluded' only where necessary 'in the best interests of the child'[257]. Nonetheless, this Convention considers also that the child should have contact with relatives other than the parents and establish several measures to improve and promote trans-national contact[258]. Spain signed the Convention but has not yet ratified and therefore is not legally bound. Switzerland and the United Kingdom have not even signed it.

The parental responsibilities are recognised by the ECHR under article 8 of the Convention as the main duty of the parents towards their children and the need of protection of the bonds of the family relationships. As has been noted in the second section of this chapter, the main problem of article 8 of the Convention is its lack of definition of what 'family life'[259] means and how wide the scope for application this article is over parent-child relationships. The ECtHR has highlighted that article 8 ECHR establishes

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253 European Convention on the Legal Status of Children born out of Wedlock (15 October 1975) art 7.

254 Council of Europe, Convention on Contact concerning Children (open to signature 15 May 2003, entry into force 1 September 2005) CETS no 192 (15 May 2003).

255 Convention on Contact concerning Children (15 May 2003) preamble.

256 Convention on Contact concerning Children (15 May 2003) art 4 (1).

257 Convention on Contact concerning Children (15 May 2003) art 4 (2).

258 Convention on Contact concerning Children (15 May 2003) ch III.

259 European Court of Human Rights, 'Guide on article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence' (31 December 2018).

'the duty of the state not to intervene in family life'[260] but at the same time, states the necessary protection of children in any circumstances[261] and the protection of their right to have personal relationships with each of the parents, independently of their circumstances[262]. Both rights and protections are 'implicit' in article 8 ECHR, according to the Council[263]. Even if it cannot be concluded that the Court supports shared parental responsibilities as a benefit for the children, it is however noted that it has referred already to the necessary mutual enjoyment of the parents with the child for his or her development [264].

From an European perspective, the concept of 'family life' recognised in article 8 of the ECHR can be attributed not only to married parents and their legitimate minor child, but also cohabiting parents and their minor child or any other relationship under the same roof, usually with children[265]. For the purpose of this study, we will understand as 'holders of parental responsibilities' the parents and other persons or bodies entitled to exercise some or all parental responsibilities[266] . This study will not enter into the questions concerning biological or social parentage of the children. This research will

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260 European Union Agency for Fundamental Rights, Council of Europe and European Court of Human Rights, 'Handbook on European law relating to the rights of the child' (June 2015) 76.

261 Decision ECtHR, *R.M.S. v. Spain*, App no 28775/12 (ECHR, 18 June 2013) para 69.

262 See Decision of the ECtHR, *Keegan v. Ireland* App no 16969/90 (ECHR, 26 May 1994); Decision of ECtHR, X,*Y and Z v. United Kingdom*, App. No. 21830/93 (ECHR, 22 April 1997); Decision ECtHR, *Zaunnegger v. Germany*, App. no. 22028/04 (ECHR, 3 December 2009) ; Decision ECtHR, *N.Ts.v. Georgia*, App no 71776/12 (ECHR, 2 February 2016) Decision of the ECtHR, *Monory vs Romania and Hungary*, App no 71099/01 (ECHR, of 5 April 2005); Decision of the ECtHR, *Zorica Jovanović vs Serbia*, App no 21794/08 (ECHR 9 September 2013); Decision of the ECtHR, *K. and T. v. Finland* [GC] App no 25702/94 (ECHR, 12 July 2001) para 151. See also Council of Europe and European Court of Human Rights, Handbook on European law relating to the rights of the child (Luxembourg, June 2015) 77.

263 Council of Europe and European Court of Human Rights, Handbook on European law relating to the rights of the child (Luxembourg, June 2015) 77.

264 Decision of ECtHR, *K. and T. v. Finland*, App no 25702/94 (ECHR, 12 July 2001) para 151; see also Decision ECtHR, *Zaunnegger v. Germany*, App no 22028/04 (ECHR, 3 December 2009) para 44; Decision ECtHR of, *Kuppinger v. Germany*, App no 62198/11 (ECHR, 15 January 2015) para 99; see also Andrea Büchler and Helen Keller, *Family forms and Parenthood. Theory and Practice of Article 8 ECHR in Europe* (Intersentia 2016) 53-54.

265 Boele -Woelki and others, *Principles of European Family Law*..., 16.

266 ECECR, art 2.

only stick to the legal parentage of the children, already established *ex lege* or through acknowledgment or adoption[267].

There is not an established definition of parental responsibilities in Europe. However, the Council of Europe itself defined parental responsibilities as the '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'[268]. The conclusions of the Council of Europe are not legally binding to the Member States, but it helps set a harmonized framework of parental responsibilities in the countries under study. The definition gives the main elements of the concept of parental responsibilities in Europe and confirms a common core in the continent. The Committee of Experts on Family Law[269] – which operates under the authority of the European Committee of Legal Cooperation of the Council of Europe– considers in its 2006 White Paper that the main elements of the parental responsibilities are in the definition given by the Council of Europe in 1984. However, the Committee of Experts broadened the definition to include the words 'care and protection' as it is wider than 'care' of the previous definition. Also, the Committee considers necessary to include the 'determination of the residence of the child' as an element of parental responsibilities[270]. However, not all countries include this decision in the concept of parental responsibilities[271].

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267 Boele -Woelki and others, *Principles of European Family Law…*, 33.

268 Recommendation No R (84) of the Committee of Ministers to member States on Parental responsibilities (Adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies).

269 Not to be confused with the Commission of Experts on Family Law (CEFL) which is an independent group of experts from all over Europe who work for the harmonization of the family law in Europe and does not depend on any institution. The Committee of Experts of the Council of Europe helps the Council in all issues regarding family law and depends on the European Committee on Legal Cooperation (CDCJ) of the Council of Europe.

270 Committee of Experts on Family Law (CJ-FA) Report on principles concerning the establishment and legal consequences of parentage – *'the White Paper'* as adopted by the CDCJ at its 79th meeting on 11-14 May 2004 (Strasbourg, 23 November 2006) principle 18.

271 For example, United Kingdom (residence orders are not part of parental responsibilities) and Switzerland until 2014, when the Review of the Civil Code about parental responsibilities also included the decision about the residence of the child. See about Chapters 4.2.1. and 5.2.2. of this study.

The first duty as parents holding parental responsibilities is to make decisions according to the best interests of the child in all matters regarding him or her. The best interests of the child, however, may differ with the interests of the parents and what they think is in the best interests of their child. In addition, it is common that as the child matures, a 'divergence' between what the child considers his or her interests and what the parents consider their best interests may present itself[272]. As it was noted before[273], the best interests of the child are still 'a primary consideration' but not 'the primary consideration' and other rights have to be taken into account. For this reason, to establish which interests is principal and must be protected, the intervention of public bodies is necessary. The ECtHR has as a main duty to rule whether an intervention has been in line with the concept of family life of the individuals concerned.

In custody and contact cases, both elements of the parental responsibilities, the ECtHR has established in its case law that the custody and contact cannot be limited for reasons of religion, sexual orientation or other reasons, in the light of article 14 ECHR[274]. The mutual enjoyment by parent and children of each other's company constitutes a fundamental element of 'family life'[275] and therefore is protected by the ECHR. According to the Court's case law, the mutual enjoyment by parent and child of each other's

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[272] Roda y Roda, 45. See also Katarina Boele – Woelki and Tone Sverdrup, *European Challenges in Contemporary Family Law* (Intersentia 2008) 65.

[273] See section 2.2.2.1 of the study.

[274] Decision of the ECtHR, *Vojnity v. Hungary* App no 29617/07 (ECHR, 12 February 2013). See also Decision of the ECtHR, *P.V. vs Spain*, App no 35159/09 (ECHR, 30 November 2010); Decision of the ECtHR, *Hoffman vs Austria* App no 12875/87 (ECHR, 13 February 1993). In the light also of ECHR, art 14, it has been noted by the case-law of the ECtHR that the concept of 'family life' also refers to unmarried parents. See Decision of the ECtHR, *Keegan vs Ireland* App no 16969/90 (ECHR, 26 May 1994) ; Decision of the ECtHR, *Kroon and Others vs The Netherlands*, App no 18535/91 (ECHR, 27 October 1994); Decision of the ECtHR, *Zaunnegger vs Germany* App no 22028/04 (ECHR, 3 December 2009); Decision of the ECtHR, *Chavdarov vs Bulgary*, App No 3465/03 (ECHR, 21 March 2011).

[275] Decision of the ECtHR, *K. and T. v. Finland*, App no 25702/94 (ECHR, 12 July 2001) para 151; Decision of the ECtHR, *Monory vs Romania and Hungary*, App no 71099/01 (ECHR, of 5 April 2005) para. 70; Decision of the ECtHR*, Zorica Jovanović vs Serbia*, App no 21794/08 (ECHR 9 September 2013) para 68. See also, European Court of Human Rights, *Guide on article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence* (31 December 2018).

company still applies where the family ties between the parents are broken[276]. Article 8 thus guarantees the non-custodial parent a right to visit and contact his or her child[277] and considers that the domestic measures obstructing the contact between parents and children is 'an interference with the right protected by Article 8 ECHR'[278]. It is an established principle that, in the event of divorce or separation, children need to have contact with both parents 'to allow them to identify with the non-custodial parent' and to ensure a harmonious development[279].

Shared parental responsibility is not explicitly recognised by the European Court. However, its case law suggests that the Court promotes the necessary contact and involvement of both parents in the life of the child under article 8 ECHR, independently of their civil status. For this recognition, the case *Zaunnegger vs Germany*[280] was central, even for other Germanic countries[281]. In this case – to which other cases followed – an unmarried father complained about the fact that the German law did not provide him with the opportunity to be granted joint custody without the mother's consent. The ECtHR established that there had been a violation of article 14 ECHR in conjunction with article 8 ECHR, as it signalled a difference in treatment for the unmarried father. The Court specified that the main consideration should be the best interests of the child and that the father had been caring for the child during the time of separation with the mother on a regular basis. Therefore, there is no reason to justify the difference of treatment between the mother and the father and to not grant the joint custody. The Court stated that 'it cannot be shared the assumption that joint custody against the will

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276 Christoph Grabenwarter, *European Convention on Human Rights. Commentary* (C. H. Beck 2014) 196. See also, Decision ECtHR, *Elsholz v. Germany*, App no 25735/94 (ECHR 13 July 2000) para 43; Decision of the ECtHR, *Monory vs Romania and Hungary*, App no 71099/01 (ECHR, of 5 April 2005) para 70; Decision ECtHR, *Kacper Nowakowski v. Poland*, App no 32407/13 (ECHR, 10 January 2017) para 70.

277 Decision of the ECtHR, *Hoffman v. Germany*, App no 34045/96 (ECHR 11 January 2001); Decision ECtHR, *Kacper Nowakowski v. Poland*, App no 32407/13 (ECHR, 10 January 2017) para 70.

278 Decision of the ECtHR *Mc Michael v. UK*, App no 16424/90 (ECHR, 24 June 1995) para 86; Decision of the ECtHR, *Hämäläinen v. Finland*, App no 37359/09 (ECHR, 16 July 2014) para 63; see also Büchler and Keller, 53-54.

279 Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Routledge 1999) 252.

280 Decision of the ECtHR, *Zaunnegger vs Germany*, App no 22028/04 (ECHR, 3 December 2009).

281 The study analyses the consequences of this case in Switzerland in chapter 5.3.1.

of the mother is *prima facie* not to be in the child's interests'[282] and recalled that the Convention is a 'living instrument' which has to be interpreted in present-day conditions. For this reason, the Court considers that, even if there is no European consensus about the joint custody of unmarried parents, the attribution of custody 'are to be based in the child's best interests'[283]. This statement by the Court introduces the possibility that the best interests of the child can involve shared parental responsibilities, including shared custody between parents if there is a benefit for the child and both parents have a regular contact and care for the child.

Since 2000, the Council of Europe has published a series of recommendations on parental responsibility, more correlated to the concept of equality between parents as focusing on children. First, in 2006, the Committee of Experts on Family Law of the Council of Europe[284] wrote a Report on principles concerning the establishment and legal consequences of parentage. Even as a working document for the Committee, it gives a glimpse into the thinking of the Council of Europe and the Committee of what lies ahead in the coming years. The report states that the underlying idea of the shared parenting principles is 'that the joint exercise of parental responsibilities is in the best interests of the child' irrespective of the civil status of the parents and also that the 'joint attribution and exercise of parental responsibilities would be the ideal situation for the child'[285].

The Committee of Ministers said in its Recommendation CM/Rec (2007) 17 on gender equality standards that '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

[282] Decision of the ECtHR, *Zaunnegger vs Germany*, App no 22028/04 (ECHR, 3 December 2009) para 59.

[283] Decision of the ECtHR, *Zaunnegger vs Germany* App no 22028/04 (ECHR, 3 December 2009) para. 60.

[284] Not to be confused with the Commission of Experts on Family Law (CEFL) which is an independent group of experts from all over Europe who work for the harmonization of the family law in Europe and does not depend on any institution. The Committee of Experts of the Council of Europe helps the Council in all issues regarding family law and depends on the European Committee on Legal Cooperation (CDCJ) of the Council of Europe.

[285] Committee of Experts on Family Law (CJ-FA) Report on principles concerning the establishment and legal consequences of parentage –'*the White Paper'* as adopted by the CDCJ at its 79th meeting on 11-14 May 2004 (Strasbourg, 23 November 2006) para 66.

fully and equally respected'[286] and considered that the states should respect 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'[287]. The Committee also states that the family sphere 'must secure women and men the same parental rights and responsibilities'[288].

More recently, the Council of Europe has made a step forward in the recognition of the shared parental responsibilities in Europe and increased involvement of fathers in the life of the child. Even if not all countries have introduced shared parental responsibilities in their legislation and policies, it is clear that the Council of Europe promotes this recognition. Since 2013, the Parliamentary Assembly acknowledged the need to promote the role of fathers and their right 'to enjoy shared parental responsibility' and called on national authorities to ensure that 'in case of separation or divorce' the possibility to grant joint custody of children' in their interests and for a major involvement of the fathers in the life of the child[289].

Following this resolution and after a 2015 Report from the Committee on Social Affairs[290] Parliamentary Assembly called for 'equality between parents must be guaranteed and

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286 Recommendation CM/Rec (2007)17 of the Committee of Ministers to member states on gender equality standards and mechanisms (Adopted by the Committee of Ministers on 21 November 2007 at the 1011th meeting of the Ministers' Deputies) para 22.

287 Recommendation *CM*/Rec(2007) para 23 (vii).

288 Recommendation CM/Rec(2007) para 23 (vii).

289 Council of Europe, Parliamentary Assembly Resolution 1921 (2013) 'Gender equality, reconciliation of private and working life and co-responsibility' (25 January 2013) para 8.4.

290 Committee on Social Affairs, Health and Sustainable Development, Committee Opinion, Doc 13896, 'Equality and shared parental responsibility: the role of fathers' (30 September 2015). The Committee emphasizes that 'a parent's right to shared parental responsibility, joint custody or shared residence for a child can never supersede the rights of the child concerned. Every child has the right not to be separated from his or her parents, and to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. A child who is capable of forming his or her own views also has the right to express those views freely in all matters affecting him or her, the views of the child being given due weight in accordance with the age and maturity of the child. It is thus not sufficient for parents themselves or the competent courts to determine how parental responsibility, custody or the child's residence are to be shared – the views of the child concerned must be taken into account and his or her best interests must be given primacy'

promoted from the moment the child arrives' within families in Europe [291]. The Parliamentary Assembly considers also that 'the involvement of both parents in their child's upbringing is beneficial for his or her development' and states that the shared parental responsibility 'implies that parents have rights' but also 'duties and responsibilities regard to their children'. The Council also recognises that fathers are discriminated against in their role within laws and practices that cause them 'to be deprived of sustained relationships with their children'[292].

Parental responsibilities imply a complicated tripartite of interests between parents, children, and the State. While the parents have their own interests to protect and have the capacity to defend them, the children are sometimes unprotected. It is a duty for the State to protect and defend the best interests of the child and, at the same time, support the parents in their care of children[293]. European States try to update their laws in this changing society, trying to provide a greater legal certainty concerning the legal status of children and the protection of their interests. As Rainey, McCormick and Ovey state, in family crisis and breakdowns of families, the national authorities are required to balance the children and parental rights, which sometimes may compete or disagree with each other[294]. In this context, national legislations are prioritising parental equality rather than the interests of the child, as will be seen throughout the study.

### 2.2.3 SHARED PARENTING AS AN INTERPRETATION OF THE BEST INTERESTS OF THE CHILD

The Council of Europe, with the Recommendations and Conventions that we have seen in the previous chapter, has advocated for shared parental responsibility. In modern society, the common view of all legal traditions is that it is better for the child to have a relationship with both parents. However, this consideration is often made from the parent's view and not necessarily from the child. Several times, the focus is on the

[291] Council of Europe, Parliamentary Assembly, Resolution 2079 (2015) 'Equality and shared parental responsibility: the role of fathers' (36th Session, 2 October 2015) para 1.

[292] Council of Europe, Parliamentary Assembly Resolution 2079 (2015) 'Equality ….', para 2.

[293] Brenda Hogget, *Parents and Children: The law of parental responsibility* (4th edn, Sweet & Maxwell 1993) 5.

[294] Rainey, McCormick and Ovey, 383.

equal right of the parents to hold parental responsibilities and the discrimination of children born out of wedlock. It is considered that parents should have an equal right about parental responsibilities and the children should not be affected by the status of the relationship between parents[295]. There is always friction when striking a balance between the parent's rights and interests of the child.

In order to contextualize the subject matter under study, is it necessary to determine which rights are being considered in the exercise of parental responsibility and how the rights of parents and the rights of children are balanced. This joint exercise of parental responsibility might be understood as a dual legal institution, based on the fusion of two rights, on the one hand, the right of the child to have contact with both parents[296] and on the other hand, the rights of parents to a balanced and on-going relationship with their children. It has been already pointed out that the child's best interests should be a primary consideration while not necessarily overriding the rights of parents. It should be the main focus, but it requires a spirit of cooperation from parents, setting the interests of their children above their own interests[297]. It is therefore a model of exercise of parental responsibility that requires a greater commitment by the public bodies – and the parents – for the greater well-being of the children after a marriage breakdown or family crisis.

The joint exercise of parental responsibility means that parents decide jointly on all matters affecting their children and implies that parents 'have certain rights, duties and responsibilities with regard to their children'[298]. As it was noted before, shared parental responsibilities allow parents to equally exercise the rights and duties towards their children. At the same time, the joint parental responsibilities also protect the right of the child to be cared and to have contact with both parents, as it is protected in the CRC[299]. However, the authorities have to take into account also the best interests of the child, as a General Principle, when it comes to deciding the holders of parental

295 Mair and Örücü, 292.

296 CRC, art 9 (3).

297 Roda y Roda, 140.

298 Council of Europe, Parliamentary Assembly Resolution 2079 (2015) 'Equality…'para 1.

299 CRC, art 9 and art 18.

responsibilities. Therefore, two rights need to be balanced: 1) no discrimination of any of the parents in their exercise of parental responsibilities[300] and 2) the protection of the best interests of the child. As previously noted, the best interests of the child is 'a primary consideration' but not the only consideration[301]. However – as previously mentioned – the CRC states that the parents should take into consideration the best interests of the child and therefore, the shared parental responsibilities should look to protect the interests of the child. Thus, the authorities should first consider the development of the child and its interests and not just the equality between parents.

In all countries covered by this study, the constant conflict between parents about the decisions regarding the child can be the main reason for the authorities to not to allocate shared parental responsibilities. As the next chapters will uncover, the main reservations against the shared parental responsibilities are the possibility that both parents disagree in key decisions about the child, provoking a constant discussion that could harm the best interests of the child.

In divorce or separation cases, a complete equal treatment of the parents in the allocation of the child and in decision-making, is difficult to achieve without a complete agreement of the parents. Usually, the child will live permanently with one of them – or for long periods of time – and the other will have the right of contact with the child, which does not ensure complete equal treatment between the parents. The Committee of Experts of Family Law[302] and the Commission of European Family Law[303] (CEFL) agree with the idea that the shared parental responsibilities are in the best interests of the child. However, there is clear disagreement between these two institutions. While the Committee – under the Council of Europe – considers that the shared parental

300 UNDHR, art 2; ECHR, art 14.

301 See CRC/C/GC/14.

302 The Committee of Experts of the Council of Europe helps the Council in all issues regarding family law and depends on the European Committee on Legal Cooperation (CDCJ) of the Council of Europe.

303 As it was already mentioned, the Commission of Experts on European Family Law is an independent group of scholars of several universities in Europe, who try to harmonize the family law in the continent.

responsibilities should be allocated only in case of agreement between parents[304] and therefore never imposed, the Commission states that the joint exercise of parental responsibilities is in the best interests of the child, regardless of the relationship between the parents and any acrimony thereof[305]. However, the countries in this study have different models to exercise shared parental responsibilities. These three models try to strike a balance between the rights of divorced, unmarried and separated parents and the best interests of their children.

According to the Spanish legislation, parental responsibilities are exercised by both parents for alternate periods of time, if they do not live together[306] and without distinction between unmarried and married parents. The Law entered into force in 2005 focused on custody but not parental responsibilities[307], as the responsibilities have been conferred to both parents independently of their civil status since 1981. Usually, doctrine and in practice provide that the parental responsibilities means that the important decisions for the development of the child should be taken jointly, but the 'everyday' decisions can be only be made by the parent living with the child at the time. However, some scholars consider that the Spanish modality of custodial arrangement corresponds more to the definition of 'alternating custody', because the child splits his or her time with the parents[308].

Since 2000, Swiss legislation has provided that the joint exercise of parental responsibilities in divorce or separation cases is attributed by agreement between parents. However, the revision of the Civil Code relating to parental responsibilities in 2014 makes shared parental responsibilities a rule that is automatically given to both parents, no matter

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304 Council of Europe, Parliamentary Assembly Resolution 1921 (2013) Gender equality, reconciliation of private and working life and co-responsibility, para 8.4; see also Committee on Social Affairs, Health and Sustainable Development, Committee Opinion, Doc. 13896 (30 September 2015) 'Equality…'

305 Jeppesen De Boer, *Joint Parental Authority…* 5; Boele -Woelki and others, *Principles of European Family Law…* 283, principle 3:11 and principle 3:14.

306 Fuensanta Rabadán Sánchez-Lafuente, *Ejercicio de la Patria Potestad cuando los padres no conviven* (Aranzadi 2011) 68.

307 Ley Orgánica 15/2005, de 8 de julio por la que se modifican el Código Civil y la Ley de Enjuiciamiento Civil en materia de separación y divorcio.

308 Hayden, 7.

their marital or relationship status. A parent can be granted limitation in its exercise of parental responsibilities only if this limitation is for the best interests of the child[309]. The Review of 2014 also introduced the decision about the residence of the child as an element of the parental responsibilities.

In England and Wales, the Adoption Act 2002 allows unmarried fathers to acquire parental responsibility by registering as the father in the birth certificate of the child, by court order or by agreement with the mother. Before this Act, the shared parental responsibility was only allocated by agreement with the mother or by a court order. In addition, the Children and Families Act 2014 introduces the child's arrangements order, enabling the possibility for shared parental responsibility order for both parents and combining the aforementioned residence and contact orders into one order. In addition, the Act introduces the 'involvement of both parents' as an element of the best interests of the child. According to the wording of the law, the involvement of both parents 'will benefit the welfare of the child'.

In conclusion, European context considers that shared parental responsibilities respond optimally to the best interests of the child, as it protects the right of the child to have an ongoing relationship with his or her parents and respects the right of parents to no discrimination in their relationship with their children. As covered earlier, the last decade has seen the Council of Europe and related institutions promote shared parental responsibilities. Also – as will be explored in the next chapters on the countries included in this study, shared parental responsibilities are viewed to be in the best interests of the child. However, this tendency towards shared parental responsibilities has been – as we will see hereafter- also promoted by the media and the social movements, who presented their demands before the shared parental responsibilities were introduced. Therefore, the question that must be answered is whether the introduction in the countries under study has been done with the best interests of the child in mind or actually the rule of no-discrimination between parents.

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309 Botschaft vom 16. November 2011 über die Änderung des Zivilgesetzbuches (elterliche Sorge) BBl 2011 9108.

# 3 THE BEST INTERESTS OF THE CHILD AND PARENTAL RESPONSIBILITIES IN SPAIN

The first reform in Shared parental responsibilities for unmarried and divorce parents dates back to the 1981 first reform in Family Law in Spain in Democracy [310]. For this reason, the dissertation focusses more on the concept of shared custody but includes reference to the 2005 principle of co-parenting and its implications for the best interests of the child.

The tendency before the law entered into force in 2005 was to give custody to the mother and visiting rights to the father. This tendency was seen as discriminatory against fathers, who have over the years played a more prominent domestic role and whose social movements have heated up the debate about the shared custody in Spain.

## 3.1 THE BEST INTERESTS OF THE CHILD IN SPAIN

The best interests of the child and the right of the child to be heard are the main principles that inform the decisions surrounding arrangements concerning the child[311]. As explored in the previous chapters, these two principles are intricately linked.

Although the term 'best interests of the child' is not recognised specifically in the Constitution, the whole set of rights regarding the child is recognised in section 39 of the Spanish Constitution (hereafter CE) which states,

1. The public authorities ensure social, economic, and legal protection of the family.
2. The public authorities likewise ensure full protection of children, who are equal before the law, regardless of their parentage, and of mothers, whatever their marital status. The law shall provide for the possibility of the investigation of paternity.

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[310] Ley 11/1981, de 13 de mayo, de modificación del Código Civil en materia de filiación, patria potestad y régimen económico del matrimonio.

[311] Fabiola Lathrop-Gomez, *Custodia Compartida de los hijos* (La Ley 2008) 110. Most of the literature around the joint custody in Spain refers to the years 2004 to 2010, with less doctrine discussing it after 2013.

3. Parents must provide their children, whether born within or outside wedlock, with the assistance of every kind while they are still underage and in other circumstances in which the law so establishes.
4. Children shall enjoy the protection provided for in the international agreements safeguarding their rights.

Other sections in the Constitution also refer to the rights of children, as section 10 (1) – fundamental rights of the individual and human dignity – and section 27 (right to education)

Article 154 of the Civil Code mentions the best interests of the child in reference to the parental authority, specifically that this authority should be exercised always 'for the benefit of the minor'[312]. Through the years, other family laws have referred to the best interests of the child[313]. As this study focusses on the best interests of the child and shared parental responsibilities, focus will be applied on the norms that refer to the child's arrangements and best interests.

Regarding child's arrangements, the Civil Code (hereafter CC) recognises the best interests of the child in article 159 and article 92. Article 159 CC states:

> If the parents live separately and are unable to decide by common consent, the Judge shall decide, **always for the benefit of the children**, in the custody of which parent the underage children are to remain. The Judge, before taking this measure, shall hear the children who have sufficient judgement and, in any event, those older than twelve[314].

[312] CC, art 154 after modification of the Ley 11/1981, de 13 de mayo, de modificación del Código Civil en materia de filiación, patria potestad y régimen económico del matrimonio; see also Ley Orgánica 30/1981 de 7 de julio por la que se modifica la regulación del matrimonio en el Código Civil y se determina el procedimiento a seguir en las causas de nulidad, separación y divorcio.

[313] E.g. Ley Orgánica 1/1982 de 5 de Mayo sobre la protección de los derechos al honor, a la intimidad personal y familiar y derecho a la imagen; Ley Orgánica 8/1985 reguladora del derecho a la Educación; Ley Orgánica 54/2007 sobre Adopción Internacional.

[314] CC, art 159.

The Organic Law 1/2005 to which it will refer in the discussion[315] established for the first time the modality of shared custody in Spain, introduces the 'benefit of the children' in article 92 (4) and 92 (8) CC:

> Art 92(4) Civil Code
>
> The parents may agree in the settlement agreement, or the Judge may decide, **for the benefit of the children**, that parental authority be exercised in whole or in part by one of the spouses[316].
>
> Art 92 (8) Civil Code
>
> Exceptionally, even when the circumstances described in section five of this article do not arise, the judge, at the request of one of the parties, with a favourable report from the public prosecutor's office, may award shared care and custody, on the basis that only in that way are **the best interests of the minor** adequately protected [317].

The principle of the best interests of the child is recognised in Spanish law yet is undefined[318]. It is considered as the *interés superior del niño* – paramount interests of the child – and the main guiding principle in any proceedings and actions of public officials involving children[319]. The wording defines the principle as overriding other interests, making the child the priority in family law and in all decisions concerning him or her. As Rivero Hernandez says, the best interests of the child should prevail over others and any measure restricting the rights of children – intimately bonded to the main principle of the best interests of the child – should be necessary, justified and proportional[320]. The Constitutional Court states that the notion of the best interests of the child is a

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315 Ley Orgánica 15/2005 de 8 de julio.

316 CC, art 92 (4).

317 CC, art 92 (8).

318 Lathrop-Gomez, *Custodia compartida de los hijos*, 116. This 'technique' is called 'general clause' and it opposes to the Anglo-Saxon system, which establishes a list of different criteria to determinate the best interests of the child.

319 Ley Orgánica 1/1996 sobre la Protección Jurídica del Menor, art 2.

320 Francisco Rivero Hernandez, *El interés del menor* (Dykinson, 2000) 34.

fundamental principle that should be considered in all family proceedings affecting the child and an imperative element in Family Law[321]. The High Court states that the best interests principle acts as the key criterion in any decision affecting children[322]. However, without a definition and considering the principle as a 'general clause' the interpretation of the principle is broad in the Spanish Law. As Bartolomé states, the absence of a determinate concept leaves a lot of action to the legal actors[323]. Precisely, it is a question to answer if this lack of certainty in the concept of the best interests of the child allows the best interests principle to be more easily linked to shared parenting since it depends on the interpretation of legal actors.

The Organic Law 8/2015 establishes, for the first time, the elements and criteria when deciding on the best interests of the child but does not define the concept clearly. The Law states the best interests of the child as preeminent over all other interests and considers that this principle should not constrain other rights of the child without an appropriate justification. The criteria established by the law to apply the best interests of the child are the protection of the life and development of the child, the protection of the children's basic needs – not only material, physical and educational needs but also affective and emotional needs – an adequate family context and maintenance of family relations, preservation of their identity and a harmonic development of their personality[324]. The Law considers that public authorities must do everything in their power to preserve the relationship of the children with their biological parents. This Review has modified the Organic Law 1/1996 for the legal protection of the child, which was in force when the law about shared custody was approved[325]. Also, the Organic Law 26/2015 establishes some criteria for the consideration of the preferences and opinions

321 Sentencia Tribunal Constitucional (STC) 4/2001 de 15 enero, BOE no 41, del 16 de febrero 2001, Fund Tercero.

322 Sentencia del Tribunal Supremo (STS) STS 4258/2017 de 29 Noviembre, Fund Tercero.

323 Carlos De Bartolomé Cenzano, 'Sobre la interpretación del interés superior del menor y su trascendencia en el Derecho positivo español' (2012) 3 Revista sobre la infancia y la adolescencia, 46 – 59.

324 Ley Orgánica 8/2015 de 22 de julio de modificación del sistema de proteccion a la infancia y la adolescencia, art 1. See also Sentencia del Tribunal Supremo (STS) 658/2015 de 17 Noviembre, Fund Sexto.

325 Ley Orgánica 1/1996 de 15 de enero, art 2 (2).

of the child, the necessity that his or her daily life should be in an adequate context and the promotion of the participation of the child in the society and in the decisions affecting them[326].

However, the Laws entered into force in 2015 have not modified the main considerations of the Law in 1996 for the procedural rules in child's arrangements cases. According to the Review 1/1996 about the judicial protection of the minor, the interests of the child should be evaluated in any case regarding children and should be the guiding rule on the interpretation of the actions regarding children. The Law also considers that the best interests of the child is a procedural principle[327]. An important reform from the Law 1/1996 was the insertion of the 'duties of the child', which considers children as co-responsible of the societies and in the context where they live[328]: family, school, or society. These duties have been improved by the new review of 2015[329]. In a certain manner, the reviews that entered into force in 2015 completed the Organic Law of 1996, whilst preserving the spirit and general principles that guided the drafting of the Law.

According to Ravetlla Ballesté, the principle of the best interests of the child is identified with the protection of those fundamental rights that the law ascribes to the individuals. Consequently, the law and the juridical thoughts about minors are not an empty concept, as legal actors must ensure the effectiveness of the rights recognised to those individuals without capacity to make their own decisions and they need flexibility to do so[330]. However, as De Bartolomé Cenzano states, this flexibility cannot be translated into arbitrary application of the principle but must be applied with objectivity and with objective justification, therefore decided with a holistic view[331]. Rivero Hernandez states

326 Ley Organica 26/2015 de 28 de Julio, Título I.

327 Ley Orgánica 1/1996 de 15 de enero, art 2 (2), see also Blanca Sillero Crovetto, 'Interés superior del niño y responsabilidades parentales compartidas' (2017) 6 Actualidad Jurídica Iberoamericana, 18.

328 Ley Orgánica 1/1996 de 15 de enero, Titulo III; see also Ley Orgánica 26/2015 de 28 de Julio de modificación del sistema de protección a la infancia y a la adolescencia, Titulo II.

329 Ley Orgánica 26/2015 de 28 de Julio de modificación del sistema de protección a la infancia y a la adolescencia, Titulo II.

330 Isaac Ravetlla Ballestè, 'El interés superior del niño: concepto y delimitación del término' (2002) 30 (2) Educatio siglo XXI 89, 96; see also De Bartolomé Cenzano, 52.

331 De Bartolomé Cenzano, 52.

that all laws related to children and their interests constitute the juridical status of the minor, for their protection as a minor and the primacy of their interests[332].

The capacity of the child to exercise his or her rights is limited and variable, evolving with the individual and increasing with age. Due to immaturity to act freely, the child cannot decide autonomously until reaching legal age, therefore requiring parental authority[333].

## 3.2 PARENTAL AUTHORITY IN SPAIN

'Parental authority' in Spain is established in the best interests of the child and encompasses all the duties and rights of the parents towards the child. The wording of the institution of parental authority – patria potestad – provides a deeper patriarchal emphasis, focusing more on the rights than on the responsibilities of the parents towards the child. However, it has developed over the years and now focusses on responsibilities and duties of the parents than their rights over the children[334]. Currently, the Law 26/2015 does not change the concept of parental authority but specifies in the review of article 154 of the Civil Code that the parental authority is considered 'as parental responsibility'[335]. The elements of the parental authority are based upon what it is considered the common core in Europe: maintenance, family relationships, care and upbringing and education[336]. During the parliamentary proceeding of the law 15/2005 on divorce and separation, the Catalan party ERC claimed to change the concept of 'patria potestad' to 'responsabilidad parental' but, in the end, the proposal was not accepted[337].

The parents, as holders of parental authority, are the responsible parties for, and guardians of, the best interests of the child. The best interests of the child is created as a guide for the action of the parents and the exercise of parental authority and is therefore,

332 Rivero Hernandez, 35.

333 Rabadán Sanchez-Lafuente, 1236.

334 Rabadán Sanchez-Lafuente, 1236.

335 CC, art 154 (1) and Ley Orgánica 26/2015 de 28 de Julio de modificación del sistema de protección a la infancia y a la adolescencia, art 2 (8).

336 CC, art 154 (1) and (2).

337 Boletin Oficial de las Cortes Generales (BOCG) Congreso de los Diputados, Serie A, no 16-8 (15 marzo 2005) Enmienda 21.

oriented at the service of the children[338]. Some articles of the Civil Code refer to the link between parental authority and best interests of the child.

Article 154 states that parents should exercise parental responsibility for the benefit of the children. Article 90 is also drafted in this manner, as it states that the judge should not accept any clause on the divorce agreement against the best interests of the children involved[339]. Article 92 (4) of the Civil Code – modified with the Act 15/2005 – states the exercise of parental authority should be decided for the benefit of children. Article 92 (7) prohibits granting the joint custody of the child when either of the parents are a subject of criminal proceedings against the life or physical integrity of the children or in case there has been evidence of domestic violence against them[340]. Act 1/1996 states that the application of the Act is subject to the best interests of the child, which will prevail over any other interests[341]. Also, the Law 8/2015 modifies article 2 of the Law 1/1996 and states that the authorities should prioritize the permanency of the child in the family of origin and preserve the family relationships if it is in the best interests of the child[342].

The Constitution makes the parents responsible and liable for the protection of their children and their best interests in its article 39 (3) stating:

> (3) Parents must provide their children, whether born within or outside wedlock, with the assistance of every kind while they are still underage and in other circumstances in which the law is applicable.

The main limit of parental authority is the best interests of the child and thus the main duty of the parents is to create the appropriate environment for children to exercise their rights. Article 154 (1) of the Civil Code states that minors are under the authority of their parents, who should always exercise this authority in the benefit of the children

338 See Sentencia Tribunal Supremo (STS) 1165/1996, de 31 de Diciembre, Fund Cuarto; Sentencia Tribunal Supremo (STS) 2974/2019 de 1 de Octubre, Fund Segundo; Rabadán Sanchez-Lafuente, 33.

339 CC, art 90.

340 CC, art 92 (4) and (7).

341 Ley Orgánica 1/1996 de 15 enero, art 2.

342 Ley Orgánica 8/2015 de 22 de julio Título I, II.

involved[343]. The Spanish High Court states that parental authority acts as an inherent right of paternity and maternity with a protection function which configures it as an institution in favour of children[344]. According to the Court, parental authority is configured as a set of rights that the law confers to the parents on their children, to ensure the fulfilment of the liabilities towards the education and support of the children, oriented in favour and service of the children[345].

Most of the authors mentioned in this study identify parental authority as all legal relations between parents and minors, a duty towards children primarily to protect their interests and the fulfilment of their rights[346]. Roda y Roda defines parental authority as all the duties and responsibilities recognised by the legal system to the parents of biological or adopted children, for the fulfilment of their assistance, education and care, including the adoption of core decisions and the assumption of responsibilities, independently of the status of the relationship between the parents[347]. The author also states that the parental authority is non-transmissible, inalienable, and indefeasible[348]. The parents are, therefore, the main actors and protectors of the best interests of children and ultimately responsible for their well-being.

The duties and responsibilities granted to parents towards their children are circumscribed in article 154 CC. These include looking after them, to have them in their company, feed them, educate them, provide them with a comprehensive upbringing, to represent them and to manage their property[349]. These are the principal elements of parental responsibility, and these must be exercised by both parents according to their circumstances.

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343 CC, art 154 (2).

344 STS 720/2002 de 9 de Julio, Fund Primero.

345 STS 4931/1994 de 25 Junio, Fund Primero; STS 3562/2020 de 26 Octubre, Fund Tercero.

346 See Jose Luis Lacruz Berdejo, Francisco de Asis Sancho Rebullida, Francisco Rivero Hernández (eds), *Elementos de Derecho Civil IV, Derecho de Familia* (Dykinson 2010) 387-388; Roda y Roda, 59; Rabadán Sanchez-Lafuente, 31.

347 Roda y Roda, 59; Lacruz Berdejo, Sancho Rebullida and Hernández, 387-388.

348 Roda y Roda, 61.

349 CC, art 154 (1) and (2).

The act of looking after the child is considered care and protection of the child and is a principal responsibility of parents with parental responsibilities. This is also the case where they do not have custody of the child and only contact rights. It means care, surveillance and supervision of the child and implies a protective purpose that permeates into other duties that comprise parental responsibility[350]. To have them in their company also means any type of communication between parents and children and does not mean only living under the same roof[351]. The expression 'feed them' comprises all the material needs of the child, according to the general rule of maintenance, stated in article 142 CC[352] which include residence, dress, medical assistance and educational costs. When parents do not live together, it means the child support payments and input into all decisions regarding education or health. Even as an element of parental responsibility, maintenance does not end with the deprivation of parental authority, as it derives from the parent-child relationships[353]. The education of the child not only includes intellectual education, but also moral and religious education[354]. The parents hold the responsibility to represent the minor, as their legal capacity to act is limited because of the immaturity of the child. Because of this, parents also represent their child when it comes to the management of the minor's properties[355].

Parental authority has evolved from an 'authoritative' institution to an institution designed to serve the interests of the child. As it has been noted before, the parental responsibility is held and exercised by both parents for the benefit of the child. The Law 8/2005 also includes the right of the child to be heard in divorce proceedings from

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350 Lacruz Berdejo, Sancho Rebullida and Hernández, 576; Rabadán Sanchez-Lafuente, 31.

351 Sentencia Audiencia Provincial Madrid (SAP) 610/2012 de 21 Septiembre, Fund Tercero; Rabadán Sanchez-Lafuente, 31.

352 CC, art 142 states: Support shall be deemed to mean everything which is indispensable for food, shelter, dress and medical assistance. Support shall also comprise education and instruction of the recipient of support while he is underage and even thereafter when he has not finished his training for a cause not attributable to him.

353 Rabadán Sanchez-Lafuente, 31.

354 Constitución Española (CE) art 10 and art 17; CC art 154; Rabadán Sanchez-Lafuente, 31.

355 CC art 164-168. The Civil Code establishes a series of goods that are excluded from the administration of the parents, as the goods acquired by the minor older than 16 years with his or her work.

the age of 12 years old as an element of the best interests of the child. The Law 26/2015 has realised this consideration and states the need of the children to participate in all issues concerning them and all decisions that could affect to their interests[356].

Since 1981, parental authority has developed into an institution designed to serve the interests of the child. Parental authority is held by both parents and should always be exercised to the child's benefit. For this reason, the parents should allow the child to express their opinion in all matters affecting them. Nonetheless, parental authority is not only a private family matter, but a public matter. The State can therefore intervene actively to ensure the fulfilment and protect the best interests of the child[357].

The Spanish Civil Code separates parental authority (Article 154 and subsequent sections) from custody and guardianship (Article 92). This distinction is not relevant in situations where the parents live together, as both parents are involved in all decisions regarding the child. The distinction between parental authority and custody and guardianship therefore, comes into effect when there is a family breakdown or the parents do not live together. In all situations where cohabitation ends, the legal entitlement of parental authority remains with both parents, who share all relevant decisions concerning the child. Custodial arrangements should be decided at the moment cohabitation ends, according to the best interests of the child[358].

Article 156 of the Civil Code distinguishes between holding parental authority and exercising parental authority. If the parents live together, parental authority is held by both parents and exercised together or by one of them with the agreement of the other. The exercise of parental authority by one of them will be valid according to the social use and on urgent circumstances, as for example, a medical emergency that should be treated immediately[359].

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356 Ley Orgánica 8/2015 de 23 de julio, Cap I para 2.

357 Roda y Roda, 65.

358 Ricardo Miguel Agueda Rodriguez, *la guarda compartida y el interés superior del menor, supuestos de exclusión* (Hispalex, 2016) 15.

359 CC, art 156.

If the parents live separately, parental authority is exercised by the one with whom the child lives and is responsible for the daily routine of the child[360]. When the parents do not live together, the exercise of parental authority splits and introduces new figures in the Spanish law. These figures are the custody and guardianship and the visiting rights[361].

The 'custody and guardianship of minors' and the establishment of the family home therefore are conferred by parental authority and is made necessary by the non-custodial parent in order to maintain and exercise the duties of the parental responsibility[362]. Ivars Ruiz states that the exercise of parental responsibility can be considered a general concept and the 'custody and guardianship' as an element of parental responsibility. Custody and guardianship facilitate the exercise of parental responsibility and responds to the requirement to have the children in the company of the parents, as the Civil Code states. Custody and guardianship imply more than merely living with the child, as the custodial parent will be more involved in the everyday life of their child. Custody and Guardianship therefore mean caring for the minor in all aspects of their daily life[363].

When the parents live together, it is not necessary to distinguish between capabilities or duties of the parental authority, as all the duties that encompass the parental authority are exercised between both parents in the home. When breakup occurs, or there is no cohabitation of the parents, brings forth the question of who takes care of the child, who decides the main issues of the upbringing and, in the case of sole-custody, how the non-custodial parent – without legal custody – will have contact with their child[364]. The content of parental authority without cohabitation of the parents should be concretized adequately, as the non-custodial parent should effectively exercise the duty to look after the child and to oversee his or her development[365].

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360 Joaquín Ivars Ruiz (ed), *Guarda y Custodia compartida, aspectos procesales y sustantivos. Doctrina y Jurisprudencia* (Tirant Lo Blanch 2008) 28.

361 Rabadán Sanchez-Lafuente, 44.

362 STS 566/2017 de 19 de Octubre 2017, Fund Sexto; STS 200/2014 de 25 de Abril, Fund Cuarto; Rivera Alvarez,139 – 140.

363 Paloma Zabalgo, 'La custodia compartida en la jurisprudencia actual del Tribunal Supremo' (2017) 9088 Diario La Ley 1, 2.

364 Rabadán Sanchez-Lafuente, 44.

365 CC, art 154; Agueda Rodriguez, 15.

Custody and Guardianship was not a unitary concept until the Act 15/2005. The law before 2005 used the concept of 'care' of the child, referring to the upbringing of the child on a daily basis[366]. Case law often used the word 'guardianship', but both terms are presented in several judgments of the High Court and the dual concept 'Custody and Guardianship' has been consolidated in the doctrine[367]. It is only after the Act 15/2005, that the Civil Code refers explicitly to this institution merging both principles as 'Custody and Guardianship'[368].

Both terms are effectively used as synonyms in Spanish law, referring indistinctly to 'guardianship' and others to 'custody' or 'care'[369]. There is no legal definition of the 'custody and guardianship', and this lack of definition has brought some confusion about the subject in the legal framework. It can be assumed that custody is the duty of the parents to care for and provide maintenance for their children as a consequence of filiation as well as the responsibility to have them in their company[370]. The doctrine states that custody goes beyond cohabitation or residence of the child and even can be defined the exercise of the parental authority[371]. According to Lathrop Gomez[372]. Zanón Masdeu observes that the duty to have them in their company should be understood in the broadest sense, as not only providing a personal company and a same roof, but also affection and care, linked with the duty to 'take care of them'[373]. Some

366 See Ley Orgánica 11/1981 de 13 de mayo; Ley Orgánica 30/1981 de 7 de julio; Lathrop-Gomez, *Custodia Compartida de los hijos*, 48.

367 STS 5707/2009 de 28 de Septiembre; STS 6004/2002 de 29 de Septiembre, Fund Primero; Lathrop-Gomez, *Custodia Compartida de los hijos*, 48.

368 CC, art 92.

369 See more in Lathrop-Gomez, *Custodia Compartida de los hijos*, 48-49.

370 CC, art 110; STS 566/2017 de 19 de Octubre 2017, Fund Sexto; STS 200/2014 de 25 de Abril, Fund Cuarto; STS 5333/1983 de 19 de octubre. See also Aurora Romero Coloma*, la guarda y custodia compartida, una medida familiar igualitaria* (Editorial Reus 2011) 4.

371 Agueda Rodriguez, 17; Lathrop-Gomez, *Custodia compartida de los hijos,* 49-50; Luis Felipe Ragel Sanchez, 'La Guardia y Custodia de los Hijos' (2001) 15 Derecho Privado y Constitución, 281, 289; Luis Zanón Masdeu, *La Guardia y Custodia de los Hijos* (Bosch 2002) 83; Romero Coloma, 4; Cristina Zafra Espinosa de los Monteros, *Nadie Pierde: la guarda y custodia compartida: Aspectos Jurídico- Procesales* (Dykinson 2018) 125.

372 Lathrop-Gomez *Custodia compartida de los hijos,* 50.

373 Zanón Masdeu, 83.

authors go further and consider that custody and guardianship include the personality development of the child and the guarantee of a healthy environment for personal and social enrichment[374].

According to Spanish legislation, both parents legally possess parental authority while there are two different models of custody: sole or exclusive custody and joint or shared custody. The first model exclusively gives custody – the physical living with the child and legal residence of the minor – of the child to one of the parents, but the other parent has contact and visiting rights regarding the child[375], which can be more or less broad depending on the case. The second model gives both parents custody of the child for periods of time clearly defined in an alternate basis. In Spain, it has been agreed that the joint custody should be named 'alternate' joint custody arrangement, as the child alternates living with each parent for periods of time (months, weeks or even days). This means that, while there is joint custody, both parents alternate or shift living with the child. As ‚alternate custody' is not yet recognized in the legal framework, the officially termed 'joint custody' permits that both parents are substantially involved in the life of the child and that an alternating arrangement depends on each individual case.

At the time of writing, both models are accepted in Spain, but sole custody was the model until 2005. The second model, joint custody, was expressly introduced in 2005 in the law, but it was not until the judicial decision of the High Court in 2013 that it was not accepted with the time. Articles 90,92, 94, 103 on marriage and divorce proceedings and articles 156 to 161 on parental authority rule on the custody and guardianship and visitation rights in the Civil Code[376]. The new Law 15/2005 about joint custody amends those articles referring to marriage and divorce, but not those referring to parental authority. That fact brought some confusion in the approval of the Law that will be covered afterwards[377].

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374 See Antonio Monserrat Quintana, 'La Custodia compartida en la nueva Ley 15/2005 del 8 de Julio' (2006) 23 Practica de Tribunales. Revista de Derecho Procesal Civil y Mercantil 6, 6-14.

375 Roda y Roda, 126.

376 CC, art 90; CC, art 92; CC, art 94 and CC, art 103 (Titulo III); CC, art 156-161 (Titulo V).

377 See chapter 3.4 of the study.

According to Roda, the pressure coming from social movements and the change in parental roles in society has encouraged institutions to define the scope and conditions of joint custody more clearly in Act 15/2005, with the purpose that joint custody would be more socially and judicially accepted[378].

## 3.3 THE INTRODUCTION OF JOINT CUSTODY IN SPAIN

The introduction of joint custody in Spain began with the Act 15/2005 about marriage and separation[379] but – as mentioned above – the changes of 2015 concretized the concept of the best interests of the child in Spain. For this reason, we will also briefly explore this reform[380] .

The Act defines joint custody or shared custody as 'the situation, the result of the end of cohabitation between the parents of a child, in which both take charge of the daily attention of the child, assuming jointly the parental responsibility and sharing the maintenance of the child'[381].

The Civil Code and most regional legislation do not define the institution of joint custody. Only The Catalan Civil Code establishes that the custody must be exercised together by both parents and includes the cohabitation of the parents with the child[382] but does not include a concept of shared custody.

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[378] Roda y Roda, 127.

[379] Ley Orgánica 15/2005 de 8 de Julio.

[380] Ley Orgánica 8/2015 de 22 de julio; Ley Orgánica 26/2015 de 28 de julio.

[381] Encarna Roca Trias, 'Libertad y Familia: discurso leído el 10 de diciembre de 2012 en el acto de recepción pública como académica de número' Real Academia de Jurisprudencia y Legislación (Madrid 2012).

[382] Codigo Civil Catalán art 233 (8) and (9). Also Ley 5/2011 de la Comunidad Autónoma Valenciana art 3 states a more precise concept and defines the joint custody as the system instructed to regulate and organise the living of the no-cohabitant parents with their children or minors, characterised by an equal and rational distribution of the time of cohabitation of each parent with their children, previously settled by an agreement or by judicial decision'. However, the Valencian Act was declared inconstitutional in 2016 by Sentencia del Tribunal Constitucional (STC) 192/2016 de 16 de Noviembre.

Thus, the new legislation of joint custody has been unclear in the terms and the framework of application. Several authors highlight the confusion in the wording of the legislation, as it does not define the competencies allowed by the new institution of joint custody. Ivars Ruiz states that joint custody could only be practical in the praxis in the 'alternate model' – and not so much jointly – when the parents do not live together, as the children should alternate homes to live with both parents and to maintain a consistent relationship[383]. Garcia Rubio and Otero Crespo believe that the institution of 'custody' refers to all aspects of the exercise of parental authority linked with the daily needs of the child and the cohabitation with him or her[384]. Therefore, the main modification of Article 92 CC is the somewhat unclear assertion that joint custody is a model for the exercise of parental authority, which the legislator wants to favour[385].

The main changes in legislation across Europe in recent years relate to curbing overregulation of the family and to give more autonomy to families. An example is the reduction of obstacles to unmarried parents to hold parental responsibilities or making it easier to file for divorce. Spain has followed the continental trend and the Law in 2005 gives, for instance, more options for divorce including 'express divorce', which circumvents the mandate for prior separation or the rule of having to have been married three months. Secondly, it gives more autonomy to the parents to make quick decisions in an emergency situation[386]. However, parental autonomy can be restricted by authorities in several circumstances[387], for example the harm to the best interests of the child or disagreement of the parents about an issue concerning the child.

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383 Ivars Ruiz, 37-38; Diego Becerril and Mar Venegas, *La custodia compartida en España* (Dykinson 2017) 47.

384 Maria Paz Garcia Rubio and Marta Otero Crespo, 'Apuntes sobre la referencia expresa al ejercicio de la guardia y custodia de los hijos en la Ley 15/2005' (2006) 8 Revista Jurídica de Castilla y León 69, 72.

385 Ivars Ruiz, 37-38.

386 Teresa Picontó Novales (ed) *La Custodia Compartida a Debate* (Dykinson 2010) 50-51.

387 See CC, art 92, the judge can decide to grant a shared custody when the parents do not agree about this modality, only if shared custody will be the best option to protect the best interests of the child and if the report of the Public Prosecutor is in favour. The binding report of the Public Prosecutor has been abolished by the Constitutional Court.

### 3.3.1 THE LAW-MAKING PROCESS OF THE LO 15/2005 IN SPAIN

Shared parental authority has been recognized by the Law for both parents since 1981. However, shared custody after a divorce or separation or when the parents do not live together has undergone several changes in recent decades. Custody was given to the mother[388] with restricted visiting rights for the father, based on traditional, societal and psychological tendencies to consider the mother as the main caretaker of the child and in the old article 156 CC about parental authority, which stated, 'if the parents live separated and they do not have an agreement, the children under seven years old will be left in the care of the mother, unless the judge will decide if there are especial reasons to do differently'[389]. Another important change in this perspective arrived in 1990, with the Law 11/1990, which changed article 156 CC. This Review eliminates the allusion in the law to the exclusive care of the mother for children under seven years old and banishes also any discrimination based on gender[390]. The Act has enabled future judgments to recognise the capacity of fathers to care for their children and the best interests of the child prevents the discrimination against the father in these cases[391]. From 2000 onwards, the primacy of the mother as the main guardian of the child in case law began to fade, producing an increase in the recognition of more extended visiting rights for the non-custodial parent[392].

Joint custody was not specifically prohibited in the laws before 2005 but was also not expressly codified. Therefore, several judicial authorities began to grant joint custody, especially when the parents agreed and when it was for the best interests of the child, which is the guiding principle. The fundamental ruling in Spanish law which states that what is not expressly prohibited by the law may still be permitted, together with

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388 See STS 8030/2012 de 10 de diciembre, Fund Cuarto ; STS 1161/1982 de 11 Octubre, Fund Tercero; STS 146/1984 de 2 Octubre.

389 CC, former art 156.

390 See Ley Orgánica 11/1990 de 15 de Octubre sobre reforma del Codigo Civil, en aplicación del principio de no discriminación por razón de sexo.

391 Garcia Rubio and Otero Crespo, 78.

392 Garcia Rubio and Otero Crespo, 79.

the parents' autonomy and the general rule of the dual exercise of parental authority, allowed the viability of joint custody[393]. However, the courts, especially the regional or 'minor' courts, only conferred shared custody in exceptional cases before the Act 15/2005 – as it was not expressly prohibited by the law. In some cases, to make up for a lack of a comprehensive shared custody regime, generous visiting rights were afforded to the non-custodial parent prior to 2005[394].

As noted above, case law was reluctant to allow joint custody before the legislation changed in 2005[395]. Before 2000, the judgements tended to give custody only to one of the parents, usually the mother. Joint custody was given only in cases where the parents agreed to it and their relationship was adequate and cooperative regarding the decisions concerning the child[396]. According to the decision of the regional court from Valencia in 1999 – one of the first courts to give joint custody – both parents should decide together 'the designation of the school, medical interventions, participation in travel, risky activities or any other activity that may seriously affect the harmonious development of the children'[397].

2004 saw the beginning of legal action concerning the rules regarding separation and divorce, which introduced the joint custody in the law as a solution for child's arrangements after divorce. Simultaneously, the law-making process of the LO 13/2005, was initiated to legalize same-sex marriage. This coincidence helps to contextualize the

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393 Lathrop-Gomez, *Custodia compartida de los hijos*, 412.

394 Roda y Roda, 150; see Sentencia del Tribunal Supremo (STS) de 22 de Mayo 1999 (RJ 1999/3358); Sentencia Audiencia Provincial (SAP) Jaén, (Sección 1a) de 29 de septiembre de 2000 (JUR 2000/302290); Audiencia Provincial de Castellón (Sección 2a) de 14 de julio de 1998 (AC1998/1429), SAP de Jaén de 20 de febrero de 1998 (AC 1998/4077); see also Joaquín Rivera Alvarez, 'La custodia compartida:génesis del nuevo art. 92 del Código Civil' (2005) 18 Cuadernos de Trabajo Social 137, 137-162.

395 See Sentencia Audiencia Provincial (SAP) Jaén (Sección 1a) de 29 de septiembre de 2000 (JUR 2000/302290); Sentencia Audiencia Provincial de Castellón (Sección 2a) de 14 de julio de 1998 (AC1429/1998); SAP de Jaén de 20 de febrero de 1998 (AC 4077/1998); see also Rivera Alvarez, 137-162.

396 See Sentencia Audiencia Provincial (SAP) Valencia SAP 9730/1999 de 22 de abril de 1999 (AC 9730/1999); see also SAP Álava de 7 de mayo de 1996 (AC 1996/1008); SAP Baleares (Sección 5) 19 Abril 1999 (AC 249/1999).

397 Sentencia Audiencia Provincial (SAP) de Valencia de 22 de abril de 1999 (AC 9730/1999).

focus of the media during this period. As Garcia Rubio and Otero Crespo note, media coverage of, and public discourse surrounding, the introduction of shared custody overshadowed the other reform within Family Law, namely the introduction of same-sex marriages in traditionally catholic Spain[398].

Since the beginning, the LO 15/2005 on separation and divorce faced a main problem that deepened in the confusion about the shared custody and kept the focus on the parents and not on children. As Rubio and Crespo note, shared custody is designed to rule the exercise of parental responsibility and parent-child relationships. However, this topic has been addressed in a Law project designed to modify the ruling of divorce and separation[399]. According to the authors, this is one of the first mistakes of the law, as the reform is focused on the divorce and family breakdown and not on the parent-child relationship. Shared custody should be modifying the articles in the Civil Code related to parental responsibility (article 154 and thereof) and not articles related to separation. As Otero Crespo and Garcia Rubio note, the legislator ignores what happens with children born out of wedlock when parents separate[400].

Therefore, the main articles on shared custody that are changed include article 90 of the Civil Code (regarding the divorce agreement) and principally, article 92 of the Civil Code regarding the measures on the custody of children. The prior version of article 92 addresses some issues concerning the exercise of parental authority[401] for example, the right of the children to be heard by the courts in all decisions regarding their custody, care, and education[402] and the capability of the parents to decide by agreement the modalities of exercise of parental responsibility[403].

398 Garcia Rubio and Otero Crespo, 69.

399 Garcia Rubio and Otero Crespo, 69.

400 Garcia Rubio and Otero Crespo, 3; Jose Manuel de Torres Perea, 'Custodia Compartida: Una alternativa exigida por la nueva realidad social' (2011) 4 Indret Revista para el análisis del Derecho 3, 13.

401 CC, former art 92.

402 CC, art 92 (3).

403 CC, art 92 (4).

The new reforms of the Law have liberalized divorce, abolished the fault grounds, and have accelerated the process, with separation no longer a precondition for divorce[404]. The Act 15/2005 encourages the shared custody of children, introducing for the first time expressly in law the possibility that shared custody may be agreed by the parents or, in special circumstances, required by the judge[405].

The introduction of shared custody in Spain began in 2004 through a legal project presented by the Ministry of Justice in the parliament. The main objective was to break the sole-custody tendency in the courts and simplify the divorce proceedings[406].

The Bill proposed to change article 92 of the Civil Code to establish the possibility to state a shared custody system in Spain. According to several authors, the legal modification has its origins in the pressure made by some advocacy groups to introduce shared parental custody in the Spanish legislation[407]. As the Report for the Department of Justice states, joint custody was introduced as a legislative measure to overcome the family breakdown and was expected to be 'with agreement between the parents'[408]. The Bill introduces both modalities of joint custody: by agreement of the parents or the so-called 'imposed' joint custody, decided by the judge for the benefit of the children[409].

The Explanatory Report of the Bill states in the first paragraphs that the law is expected to give more 'autonomy to the marriage' and strengthen the principle of freedom inside the marriage, also including the freedom to choose to end the marriage and/or live separately and the arrangement of children. As stated before, the intervention of the

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404 CC, art 81.

405 Eriika Oinonen, *Families in Converging Europe: A Comparison of Forms, Structures and Ideals* (Palgrave MacMillan 2008) 93.

406 Rivera Alvarez, 157; see also Garcia Rubio and Otero Crespo, 138

407 Roda y Roda, 156; Viñas Maestre, 1-16. We would analyse in the next chapter if this pressure arose and if was shipped to the media.

408 Rivera Alvarez, 157; see also Consejo de Ministros (CM) Ministerio de Justicia, 17 Septiembre 2004 [2004] <http://www.lamoncloa.gob.es/consejodeministros/referencias/paginas/2004/c1709040.aspx#Divorcio>(last visit 19.01.2022)

409 Consejo de Ministros (CM) Ministerio de Justicia, 17 Septiembre 2004 [2004] http://www.lamoncloa.gob.es/consejodeministros/referencias/paginas/2004/c1709040.aspx#Divorcio> (last visit 20.01.2022)

judge is justified only in situations where the content of the divorce agreement could be detrimental for children or disabled[410].

According to the Bill, the main purpose of the Review is to ensure the 'best realisation of the interests of the children involved' and, for the parents, 'to reinforce the perception that the responsibility for the children continues' but requires 'a due diligence from the parents in the exercise of parental authority'[411]. The Bill considers also that the parents should determine, in the divorce agreement, if the custody should be exercised by one of them or by both jointly and should determine, in any case, in the best interests of the minor how the child will maintain the relationship with the parent he or she does not live with. Furthermore, the parents should also agree on how they will achieve the principle of co-responsibility in the exercise of the responsibilities[412]. As noted, herein lies a misunderstanding on the terms, as exercising the parental responsibility is mistakenly conflated as custody. Both hold and exercise parental responsibility separately, but the exercise of parental responsibility entails duties that go further than the residence of the child[413].

Focusing on joint custody, the Bill considers it necessary to change article 92 of the Civil Code and that joint custody is agreed to by the parents or set by the judge (if the parents do not agree), deciding that custody would be exercised jointly or by one of them[414].The judge should decide favourably for joint custody only after hearing the child (If they are over 12 years old), with a favourable report from the public prosecutor and only if the arrangement is judged to be in the best interests of the child[415].

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410 Ministerio de Justicia, Anteproyecto de Ley de Modificación del Código Civil en materia de separación y divorcio (Madrid, 20 Septiembre 2004) Exposición de Motivos and para 15.

411 Ministerio de Justicia, Anteproyecto de Ley de Modificación del Código Civil en materia de separación y divorcio (Madrid, 20 Septiembre 2004) Exposición de Motivos, para 17.

412 Ministerio de Justicia, Anteproyecto de Ley de Modificación del Código Civil en materia de separación y divorcio (Madrid, 20 Septiembre 2004) Exposición de Motivos, para 18.

413 See Garcia Rubio and Otero Crespo, 69.

414 Ministerio de Justicia, Anteproyecto de Ley de Modificación del Código Civil en materia de separación y divorcio (Madrid, 20 Septiembre 2004), Exposición de Motivos, para 4.

415 Ministerio de Justicia, Anteproyecto de Ley de Modificación del Código Civil en materia de separación y divorcio (Madrid, 20 Septiembre 2004), Exposición de Motivos, para 4.

On 27 October 2004, various mothers' organisations protested against the new reform and sent a document to the Government, stating that 'all the consequences' the law could have on mothers have to be explored[416]. These associations alleged that in most of the cases, the father does not ask for custody of the child, or the joint custody is not decided 'by agreement'. On the other hand, the Association of Separate Fathers wanted to propose the joint custody as a general norm, so they could share all responsibilities concerning the child but also complained that the Government did not consult the father's associations and social movements before the proposition of the law[417].

A report which proved decisive in the change in the Bill was the Report of the General Council of Justice (CGPJ). The main Justice institution put the focus on children and aimed to introduce a mention to the principle of the best interests of the child in the Bill, even considering positively the new proposal of the joint custody. According to the Council of Justice, the joint custody is for the best interests of the child. The CGPJ specifies that the judge, in cases of disagreement between parents on the custodial arrangement, should decide in the best interests of the child, taking into account also the development of the child's personality and a cohesive affective and education model for the children[418].

The Institute of Family Politics added that the exercise of joint custody is 'misguided from a juridical, familiar, psychological and social point of view'[419], while the Association of Women Jurists 'Themis' stated that joint custody arrangements are prejudicial for chil-

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416 Roda y Roda, 157; see for example Ana Maria Pérez del Campo Noriega, 'Información y propuestas de la Federación de Asociaciones de Mujeres Separadas y Divorciadas al Proyecto del Gobierno sobre Modificación del Código Civil en materia de Separación y Divorcio', Federación de Mujeres Divorciadas y Separadas (Madrid, 20 September 2004); Ana María Pérez del Campo Noriega (Presidenta Federación de Mujeres Divorciadas y Separadas), Pedro Nuñez Morgades (Defensor del Menor) and Angela Alemany (Asociación de mujeres Juristas Themis) in 'La ley del divorcio que el Gobierno prevé aprobar hoy enfrenta a las madres y los padres separados' *El Mundo*, (Madrid, 17 September 2004) <http://www.elmundo.es/elmundo/2004/09/16/sociedad/1095351910.html> (last visit 19.01.2022)

417 La ley del divorcio que el Gobierno prevé aprobar hoy enfrenta a las madres y los padres separados' *El Mundo*, (Madrid, 17 September 2004) <http://www.elmundo.es/elmundo/2004/09/16/sociedad/1095351910.html> (last visit 20.01.2022); Rivera Alvarez, 158.

418 Comisión de Estudios e Informes, 'Informe al Anteproyecto de Ley en materia de separación y divorcio' Consejo General de Poder Judicial (27 Octubre 2004) para 2.

419 Instituto de Politica Familiar, 'Informe sobre el Anteproyecto de Ley en materia de Separación y Divorcio. Análisis y Propuestas' (Noviembre 2004).

dren, as the children will not have a 'referential home'. This association added it would be better not to grant the joint custody in case of 'disagreement' between both parents[420].

According to some authors, joint custody is not exactly a novelty, as it has already been considered by case law before. However, for other scholars, the new reform was made to enhance the existing, yet informal, model of joint custody and to prevent confrontations between parents for the decisions regarding their common children[421]. The new Bill offers, according to the doctrine, an explicit legal basis to adopt the joint custody and has had a 'educational and informative effect' on society including the public and institutions, which it has been expressed in various regional norms entered into force in the last decade in Spain[422].

Some parties went against the wording of article 92 and proposed to jointly change 'alternate' custody, as it was closer to reality as it was impossible to achieve practical 'joint custody' if the parents do not live together. Also, it was considered that the joint custody in the Civil Code – understand as co-exercise – it was contemplated already in law as an element of parental responsibility[423]. The ERC party suggested replacing 'joint' with 'alternating custody' in order to add the co-exercise of parental authority to the alternation of caring for the child[424]. However, the statement was not introduced, as it was ruled that introducing alternate custody would introduce a unique model of exercise of parental authority and the Review wanted to keep the modality flexible on how joint custody is exercised in practice[425].

According to the Socialist party, the main aim of the Review was to encourage the co-responsibility of the parents and to promote co-responsibility for effective decision-making concerning the child[426].

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420 see Rivera Alvarez,158.

421 Roda y Roda, 158.

422 Viñas Maestre, 1-55; see also Roda y Roda, 158; Garcia Rubio and Otero Crespo, 70; Ivars Ruiz, 45.

423 Boletin Oficial de las Cortes Generales (BOCG) Serie A, no 16-8 [15 Marzo 2005].

424 Boletín Oficial de las Cortes Generales (BOCG) Serie A, no 16-8 [15 Marzo 2005].

425 Diario de Sesiones, Congreso de los Diputados, Comisiones, no 242 [6 Abril 2005].

426 Diario de Sesiones, Congreso de los Diputados, Comisiones, no 242 [6 Abril 2005].

One of the main debated issues is the imposed joint custody, which implies that the judge may grant joint custody on the request of one parent, even without the agreement of the other if this custody model is in the best interests of the child. Some associations and parties proposed to approve joint custody only with the agreement of both parents[427] and to leave the imposed joint custody option out of the review. Others proposed not to close the door for a single petition of custody as mothers take complete responsibility for the care of the child, which makes the imposed joint custody necessary in order to give them the chance to 'share that responsibility'[428], even with disagreement from the other parent. In their opinion, including imposed joint custody will lead to this model becoming the rule rather than the exception and the principle of co-responsibility will be granted[429].

The introduction of a joint custody decision where there is disagreement between parents was the subject of an intense debate in Parliament before the Review entered into force. Some authors and political parties called for the notion of imposed joint custody to be an exception, to only be granted in cases where there is good communication and agreement between parents was awarded[430]. The Review considered that in case of disagreement of both parents, the judge could decide the joint custody only if the measure is in the best interests of the child[431].

Other proposed amendments seek to reinforce the guarantees for the best interests of the child where there is disagreement between both parents[432]. Moreover, it was proposed to present a 'plan of co-responsibility' which divides time between the parents with the child and delegates responsibilities to the parents individually[433] and would

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427 Boletin Oficial de las Cortes Generales (BOCG) Serie A, no 16-8 [15 Marzo 2005] enmienda 79.

428 Diario de Sesiones, Congreso de los Diputados, Comisiones, no 242 [6 Abril 2005].

429 Diario de Sesiones, Congreso de los Diputados, Comisiones, no 242 [6 Abril 2005].

430 See Boletin Oficial de las Cortes Generales (BOCG) Serie A, no 16-8 [15 Marzo 2005] enmiendas 30, 40 and 81; Boletin Oficial de las Cortes Generales, Senado (VIII Legislatura) Serie II [5 Mayo 2005] no 14 (A) Enmienda 26; see also Diario de Sesiones, Congreso de los Diputados, Pleno y Comisión Permanente, no 84 (21 Abril 2005).

431 CC, art 92 (8).

432 BOCG, Serie A, num.16-8, [15 Marzo 2005] enmiendas 32 and 42.

433 BOCG, Serie A, num.16-8, [15 Marzo 2005] enmienda 81; Laura Alascio and Ignacio Marin, 'Juntos pero no revueltos: la custodia compartida en el nuevo art. 92 CC' (2007) 3 Indret Revista para el Análisis del Derecho 2, 15.

respect the principle of co-responsibility of both parents towards the child advocated by the Government in the Review.

The principal additions are introduced in article 92, as paragraphs 5, 6, 7 and 8. These paragraphs define the criteria to grant or decide shared custody. According to these last paragraphs, shared custody is granted when both parents apply for this arrangement in the divorce agreement or if both agree during the divorce proceeding[434]. Also, the judge can grant joint custody – what is called 'imposed joint custody' – if only one parent applies for it and the judge considers it to be the best model for the child, but this granting of a 'imposed' joint custody is specifically stated as 'exceptional'[435]. The Judge should adopt any measures needed for the fulfilment of the shared custody while working to avoid sibling separation. In addition, the judge must hear the child – when he/she is older than 12 years old – and request the opinion of the Public Prosecutor and specialists and verify the relationship between the parents to establish their suitability for shared custody[436].

In light of the arguments in favour of and against joint custody, paragraph 8 of article 92 CC introduces conditions under which joint custody is granted. Paragraph 8 gives judges the authority to grant joint custody at the request of one of the parties under two conditions: 1) with a previous, compulsory and 'favoured' Report of the Public Prosecutor for the joint custody, considering that this model is the best solution and 2) when the judge considers the joint custody is in the best interests of the child[437]. The Constitutional Court eliminated the word 'favoured' of the Report of the Public Prosecutor, considering the word unconstitutional[438] as it restricts the capacity of the judge to decide freely. Hearing the claims of the women's social movements, the Government improved the proposal and added that shared custody shall not be granted when either parent is the subject to criminal proceedings for domestic violence[439].

434 CC, art 92 (5).

435 CC, art 92 (8).

436 CC, art 92 (6).

437 CC, art 92 (8); see also Rivera Alvarez 139; Garcia Rubio and Otero Crespo, 89.

438 Sentencia del Tribunal Constitucional (STC) 185/2012 de 17 de octubre.

439 CC, art 92 (7).

A main issue to point out is a mistake in the voting process of the modifications aimed to improve the Paragraph 8 of article 92. According to the proposed changes made in the Senate, it was originally planned to introduce some conditions to grant the shared custody where there is disagreement between the parents[440]. These criteria aim to guide the judge and are understood to further clarify the protection of the best interests of the child. Some of these criteria include the age of the children, the place of residence or the working hours of the parents[441]. However, because of a mistake in the voting process[442] these criteria never entered into force. Therefore, the Organic Law 15/2005 entered into force the 10th July 2005 without these criteria and kept the decision on joint custody arrangements reliant on the case and circumstances of the family. What remains unclear is why the Government or any other party did not resolve the mistake in the ensuing years. It was not until the Laws entered into force in 2015 seek to help the judges determine the best interests of the child. As mentioned before, the Law 26/2015 about the minors' protection establishes criteria to determinate the best interests of the child which can be applied also in custody arrangements, whilst not being limited to them.

The criteria that did not enter into force in the Organic Law 15/2005 are very specific about the conditions to decide the joint custody arrangements. It can be gleaned that the legislator had in mind more autonomy for the family – and more for the courts – when drafting these criteria regarding joint custody. Also, if the aim of the legislator was to promote joint custody, it is logical to keep the model without any other condition than a general clause or principle as the best interests of the child, which differs in each case.

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440 BOCG, Senado, VIII Legislatura, Serie II (5 Mayo 2005) no 14 (A); Garcia Rubio and Otero Crespo, 93.

441 Garcia Rivas, 87.

442 Diario de Sesiones, Congreso de los Diputados, Pleno y Comisión Permanente, no 84 (21 Abril 2005) 91. Garcia Rivas, 77-102. The mistake was a main issue in the voting process of two main amendments. The amendments 37 and 38 referred to paragraphs 8 and 9 of the reform and were intended to qualify the power of decision of the judge about the joint custody when there were no agreement between the parties. The amendments included, for example, some criteria to guide the judge in the appeals for joint custody and were understood to look at the best interests of the child Mistakenly, the Party in the Government voted against these two amendments, which previously were defended by the spokesman of the Party in the Parliament.

### 3.3.2 THE JOINT CUSTODY AND SHARED PARENTING IN THE NEW REFORM

There are three key reforms made by the Law 15/2005 and more specifically, in the new section 92 CC: 1) the recognition of the right to be heard of the child, 2) exercise of parental responsibilities agreed in the divorce agreement and 3) the possibility of the joint custody, which should also be included in the divorce agreement[443].

The main objectives of the Review are to reinforce the autonomy of the family to decide by themselves – in the case of divorce, within the divorce agreement – the distribution of family duties and parental responsibility and to promote the joint custody as a valid model for the arrangements of the child. The parents should declare, therefore, on the divorce agreement whether parental responsibility will be exercised by one or by both and the circumstances of this exercise. The support of the lawmaker to this autonomy is clearly expressed in the explanatory report of the law and on the obligation for the judge to decide the joint custody only at the request of one of the parents[444].

The other main aim of the reform was to promote the joint custody as the model that protects better the best interests of the child and the right of the child to be cared by both parents. However, it was pointed out by jurists and parliamentarians that the joint custody demands a minimum of collaborative communication between the parents[445]. For this reason, the new article 92 includes two different forms of shared custody: the 'agreed' shared custody, requested by both parents and which should be indicated in the divorce agreement and the 'exceptional' joint custody, requested only by one of them and decided by the judge in court[446]. The condition for the exceptional joint custody – or imposed custody by the judge – is that the measure should be rooted in the best interests of the child.

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443 CC, art 92; Rabadán Sanchez-Lafuente, 49.

444 Rabadán Sanchez-Lafuente, 50; Raquel Castillejo, *Guardia y custodia de Hijos Menores. Las Crisis Matrimoniales y de Parejas de Hecho. Procesos delcarativos especiales en la LEC* (La Ley 2007) 358.

445 see Diario de Sesiones, Congreso de los Diputados, Comisiones, no 242 [6 Abril 2005].

446 Zafra Espinosa de los Monteros, 131-132; Ivars Ruiz, 46.

After the approval of the Law 15/2005, parental authority after marriage breakdown or if the unmarried parents do not live together, is ruled by the new article 92 CC.

The current article 92 of the Civil Code states:

1) Separation, annulment, and divorce shall not exonerate parents from their obligations to their children.
2) When the Judge is to adopt any measure relating to custody, care and education of underage children, he shall ensure compliance with their right to be heard.
3) The judgement shall order the deprivation of parental authority when grounds for this should be revealed in the proceedings.
4) The parents may agree in the settlement agreement, or the Judge may decide, for the benefit of the children, that parental authority be exercised in whole or in part by one of the spouses.
5) Shared care and custody of the children shall be decreed where the parents should request it in the settlement agreement proposal or where both of them should agree on this during the proceedings. The Judge, in decreeing joint custody and after duly motivating his resolution, shall adopt the necessary precautions for the effective compliance of the agreed custody regime, trying not to separate siblings.
6) In any event, after decreeing the care and custody regime, the Judge must ask the opinion of the Public Prosecutor and hear minors who have sufficient judgement, where this is deemed necessary ex officio or at the request of the Public Prosecutor, the parties or members of the Court Technical Team, or the minor himself, and evaluate the parties' allegations at the hearing and the evidence practised therein, and the relationship between the parents themselves and with their children to determine the suitability of the custody regime.
7) No joint custody shall be granted when either parent should be subject to criminal proceedings as a result of an attempt against the life, physical integrity, freedom, moral integrity or sexual liberty and integrity of the other spouse or the children who live with both of them. Neither shall it apply where the Judge should observe, from the parties' allegations and the evidenced practiced, that there is well-founded circumstantial evidence of domestic violence.

8) Exceptionally, even in the absence of the circumstances provided in section five of this article, the Judge, at the request of one of the parties, with the favourable report of the Public Prosecutor, may decree the shared care and custody based on the argument that only thus is the minor's higher interests suitably protected.
9) The Judge, before adopting any of the decisions mentioned in the preceding paragraphs, ex officio or ex parte, may ask for the opinion of duly qualified specialists relating to the suitability of the form of exercise of parental authority and the minors' custody regime.

Shared custody refers to the doctrine of both parents participating actively and responsibly, in the process of raising their children with both having the possibility of taking care of their children in a balanced way, as well as representing them legally[447]. The Law also introduced the possibility to appeal to mediation where there is disagreement between the parents about custody or other decisions that can affect the normal development of the child[448]. One main insertion of the Law is the necessary collaboration of married couples in the family responsibilities and the care of children and dependents[449] which reinforces the idea of parental co-responsibility, not only in married couples but also for divorce and unmarried parents.

The view of essential co-responsibility of both parents with respect to increased involvement of the father in the family responsibilities has grown in recent years[450]. Increasingly, the fathers request the custody of children and to be more involved in their children's life. The High Court – as be explored in section 3.4 – has already recognised that shared custody is not only a valid model for the arrangements of the child, but also the 'normal and desirable' measure to protect the best interests of the child[451]. Also, a 2013 Bill on co-responsibility was proposed that in the end did not enter into

447 Paloma Zabalgo, 'La custodia compartida en la jurisprudencia actual del Tribunal Supremo' (2017) 9088 Diario La Ley 1, 1-6; Beatriz Morera Villar, 'Custodia Compartida Impuesta' (2018) 9 Actualidad Jurídica Iberoamericana 418, 423 – 424.

448 Ley Orgánica 15/2005 de 8 de Julio, Disposición Tercera.

449 CC, art 68 CC reviewed by Ley 15/2005 de 8 de Julio.

450 See Carmen Iglesias Martin, *La custodia compartida: hacia una corresponsabilidad parental en plano de igualdad* (Tirant lo Blanch 2019) 116 Cff.

451 STS 2246/2013 de 29 de abril, Fund Segundo.

force[452]. Later, the Explanatory Report of the Bill considered that the Law 15/2005 was insufficient for the promotion of shared custody and was therefore, necessary to satisfy the new requirements of the present-day society[453].

#### 3.3.2.1 The ambiguities of the law

One of the obstacles inhibiting new shared custody arrangements was the lack of clarity in the reform of the Law 15/2005 and the vagueness that the law introduces in the Civil Code. The Law has several ambiguities, contradictory points and adds confusion to norms already in place prior to 2005[454].

Some authors highlight the reform as confusing. First of all, the so-called imposed joint custody – decided by the judge and not by agreement – it must be requested by one of the parents, which has been criticised, as the judge should only be subject to the circumstances of the case and the best interests of the child[455]. For instance, there is no reference to article 96 of the Civil Code about the family home. The article considers that after the breakdown of the marriage or when the parents do not live together, the family home should be used by the children and the parent in which company are they staying. In that way, the article 96 CC still recognizes the sole custody of the children and the shared custody in the old way. According to this, it is still recognized that one of the parents will spend more time and will have more daily contact with the children than the other, as the Law does not establish any criteria for the designation of the

452 Intervención ministro de Justicia sobre el Anteproyecto de Ley de Corresponsabilidad Parental en caso de divorcio, separacion o nulidad, <https://www.lamoncloa.gob.es/consejodeministros/Paginas/enlacetranscripciones/190713-ruiz-gallardon.aspx (last visit 06.01.2022).

453 Ministerio de Justicia, Anteproyecto de Ley sobre el Ejercicio de la corresponsabilidad parental en caso de Nulidad, separación o divorcio (19 Julio 2013) <https://www.mjusticia.gob.es/cs/Satellite/es/1215197775106/Medios/1288781716675/Detalle.html> (last visit 07.01.2022).

454 The ambigueness was translated not only to the Civil Code, but also to the Ley Orgánica 1/2000 de Enjuiciamiento Civil.

455 Matilde Cuena Casas, 'El régimen jurídico de la vivienda familiar' in Matilde Cuena Casas and Mariano Yzquierdo Tolsada (eds), *Tratado de Derecho de Familia. Los Regímenes Económicos matrimoniales* (2nd edn, Aranzadi 2017) 413.

family home. Therefore, decisions on what to do with the family home and the exercise of parental responsibility are at the discretion of the judge[456] .

Another imprecision is paragraph 7 of article 92 CC. The new reform states that it is not possible grant the joint custody if one of the parents is accused – charged but not yet convicted – in a criminal proceeding for threatening the life, dignity, physical or/and moral integrity, freedom and sexual indemnity of the other partner or of the children and in cases where there is evidence of domestic violence[457]. The term 'charged' refers to those ongoing proceedings without judgment and can lead to misunderstandings – or worse, abuses of law. For instance, an innocent parent may be stripped of custody by the judge with a low burden of proof required from the accuser. The term 'charged' does not give any legal guarantees of certainty and legal security. Some authors note the dangerousness of the concept of 'charged' and not 'condemned' established in the legal document, which can lead to cases where a parent acts in bad faith and falsely accuses the other for the sole purpose of winning sole-custody[458].

The obligation to have a favourable Report from the Public Prosecutor to grant joint custody is another confusing paragraph of the Law. This obligation is widely viewed as an obstacle that potentially hinders the recognition of the shared custody which the law seeks to promote. Some authors criticise this as undermining the independence of the judge[459] as it gives the right to the Public Prosecutors to ban the shared custody and to add conditions to the decision of the judge. The Constitutional Court thus decided that the paragraph is unconstitutional and that the judge can grant the joint custody without this favourable Report from the Public Prosecutor[460]. According to the final

456 Cuena, 414; Garcia Rubio and Otero Crespo, 96; Ivars Ruiz 40; Castillejo, 367-368.

457 CC, art 92 (7).

458 Garcia Rubio and Otero Crespo, 96 – 97; Alascio and Marin, 14; about the consequences for children of these abuses see Carlos Montaño, *Alienación parental y custodia compartida: un desafio al trabajo social en la protección de los más indefensos: los niños y las niñas alienados* (Ebook, Espacio Editorial 2021) 73; see for example STS 1638/2016 de 13 de Abril, Fund Quinto (v).

459 CC, art 92 (8); Castillejo, 352; Garcia Rubio and Otero Crespo, 101.

460 Sentencia Tribunal Constitucional (STC) 185/2012 de 17 de Octubre, Boletín Oficial del Estado, num. 274 [14 noviembre 2012] According to the Judgment of the Constitutional Court, the word 'favourable' Report goes against art 117(3) judicial exclusivity, art 24 (effective protection of the judges and courts) art 14 (Equality before the law) and art 39 (public protection of the family)

verdict of the Constitutional Court, the Public Prosecutor is guardian to the best interests of the child, and so, his Report is aimed to protect the child but cannot undermine the independence of the judge, who has all the necessary elements to determine the interests of the child[461].

Another ambiguity of the law is the word 'only' in paragraph 8 of article 92. According to this paragraph, the Judge can grant the joint custody only if the measure corresponds with the interests of the child. Some authors state that the paragraph can be misinterpreted, as the only way to grant the shared custody is if there is no other alternative to protect the interests of the child[462].

The objective of the legislator was to promote the shared custody, but in the process of the law it was clear that some groups –from different positions- were against for different and even opposing reasons. Consequently, the legislator was cautious introducing shared custody when there was a disagreement of the parents about the custody of children. The ambiguity of the law comes from this lively debate surrounding the norm on shared custody being requested by one of the parents to the disagreement of the other. Some authors consider that the exception of the 'imposed' joint custody seeks to ensure that, when judges decide to impose joint custody, they are certain the decision is in the best interests of the child and reaffirms the exceptional character of the measure[463] in contentious proceedings.

However, the Review of 2005 spurred a change on the conception of shared parenting in Spain. The introduction of the shared custody signalled a turning point in the legal recognition of a co-responsibility of both parents towards the child. Within eight years

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of the Spanish Constitution. The Court considered the Judge should decide independently for the best interests of the child considering all the evidence and the Public Prosecutor can only give the Report as a part of the consultations the judge makes during the proceedings.

461 Sentencia Tribunal Constitucional (STC) 185/2012 de 17 de Octubre, Boletín Oficial del Estado, no 274 [14 noviembre 2012]. See also Garcia Rubio and Otero Crespo, 101; Castillejo,352-353.

462 Laura Alascio, ,La excepcionalidad de la custodia compartida impuesta (art. 92.8 CC)' (2011) 2 Indret Revista para el Análisis del Derecho, 3, 9. See also Carmen Perez Conesa, *La Custodia Compartida* (Aranzadi 2016) 46; Colección Francis Lefevre, *Relaciones Paterno-Filiales*, *Derecho de Familia* (Lefevre – El Derecho 2016) 42.

463 Alascio ,La excepcionalidad de la custodia …', 9; Carmen Perez Conesa, *La Custodia Compartida* (Aranzadi 2016) 46.

(until 2013) shared custody went from being an exceptional measure to being the main measure recognised. Therefore, from a social point of view, shared custody is now more recognized than before[464].

Another main problem of the new Reform is the lack of a definition of the term shared custody and exercise of parental responsibility and the absence of specific criteria to confer the joint custody. However, the case law has filled the gap, especially since the decision of the Supreme Court in 2009 which states some criteria already recognised in the comparative Law. The Supreme Court reaffirms the indeterminacy of the best interests of the child and considers the difficulty to define the concept[465]. Together with the legal standards specified in article 92, the courts have established the following criteria to confer the joint custody:

- Ability of the parents to reach agreements[466], a respectful relationship between parents[467], the agreement between parents on the lifestyle and education of the child[468],
- the availability of the parents to attend to the needs of the child, the distance between the parents' homes, the proximity between each other and to the referent locations of the child[469], the age and the will of the minors[470]
- and the result of the reports legally required[471].

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464 Instituto Nacional de Estadística, matrimonios, divorcios y nulidades 2019, 4. The 37.9% of couples had joint custody in 2019, against the 33% in 2018, for example.

465 Sentencia del Tribunal Supremo (STS) STS 5969/2009 de 8 de Octubre, Fund Quinto.

466 STS 4082/2013 de 19 de julio, Fund Segundo.

467 STS 5710/ 2013 de 25 de Noviembre, Fund. Cuarto; STS 5218/2015 de 17 de noviembre, Fund Quinto.

468 STS 1699/2014 de 25 de Abril, Fund. Cuarto (i); STS 1636/2016 de 12 de Abril, Fund Cuarto.

469 STS 963/2010 de 11 de Marzo, Fund Segundo; STS 5969/2009 de 8 de Octubre de 2009, Fund Quinto; STS 258/2015 de 16 de Febrero, Fund Segundo.

470 It is established in the new Ley Orgánica 15/2005 the reference to the will of the child, and the need to hear the child in the proceedings, according to the new CC, art 92 (6); STS 1699/2014 de 25 de Abril, Fund Cuarto (i); STS 1108/2021 de 24 de Marzo, Fund Tercero; STS 3863/2021 de 19 de Octubre, Fund Cuarto.

471 See STS 5969/2009 de 8 de Octubre de 2009, Fund Quinto; established by the doctrine of the Supreme Court in STS 257/2013 de 29 de Abril 2013, Fund Cuarto; and STS 4824/2011 de 7 de Julio, Fund Séptimo and Fund Octavo; see also, Conesa, 56-57.

Of course, all these criteria are directed to protect the best interests of the child[472]. However, the fact that the High Court has repeatedly expressed itself in favour of establishing the shared custody rule – as being in the best interests of the child – does not mean that shared custody is the inevitable outcome, especially where the arrangement is considered unfavourable for the child or the parents[473]. According to the High Court, the joint custody aims to approximate the model existing before the break-up and guarantee the parents the possibility to continue to exercise their parental rights and responsibilities inherent to the parental authority and to participate equally in the development and growth of the children[474]

Recently, the Council of Justice (CGPJ) considered in a public study that shared custody should be not understood as a distribution of time with the child but the effective exercise of a co-responsible parenthood. The aim – states the Council – is not to share time equally, but to equalize the dedication to the children in terms of time and effort, and to create an affective bond that allows the children to maintain both the maternal and paternal reference. However, the Council considers that any model is valid – sole custody or shared custody – and that each model must be decided on a case-by-case basis with a previous assessment of the circumstances[475]. The Council sets the criteria for shared custody decisions where the parents disagree. Example criteria includes good communication between the parents, the proximity of the homes of both parents, the willingness of the children and the parental involvement[476]. However, these criteria

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472 STS 5969/2009 de 8 de Octubre, Fund Quinto; STS 4082/2013 de 19 de julio, Fund Segundo; STS 1699/2014 de 25 de abril, Fund Cuarto (i); STS 1636/2016 de 12 de abril, Fund. Cuarto.

473 STS 748/2016 de 21 Diciembre, Fund Segundo.

474 Tribunal Supremo, Sala Primera, 'Recopilación de Criterios de la Sala Primera del Tribunal Supremo en recursos por interés casacional y en procedimientos de tutela civil de los derechos fundamentales' (Enero 2017) 3.

475 Consejo General del Poder Judicial, Guia de criterios de actuación judicial en materia de custodia compartida (25 Junio 2020) http://www.poderjudicial.es/cgpj/es/Temas/Igualdad-de-Genero/Estadisticas--estudios-e-informes/Estudios/Guia-de-criterios-de-actuacion-judicial-en-materia-de-custodia-compartida ((last visit 27.12.2021)

476 Consejo General del Poder Judicial, Guia de criterios de actuación judicial en materia de custodia compartida (25 Junio 2020) 36 <http://www.poderjudicial.es/cgpj/es/Temas/Igualdad-de-Genero/Estadisticas--estudios-e-informes/Estudios/Guia-de-criterios-de-actuacion-judicial-en-materia-de-custodia-compartida>(last visit 28.12.2021)

are only a guideline for the courts and as a matter of fact, it was very criticised by the practitioners.

#### 3.3.2.2 The preference of joint custody and co-responsibility. The step forward.

In the last decade, there have been some attempts to declare the preference to shared exercise of parental responsibility, spurred by efforts – not yet approved – to introduce the Bill of Parental Co–responsibility; an effort which persists to the date of this study's writing despite changes in government [477].

The preference towards shared custody and the view of co-responsibility of the parents towards the child first arose with the 2013 High Court decision on shared custody. In this decision, the High Court declares shared custody arrangements to generally be in the best interests of the child, considering the need of the child to have an ongoing relationship with both parents. In the Judgment of 29 April 2013, the High Court notes that the wording of article 92 does not allow to conclude that shared custody is an exceptional measure but should be considered normal and even desirable[478] because it protects the right of the children to have a relationship with both parents, also in situations of family breakdown, when this is possible[479]. The decision of the High Court foresaw in subsequent years a new period where joint custody is recognised as a measure which permits an effective relationship between each parent with the child[480].

There have been other High Court decisions High Court that widen the scope under which shared custody is granted. In 2013, the High Court stated that the best interests of the child include collaboration between both parents in the education and devel-

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477 Intervención del Ministro de Justicia, 19 julio 2013, https://www.lamoncloa.gob.es/consejodeministros/Paginas/enlacetranscripciones/190713-ruiz-gallardon.aspx (last visit 16.12.2021) and Ministerio de Justicia, Anteproyecto de Ley sobre el Ejercicio de la Corresponsabilidad parental en caso de nulidad, separacion o divorcio (19 Julio 2013).

478 STS 2246/2013 de 29 de Abril, Fund Cuarto.

479 STS 2246/2013 de 29 de Abril 2013, Fund Cuarto. The doctrine was reiterated in judgments thereafter: STS 2650/2014 de 2 Julio, Fund Segundo; STS 258/2015 de 16 de Febrero, Fund Segundo.

480 STS 258/2015 de 16 de Febrero, Fund. Segundo; STS 1108/2021 de 24 de Marzo, Fund Tercero.

opment of the child and a close relationship between the child and each parent[481]. A year later, the High Court recognised the objective benefits of joint custody for the child and the parents[482].

In recent years, the doctrine of the Court has established some circumstances for shared custody. First, the Law considers that shared custody be granted 'exceptionally' by the judge in cases of disagreement between parents only if the interests of the child is protected. According to the High Court, this exception only refers to the lack of agreement between the parents on shared custody, not any other specific circumstances and decisions where they do not agree. In the same decision, the High Court establishes that the relationship between the parents is relevant only where the relationship is harmful to the interests of the child[483].

The High Court's decisive ruling in April 2013 establishes shared custody as a 'normal and desirable' arrangement to protect the best interests of the child. However, in the same decision, the High Court considers indispensable the joint custody request by at least one of the parents. The High Court considers that if both request it, paragraph 5 of article 92 of the Civil Code shall apply, and if only one requests it and the judge considers it is convenient – in view of the reports required – for the best interests of the child, the joint custody shall be granted. According to the interpretation of the Court, the Civil Code always requires the request of at least one of the parents, without which it cannot be granted[484].

The High Court also establishes that when granting shared custody in the best interests of the child, it is necessary to motivate the decision, in favour of or against shared custody but it cannot be only a superficial motivation[485] without justification and assessing the

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481 STS 4082/2013 de 19 de julio, Fund Segundo; STS 3707/2015 de 9 de Septiembre Fund Segundo; See also STS 1164/2016 de 17 Marzo, Fund Segundo.

482 STS 1287/2016 de 17 Marzo, Fund. Segundo y Fund. Tercero. The criteria of the best interests of the child, as it was already noted, should be sufficiently motivated. STS 4924/2011 del 22 de Julio, Fund Cuarto.

483 STS 4924/2011 del 22 de Julio, Fund Cuarto.

484 STS 4082/2013 de 19 de julio de 2013, Fund Segundo; STS 4924/2011 del 22 de Julio, Fund Cuarto.

485 STS 4824/2011 de 7 de Julio, Fund Cuarto.

benefits that a shared custody arrangement will bring to the child. However, the High Court states that it does not have the authority to decide the concrete circumstances of the shared custody for the child. The High Court can only make a judgment on the Judge's decision on the best interests of the child to grant the joint custody[486] .

Subsequently, other steps have been taken to promote joint custody as the preferential model of exercising parental responsibilities in Spain. Some regions began to recognise joint custody or a system of shared exercise of parental responsibility already a year after the Law 15/2005. Aragón, Comunidad Valenciana, Cataluña and Navarra stated the preference for the shared exercise of parental responsibility. In these territories, the regional civil legislation takes precedence over the national legislation[487]. There are three main principles for the shared exercise of parental responsibility in these regions:

1. The law is based on the principle of the best interests of the child and joint custody should be favoured for this reason
2. The breakdown of the couple (married or not) does not mean the rupture of the 'parental couple'
3. The necessary gender equality in the parental responsibilities[488].

In 2013, the Government presented the Bill of Exercise of Parental Co-responsibility in case of annulment, separation, or divorce[489] proposing the review of shared custody as an alternative, but not as a preferred option – a step back from the High Court ruling in 2013[490]. Unlike the previous legislation, the new draft allows judges to decide in favour

[486] STS 1845/2012 de 9 Marzo, Fund Cuarto (A); STS 5873/2011 de 3 de Octubre, Fund Quinto.

[487] Ley de Aragón 2/2010 de 26 de Mayo, de igualdad en las relaciones familiares ante la ruptura de la convivencia de los padres; Ley 25/2010 de 29 de Julio del Libro Segundo del Código Civil de Cataluña, relativo a la persona y la familia; Ley Foral Navarra 3/2011 de 17 de marzo, sobre custodia de los hijos en los casos de ruptura de la convivencia de los padres; Ley de la Comunidad Valenciana 5/2011 de 1 de Abril, de la Generalitat, de relaciones familiares de los hijos e hijas cuyos progenitores no conviven y Ley del País Vasco 7/2015 de 30 de Junio, de relaciones familiares en supuestos de separación o ruptura de los progenitores. See also Monste Solsona, Jeroen Spijker and Marc Ajenjo, 'Calidoscopio de la custodia compartida en España' in Diego Becerril and Mar Venegas (eds), *La Custodia Compartida en España* (Dykinson 2017) 46.

[488] Solsona, Spijker and Ajenjo, 48.

[489] Ministerio de Justicia, Anteproyecto de Ley sobre el ejercicio de Co-Responsabilidad Parental en caso de nulidad, separación y divorcio, CM – 19 Julio 2013.

[490] STS 4082/2013 de 19 de julio, Fund Segundo.

of shared custody even in the case where neither of the parents requested it[491]. However, the Bill does not consider shared custody as a preferred option but states that divorce agreements should contain a 'plan for the parental co-responsibility' where the parents outline the exercise of the parental responsibilities and the arrangements surrounding custody, education, and care of the child[492].

Previous case law promoting shared custody and mandatory co-responsibility of the parents for the development of the child favour the presentation of the Bill. Also, it recognises movements in regional courts towards shared custody arrangements.

However, the project was rejected by the State Council in 2014. The next year, Parliament was dissolved before the Bill was brought to the Parliament to be voted on. The Bill states that, even if joint custody should not be the preferred model, it cannot also be used as an extraordinary measure. The purpose of the Bill was to promote joint custody as a valid model for the arrangements of the child[493] and to promote the co-responsibility of both parents towards the child.

Another step took place in 2017, when the Party 'Ciudadanos' presented a motion on the Congress[494], asking the Government to begin all necessary steps to make joint custody a preferred option. However, the political situation in Spain – as the Catalunya independence movement, the impeachment against the last Government of Partido Popular and three different elections in two years, without mentioning the problems derived by the coronavirus crisis – has since blocked all the attempts of the parties to make effective any other change in Family Law.

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491 Ministerio de Justicia, Anteproyecto de Ley sobre el ejercicio de Co-Responsabilidad Parental en caso de nulidad, separación y divorcio, Consejo de Ministros, CM – 19 Julio 2013.

492 Ministerio de Justicia, Anteproyecto de Ley sobre el ejercicio de Co-Responsabilidad Parental en caso de nulidad, separación y divorcio, Consejo de Ministros, CM – 19 Julio 2013, Exposicion de Motivos and art 1 modificando CC art 90.

493 Ministerio de Justicia, Anteproyecto de Ley sobre el ejercicio de Co-Responsabilidad Parental en caso de nulidad, separación y divorcio, Consejo de Ministros, CM – 19 Julio 2013, Exposición de Motivos.

494 Boletín Oficial de las Cortes Generales (BOCG) Serie D no 183 (28 Junio 2017) 18.

## 3.4 THE BEST INTERESTS OF THE CHILD AND JOINT CUSTODY IN SPAIN

Even if there have been attempts to advance shared custody in the Law of 2005, shared custody in Spain is not automatically presumed. The changes around the best interests of the child and the joint custody with the Law 15/2005 are ambiguous due to the legal language being cautious not to establish a presumption of joint custody in the child's arrangements and avoiding the reference to joint custody as the best model for the interests of children. However, as previously noted, article 68 of the Civil Code states the necessary co-responsibility of both parents towards their minors[495]. Shared parental responsibilities are recognized in Spain in the first reform in democracy[496] but the Law 15/2005 affords the possibility to share the exercise of this parental responsibilities through custody, an element of the parental authority. With the shift towards joint custody, even if cautiously, it was recognised that it was better for the child for both parents to be involved in daily decisions and to actively participate in raising the child.

The step towards shared parental responsibilities took place soon enough. First, the High Court considered the model of shared custody as a normal and desirable for the best interests of the child[497] and – as has already been explored – subsequent case law has reinforced this view. The promotion of the Bill on Co-responsibility became a new step forward but is not yet approved. Also, the Bill was halfway between the approval of shared custody as an alternative and the full recognition of a co-responsibility of both parents towards the child. The Bill not yet being approved gives an opportunity to finetune it and recognise the benefits of full co-responsibility of the parents towards the child.

Since the Law 15/2005, shared custody has increasingly become the preferred model in courts and divorce case law but is not yet dominant having risen from 33% to 37%

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495 CC, art 68.

496 Ley 11/1981, de 13 de mayo, de modificación del Código Civil en materia de filiación, patria potestad y régimen económico del matrimonio.

497 STS 4082/2013 de 19 de julio, Fund Segundo; STS 3707/2015 de 9 de Septiembre, Fund Segundo; STS 1164/2016 de 17 de Marzo, Fund Segundo; see about Carmen Iglesias Martin, *La custodia compartida : hacia una corresponsabilidad parental en plano de igualdad* (Tirant lo Blanch 2019).

between 2018 and 2019[498]. This change was possible due to the new law 15/2005, as a first step towards the presumption of shared parenting for the best interests of the child. It cannot be said that the concept of the best interests of the child has changed dramatically, or that public opinion has gone clearly in this direction. However, the notion has started a lively debate which still continues to this day within the Spanish public opinion. It can be concluded that the main change has been to open the door to shared parenting and a common view of the need for more cooperation between parents for the child's benefit.

[498] Instituto Nacional de Estadistica (INE) Estadística de Nulidades, Separaciones y Divorcios (ENSD) Año 2019 (publicado el 28 de septiembre 2020).

# 4 THE 'WELFARE PRINCIPLE' AND SHARED PARENTAL RESPONSIBILITY IN ENGLAND AND WALES

This chapter analyses the welfare principle and how shared parenting was introduced in England and Wales, focusing on the amendments enacted to modify the Children Act 1989 by the Adoption Act 2002 and the Children and Families Act 2014. The 2014 Act's introduction of shared parenting has changed the governing principles surrounding the best interests of the child and the factors to consider when deciding the child's subsequent arrangements.

## 4.1 THE 'WELFARE PRINCIPLE' IN THE CHILDREN'S ACT 1989

In England and Wales, the term used is 'welfare' of the child when referring to the interests of children. In family proceedings, the welfare of the child is the paramount consideration, prevailing also over the interests of parents. Prior to the Children Act 1989, the child's welfare was not considered paramount, but only a factor to take into consideration[499].

The principle of 'welfare' of the child was introduced in the English jurisdiction with the Children Act 1989 (hereafter CA) which entered into force in 1991, following the ratification of the CRC in 1990. The CA recognizes the welfare of the child as paramount over other interests and put the English Law in line with the new ratification of the CRC. The welfare principle is recognised in section 1 (1) of the CA, which states:

> Welfare of the child.
>
> (1) When a court determines any question with respect to—
>
> (a) the upbringing of a child; or
>
> (b) the administration of a child's property or the application of any income arising from it,
>
> the child's welfare shall be the court's paramount consideration[500].

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[499] Mary Welstead Mary and Susan Edwards Susan, *Family Law* (4th edn, Oxford University Press 2011) 368.

[500] Children Act 1989 (henceforth CA), s 1(1).

There is not a clear definition for welfare of the child in the CA, but the Law provides a list of legal criteria[501] that permits a judge to resolve a case according to the rights and interests of children. This 'Welfare Checklist', as it is called by the doctrine [502], is recognised in section 1 (3) and it describes the main issues that the courts must consider when they decide about children. Even if the checklist is formally reduced to what is called section 8 orders – the orders referring to the custody, residence, and child's arrangements – it is not said that the judge cannot apply these factors to other circumstances. As previously highlighted, the welfare of the child varies over time and depends on the circumstances of each individual case and actual cultural circumstances[503] but the welfare checklist allows to identify the main rights and circumstances that the courts should ponder when they decide about the child and his or her upbringing. Together with the welfare checklist, the CA also establishes several principles that rule and outline the welfare principle.

### 4.1.1 THE 'WELFARE CHECKLIST'

The Children Act 1989 introduced a checklist of legal criteria for courts when considering section 8 orders, those orders about the care and upbringing of the child. The checklist is recognised in section 1 (3) of the Children Act and considers that the courts deciding about contested section 8 orders should take into account:

- the wishes of the child according to their age and understanding
- the physical, emotional and education needs of the child,
- the likely effect on him of any change in his circumstances,
- the age, sex, background, and any characteristics of his which the court considers relevant,
- any harm which he has suffered or is at risk of suffering,
- the capability of the parents – or any person relevant – is of meeting his needs and
- the range of powers available to the court under the Children Act in the proceedings of section 8 orders[504].

501 CA, s 1 (3) and (4).

502 CA, s 1 (3); see also Frances Burton, *Family Law* (2nd edn, Routledge 2015) 361; Andrew McFarlane and Madeleine Reardon, *Child Care and Adoption Law. A Practical Guide* (Family Law 2010) 3.

503 *Re M* (2017) EWCA Civ 2164 para 44; Probert and Harding, 233; Bainham and Gilmore, *Children. The Modern Law*, 67.

504 CA, s 1 (4).

The checklist is the key tool for resolving private law disputes concerning children but should also be applied to the unique circumstances of each case and is only indicative. It ensures 'all relevant matters are considered and balanced'[505]. Similar to the rights recognized in the Constitution and in the Civil Code in Spain and in Switzerland[506], the checklist does not define the meaning of the welfare of the child, but it mentions several rights of the child – the right to be heard, the right to physical integrity, the right to education – that involve the welfare of the child. The list gives the judge an indication of which factors are relevant for the case to protect the welfare of the child[507]. Bainham and Gilmore consider also that 'no premium is attached to any of the factors in the list' and thus, the weight actually 'accorded to particular factors will depend on the circumstances of the particular case' and the 'amount of discretion' of the judges[508].

As stated above, section 1 (3) CA should be applied according to the Children Act specifically to contested section 8 CA applications and in all proceedings about care of children[509]. However, Courts can apply the factors listed in section 1 (3) in other cases where it is essential to determine the welfare of the child, for example contested applications for parental responsibility orders and guardianship appointments[510].

### 4.1.2 THE PRINCIPLES RELATED TO THE WELFARE OF THE CHILD

There are several principles recognised in the Children Act that are related to the welfare principle. These principles are the paramountcy of the welfare of the child, the no-order principle, the no-delay principle and, since 2014, the so-called 'involvement of both parents'[511] principle, all of which will be analysed in this chapter.

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505 Bromleys ed Lowe and Douglas, 402.

506 See chapters 3 (Spain) section 3.1.1. and chapter 5 (Switzerland) section 5.1. of the project.

507 Burton, 361.

508 Bainham and Gilmore, *Children. The Modern Law*, 67.

509 CA, s 1 (4) and s 67; Bromleys ed Lowe and Douglas, 402.

510 Bromleys ed Lowe and Dougals, 401; Welstead and Edwards, 368.

511 CA, s 1 (2A) and (2B).
(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

#### 4.1.2.1 The paramount principle

As stated in the CA, when a court determines any question with respect to the child's upbringing, the child's welfare 'shall be the court's paramount consideration'[512]. The paramountcy principle is the consideration that the child's welfare overrides those of adults, whether these are parents, guardians or any adult related. When there is a family conflict, the child's welfare is paramount.

Contrary to the CRC considering the interests of the child as a primary consideration, but not paramount[513], the CA states that the welfare of the child is paramount in every decision[514]. The paramountcy principle applies to any relevant court decision[515] where a child is involved. The courts must protect the welfare of the child as the main right to consider, and at the same time, they have to consider other rights and interests involved.

Bainham and Gilmore point out that what is called the 'paramount principle' means that the welfare of the child plays a greater role against other rights but cannot be regarded as paramount in the sense of being the sole matter under consideration[516]. Attaching 'priority' to the best interests of the child seems not to be a problem 'as long as adult interests are not ignored in the process'[517]. Despite the predominance of the welfare principle, Herring considers that courts have been able to 'protect the interests of parents'[518].

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(2B) In subsection (2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.
Some authors consider that the new amendment, introduced by the Children and Families Act 2014, has introduced a new principle related with the welfare of the child. See Probert and Harding 226; Tim Jarret, 'Children: residence and contact court orders and related matters for parents, grandparents and others' House of Commons Library Briefing Paper no 03100 (2017) 12-13.

512 CA, s 1 (1).

513 CRC, art. 3.

514 Jonathan Herring, *Family Law* (9th edn, Pearson Education Limited 2019) 432.

515 Mary Hayes and others, *Hayes and Williams' Family Law* (6th edn, Oxford University Press 2018), 465.

516 Bainham and Gilmore, *Children. The Modern Law*, 65.

517 Bainham and Gilmore, *Children. The Modern Law*, 65.

518 Herring, *Family Law*, 473.

Some issues are excluded from the application of the welfare principle and therefore, from the application of the paramountcy. First, the paramountcy of the welfare principle does not apply when there are multiple children involved. In cases involving multiple children, the court should consider children on an individual basis which under the most exceptional circumstances can lead to separation of the children; an outcome which is the last resort[519]. Another issue where the paramount principle does not apply, will be if another provision explicitly or implicitly excludes its operation, for example when a child can be a danger to others[520]. In addition, the paramount principle only applies when the upbringing of the child is the central issue[521].

#### 4.1.2.2 No delay principle

Another principle related with the welfare of the child is enshrined in section 1(2) CA, the so called 'no delay principle', which states:

'In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child'[522].

The delay of a court order can damage the welfare of the child, delaying important decisions that involved his or her development. Children grow up quickly and a court decision made too late can negatively affect their daily life and have a negative effect on them. As Bainham and Gilmore also point out, children suffer significant harm during family and care proceedings[523], so delays can only aggravate the situation. The authors

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519 *Re S* (Relocation: Interests of Siblings) [2011] EWCA Civ 454, [2011] 2 FLR 678, para 62 and LJ Lloyd, para 74; *Birmingham City Council v H (A Minor)* 1994 2 AC 212, para 5; Hayes and others, 466.

520 In cases applying for CA s 25, when a child can be a danger for himself or for others; *Re M (a Minor)* Secure Accommodation Order, 1995 Fam 108, Re B (Secure Accommodation Order) [2019] EWCA Civ 2025, para 65; *M (A Child)* (Secure Accommodation) 2018 EWCA Civ 2707, LJ Peter Jackson para 6; *Re M* (Secure Accommodation Order) [1995] Fam 108; Hayes and others, 466.

521 *Clayton v Clayton* [2006] EWCA Civ 878, LJ Wall para 131; *Re Z (A Minor)* (Freedom of Publication) 1997 Fam 1; *Re X (A Child)* (Injunctions Restraining Publication) (2001) 1 FCR 541.

522 CA, s 1(2).

523 Bainham and Gilmore, *Children. The Modern Law*, 73.

consider that a delay 'engenders uncertainty in the lives of children and can prejudice the party who is not living with the child'[524]. Only some delays can benefit the children for example the need for a report on the child's welfare[525] but the CA provides that the court must draw up a timetable for disposing of the application without delay and in any event within 26 weeks, to avoid any delay in the proceedings concerning children[526]. The Family Procedure Rules[527] 2010 – amended in 2020 – also declare the need to avoid delays in private and public law procedures[528].

#### 4.1.2.3 No intervention principle

Another principle affecting the welfare of the child is the 'no order' or 'no intervention principle, stated in section 1 (5) CA. The principle states that 'whenever a court is considering whether to make one or more orders under the Act with respect to a child, it shall not make the order or any of the orders, unless it considers that doing so would be better for the child than making no order at all'[529]. The principle protects the autonomy of the family to organise themselves and avoid the intervention of the State in the affairs of the family, unless the welfare of the child is harmed, or any other interests are affected. The defence of the autonomy of the family was also a main issue in Switzerland and in Spain when shared parental responsibilities were debated.

According to Lowe and Douglas, the principle underlines the objective of the Act as respecting the integrity and independence of the family save where courts have some

524 Bainham and Gilmore, *Children. The Modern Law*, 73.

525 For example, the need to wait for a full welfare report, see about Bainham and Gilmore, *Children. The Modern Law*, 73; Bromley ed Lowe and Douglas, 436.

526 CA, s 32 (1)(a); *S-L (Children : Adjournment)* [2019] EWCA Civ 1571 (19 September 2019) para 12.

527 The family procedure rules are a Statutory Instrument (delegated legislation to the Government) with a single set of rules governing the practice and procedure in family proceedings in the high court, county courts and magistrates' courts. See more The Family Procedure Rules 2010 and Ministry of Justice https://www.justice.gov.uk/courts/procedure-rules (last visit 24.01.2022)

528 Family Procedure Rules 2010 (come into force 6th April 2011) Part 12 (12).

529 CA, s 1 (5).

positive contribution to make towards the child's welfare[530]. According to scarce case law on the no order principle, the court should adopt the 'least interventionist approach'[531].

It is important to note that already in 1988, the Law Commission's Report on Guardianship and Custody determine that development of children after separation is best when the child can maintain a good relationship with both parents. The Law Commission report asserts that if the parties can cooperate with each other, the court should intervene as little as possible[532].

#### 4.1.2.4 The new 'involvement of both parents'

According to some authors, the Children and Families Act 2014 introduces a new principle which states that the involvement of both parents in the life of the child concerned 'will further the child's welfare'[533]. The new section 1 (2A) of the CA now provides that in contested cases, where the court is considering whether to make a parental responsibility order or a section 8 order, the court must presume that 'the involvement of both parents in the life of the child will further the child's welfare, unless the contrary is shown'[534]. Involvement, for the reasons of the law, is intended as any type of involvement or contact, direct or indirect, in the life of the child, but does not entitle any parent to a particular division of the child's time[535].

The 2010 Family Justice Review[536] recommended no change to the substantive Law, but the Government considered necessary a legislative statement of the importance of

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530 Bromleys ed Lowe and Douglas, 438-439.

531 *Re B-S (Children)* (Adoption: Leave to Oppose) [2014] 1 WLR 563, Sir James Munby, para 23; *Re K* (Supervision Order) (1999) Fam Law 376, LJ Wall; Burton, 309.

532 Law Commission, 'Report on Guardianship and Custody' (Law Comm no 172, 1988) para 4.5.

533 CA, s 1 (2A); Bromleys ed Lowe and Douglas, 432-433; Probert and Harding, 238-239; Hayes and others, 468.

534 CA, s 1 (2A).

535 Probert and Harding, 239.

536 The Family Justice Review was an independent panel set up in March 2010 – During the Conservative- Liberal Democrat Coalition in the Government 2010-2015 – to consider a radical reform on Family Law. It was directed by Daniel Norgrove. See more in <https://www.gov.uk/government/collections/family-justice-review#:~:text=The%20Family%20Justice%20Review%20was,the%20process%20of%20divorce%3B%20and>(last visit 22.01.2022)

children having an ongoing relationship with both parents after family separation[537]. As will be elaborated in Section 4.3.1 of this study[538], the Government proposal was approved in section 11 of the Children and Families Act 2014, which inserted the presumption of the involvement of both parents in the Children Act in section 1 (2A) and section 1 (2B) about welfare of the child:

> (2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.
>
> (2B) In subsection (2A) 'involvement' means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

Some authors and authorities regard the new presumption of involvement of both parents as unnecessary with potential to lead to more confusion, misinterpretation, and unrealistic expectations from parents – who could interpret the involvement as a more amount of time with children. In short, many authors believe that the core principle of paramountcy is sufficient to protect the welfare of the child[539].

## 4.2 PARENTAL RESPONSIBILITY IN ENGLAND AND WALES.

The CA adopts the term 'parental responsibility' to describe the bundle of duties and responsibilities of the parents towards the child. The CA defines parental responsibility in section 3 as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'[540]. As the former

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537 See Family Justice Review, Final Report (Ministry of Justice, November 2011) para 4.23- 4.24; Ministry of Justice and Department of Education, 'The Government Response to the Family Justice Review: A System with Children and Families at its Heart' (Cm 8273, February 2012) para 59-64.

538 See section 4.3.1. of the chapter.

539 See Family Justice Review, *Final Report* (November 2011) para 4.37 – para 4.40; Justice Committee, *Operation of the Family Courts* (HC 2010-2012, 518 -I) 66; Jane Fortin, Joan Hunt and Lesley Scanlan, *Taking a Longer View of Contact, The Perspectives of Young Adults who Experienced Parental Separation in their Youth* (Sussex Law School 2012) 343.

540 CA, s 3 (1).

President of the Family Division, Munby P said, parental responsibility is 'much more than a mere lawyer's concept or a principle of law (...) parental responsibility involves duties owed by the parent not just to the court. First and foremost (...) involves duties owed by each parent to the child'[541].

### 4.2.1 THE MEANING AND CONTENT OF PARENTAL RESPONSIBILITY

There have been several attempts to define the duties and responsibilities that encompass parental responsibility. Legal doctrine and case law have suggested some responsibilities and duties of the parents, but it changes with the circumstances of the specific child. Bainham and Gilmore state that the parental responsibility is the link between the child and the person – or persons- who make decisions for the child and his or her upbringing[542]. Bainham and Gilmore say 'person' and not 'parents', as the legal parenthood can be acquired by persons who are not the biological parent of the child[543].

The legal definition of parental responsibility does not stipulate the kind of duties and rights parents have towards their children. The legal definition, as stated by Eekelaar, performs two interrelated functions, as 'it encapsulates all the legal duties and powers that enable a parent to care for a child or act on the child's behalf' and determines 'who has the authority to make a decision about a child'[544]. The 1988 Law Commission recognises the unfeasibility of providing a list of rights and duties involving parental responsibility, as it will change from time to time and vary with the circumstances of each individual case[545].

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541 *James P. Re H-B (contact)* [2015] EWCA Civ 389, [2015] Fam Law 634, [2015] 2 FCR 581, para 72.

542 Bainham and Gilmore, *Children. The Modern Law*, 159.

543 The research will not go deeper on the subject. For more information, see Children and Adoption Act 2002, s 67; Human Fertilisation and Embryology Act 2008, s 42 – 43; The Civil Partnership (Opposite-sex Couples) Regulations 2019, s 15 and s 16.

544 John Eekelaar, 'Parental responsibility: State of Nature or Nature of the State?' (1991) 13 Journal of Social Welfare and Family Law 37, 38-39.

545 Law Commission, 'Report on Guardianship and Custody' (Law Comm no 172, 1988) para 2.6; see also Nikolina, 51.

However, there is general agreement regarding the doctrine[546] that responsibilities of parents include:

- the right to decide where the child should live,
- to provide the child a home,
- the right to choose the name,
- the right to decide on the child's education and religious upbringing,
- the right to discipline the child,
- the right to consent to medical treatment,
- the right to consent or not to a proposed marriage or civil partnership,
- the right to veto the issue of a passport and to decide whether to take the child out of the United Kingdom,
- the right to administer the child's property
- the right to appoint a guardian for the child to exercise parental responsibility after the parent's death.

However, all these responsibilities and rights are secondary to the welfare of the child and change also with the circumstances, the age, and the development of the child[547].

In this context, the no-intervention principle is of interests. According to the Law Commission, unless and until a court order is obtained, a person with parental rights is legally and fully empowered to take action concerning a child in the exercise of parental responsibility. However, this responsibility may be restrained if the decision is deemed by the court to not in the interests of the child[548]. As it has been seen in Spain – and it will be seen in Switzerland – the main limit for the grant of shared custody (in Spain) or shared parental responsibilities (in England and in Switzerland) is always the best

546 Bromleys ed Lowe and Douglas, 337-338; Probert and Harding, 277-278; Burton, 311- 312.

547 *Re A (Children) (Conjoined Twins: Medical Treatment)* [2001] 2 WLR 480, para 9; *Yates and Gard v Great Ormond Street Hospital for Children NHS Foundation Trust* [2017] EWCA Civ 410, McFarlane LJ; *Alder Hey Children's NHS Foundation Trust vs Evans, James, Alfie Evans* (A Child by his Guardian CAFCASS Legal) [2018] EWHC 308 (Fam); Probert and Harding, 279. Here is to balance the best interests of the child – interpreted by the courts and as it has been already noted, indeterminate – and the interests of parents. The cases of Charlie Gard and Alfie Evans are examples of how this indeterminacy can bring to fatal consequences.

548 Law Commission, 'Family Law: Illegitimacy' (Law Comm no 118, 1982) ch 13-14.

interests of the child. The courts can decide for the sole parental responsibilities or the shared parental responsibilities, depending on the circumstances and applying some criteria for the welfare of the child.

The main changes from the Children and Families Act 2014 concerning parental responsibility do not materially affect the notion's scope, but rather seeks to involve the person who holds responsibility for the child and to reinforce the idea that shared parenting is the optimal arrangement for the child's upbringing[549].

#### 4.2.1.1 WHO IS ENTITLED TO EXERCISE PARENTAL RESPONSIBILITY?

The two biological parents are usually entitled to exercise the parental responsibility equally, deciding together aspects of the child's upbringing. However, the growing number of divorces and parents who live separately make this equal right of decision about the child difficult to achieve in practice. The Children Act states that each holder of parental responsibility can act alone and without the other in meeting that responsibility[550] but there are some decisions that -especially for those parents who do not live together or are divorced – cannot be made unilaterally. These decisions are, for example serious medical treatment[551], the change of child's surname[552], or the child's education[553] . These types of situations usually require the consent of all holders of parental responsibility. Where there is more than one holder of parental responsibility, the case law states that it will be the duty of the parent to ensure that the rights of the other holders of parental responsibility are respected[554].

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549 We will return to this further in the chapter.

550 CA, s 2 (7).

551 *B (A Child: Immunisation)* [2018] EWFC 56, para 66; *Re C and F (Children)* [2003] EWHC 1376 (Fam), para 294.

552 CA, s 13.

553 About the limits of this responsibility, see *Re N (A Child – Religion – Jehovah's Witness)* [2011] EWHC B26 (Fam) para 65-para 68; see also *Re G* [2012] EWCA Civ 1233, para 43; *Re G (A Minor)* (Parental Responsibility: Education) (1994) 2 FLR 964.

554 *Re W* (*Children)* (2012) EWCA 999, para 74.

Only married parents[555]- father and mother – or the biological mother[556] are automatically endowed with parental responsibilities. However, the Children Act was modified in 2002 to enable unmarried parents to acquire parental responsibility[557]. The position of unmarried fathers has developed through the years from a position having little or no legal relationship with their children to the current position of having the capacity to be fully involved in the life of the child. Now unmarried fathers can acquire parental responsibility with a unilateral registration as the father in the birth certificate of the child, with a court order (parental responsibility order or contact/residence order), by subsequently marrying the child's mother, by agreement with the mother[558].

The allocation and acquisition of parental responsibility has been the subject of debate in recent decades between the English Law Commission and the Lord Chancellor's Commission, focusing on the question of the legal circumstances 'under which the unmarried father should acquire parental responsibility'[559]. 1987 saw the legal acceptance of the principle that civil status of the parents is no reason to discriminate against the and ultimately the abolition of discriminatory acts against children and the title of 'illegitimate'[560]. However, the principal reforms recognising the role of unmarried fathers in the life of the child did not come until 2000.

However, the 1987 Law Reform preserves the principle that the unmarried father does not automatically have parental responsibility but makes it possible to acquire parental responsibility with agreement from the mother or by court order (called Parental Responsibility Order)[561]. The Family Law Reform Act avoids referring also to 'illegitimate' children and refers to the child whose father and mother were not married to

555 CA, s 2 (1).

556 CA, s 2 (2).

557 Children and Adoption Act 2002, s 111; CA s 4 (1).

558 CA, s 2 (2) (b); Bromleys ed Lowe and Douglas, 370.

559 Lord Chancellor-s Department, '1.Court Procedures for the Determination of Paternity, 2. The Law on Parental Responsibility for Unmarried Fathers' (March 1998) Law Com Working Paper No 74 Illegitimacy (1979); Law Com Report no 118 'Illegitimacy' (1982) and Law Com Report no 157 'Illegitimacy' (Second Report) 1986; Bainham and Gilmore, *Children. The Modern Law*, 162.

560 Family Law Reform Act 1987, s 1.

561 Family Law Reform Act 1987, s 4.

each other 'at the time of his birth'[562]. However, the new reform states a new division. According to Probert, somehow fathers have been divided between those 'who were deemed deserving parental responsibility and those who were not'[563].

In 1991, the case Re H (Minors) determined a three-point test to examine the father's fitness to assume parental responsibilities when asked for a Parental Responsibility Order (PRO). These three points were: the degree of commitment the father has shown to the child, the degree of attachment between father and child and the reasons for applying the order[564]. The Adoption and Children Act (henceforth ACA) 2002 allows fathers who have registered the birth of their child to acquire parental responsibility almost automatically with the registration of the child, without a specific order or a parental responsibility agreement with the mother[565]. Also, the ACA 2002 allowed unmarried partners to adopt a child together[566].

Moreover, in 1998 the formerly Lord Chancellor's Department reviewed the Children Act, noting that the discrimination between married and unmarried parents was increasingly seen as 'unacceptable'[567]. This report was decisive in simplifying the acquisition of parental responsibility by unmarried parents and in 2002 the report saw its desired outcome realised through the Child and Adoption Act 2002. With the Children and Adoption Act 2002 and the Children and Families Act 2014, the new amendments of the CA signal a fundamental change in the recognition of unmarried parents – especially fathers – and their acquisition of parental responsibility of their children. An unmarried father almost automatically gets parental responsibility or holds parental responsibility for his child with his registration as the father on the child's birth certificate, by paren-

562 Family Law Reform Act 1987, s 1 (2).

563 Probert and Harding, 283.

564 *Re H (Illegitimate Children: Father: Parental Rights: Number 2)* [1991] 1 FLR 214, 219; see also *Re L,V,M and H* [2000] 2 FLR 334 Appeal in Re L.

565 Adoption and Children Act 2002, s 111. The parental responsibility is acquired at the moment of the birth registration of the child, following the rules of the Births and Deaths Registration Act 1953, s 10 (1)(a)(c) and s 10A.

566 Adoption and Children Act 2002, s 50 and s 144 (4).

567 Lord Chancellor's Department Consultation Paper, 'Procedures for The Determination of Paternity and on The Law on Parental Responsibility for Unmarried Fathers' (1998) para 51.

tal agreement or by a court order. This means that the agreement of the mother is not necessary to hold parental responsibility and the father – in theory – does not have a burden of proof to overcome before the court.

As Bainham and Gilmore explain, if the mother is 'unwilling to register the father or share responsibility voluntarily, the father may apply to the court for a parental responsibility order'[568]. The father can also register himself on the child's birth certificate once the paternity is proven[569]. Parents who have not registered their children or did not have the possibility after 1st December 2003[570], are eligible acquire parental responsibility by a parental responsibility agreement with the mother, by a PRO made by the court or by a residence order (now replaced by the children arrangements order[571]).

### 4.2.2 SECTION 8 ORDERS

The aforementioned section 8 of the CA states four orders related with the exercise of parental responsibility[572]. These orders are residence order, contact order, prohibited steps order and specific issue order. The residence and contact orders have been replaced by the child's arrangement orders of the Children and Families Act 2014. The implications of this change will be explored in section 4.3.2. of the chapter.

The CA empowers the court to make a section 8 order in 'any family proceedings[573] in which a question arises with respect to the welfare of any child either upon 'an application

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568 Bainham and Gilmore, *Children. The Modern Law*, 167.

569 Bromleys ed Lowe and Douglas, 373; Bainham and Gilmore, *Children. The Modern Law*, 167; See also Government of United Kingdom, 'Childcare and Parentage, Birth registration' <https://www.gov.uk/register-birth/who-can-register-a-birth> (last visit 02.01.2022).

570 When s 111 was coming into force, see about Adoption and Children Act 2002 (Commencement No.4) Order 2003.

571 Children and Families Act 2014. We will return to this later in the dissertation.

572 CA, s 8.

573 CA, s 8 (3) family proceedings are any proceedings under the inherent jurisdiction of the High Court in relation to children or under any of the enactments listed in CA, s 8 (4); see also Bainham and Gilmore, *Children.The Modern Law*, 199.

or of the court's own motion'[574]. The court must apply the welfare principle, the checklist and other principles related when deciding on whether to give a section 8 order[575].

The Children and Families Act 2014 has deeply transformed section 8 as well as the criteria governing the welfare principle, resulting in the presumption that both parents' involvement benefits the child. The next section explores the transformation of contact and residence orders on children arrangement orders and its implications on the welfare of the child.

#### 4.2.2.1 The former contact orders and residence orders

Contact and residence orders were once the main orders when a family breakdown occurred. Both contact and residence orders were the most disputed and sensitive cases that courts had to deal with before the Children and Families Act 2014 replaced them with the child's arrangements orders. The English Government's objective in the 2014 replacing of the contact and residence orders with a child's arrangements orders was to avoid the continuous use of different terms by parents to refer to the same notion [576].

As the Children Act 1989 stated in its former section 8, a contact order means ' an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other[577] and were made by a court when the mediation and collaboration between the parents failed[578]. Independently of their position, both parents – whether holding parental responsibility at the time or not or married or not – can apply for the order. Other persons – including the child – can apply only with the consent of the

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574 CA, s 10 (1)(a) and (b).

575 Kate Standley and Paula Davies (eds), *Family Law* (8th edn, Palgrave Law Masters 2013) 269.

576 Standley and Davies, 294.

577 CA, former s 8.

578 Standley and Davies, 293. The parents should appeal to the court when a mediation or a collaborative law fail. A contact order is open also to persons other than the parents, that are related with the child in different ways (granparents, stepparents etc).

court[579]. For a contact order to be granted, the court could ask for a 'welfare report' and ask the local authority to investigate the case[580].

Contact orders were the main legal remedy for the non-resident fathers – who do not live with the child – to have a relationship with the child, even without a residence order. The need for contact and residence orders – recognized in the Children Act 1989 – are based on the Law Commission's recommendations in the Report on Guardianship and Custody which states that the children 'who fare best after their parents' separation are those who are able to maintain a good relationship with both parents'[581]. These recommendations have led to the introduction of the so-called section 8 orders in the Children Act 1989.

The recognition of the importance of contact with both parents for the child's development and his or her welfare has long been recognised by the case law and the legal institutions. Judge Wrangham's 1973 ruling declares that contact is 'a basic right in the child'[582]. This contact can involve direct – periodic visits – or indirect in case of domestic violence or other circumstances – through letters or calls[583]. Case law also assumes that the contact should only be stopped as a last resort by the judge[584] considering that contact is a fundamental element of family life and 'almost always' in the interests of the child[585]. The right of the child to have contact with his/her parents is a right recognized in the CRC and is present in all three countries under study. In Spain and in Switzerland, the loss of contact between the child and one of the parents is considered

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579 Children and Adoption Act 2006, s 1 to s 5; Standley and Davies, 295.

580 CA, s 7 and s 37.

581 Law Commission, 'Report on Guardianship and Custody' (Law Comm no 172, 1988) para 4.5.

582 *M. v. M. (Child: Access)* 0 [1973] 2 All E.R, para 81 – 85; *Re L, V, M and H* [2000] 2 FLR 334, LJ Thorpe; See also *A v L (Contact)* [1998] 1 FLR 361, Holman J; see also Felicity Kaganas and Shelley Day Sclater, 'Contact Disputes: Narrative Constructions of Good Parents' (2004) 12 Feminist Legal Studies 1, 5.

583 *Re* (no order for contact after findings of domestic abuse) [2020] EWFC B57, para 23; *C (A Child),* Re [2011] EWCA Civ 521, para 44.

584 *Re P (Children)* [2008] EWCA Civ 1431, [2009] 1 FLR 1056, LJ Ward, para 38; *Re C (A Child)* [2011] EWCA Civ 521, para 46.

585 *Re P (Children)* [2008] EWCA Civ 1431, [2009] 1 FLR 1056, LJ Ward, para 38; *Re C (A Child)* [2011] EWCA Civ 521, para 46 and para 47.

also as a last resort for the judges. The shared parenting laws make a step forward the involvement of both parents in the life of the child and goes beyond the concepts of visiting rights, contact and residence.

In 2004, the Government published a Green Paper which states that the Government 'firmly believes that both parents should have responsibility for and a meaningful relationship with their children after parental separation'[586]. After that consultation paper, the Government published in 2005 a White Paper recommending various reforms to improve the enforcement and facilitation of contact, as a greater tool of mediation, additional powers to the court before making contact orders and improve the effectiveness of the Family Assistance Orders[587].

The Children and Adoption Act 2006 (hereafter CAA 2006) took up some of the recommendations made by the Government the year before, inserting a new section from 11A to 11P into the Children Act 1989. The new provisions both promote contact and enforce contact orders giving additional powers to the courts when dealing with contact orders[588]. The new section does not materially change section 8 orders.

The other order replaced by the child's arrangements order is the residence order. This order settled the arrangements to be made with the parent with whom the child is to live'[589]. At the time, the order was the most significant order for the relationship between parents and children, until it was substituted by the child's arrangements order[590]. It was

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586 United Kingdom Departments for Education and Skills, for Constitutional Affairs and for Trade and Industry, *Green Paper, Parental Separation: Children's Needs and Parents' Responsibilities* (Cm 6273,2004) 40. Already in 2002, the Lord Chancellor's Advisory Board published a report with recommendations for the courts to improve the contact orders for non-residential fathers. See Lord Chancellor's Advisory Board on Family Law – Children Act Sub-Committee, 'Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact between Children and Their Non-Residential Parents and the Enforcement of Court Orders for Contact' (Lord Chancellor's Department, 2002).

587 Departments for Education and Skills, for Constitutional Affairs and for Trade and Industry, *Parental Separation,Children's Needs and Parents Responsibilities, Next Steps. Report of the Responses to Consultation and Agenda for Action* (Cm 6452, July 2005) 93-97.

588 Bromleys ed Lowe and Douglas, 489-490; Standley and Davies, 301.

589 CA, s 8 (1).

590 Children and Families Act 2014 (CFA 2014) s 11.

introduced by the Children Act 1989 to strengthen the statement that both parents have a continual role to play in raising the child, substituting the former 'custody order'[591] and thereby promoting the autonomy of the parents to make decisions concerning their children after a divorce or separation[592]. The residence order also sought to reduce the emotional intensity of the parents in court proceedings about the arrangements of children. However, as Lowe and Douglas state, this strategy clearly failed as the cases arose in the following years. According to the authors, this was exacerbated by the failure of the media to 'embrace' the new terminology, using instead the blanket term 'access and custody battles' when covering these situations[593]. The media also used this term when covering stories on the law which could potentially allocate parental responsibility to fathers who applied for a residence order[594]. This clause has been the main factor in conferring parental responsibility to the non-resident parent who is usually the father.

The shared residence order, alongside the contact order was repealed by the new Children and Families Act 2014. The 2014 order opens up the possibility of a child living in different households[595]. However, the previous shared residence orders contributed to developing the new child arrangements order of the Children and Families Act 2014. These orders were designed to allow two or more persons to live with the child in different households[596]. The court had to establish the periods during which the child is to live in the different households concerned[597] but the shared residence orders did not entail a 50/50 split of the time[598].

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591 Standley and Davies, 269.

592 As it has been noted before, the promotion of the autonomy of the parents to decide for their children is present also in Spain and in Switzerland.

593 Bromleys ed Lowe and Douglas, 481.

594 CA, s 4 and s 12 (1); McFarlane and Reardon, 28. If the parental responsibility is made in favour of a non-parent, he or she will have parental responsibility only while the residence order is in force. According to the Human Fertilisation and Embriology Act 2008, also the female partner of the mother of the child is treated with the same conditions as the father.

595 Hayes and others, 699.

596 CA, former s 11 (4).

597 CA, former s 11 (4).

598 McFarlane and Reardon, 29.

In the debate before the CA entered into force, the Law Commission stated that residence orders do not apply to a 50/50 split of the time but to a wide range of situations[599]. Case law also establishes that shared residence orders underline the notion that parenting is a 'continuing and shared responsibility even after a separation' and promotes the equality between the parents[600]. However, the concern from the courts was the potential for additional stress and confusion for children more as result of being caught in between two competing homes[601]. In 1996, some judges were inclined to give shared residence orders to promote 'equal status' between parents but the Court of Appeal stressed that if the children wanted the shared arrangements to continue, there would also be no need for a harmonious relationship between the parents as a prerequisite to a shared residence order[602]. This statement is different to the Law in Switzerland, as the Swiss High Court stablished that the continuous conflict between the parents is one of the main reasons why the judge may decide to grant parental responsibilities to only one of the parents[603].

Also with the case *D vs D*, the courts abandoned the initial reluctant attitude towards the shared residence orders and considered that it was not necessary to show that 'exceptional circumstances exist before a shared residence order may be granted'[604]. It was required only to demonstrate that the order is for the welfare of the child.

According to McFarlane, the orders were made to address a real or perceived power imbalance between the parents. Although the CA 1989 concept of parental responsibility

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599 Law Commission, 'Report on Guardianship and Custody' (Law Comm no 172, 1988) para 4.12; see also *A v A* (Shared Residence) [2004] EWHC 142 (Fam) para 115; *D v D* (Shared Residence Order) [2001] 1 FLR 495 para 24; McFarlane and Reardon 29.

600 *Re AR* (A Child: Relocation) [2010] EWHC 1346 (Fam) para 52 ; *Re A* (A Child: Joint Residence/ Parental Responsibility) [2008] EWCA Civ 867 para 66; *A v A* (Shared Residence) [2004] EWHC 142 (Fam) para 118 and para 126.

601 See *Re M* (Children) [2012] EWHC 1948 (Fam) para 63; Re *H* [1994] 1 FLR 717.

602 *Re R* (Residence: Shared Care: Children's views) [2005] EWCA Civ 542, para 11; *A v A* (Shared Residence) [2004] 1 FLR 1195, para 126.

603 See ch 5 section 5.4 of the research.

604 *D v. D* [2001] 1 FLR 495 (1) Butler Sloss LJ and Hale LJ, para 41.

was 'intended to put parents on a level playing field', many parents 'still prefer the sense of equality' that the shared residence orders bring with it[605].

Some case law enacted after 2001 focuses on the concept of 'equality' between parents and the judges state that 'a shared residence order may be psychologically beneficial to the parents in emphasising the equality of their position and responsibilities'[606]. In a 2004 judgment, Judge Wall states that it is necessary to grant a shared residence order to reflect the fact that the parents are 'equal in the eyes of the law' and have 'equal duties and responsibilities' towards their children, although he affirms that the orders 'were not made to deal with parental status'[607]. However, as Bainham and Gilmore consider, the emphasis on equality and the 'psychological benefit for the parent' may not be considered as an 'accurate statement of the law'[608].

In 2010 Judge Mostyn observed that the shared residence orders are today 'the rule rather than the exception'[609] but the statement was afterwards refuted by LJ Black, who considered a shared residence order decision should depend on what is in the child's best interests and considers that 'it is not a prerequisite for a shared residence order that the periods of time spent with each adult should be equal'[610].

Judge Black also states that it is 'profoundly disappointing' to see how, in practice, 'instead of bringing greater benefits for children' shared residence serves 'as a further battlefield for the adults in the children's lives' which 'can never have been intended when shared residence orders were commended by the courts as a useful tool'[611]. Other judges have noted that shared residence is psychologically beneficial to the parents

605 McFarlane and Reardon, 29.

606 *Re A* (Joint Residence: Parental responsibility) [2008] EWCA Civ 867 [2008] 2 FLR 1593, Sir Mark Potter, para 66.

607 *D v. D* [2001] 1 FLR 495 (1) para 15; *A v A* (Shared Residence) [2004] EWHC 142 (Fam) [2004] 1 FLR 1195, para 121 and 124.

608 Bainham and Gilmore, *Children.The Modern Law*, 223.

609 *Re AR* (A Child: Relocation) [2010] EWHC 1346, [2010] 2 FLR 1577, para 52.

610 *T v T* [2010] EWCA Civ 1366, para 26.

611 *T v T* [2010] EWCA Civ 1366, para 27.

because its 'emphasise' on the 'equality of their position'[612], while others consider that shared residence emphasises that they have 'equal duties and responsibilities'[613].

As seen in the case law covered by this study, some principles governed shared residence orders[614]. First, case law states that it is not necessary to demonstrate exceptional circumstances to grant a shared residence order[615]. Secondly, a shared residence order does not mean a 50/50 split of the time and it is even possible to grant a shared residence order even when the parties do not collaborate peacefully[616]. However, recent case law affirms the contrary, and considers necessary a baseline of collaboration between parents for the fulfilling of shared residence, to avoid any suffering of children[617].

#### 4.2.2.2 Shared residence and parental responsibility

The residence order also automatically conferred parental responsibility to individuals who have not held it yet, usually the biological father and in more exceptional cases a grandparent. Therefore, the order was applied – in some circumstances – as a way to grant access to parental responsibility for any person who would otherwise not be able to apply for a free-standing parental responsibility order[618]. Moreover, the residence order enhanced the role of the parent to whom it was granted, as they could decide the day-to-day issues of the child. According to some case law, the residence order provided a different psychological impact than that of a contact order from the child's perspective,

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612 *Re A (Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867 [2008] 2 FLR 1593, para 66; see also *Re F (Shared Residence)* [2003] EWCA Civ 592 [2003] 2 FLR 397, para 32 and para 35.

613 Wall LJ in *Re P (Shared Residence Order)* [2005] EWCA Civ 1639 [2006] 2 FLR 347 para 22.

614 Standley and Davies, 290.

615 As noted before, see *D v. D* [2001] 1 FLR 495 (1) para 15.

616 *T v T* [2010] EWCA Civ 1366, para 26; *Re AR* (A Child: Relocation) [2010] EWHC 1346 para 52.

617 *K v D (Parental Conflict)* [2015] EWFC 49 para 30 and para 34; *Re H-B* (Contact) [2015] EWCA Civ 389 para 77.

618 For example: *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR, para 883; *Re A (Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867 [2008] 2 FLR 1593, para 66; Bainham and Gilmore, *Children.The Modern Law*, 222.

providing the comfort and security to children of knowing with whom they should be living as well as improving the 'status' of the person who holds the residence order[619].

Defenders of the notion of shared residence state that the order allows the recognition of equal status between the parents. Though, Judge Hale narrows the scope of the order, saying that the law already deems the parents to have an equal and independent power to exercise parental responsibility. Therefore, according to Judge Hale, the residence order only relates to where the child will live[620]. Moreover, in section 2 (5) the Children Act confirms that parental responsibility can be held by more than one person and so, parental responsibility is not lost because someone else acquires it[621]. There is a wide array of arrangements which demonstrate that parental responsibility can be shared[622], through a shared residence order or by a shared parental responsibility order granted via an agreement, a parental responsibility order or by birth certification of paternity[623].

Prior to the 1989 enacting of the Children Act, the Law Commission considered that the aim of shared residence orders was to reinforce the notion of shared parenting[624] but at the beginning the courts were reluctant to grant shared residence orders. However, courts began to grant shared residence orders after the case *D v D* (2001) which ruled that it is not necessary to demonstrate any exceptional circumstances to grant shared residence orders, if it is in the welfare of the child[625]. According to George, the judges increasingly began to turn parental responsibility into a 'label marking mere parental

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619 *Re A (A Child: Joint Residence/Parental Responsibility)* [2008] EWCA Civ 867 para 66; *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR, para 889; Herring, *Family Law,* 536.

620 LJ Hale in *Re A (Shared Residence)* [2001] EWCA Civ 1795, para 17; *Re F (Shared Residence Order)* [2003] EWCA Civ 592 [2003] 2 FLR 397, para 21; *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR.

621 CA, s 2 (5) and s 2 (6).

622 Bainham and Gilmore, *Children.The Modern Law*, 189.

623 See for example, *Re A (A Child: Joint Residence/Parental Responsibility)* [2008] EWCA Civ 867 para 883; *Re F (Shared Residence Order)* [2003] EWCA Civ 592 [2003] 2 FLR 397, para 21.

624 Law Commission, 'Report on Guardianship and Custody' (Law Comm no 172, 1988) para 2.4; Standley and Davies, 289.

625 *D v. D* [2001] 1 FLR 495 (1), para 41; *A v A* (Shared Residence) [2004] EWHC 142 (Fam) [2004] 1 FLR 1195, para 121; Re A (*Joint Residence: Parental Responsibility*) [2008] EWCA Civ 867 [2008] 2 FLR 1593, para 66.

status' and consequently, pressure 'started to mount on residence orders'[626]. Some authors state that this pressure was a result of increasing of shared residence orders, focusing more on the idea of the 'parental status' than on the reality of children's living arrangements[627]. As some authors note, the granting of parental responsibility is used to reaffirm a person's 'core status' as a parent and shared residence to provide an 'equal status' with the person – usually the mother – who is responsible for the daily care of the child[628]. For this reason, the debate around the shared residence orders has increased over the years together with the increase of the granting of shared residence orders[629]. The 'cultural shift'[630] of increased involvement fathers in the life of their children and their demand for more recognition under the law, has also led to the replacement of the residence and contact orders with the child's arrangements order, the idea being to reinforce the shared parenting notion. However, this change brought some misunderstandings.

An important shift was the decision of the Family Justice Review[631] to support shared parental responsibilities rather than shared residence and to promote the substitution of the residence and contact orders with the child's arrangements order. The Review's panel proposed these orders to avoid battles between parents concerning the contact and residence issues whilst also promoting the idea that both parents are responsible

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626 Rob George, *Ideas and Debates in Family Law* (Hart 2012) 136.

627 See Peter Harris Peter and Rob George, 'Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations' (2010) 22 2 Child and Family Law Quarterly, 151-171; George, *Ideas and Debates in Family Law,* 136-137; Noel Arnold, *Children and Families Act. Family justice under the new law* (The Law Society 2014) 50.

628 George, 136-137.

629 Bainham and Gilmore, *Children.The Modern Law*, 224.

630 Herring, 482. As it will be seen in chapter 7 of the study, the actions of social movements as Fathers4Justice led the pressure for the change in the law.

631 The Family Justice Review was created by the Liberal-Democrat Coalition of the Government between 2010 and 2015, 'to examine the effectiveness of the family justice system in England and Wales and the outcomes it delivers' and it was composed by experts on Family Law and 'senior figures representing the key organisations in the family justice system'. See more in <https://www.gov.uk/government/publications/2010-to-2015-government-policy-family-justice-system/2010-to-2015-government-policy-family-justice-system> (last visit 07.12.2021).

for their children and therefore, states that the child needs – for his or her welfare – the collaboration of both parents[632].

According to Burton, the child's arrangements order may lead to more confusion, as the debate about shared residence was shifted to one concerning the care of the child and the status of the father, which was already covered by the granting of parental responsibilities[633]. The media has added to the confusion, in its framing of the issue and misinforming public opinion and therefore families – that the child's arrangements order and the novel notion that the involvement of both parents will benefit the child will grant more 'time' with the child[634].

The Family Justice Review recommended no change to the current law regarding the statement about involvement, but the Government did not follow this advice[635] substituting the concept of shared parenting with the concept of 'involvement' of both parents in the Children and Families Act 2014.The Family Justice Review did, however, propose the replacement of the contact and residence orders with the child's arrangements orders.

## 4.3 THE CHILDREN AND FAMILIES ACT 2014 AND THE PROMOTION OF THE SHARED PARENTING

As previously outlined, before the Children and Families Act 2014, there were attempts to reduce conflict on family law disputes in general and in particular the children's arrangements. The Children and Adoption Act 2006 seeks to review Family Law, encouraging collaboration of both parents and promoting the enforcement of the contact orders. This change was not enough as the debates and conflict concerning residence orders and shared parenting continued. Therefore, the Children and Families Act (henceforth

632 Family Justice Review, *Interim Report (*March 2011) para 5.9.

633 Burton, 389.

634 Burton, 389; Bromleys ed Lowe and Douglas, 481.

635 Family Justice Review, 'Final Report' (Ministry of Justice, November 2011); Ministry of Justice and Department of Education, 'The Government Response to the Family Justice Review: A System with Children and Families at its Heart' (CM 8273 February 2012) para 59-64.

CFA 2014) has been perceived as a good opportunity to introduce a more collaborative model of shared parenting and an enhancement of family law in the country[636].

The main changes CFA 2014 introduces are, firstly the replacement of the residence and contact orders with the new Child's arrangements order (CAO) and secondly, the presumption that parental involvement in the life of the child 'will further the child's welfare'[637]. There has been controversy surrounding the introduction of the formula of 'involvement'; this will be covered in section 4.3.1. The Family Justice Review and the Government held different opinions about the establishment of a 'presumption' of shared parenting before the Act entered into force and the wording of section 11 CFA was introduced and reviewed the welfare principle. Contrary to what one might think, the media did not focus the debate on the opposition between the FJR and the government.

### 4.3.1 THE WAY TO THE CFA 2014

The legal course that culminated with the enacting of the CFA 2014 took some steps and developments. Shared residence orders became increasingly prevalent and the debate about this law that would introduce shared parenting – for unmarried fathers after separation or the recognition of the role of non-resident parents in their children's lives, became 'highly polarised'[638]. Some fathers considered that the legal system was biased against fathers on the issues of residence and contact[639]. Therefore, in 2010 the Family Justice Review examined the issue.

The Family Justice Review (Henceforth FJR) panel gathered in the Interim Report – published in 2011 – their recommendations for the review of the Family Law[640]. The

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636 Arnold, 48.

637 Children and Families Act 2014, s 11.

638 Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' (2015) 46 (3) Victoria University of Wellington Law Review 626, 629; Burton, 389.

639 The research made by Joan Hunt Joan and Victoria Peacey, *I'm not Saying it was easy…Contact Problems in Separated Families after Parental Separation or Divorce* (Gingerbread 2009) considers that 'since none of the non-resident parents in the sample had actually been to court, this belief was clearly not based on personal experience' but in 'media reports or to the experience of friends and relatives' 141.

640 Family Justice Review, *Interim Report* (Ministry of Justice, March 2011).

panel pointed out the 'adversarial nature' of the family law litigation and considered that conflict between parents can reduce the quality of parenting, damaging the children involved as a result[641]. The FJR also observed that for some parents – usually fathers – the family system was biased in favour of the other parent and recognized that delays in court proceedings tend to 'inflame conflict' rather than solve it[642]. Recognizing, however, that shared parenting was already the goal of the current legislation and case law, the FJR proposed a change of terminology of the orders of contact and residence, to avoid the battles around these orders and to promote the fact that both parents 'retain a role and responsibilities in their child's life' after a separation or divorce[643].

The panel recommended that the legislation avoid 'any perception that there is an assumed parental right to substantially shared or equal time for both parents' but considered that a legislative statement could help to 'reinforce the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm'[644]. According to the FJR, both parents share parental responsibility, a status beyond any parental separation and it gives more autonomy for decision-making than the contact and residence orders[645]. However, the panel recognised that 'there is a lack of awareness' of what is parental responsibility 'amongst the general public and those who are separating'[646]. Therefore, the Family Justice Review proposed to give more information to parents about the rights and duties of the parental responsibility and to promote mediation on high conflict divorces[647], a recommendation that was reiterated in their Final Report[648].

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641 Family Justice Review, *Interim Report* (Ministry of Justice, March 2011) para 5.27-5.29

642 Family Justice Review, *Interim Report* (Ministry of Justice, March 2011) para 5.27-5.29

643 Family Justice Review, *Interim Report* (Ministry of Justice, March 2011) para 5.93.

644 Family Justice Review, *Interim Report* (Ministry of Justice, March 2011) para 5.76 and 5.77.

645 Family Justice Review, *Interim Report* (Ministry of Justice, March 2011) para 5.70.

646 Family Justice Review, *Interim Report* (Ministry of Justice, March 2011) para 5.70.

647 Family Justice Review, *Interim Report* (Ministry of Justice, March 2011) para 5.64 – 5.78 and 5.100 – 5.168.

648 Family Justice Review, *Final Report* (Ministry of Justice, November 2011) para 4.11 and para 4.40.

In their Final Report – published in November 2011 – the Family Justice Review changed the reference to shared parenting and proposed introduction of the child arrangements order (henceforth CAO), substituting the former contact and residence orders. The aim of the new order proposed was to 'move discussion away from the loaded terms of 'contact' and 'residence' and focus on the practical issues of the day-to-day care of the child'[649].

Another main issue was the consideration of a presumption that the shared parenting benefits the child's welfare. The panel retreated from their initial position of promoting a legislative statement on the involvement of both parents and considered that such a presumption of shared parenting would undermine the paramount status of the welfare of the child. Therefore, the panel warned the Government about the risks of changing the legislation in a way that could create the impression of a 'parental right to a certain amount of time with the child' – a notion mistakenly peddled by the media[650]. Even confirming the importance for a child to have a meaningful relationship with both parents, the final report considers that legislation 'is a poor instrument for social change in this area' and states that the focus should be on supporting a greater awareness of shared parental responsibility and 'on the duties and rights of both parents from birth onwards'[651]. As the board pointed out, many parents are not aware that, if both share parental responsibility, both have equal status toward their child[652].

The panel considered therefore, that the principle of the child's welfare should be the main and only principle applied in court when it comes to decision-making that concerns children involved in divorce proceedings; a statement shared by the House of Commons Justice Committee[653].

The Government accepted the FJR's recommendation to introduce the child arrangements order, but also deemed it necessary to put in the legislation a presumption that

649 Family Justice Review, *Final Report* (Ministry of Justice, November 2011) para 4.15.

650 Arnold, 50-51.

651 Family Justice Review, *Final Report* (Ministry of Justice, November 2011) para. 4.27.

652 Family Justice Review, *Final Report* (Ministry of Justice, November 2011) para 4.7. See also para 4.24-4.25, about the answers gathered by the panel from individuals and institutions.

653 Family Justice Review, *Final Report* (Ministry of Justice, November 2011) para 4.40; Justice Committee, *Operation of the Family Courts* (HC 2010-2012, 518 -I) 66.

it is in the child's best interests to have a meaningful relationship with both parents. The child's arrangements orders would then focus on their needs and determine the practical arrangements for their upbringing[654].

However, disregarding the recommendations of the FJR and the Justice Committee, the Government asserted that there should be a 'legislative statement' of the importance of children 'having an on-going relationship with both their parents after a family separation'. This statement should be done 'in the child's best interests'[655]. However, it stated that a meaningful relationship 'is not about equal division of time' but 'the quality of parenting received by the child'[656]. However, the expectation that took root in the public opinion – as will be seen later – is that they will have more time with their children.

Although the FJR and the Justice Committee considered that such a presumption compromises the paramount principle of the child's welfare, the Government asserted that the changes are complementary to the paramount principle and not a substitute. The Government upheld that it 'an explicit legislative statement' about the importance of children having an ongoing relationship with both parents was necessary[657]. However, this same Government stated that the parental involvement presumption will not apply if the shared parenting or the involvement in the child's life of one of the parents would harm the child in anyway[658], as for example in cases of domestic violence or a continuous disagreement between the parents on decisions regarding the child, which can make impracticable the shared parenting.

Many social movements on the side of mothers and fathers and individuals prepared their response to the Bill and the changes that the Government wanted to propose.

654 Ministry of Justice and Department of Education, *The Government Response to the Family Justice Review: A system with children and families at its heart* (Cm 8273, 2012) para 78; Arnold, 51.

655 Ministry of Justice and Department of Education, *The Government Response to the Family Justice Review: A system with children and families at its heart* (Cm 8273, 2012) para 61.

656 Ministry of Justice and Department of Education, *The Government Response to the Family Justice Review: A system with children and families at its heart* (Cm 8273, 2012) para 62.

657 Ministry of Justice and Department of Education, *The Government Response to the Family Justice Review: A system with children and families at its heart* (Cm 8273, 2012) para 63; see also Bainham and Gilmore, 'The English Children and Families Act 2014', 629.

658 Department of Education, *Children and Families Bill 2013: Note from the Department for Education on Clause 11, Parental Involvement* (December 2013) 18.

Some fathers felt that the legislation 'should go further' in the presumption about the involvement of both parents and require that the courts should recognise the 'equal care'[659].On the other hand, a large group of children's organisations, notably the Coram Children's Legal Centre, followed the FJR's findings, asserting that courts already take a pro-contact and residence position, therefore rendering legal statements on parental involvement superfluous[660]. Along with the Family Justice Review and the Justice Committee, other institutions find that the clause of the involvement of both parents dilutes the paramount principle and that the legislative statement will not have 'any value'[661].

During the parliamentary process, an informal group of charities and children's institutions, called the 'Shared Parenting Consortium', supported the idea of using the word 'involvement' rather than 'shared parenting' and requested to include a clause stating that 'involvement' does not mean any specific measurement of time with the child[662]. As Baroness Butler-Sloss explained 'in the absence of lawyers to advise either side, the more dominant parent may insist on an arrangement based on equality, or at least on disproportion which is not appropriate for the welfare of the child'[663].

Media and corresponding public opinion have been active in the debate as well. As some authors note, the media coverage of the proposal has brought about misunderstandings on the new presumption in favour of shared parenting, offering the factually incorrect

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659 See results of the Department of Education and Ministry of Justice, 'Cooperative parenting following family separation: proposed legislation on the involvement of parents in a child's life Summary of consultation responses and the Government's response' (November 2012) 6.

660 Arnold, 51.

661 See Justice Committee, *Fourth Report: Pre-Legislative Scrutiny of the Children and Families Bill* (HC 2012-13, 739) <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/739/73902.htm> (last visit 20.01.2022) 140; see also Law Society, 'Children and Families Bill: Law Society Written Evidence to the Public Bill Committee' (2012-2013) HC Bill 131, CF 30 para 17-19; Children's Commissioner for England and Wales, 'A Child Rights Impact Assessment of Parts 1-3 of the Children and Families Bill' (2012 – 2013) HC Bill 131, CF 120 42; Joan Hunt and Alison MacLeod, *Outcomes of applications to court for contact orders after parental separation and divorce*, Oxford Centre for Family Law and Policy. Department of Social Policy and Social Work <https://dera.ioe.ac.uk/9145/1/outcomes-applications-contact-orders.pdf> (last visit 15.01.2022).

662 Arnold, 51-52.

663 HL Children and Families Bill Deb 17 December 2013, 'Report (2nd Day) Clause 11: Welfare of the child: parental involvement' Col 1144.

view that shared parenting means a 'right to a 50% share of the child's time'[664]. The strong positions of various groups and the mistaken conflation of time spent with the child and quality of parenting confused the debate in Parliament over shared parenting and the clause about parental involvement[665]. Despite the opposing opinion of the legal experts and institutions, the Government introduced into the legislation the presumption that parental involvement benefits the child. Finally, as it was requested by the Shared Parenting Consortium, it was decided to clarify in the legislation that involvement did not refer to any particular division of a child's time[666].

A study carried out by the jurists Fortin, Hunt and Scanlan finds that the clause mandating the courts to regard involvement of both parents in the life of 'every' child as promoting the child's welfare 'does not accord' with their findings. Rather, they show that 'whether post-separation contact is a positive experience for the individual child depends entirely on the child and parents in question'[667]. Therefore, according to the authors, whether the child does in fact benefit from the involvement of the parents depends on the circumstances of each particular case. It is not possible in practice to determine that the involvement of the parents will benefit the child in all cases. The authors also state that the changes to the principles of the welfare of the child will provoke misunderstandings of the law and the wrong idea to the parents that they have a right to equal time[668]. On the other hand, the Lowe and Douglas are not so critical and consider that the Government tried 'to restore and clarify public confidence that the courts recognised the joint nature of parenting'[669].

Trinder states that the process of the Children and Families Act 2014 and especially the clause about parental involvement was a political calculation by the Labour Party and the promises of the Government rather than an actual answer to the problem of the shared

664 Memorandum submitted by Professor Hamilton, 'Children and Families Bill Public Bill Committee Oral Evidence Session' (2012-2013) CF 17, para 7.

665 Burton, 389; see also Arnold, 51.

666 Children and Families Act 2014, s 11, 2b; see also the study made by Fortin, Hunt and Scarlan about the clause of parental involvement. Fortin, Hunt and Scanlan, 343.

667 Fortin, Hunt and Scarlan, 343.

668 Fortin, Hunt and Scarlan, 343.

669 Bromleys ed Lowe and Douglas, 432.

parenting[670]. Indeed, the Government acknowledged that the benefit of continuing involvement with both parents is recognised in the case law[671] but was concerned that it was not recognised explicitly in the legislation[672]. For Kaganas, the new presumption has more a symbolic nature than a real change of the action of the courts and is made to reinforce the role of the father in the family, a view shared by some other authors[673].

The main question is why the involvement of both parents was introduced, with the clear-stated opposition from the Family Justice Review, the Justice Committee, and experts. As already stated, the Government wanted a legislative statement about shared parenting to 'pacify' the father's social movements such as Fathers4Justice and FamiliesNeedsParents. Another key question is whether the Government, in changing the definition of welfare of the child, was thinking more about the parents rather than the child, the main subject of the reform.

From a practical perspective – as will be elaborated in the subsequent section – the questioned presumption of involvement of both parents did not substantively change the action of the courts. However, there is evidently a deep change on the welfare principle, as it has been recognized for the first time in legislation that the child needs the involvement of both parents for her or his welfare, which indirectly recognises that shared parenting is best for the child. The welfare of the child – an indeterminate concept which depends on their circumstances and situations – is now compromised to the necessary involvement of both parents in the life of the child. Even if it is clear that this prerogative is usually for the welfare of the child and respects their right to

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670 Liz Trinder, 'Climate Change? The multiple trajectories of shared care law, policy, and social practices' (2014) 26 (30) Child and Family Law Quarterly 1,13-14.

671 Department of Education and Ministry of Justice, 'Cooperative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life' (Public Consultation, Digital Education Resource Archive, 13 June 2012) 3.1.; Ministry of Justice and Department of Education, *The Government Response to the Family Justice Review: A system with children and families at its heart* (Cm 8273, February 2012) para 62-63; Burton, 389.

672 Department of Education and Ministry of Justice, 'Cooperative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life' (Public Consultation, Digital Education Resource Archive, 13 June 2012) 3.1.

673 Felicity Kaganas, 'A presumption that involvement of both parents is best: deciphering law's messages' (2013) 25 (3) Child and Family Law Quarterly, 270; view shared by Trinder, 13; Burton, 389; Arnold, 51-52; Bainham and Gilmore, 'The English Children and Families Act 2014', 629.

have contact with – and be cared for by – both parents, it is yet unclear whether that would be the best option in all cases. Also, as Fortin states, it is 'extremely difficult' for courts to interpret the clause without making any specific reference to the amount of time each parent spends with the child and with the shared parenting becoming the norm, thereby the order will be made 'even in some situations where they will not benefit the children themselves'[674].

### 4.3.2 THE CFA 2014 AND THE WELFARE OF THE CHILD

Shared parenting has been promoted in different ways by the judiciary and the lawmakers since 2000, preceding the new amendments introduced in 2014. The changes around the welfare of the child and the shared parenting in England and Wales in the last decade are clear. The new amendments introduced by the Adoption Act 2002[675] have given the possibility for unmarried fathers to hold parental responsibility for their children by only being recognised in the birth certificate and without compulsory agreement from the mother or a court order. In this way, unmarried fathers can hold parental responsibility and look after the welfare of their children without any condition.

The primary amendments came with the Children and Families Act. The new amendments promoting the shared parenting, especially the involvement presumption have been largely debated in the public opinion prior to being entered into force. The importance of an ongoing relationship between children and their parents has been promoted and encouraged by case law and the institutions already before the Children and Families Act was even debated. Therefore, the very necessity of such a reform can be questioned. Thus, the general debate was between those who considered that it was not necessary to introduce a legal statement on the presumption of the involvement of the parents – led by the Family Justice Review – and those who believed it was necessary – led by the government – specifically to avoid conflict and the emotional pressure on cases concerning child's arrangements.

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674 Fortin, Hunt and Scanlan, 343.

675 Adoption and Children Act 2002, s 111 (2).

The main changes for parental arrangements vis-à-vis children following divorce or separation in the Children and Families Act 2014[676] are the new child's arrangements orders – introduced in the Children Act in section 8 (1) of the CA – and the new presumption that involving of both parents benefits the child, creating two new subsections on section 1 – on the child's welfare.

Both amendments change the conception of the needs of the child in different ways after the parents' divorce or separation, with the presumption of the involvement of both parents the amendment being the factor that most changes the interpretation of the welfare of the child.

The Children Act 1989 defines the new CAO as an order regulating arrangements relating to any of the following:

(a) with whom a child is to live, spend time or otherwise have contact; and
(b) when a child is to live, spend time or otherwise have contact with any person[677].

The new orders replace the residence and contact orders with the aim to focus all discussions on the children's care 'rather than on labels such as residence and contact' putting both orders under the same umbrella[678]. While the Family Justice Review proposed the change, the Justice Committee contended that the new order would confuse more the arrangements, which would lead to more conflict more than reduce it[679].

Some authors assess that the new CAO only provides a change of 'wording' which will not change anything, as parents will 'still fight over the child's time'[680]. Even if from an emotional point of view the introduction of the CAO conceivably have reduced the implication of the parents, from a legal point of view, the orders referring to the residence of the child have to be dealt separately, as it is different to live with someone

676 Children and Families Act 2014 (Commencement no 2) Order 2014.

677 Children and Families Act 2014, s 12 (3); CA, s 8 (1).

678 Family Justice Review, 'Final Report' (November 2011) para 4.60; Bromley ed Lowe and Douglas, 486.

679 Justice Committee, *Fourth Report: Pre-Legislative Scrutiny of the Children and Families Bill* (HC 2012-13, 739) para 130.

680 Burton, 390; Joan Hunt, 'Shared Parenting Time: Messages from Research' (2014) 44 (5) Family Law 676, 676.

than to have contact with someone. As Lowe and Douglas state, one of the deficiencies of the law is that concepts as 'living with', 'spending time with' and 'having contact with'[681] are not defined in the law. Even so, the new CAO introduces more than only a change of wording, as it also solves disputes that sometimes have interrelated issues. Particularly, the CAO and thus parental responsibility are applicable until the child's 18 Birthday – while the former contact and residence orders did not go beyond the child's 16th birthday[682].

Section 12(1) and (1A) of the Children Act 1989 states that the court shall, when making a residence order in favour of a father[683], also make a parental responsibility order if that person does not hold it. The CFA establishes that the new CAO should have the same effect if it also determines where the child is to live[684].

In addition, the new subsection (1A) considers that if the court makes a CAO and the father is the person named in the order as a person with whom 'the child should spend time or have contact', the court can decide

> 'Whether it would be appropriate, in view of the provision made in the order with respect to the father or the woman, for him or her to have parental responsibility for the child and, if it decides that it would be appropriate for the father or the woman to have that responsibility, must also make an order under section 4 giving him, or under section 4ZA giving her, that responsibility'[685].

However, as previous case law states, a CAO cannot be made solely for this reason, as the father or other person related to the child can ask for a parental responsibility order. Given the new parental involvement presumption, it is likely that only in exceptional cases – as in cases of violence against the child or the mother, or when the parents live abroad and a peaceful shared parental responsibility is not possible – the court would

681 Bromleys ed Lowe and Dougals, 486.

682 Child Arrangements Order (Consequential Amendments to Subordinate Legislation) Order 2014 (SI 2014/852).

683 Or a female parent in virtue of Human Fertilisation and Embryology Act 1998, s 42.

684 Children and Families Act 2014, Sched 2 para 21.

685 Children and Families Act 2014, Sched 2 para 21 (1A).

not award the parental responsibility to the parent who has contact with the child by the CAO[686].

Section 11 of the CFA 2014 inserts the new presumption that a parent's involvement in the child's life will further his or her welfare. The new section 11 (2) amends section 1 (2A) and (2B) of the Children Act 1989, which states therefore:

> (1) Welfare of the child
>
> When a court determines any question with respect to—
>
> (a) the upbringing of a child; or
>
> (b) the administration of a child's property or the application of any income arising from it,
>
> the child's welfare shall be the court's paramount consideration.
>
> (2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.
>
> (2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.
>
> (2B) In subsection (2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

As previously highlighted, the Government believed that the introduction of a legal statement of the need for the child of shared parenting was necessary. For some authors, the presumption will not impact future court decisions serves a more symbolic

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[686] Arnold, 63. Also, the new Children Act 1989, s 12 (2A) states that where the CAO names a person who is not the guardian or the parent of the child as a person with who the child should spend time or have contact with, the court should provide for that person to have Parental responsibility. However, in virtue of section 12 (3), that person cannot change the surname of the child, agree or refuse for the adoption of the child or appoint a guardian.

function[687] to pacify the demands and pressure of social groups – especially the father's group Fathers4Justice, who were very active from the beginning with the media through their particular and extreme actions[688]– than to protect the welfare of the child. However, Kaganas states that the involvement of both parents does not have a great impact on the upper-court decisions, but it has an effect in the lower courts, who tend to apply the presumption sometimes without considering the child welfare implications of their decisions[689].

However, it is evident that the change has an impact on the interpretation of the welfare of the child, as now it is recognized that the involvement of both parents is necessary for the child's wellbeing. Therefore, the main subject of the amendment is still the child, but shared responsibility has been incorrectly framed in debates between parents as simply the amount of time with their children. The whole political conversation – as it will be explored in Chapter 7 – and wider media coverage gives the idea that the child's welfare has been 'used' as a prop, rather than being the main subject. From a legal point of view, the doctrine sees that the statement of the involvement of both parents can bring more problems than solutions. For example, there is a conflict between the involvement of both parents and the welfare checklist which assesses the capability of a parent to take care of the child. While it is considered that the involvement of both parents will benefit the child, the judge has also to examine the capability[690] of each parent in taking care of the child, so the capability of the parents has to be assessed before they are actually involved in the life of the child.

Another problem is the confusion and ambiguous wording of the presumption. Even if the statement does not recognize any amount of time for the parents – as Fortin, Hunt and Scarlan point out – it would be difficult for the orders not to specify some amount of time dedicated to each parent[691], as the parents will have to share the time of the child.

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687 Kaganas 'A presumption that involvement…', 270; Trinder, 13-14; Fortin, Hunt and Scanlan, 343.

688 **See** <https://www.fathers-4-justice.org/about-f4j/our-story/> (last visit 02.12.2021).

689 Felicity Kaganas, 'Parental Involvement: a discretionary presumption' (2018) 38 Legal Studies, 549, 563.

690 See the conditions in Children Act, s 1 (3).

691 Fortin, Hunt and Scanlan, 343.

CFA 2014 section 11 also inserts section 1 (6) (a) which states that, for the purposes of subsection (2A) a parent can be involved in the child's life 'in a way that does not put the child at risk of suffering harm' and there is no evidence before the court 'in the particular proceedings to suggest that involvement of that parent' in the child's life 'would put the child at risk of suffering harm' whatever the form of the involvement[692]. Arnold tries to solve the ambiguity and confusing wording of the principle of the involvement of both parents and considers that there is somehow a hierarchy of presumptions, as the involvement of both parents only applies to those cases that direct or indirect involvement does not put the child at risk of suffering harm[693]. According to Arnold, the paramount principle still prevails over the involvement, which will be 'rebutted' if the court considers that the child's welfare 'will not be furthered by the parent being involved in the child's life'[694].

The debate surrounding this presumption has been significant even prior to the amendment being proposed. The disagreement was guided by two concepts: the concept of 'equality' between parents and the 'welfare' or the right of the child to have a meaningful relationship with their parents. As previously covered in this section, some authors who have voiced opposition to the new legislation, also note that media coverage surrounding the new presumption has misinformed the debate in the Parliament [695]. In their reporting, media have promoted shared parenting and the involvement's principle without considering the legal consequences that this statement will provoke in child's arrangements. The media also did not put children and their welfare at the centre the problems, rather the actions and queries of the parents.

Even case law has promoted shared parenting and shared residence prior to the amendment entering into force. It is clear – as experts and institutions have already stated – shared parenting cannot be a general rule, as each child and each case is different and risks that the parents fight about the amount of time spent with the child more than

692 Children and Families Act 2014, s 11 (3).

693 Arnold, 55.

694 Arnold, 55.

695 See Arnold, 51; Bainham and Gilmore 'The English Children and Families Act 2014', 635, Kaganas 'A presumption that involvement…', 270.

about the quality of time spent and the child's welfare. From a legal perspective, the introduction of the presumption of involvement of both parents changes deeply the concept of the welfare of the child. The amendment has brought the position that the welfare of the child does not depend on their relationship with the parents, but that it is necessary that both parents – irrespective of their relationship with the child or even between the parents themselves – to be involved in the child's life.

# 5 KINDESWOHL AND PARENTAL RESPONSIBILITIES IN SWITZERLAND

Switzerland began the process towards the shared parental responsibilities in 2000 and the main Review entered into force in 2014. The 2014 review assumes that shared parental responsibilities should be the rule and that it is in the best interests of the child. Since 2017, there have been other legal changes that concretise the conditions and limits of shared parental responsibilities. Switzerland is the most recent amongst the countries included in this study to approve the shared parental responsibilities. The 2014 reform changed the concept of well-being of the child, asserting that shared parental responsibilities are the rule, and therefore it is better for the child that both parents have parental responsibilities and decide together the main decisions for the child. The later reform of 2017 updated the 2014 rule and presents the option to request an alternate custody arrangement for those children who split time residing with both parents.

## 5.1 THE WELL-BEING OF THE CHILD IN SWITZERLAND

Since 1978, family Law in Switzerland has been explicitly inspired by the principle of the welfare of the child (*Kindeswohl*)[696]. Switzerland uses 'Interest of the child' and 'Well-being of the child' interchangeably. However, the main word used is *Kindeswohl* in German, translated as 'well-being' or 'welfare'[697]. The French translation of the principle is *intérêt de l'enfant* or *bien de l'enfant*. In Italian, it used the concept *bene del figlio* (welfare of the child). In Romanscht, the word *bainstar* is used[698].

The German translation of article 3 of the Convention on Rights of the Child refers to the welfare of the child, which should be the 'primary consideration', while the French

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[696] Andrea Büchler and Annatina Wirz in Ingeborg Schwenzer and Roland Fankhauser, *Familien-Kommentar Scheidung, Band I ZGB, Band II: Anhänge* (3rd ed, Stämpfli 2017) (henceforth FamKomm Scheidung) ZGB art 133 and 134 N 6.

[697] See Committee on the Rights of the Child, 'Concluding observations on the combined second to fourth periodic reports of Switzerland' CRC/C/CHE/CO/2-4 (26 February 2015) para 26.

[698] Martin Stettler, 'Elterliche Sorge und Kindesschutzmassnahmen' in Alexandra Rumo-Jungo and Pascal Pichonnaz (eds) *Kind und Scheidun*g (Schulthess 2006) 55.

translation refers to the 'interests of the child'[699]. For some authors, the notion of 'welfare of the child' in the German translation is 'broader' than the interests of the child, as worded in the Convention. For other authors, both notions are similar[700] and can be used interchangeably. Unlike the Swiss use of the term which is viewed by some to be broader than the interests of the child, the CRC uses 'well-being' to describe one aspect of the child's interests. In 2015, the Committee made a formal request for Switzerland to change the legal meaning of the term[701].

The well-being of the child is the guiding principle for all decisions concerning the child and the most important rule when deciding the child's arrangements[702]. In Switzerland, the child is protected by the constitution and the principle of Well-being (*Kindeswohl*) is recognized in article 302 Abs 1 of the Civil Code but refers to the responsibility of the parents.

Article 11 of the Constitution (BV) is the main article for the protection of children. Although it is not explicitly mentioned, protecting the well-being of the child is viewed as the main concern of the article[703]. Article 11 considers that children require more institutional protection and promotion than adults but recognizes minors as holders of fundamental rights with an independent personality that allows them to exercise their rights according to their age and maturity[704]. Article 11 of the Constitution states

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699 CRC, art 3 (1) german translation: *Ist das Wohl des Kindes ein Gesichtpunkt, der vorrangig zu berücksichtigen ist;* French translation: *intéret supérieur de l'enfant doit etre une considération primordial*; Stettler, 55.

700 Olivier Guillod and Sabrina Burgat, *Droit des Familles* (5th edn, Helbing Lichtenhahn 2018) 147; see also Wapler, 310-311; Büchler and Vetterli, 244.

701 Committee on the Rights of the Child considers the reports of Switzerland under the Convention and on the sale of children, Second Reply of the Delegation (Explanatory Report 22 January 2015) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15504&LangID=E> (last visit 27.12.2021) para 1-2.

702 Cantieni, *Gemeinsame Elterliche Sorge nach Scheidung*, 105.

703 *Kindeswohl* in German, *bien de l'enfant* in French, *bene del figlio* in italian, all more similar to the welfare of the child concept than to the best interests's concept. See more in Eva Maria Belser and Bernhard Waldmann*, Grundrechte II. Die einzelnen Grundrechte* (2nd edn, Schulthess 2021) 100-101.

704 Eylem Copur, *Gleichgeschlechtliche Partnerschaft und Kindeswohl* (Stämpfli 2008) 156; see also Hausheer, Geiser and Aebi-Müller, 343, Sz 15.19; Belser and Waldmann, 101.

the right of children to special protection of their physical integrity – the respect to their body as a whole – and their development:

(1) Children and young people have the right to the special protection of their integrity and to the encouragement of their development.
(2) They may personally exercise their rights to the extent that their power of judgement allows[705].

Article 11 BV is the introduction of CRC's principles in Switzerland, who signed the Convention in 1997. The first reference to this principle came in 1972 with the reform of the adoption law in the country. Although the CRC adopts the standard concept of the best interests of the child in 1989, Swiss lawmakers decided not to change the concept – following the signing of the Convention – but rather to leave the notion of 'Kindeswohl' or welfare of the child when referring to the best interests principle[706].

The Civil Code (henceforth ZGB) refers to the well-being of the child in articles 301 and 302, as well as to the parents and their responsibilities towards the child. Firstly, the Civil Code states in article 301 (1) ZGB that the parents should have the well-being of the child in mind when they take the necessary decisions for his or her development[707]. But the concept of the well-being of the child is referred to in article 302 Abs 1 ZGB which states:

1. The parents must raise the child according to their circumstances and encourage and safeguard the child's physical, mental and moral development.
2. The parents must arrange for the child, especially if he or she has physical or learning disabilities, to receive an appropriate general and vocational education that corresponds as closely as possible to the child's abilities and inclinations.

Therefore, it can be presumed that the concept of well-being of the child is the child's physical, mental, and moral development and the right of the child to receive a general education according to the child's abilities and inclinations. However, as highlighted earlier, this reference to the well-being of the child is very general and is only men-

705 Bundesverfassung der Schweizerischen Eidgenossenschaft (BV) SR 101 (12 September 1848) art 11.

706 ZGB, art 264; ZGB, art 269; Bundesgesetz über die Änderung des Schweizerischen Zivilgesetzbuches (Adoption und Art 321) BBl 1972 Band I 1751, 1751 and 1754; Stettler, 55.

707 ZGB, art 301 Abs 1.

tioned in relation to parental responsibilities. Therefore, unlike the Constitution, Swiss Civil Code places at its core the parents, not the child. For Vetterli and Büchler, the lack of a definition for the well-being of the child presents a risk that the concept is subject to the sensibilities and prejudices of parents and authorities[708]. Hausheer, Geiser and Aebi-Müller consider that the well-being of the child is defined in the law as the whole physical, mental, and emotional integrity of the child[709] as stated in article 302 Abs 1 of the Civil Code. According to Schwenzer and Cottier, physical and health care also includes clothing, nourishment, general care, and the education of the child to independently exercise those functions[710]. The authors also state that religious education is also necessary for the spiritual development of the child and the parents are again at the core in their duty to choose the religion the child should grow up with[711].

Vetterli and Büchler attempt to describe the elements that shape the concept of Kindeswohl. The authors consider that the wellbeing of the child or 'Kindeswohl' includes

- the harmonic development from a physical, spiritual, and mental point of view,
- the opinion of the child,[712]
- the quality, stability and continuity of the relationships and parental affection and care,
- the cooperation of the parents in the care of the child and
- the physical and mental integrity[713].

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708 Büchler and Vetterli, 244.

709 Hausheer, Geiser and Aebi-Müller, 344 Sz 15.20; see also Bundesgericht Entscheid (BGE) BGE 129 III 250, E.3.4.2.; BGE 115 II 206, E. 4a.

710 BSK ZGB I – Schwenzer and Cottier, ZGB art 302 Abs 2.

711 BSK ZGB I – Schwenzer and Cottier, ZGB art 302 Abs 2; see BGE 142 III 502, E.2.4.1 ; ZGB art 302 Abs 2 and ZGB art 303.

712 ZGB, art 133 Abs 1.

713 Büchler and Vetterli, 244; Peter Breitschmid in Peter Breitschmid and Alexandra Rumo-Jungo, *Handkommentar zum Schweizer Privatrecht, Personen und Familienrecht inkl. Kindes und Erwachsenenschutzrecht* (3rd edn,Schulthess Juristische Medien 2016) (henceforth CHK- ZGB) art 301 N 2; see Hausheer, Geiser and Aebi-Müller, 344 Sz 15.20; BGE 129 III 250, E.3.4.2.

Some authors also include

- the optimal improvement of his or her education,
- the promotion of the adequate economic and social conditions and
- all conditions that contribute to develop all aspects of the child's personality: affective, intellectual, physical, social, and legal [714].

However, Büchler and Vetterli point out the difficulty in clarifying the concept of 'Kindeswohl' without oversimplifying the needs of the child[715]. According to Hausheer, Geiser and Aebi-Müller, the well-being of the child or 'Kindeswohl' should be considered an 'action rule' and includes all rights and obligations of all persons that have contact with the minor[716]. To these elements it can be included –after the Review of 2014 – the need for the child to be cared for by both parents through shared parental responsibility, which is a concretization of the stability and continuity of the relationships of the child. This stability and continuity of the child's relationships is called 'social continuity'[717] as German author Wapler states. From the psycho-social point of view, well-being entails the child maintaining a stable and healthy relationship with both parents and with other persons that are in contact with him or her. From the legal perspective, the *Kindeswohl* is the governing principle under which parents must protect in the representation, education, and care of the child. In this sense, it is also a limit to the margin of appreciation left to the parents[718].

The Swiss Federal Court (henceforth *Bundesgericht* or BG) has also provided some criteria to define *Kindeswohl*. According to the case law, the BG considers that the primacy

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[714] Yvo Biderbost in CHK- ZGB – art 307 III N 8, N 9; see also BGE 5A _ 66/2009, E. 3.2; E.3.3.2; Peter Breitschmid in CHK- ZGB – art 301 ZGB N 2; see BSK ZGB I-Schwenzer and Cottier, ZGB art 301 N 3; Hausheer, Geiser and Aebi-Müller, 344 Sz 15.20

[715] Büchler and Vetterli, 244.

[716] Hausheer, Geiser and Aebi-Müller, 343 Sz 15.18.

[717] 'Soziale Kontinuität' in the German translation. The criteria of the social continuousness serves to protect the social attachments of the child, differentiating between the local continuity (neighbourghood, school..) and the affective continuity (family and personal ties) intended to prevent unnecessary changes in the care and upbringing of the child. Continuity in this sense is intended as the continuity of his or her emotional ties. See Büchler and Vetterli, 244; Wapler, 252-253.

[718] Guillod and Burgat, 147 Sz 245.

of the child's well-being should be thought of in a broad sense, stating that the aim of the principle is to give the appropriate opportunities for the development of the child in physical, psychological, spiritual and social terms, taking into account the specific circumstances to determine the best solution for the child. Also, the responsibility of parents to educate their children specifically includes the transferring of moral values and convictions as well as the right to make decisions on the child's behalf, to organise its everyday life and to represent it externally[719].

The Bundesgericht considers that, even if it is extremely difficult to concretize the welfare of the child, it is essential for the child (especially the small child) to have an active and ongoing relationship with both parents[720]. A 2015 BG ruling determines that the relationship with both parents is crucial to the development of the child's identity[721], a decision marked by the new rules having entered into force in 2014. Before this ruling, BG believed that the period of conflict between parents prior to and during divorce proceedings was detrimental to the welfare of the child, and states that this conflict should end with the decision of the judge[722]. The BG also establishes that the interests of the child are paramount and override those of the parents[723].

*Kindeswohl* is the guiding principle of the action of all persons – including parents but not only – that decide on behalf of and have contact with a child and guides the rights and obligations that could arise in the relationship with the child[724]. Hausheer, Geiser und Aebi-Müller state that *Kindeswohl* is the main goal for parents and also the scope of their responsibilities and duties towards the child. For authorities, *Kindeswohl* is the

719 BGer 146 I 20 2C_1005/2018, E.5.2.1; BGE 142 III 612, E.4.3; BGE 142 III 481, E.2.7; BGer 5A_375/2008, E.2; BGE 129 III 250, E.3.4.2; BGE 117 II 353, E. 3 S. 354; BGE 142 III 612, E.4.3.

720 CRC, art 9 (3) (right oft he child to be cared and have contact with his/her parents) ZGB, art 273 Abs 1; BGE 130 III 585, E.2; ATF 131 III 209, E. 5; BGer 5A_66/2011, E.3.1; BGE 144 III 481, E.4.7; BGE 117 II 353, 354 E. 3; Breitschmid in CHK- ZGB – art 273 N 1.

721 BGer 5A_ 202/2015, E. 3.1; BGE 130 III 585, 590 E. 2.2.2.

722 BGE 142 III 612 E.4.3; about the continuing conflict between parents, which will be discussed later, see more recently BGE 141 III 472 E.4.7.

723 BGE 142 III, E.3.2.3.; BGE 141 III 328, E.5.4; BGE 141 III 472, E.4.

724 Büchler and Vetterli, 244; Hausheer, Geiser and Aebi-Müller, 197 Sz. 10.131; 344 Sz. 15.20.

main rule when deciding the child's arrangements[725]. The principal guardians of the well-being of the child are first the parents, and then the authorities. The Bundesgericht states also that the well-being of the child takes priority over the interests of parents in decisions about the custody and child's arrangements[726].

## 5.2 PARENTAL RESPONSIBILITY IN SWITZERLAND.

The Swiss Civil Code does not have a legal definition of parental responsibilities, but it explains the content and objective – the well-being of the child – in the third section of the Civil Code, from article 296 to 317 ZGB[727]. The 2014 Review presents substantial changes to the content and scope of parental responsibilities in Switzerland, including the decision about the residence of the child as part of the content of the parental responsibilities[728]. The implications following the 2014 Review's change of the concept of custody has resulted in a new paradigm towards shared parental responsibilities and therefore, also towards the concept of *Kindeswohl*[729].

To harmonize the concept of parental responsibility with the majority of European countries, in 1998 Switzerland reviewed the Divorce Law and changed the term *elterliche Gewalt* (parental authority) to the softer term of *gemeinsame elterliche sorge* (parental responsibility)[730]. This shift from parental authority to parental responsibility illustrates the evolution of the common perceptions regarding the parent-child relationship. With the 1998 review, children are considered from then, a subject of rights with their own personality and need of care, whilst avoiding the authoritative understanding of the concept of parental authority. Children are perceived, not only as legal persons with

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725 Hausheer, Geiser and Aebi-Müller, 197 Sz.10.131; 344 Sz. 15.20.

726 BGE 142 III 612, E. 4.2; BGE 131 III 209, E. 5.

727 ZGB, art 296 -317.

728 Hausheer, Geiser and Aebi-Müller, 407 Sz 17.68

729 Will be explored further in section 5.2.2.

730 Schweizerischen Zivilgesetzbuches, Änderung vom 26. Juni 1998 (Personenstand, Eheschliessung, Scheidung, Kindesrecht, Verwandtenunterstützungspflicht, Heimstätten, Vormundschaft, Ehevermittlung) (AS 1999 1118 ff) 16 and 46 – 47; Bettina Gründler, *Die Obsorge nach Scheidung und Trennung der Eltern im Europäischen Rechtsvergleich* (Peter Lang 2002) 173.

the right to welfare, protection, and promotion, but also as independent individuals with their own right to be heard in actions that concern their person. The concept of parental responsibility puts an end to a certain extent the hierarchy in the legal relationship between parents and children[731].

The law only defines the purpose of parental responsibilities, the welfare of the child, in article 296 Abs 2 ZGB and states the content in article 301 to 306 ZGB and 318 Abs 1 ZGB. In the legal doctrine, parental responsibilities are considered a 'right – function' or a bundle of rights and duties of the father and the mother regarding the child[732] and consists essentially of the promotion of the good development of the child towards a greater autonomy and independence[733].

Hegnauer defines parental responsibility as the legal right of the parents to take the necessary decisions for the development of the minor child[734]. Büchler and Vetterli define parental responsibility as a set of parental rights and duties to be exercised for the best interests of the child[735].Aebi Müller, Hausheer and Geiser consider parental responsibility as the indispensable and inalienable right of the parents to make the necessary decisions for the child, to educate him or her, to represent him or her and to manage his or her property[736].Parental responsibility is led by the well-being of the child, which means the parents should always act in a way that benefits the development of the child. The guiding principle, and limiting factor, for actions taken by the parents is thus the *Kindeswohl*[737].

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731 Valentina Baviera, 'Elternrechte und Kindeswohl' in Claudia Kaufmann and Franz Ziegler, *Kindeswohl. Eine interdisziplinäre Sicht* (Stämpfli 2003) 143.

732 See Hausheer, Geiser and Aebi Müller, 406 Sz. 17.67; see also Guillod and Burgat, 138 Sz. 234.

733 Guillod and Burgat, 142 ; see also Regina Aebi-Müller and others, *Artzrecht*, (Stämpfli 2016) 235 Sz 179.

734 Cyril Hegnauer, *Droit Suisse de la filiation et de la famille (art. 328-359 CCS*) (4 Ed, Stämpfli 1998) 163.

735 Büchler and Vetterli, 246 -247.

736 Hausheer, Geiser and Aebi Müller, 406 Sz. 17.67.

737 ZGB, art 296 Abs 1; Linus Cantieni and Rolf Vetterli in Andrea Büchler Andrea and Dominique Jakob, *Zivilgesetzbuches (ZGB) KurzKommentar* (2nd edn, Helbing Lichtehnhan 2017) (henceforth KUKO ZGB) ZGB art 301 E.4; Hausheer, Geiser and Aebi Müller, 406 Sz. 17.67.

The High Court defines parental responsibility as the decision-making responsibilities in central questions of life development of the child and a compulsory right that encompasses the totality of parental responsibilities and powers vis-à-vis the child. In particular, with regard to upbringing, legal representation and property management[738].

Parents, though, have the so-called 'monopoly of concretisation'[739] regarding the child's personal rights and therefore, must educate and guide the child according to their circumstances[740]. Parents, in principle, are subsequently free to decide for themselves which interventions in the personal rights of the child are educationally necessary or which educational measures are compatible with the personal rights of the child in a specific individual case[741]. However, all decisions regarding the child are subject to several limits. These limits, according to Trost, are guided by principles of proportionality, objectivity and should be directed to the well-being of the child, which must guide all actions concerning the child[742]. Accordingly, educational goals and the care are inadmissible if they violate or endanger the physical, mental or emotional integrity of the child, which leads to a determined development of the child or can damage his or her integration into society or live freely and independently[743].

### 5.2.1 CONTENT OF PARENTAL RESPONSIBILITY

Parental responsibility encompasses all responsibilities and obligations of the parents towards the child that empower and obligate the parents to make decisions on the

738 BGE 142 III 502, 508 E.2.4.1; BGE 136 III 353, 356 E. 3.1.

739 Urs Tschümperlin, *Die elterliche Gewalt in Bezug auf die Person des Kindes (Art 301 bis 303 ZGB)* (Universität Freiburg Verlag 1989) 779 ff; Regina Aebi-Müller and others, *Artzrecht*, 240 Sz 196.

740 Kurt Affolter-Fringeli and Urs Vogel in Heinz Hausheer and Peter Walter Hans (eds*) Berner Kommentar (BK) Schweizerisches Zivilgesetzbuch, Die elterliche Sorge / der Kindesschutz, art 296-317 ZGB* (Stämpfli 2016) (henceforth BK) art 302 N 9; BK-Hegnauer, alte ZGB art 275 N 22 ff.; BSK ZGB I Schwenzer and Cottier, ZGB art 302 N 2.

741 BSK ZGB I – Schwenzer and Cottier, ZGB art 301 N 2; Tanja Trost*, Das Elterliche Erziehungsrecht und die Persönlichkeitsrechte des Kindes. Eine Untersuchung am Beispiel von Cognitive Enhancement* (Stämpfli 2017) 36; Regina Aebi-Müller and others, *Artzrecht*, 240 Sz 196.

742 Trost*,* 36.

743 ZGB, art 301 Abs 1; Trost, 34.

child's behalf, as long as the child is a minor[744]. Parental responsibility focuses on the three major areas: the education of the child, the representation and the child's maintenance (including the children's healthcare)[745]. The 2014 Review has also resulted in the broadening of parental responsibilities to include the right to establish the residence of the child[746].

According to current law, parental responsibilities involve the care of the child in general[747], the right to give the child a name, the determination of his or her residence[748] and his or her education[749], including his or her religious education[750] and the child's representation[751]. The Message for the Revision of the parental responsibilities published in 2011 states that shared parental responsibility means that both parents must decide together all decisions concerning the child and thus the principle of equality should be recognized also between the parents[752].

To protect the well-being of the child, there are some conditions for those who hold parental responsibility. First, it is necessary that the holder has a biological or social relationship with the child, what is call 'filiation'[753], the family legal relationship between the child and his or her parents[754]. Contrary to what is seen in England and Wales, only the legal mother and legal father of the child can detain parental responsibility and only they can be holders of parental responsibilities[755] with certain conditions – as the

744 Büchler and Vetterli, 239.

745 Guillod and Burgat, 138 Sz. 234; Regina Aebi-Müller and others, *Artzrecht*, 235 Sz 179.

746 This will be explored further in section 5.4.1.2.

747 ZGB, art 301 Abs 1; Aebi-Müller and others, *Artzrecht*, 240 Sz 195.

748 ZGB, art 301a since the review of the Civil Code, Botschaft zu einer Änderung des Zivilgesetzbuches (Kindesunterhalt) BBI 2014 52 [29 November 2013].

749 ZGB, art 302.

750 ZGB, art 303.

751 ZGB, art 304 (autonomy of the child); ZGB, art 305 and ZGB, art 306.

752 Bundesamt für Justiz, Botschaft zu einer Änderung des Schweizerischen Zivilgesetzbuches (Elterliche Sorge) BBI 2011 (16 November 2011) E. 1.2.1.

753 Kindesverhältnis in German.

754 Guillod and Burgat, 138 E.234, E.235; Hausheer, Geiser and Aebi Müller, 407 E.17.69.

755 Guillod and Burgat, 138 E.235; Cantieni, 91.

agreement of the mother for the father or the need for the birth registration to demonstrate the existence of a filiation link – especially for the fathers. However, for the best interests of the child, the courts may decide that parental responsibility is attained by only one of the parents[756]. The parents must have also the whole personal capability to exercise their responsibilities towards the child, that means, consciousness and maturity[757]. The mother has automatic parental responsibility, while the father must first recognize the child. Parental responsibility is considered a right and a duty in the sense that it empowers and obligates its holders to take all necessary decisions for the proper development of the child, while he or she is a minor[758].

### 5.2.2 CUSTODY, RESIDENCE, AND PARENTAL RESPONSIBILITIES

One of the main questions about the allocation of children is who holds responsibility for day-to-day decisions and with whom the child will live. The 2014 Revision eliminates the difference between the legal custody (the decision about the residence of the child) and 'de facto' custody, where the child lives. This change will be examined in more detail in the chapter, but for now can be regarded as an implication of the concept of custody in Switzerland and its relationship with parental responsibility. The 2014 Review was not the only one to change the custody laws. The Divorce Review (in force since 2000[759]) examined both types of custody. Prior to the 2000 amendment, only one of the parents could hold custody of their children after divorce, while the other had the right to personal relationships and contact with the child. The old law differentiates legal custody and 'de facto' custody. Legal custody is understood as the right of the parents

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[756] Guillod and Burgat, 138, E.235.

[757] Hausheer, Geiser and Aebi Müller, 408 E.17.71.

[758] BGE 136 III 353, E.3.1; BGE 142 III 617, E. 3.5; Guillod and Burgat, 138 E.234; BK – Affolter-Fringeli and Urs Vogel, ZGB art 301 N 4; ZGB art 301b Abs 1; ZGB, art 296 Abs 1.

[759] Schweizerischen Zivilgesetzbuches, Änderung vom 26. Juni 1998 Personenstand, Eheschliessung, Scheidung, Kindesrecht, Verwandtenunterstützungspflicht, Heimstätten, Vormundschaft, Ehevermittlung (AS 1999 1118 ff) 1118.

to decide the residence of the child[760], where the child lives according to the law. 'De facto' custody means the daily domestic life together with the child[761].

Since the enacting of the 2014 Revision[762], the right to determine the residence of the child is inseparable from the parental responsibility. There is therefore no longer any difference between the legal custody and the 'de facto' custody. Thus, custody is intended as the right to decide the place of the child's residence[763].

Prior to the 2014 reform, allocation of parental responsibility was determined by the legal status of the parents at the time of birth of the child. If the mother was unmarried, she had automatically parental authority. The father who had recognized the child, could get parental responsibility only if the mother agreed to present an instance at the authorities of protection of the child. This regulation was not in accordance with article 8 BV which states the principle of gender equality, as the joint parental responsibility was granted to unmarried parents only if the mother agreed to do so[764]. According to the old law, when parents were not married at the time of the child's birth, parental authority went to the mother (article 298 a ZGB) unless the mother was a minor or under guardianship. In this case, the court could assign parental authority to the father[765].

One of the main changes in 2014 was to grant shared parental responsibility at the moment when the father's filiation has been established, considering that it is for the welfare of the child that both parents have parental responsibility. The shared exercise of parental responsibilities must be confirmed by a joint declaration whereby the parents confirm they want to share responsibilities for the child and agree on the terms of their custody, their personal relationship and collaboration for the maintenance and support of the

760 ZGB, art 301 Abs 3.

761 ZGB, art 301 Abs 3; BGE 128 III 9, E.4.9; BGE 136 353, E.3.2; BGer 5A_463/2017, E.4.1; Hausheer, Geiser and Aebi-Müller, 414 Sz. 17.100;

762 Botschaft zu einer Änderung des Zivilgesetzbuches (Kindesunterhalt) BBI 2014 52 [29 November 2013] 52.

763 Daniel Rosch, Christiana Fountoulakis and Christoph Heck (eds), *Handbuch Kindes-und Erwachsenenschutz, Recht und Methodik für Fachleute* (2nd edn, Haupt Verlag 2018) 331.

764 Guillod and Burgat, 141 Sz. 238. This issue will be discussed further in the chapter.

765 Guillod and Burgat, 141 Sz. 238.

child[766]. In the case that one of the parents refuses to share responsibility, the other parent – usually the father – can apply to the child's protection authority. In the case that recognition has been made before a Court, the judge should decide automatically for shared parental responsibility, unless the welfare of the child mandates exclusive parental responsibility[767].

In the previously mentioned case of *Zaunnegger vs Germany*[768] the European Court sanctioned the German courts for their refusal to give joint parental responsibility to a non-married father only because the mother opposed it, without a deep examination from the point of view of the interests of the child. The Court considered that the refusal to share the parental responsibility expressed by the mother was not motivated from the point of view of the interests of the child. According to the ECtHR, a court could assign shared parental responsibility if it is in the interests of the child. For some scholars, this decision indirectly compelled the Swiss legislator to modify the Civil Code[769].

## 5.3 THE WAY TO THE PARENTAL RESPONSIBILITY REVIEW 2014

The way towards the shared parental responsibilities began with the Divorce Review 2000. However, the meaning and therefore, the future interpretation of the well-being of the child changed with the 2014 amendment on shared parental responsibilities when it was declared that the shared parental responsibilities will be 'the rule'. With the 2014 amendment, the concept of *Kindeswohl* has widened to include shared parental responsibility of both parents.

The main change of the Divorce Review of 2000 was to give to both divorced parents the parental responsibilities and custody, under certain conditions. Before the reform, only one parent (usually the mother) held parental responsibilities and custody. The

766 ZGB, art 298 Abs 1.

767 ZGB, art 298a Abs 1 and Abs 2; Guillod and Burgat, 144-145 Sz 242.

768 Decision ECtHR, *Zaunnegger v. Germany*, App no 22028/04 (ECHR, 3 December 2009).

769 Before the reform, the Bundesgericht stated that the Zaunneger v Germany case referred only to the German Law. See BGE 5A_420/2010, E. 3.2; BGE 5A_638/2010, E.5. Guillod and Burgat, 144-145 Sz 242.

other parent had the right to contact, visit and have personal relationships with the child. However, joint parental responsibility was granted to divorced parents only under certain conditions: firstly, a joint agreement presented by both parents to the judge and secondly, that joint parental responsibilities would be for the well-being of the child[770]. Until then, only one parent held parental responsibilities, while the other (usually the father) only had visitation rights and contact with the child. The reform brought by the Divorce Review is a victory for unmarried parents, who are also able to request joint parental responsibility under the same conditions as divorced parents[771].

Another change already made in the 2000 amendment is the explicit mention of the opinion of the child as a criterion for the allocation of parental responsibilities[772]. The 2000 amendment changed the perception of the child to being an independent person with their own opinions and subject of rights[773] which are not dependent on the parent's decisions. The guiding principle of the 1998 amendment is the continuation of care for the child by the parents after divorce, proceeding with their involvement in the child's life after legal separation. The main discussion concerned those situations where there is a critical and continuous conflict between parents, a debate that was also present in the 2014 review and continues to present day. To avoid situations where parents had no fluid communication concerning their children after a divorce and avoid the probable harm to children on these conditions, the 1999 reform was more cautious and did not consider the possibility of shared parental responsibilities in all cases, as it required a joint agreement from the divorced parents to grant the shared parental responsibilities who were most likely to enter in conflict[774]. On the other hand, the review which

770 Cantieni, 24.

771 Guillaume Choffat, 'Reflexions sur la réforme de l'autorité parentale conjointe : une promesse dé UE ?' (2015) 2 Semaine Judiciaire – doctrine, 167.

772 Former ZGB art 133 Abs 1 ; Schweizerischen Zivilgesetzbuches, Änderung vom 26. Juni 1998 Personenstand, Eheschliessung, Scheidung, Kindesrecht, Verwandtenunterstützungspflicht, Heimstätten, Vormundschaft, Ehevermittlung (AS 1999 1118 ff) 3504 ; see also Schweizerische Zivilprozessordnung (Zivilprozessordnung, ZPO) vom 19. Dezember 2008 (ZPO) art 298; Fammkomm Andrea Büchler and Sandro Clausen, art 133 N 11.

773 Cantieni, 87.

774 Amtliches Bulletin der Bundesversammlung (ABB) Änderung Schweizerisches Zivilgesetzbuch, art 133 (17 Dezember 1997) 2715 -2722.

entered into force in 2014 did not require that the parents agree to share responsibility and considered that shared parental responsibilities would be the rule.

Between 2000-2010, joint parental responsibilities increased from 1.189 divorce parents with shared parental responsibilities in 2000 to 7.002 parents in 2010[775]. Therefore, the Federal Council suggested[776] in 2011 to modify the Civil Code to introduce shared parental responsibility[777]. The Parliament accepted the reform on 21st June 2013 and entered into force on 1st July 2014. Between 2011 and 2013, fathers' social movements and the media were very active in the debate, promoting the need for a Family Law reform that recognises shared parental responsibilities as the rule rather than the exception. The main problem – as will be explored in chapter 7 – was the lack of recognition from the media of the legal implications that the law would bring to children and parents.

The 2014 reform states that parents automatically have joint parental responsibility after the birth of the child, independently of their civil status[778]. The reform brought also main changes on the concepts of custody, parental responsibility, and a substantial transformation on the concept of the well-being of the child. The next section first explores how the shared parental responsibilities were reached and secondly, the effects of the 2014 Review.

In 2004, the German Constitutional Court[779] considered the advantages of the joint parental responsibility for the best interests of the child [780]. The position taken by Germany – which are usually a model for Swiss Law but does not have any practical consequences – on shared parental responsibilities inspired the position of Reto Wehrli, national Swiss Counsellor, who was the first to propose to the Parliament a change in the Law. The decision *Zaunnegger vs Germany*[781] of the ECtHR opened the door for shared

775 Botschaft Elterliche sorge BBI 2011, 9077.

776 Botschaft Elterliche Sorge BBI 2011, 8315.

777 Guillod and Burgat 141 Sz. 238.

778 See ZGB, art 299 for married parents, ZGB, art 259 (1) for unmarried parents, after the revision of ZGB, art 296; see also Botschaft Kindesunterhalt BBI 2014, 4299.

779 Decision BVerfGe (BVerfG, 29.01.2003) 1 BvL 20/99, 1 BvR 933/01.

780 Stettler, 54.

781 Decision ECtHR, *Zaunnegger v. Germany*, App no 22028/04 (ECHR, 3 December 2009); Decision ECtHR, *Sporer vs Austr*ia, App no 35637/03 (ECHR, 3 February 2011).

parental responsibility for unmarried parents in Europe. According to some scholars, on this point the German legislation is similar to the Swiss. Thus, for some this decision indirectly led Swiss lawmakers to accelerate the amending of the Civil Code[782].

Inspired by the decision of the ECtHR, Wehrli[783] asked the Federal Council on 7th May 2004 to study the possibility of promoting shared parental responsibility in cases where parents are not married or are no longer together in Switzerland. Wehrli posed the public question of whether it might not be the moment for Switzerland to introduce joint parental responsibility as the rule. Thus, he asked the Parliament to make different proposals for the relevant articles in the Civil Code[784]. Wehrli also stated that it cannot be denied that practically 'all children' want a personal, regular, constant, and enduring relationship with both parents[785].

Contrary to what happened in England – and to a lesser extent also in Spain – the Ministry of Justice in Switzerland accepted the position of experts and judicial authorities. In May 2005, the Ministry of Justice facilitated a survey amongst judges, lawyers and mediators about the Divorce Law presented in 2000 and the possibility of a new revision of the divorce law[786]. The majority of those surveyed were in favour of a new scheme for determining children's arrangements after divorce, emphasizing the importance of the father in the life of children and the need to facilitate the shared parental responsibilities[787]. However, at least 56% of the inquired participants answered that it was

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782 Philippe Meier, 'L'autorité parentale conjointe – L'arrêt de la CourEDH Zaunegger v Allemagne – quels effets sur le droit suisse ?' (2010) 65 (3) Revue de la protection des mineurs et des adultes RMA 246, 246; Guillod and Burgat, 141 Rz 238.

783 Amtliches Bulletin, Postulat Reto Wehrli (Elterliche Sorge. Gleichberechtigung) 04.3250 [07 Mai 2004].

784 Stettler, 63; Amtliches Bulletin, Postulat Reto Wehrli (Elterliche Sorge. Gleichberechtigung) 04.3250 [07 Mai 2004].

785 Schweizer Parlament, Amtliches Bulletin (07.10.2005) Postulat 04.3250 Reto Wehrli (Elterliche Sorge. Gleichberechtigung) AB NR 2005 1496 ff / BO 2005 1496 ff.

786 Bundesamt für Justiz, *Umfrage zum Scheidungsrecht bei Richter/innen und Anwält/innen, sowie Mediatoren/Mediatorinnen* [Mai 2005].

787 Bundesamt für Justiz, *Umfrage zum Scheidungsrecht bei Richter/innen und Anwält/innen, sowie Mediatoren/Mediatorinnen* [Mai 2005] 92.

not the duty of the law, but rather of the courts to solve the problems and rejected the proposal to establish the shared parental responsibility as the rule[788].

The Swiss National Funds Organisation (SNF) also carried out a study between 2004 and 2006 on shared parental responsibilities after divorce and the daily life of divorced parents, to see how shared parental responsibility affects families. According to this study, only 15% of cases had the child being cared for by both parents, but 75% of the fathers who do not hold parental responsibility wanted more participation in the life of their child[789]. The study also points out that the participation of children in their own arrangements is not considered enough[790].

The 'Wehrli Proposal' was not without critics. Some parliamentarians pointed to a perceived lack of attention or care by some fathers for their children and the dire situation of women after divorce – who were left by their ex-husbands to care for their children alone with minimal or no support – thus refused shared parental responsibility as a rule for all families, considering that it could lead to higher conflict between the parents concerning the education and development of their children[791], and ultimately lead to a major harm to the children. Previous Federal Court case law avoided granting joint parental responsibility without agreement from the parents[792] and some parliamentarians recalled that without an agreement, there would be more conflict and discussion between parents[793].

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788 Bundesamt für Justiz, *Bericht über die Umfrage zum Scheidungsrecht bei Richter/innen und Anwält/innen, sowie Mediatoren/Mediatorinnen* [Mai 2005] 15.

789 Andrea Büchler, 'Die elterliche Sorge im Blickfeld der Rechtspraxis und der alltäglichen Lebensgestaltung' in Andrea Büchler and Heidi Simoni, *Kinder und Scheidung: Der Einfluss der Rechtspraxis auf familialem Übergang* (Rüeger, 2009) 219.

790 Andrea Büchler, 'Die elterliche Sorge im Blickfeld…' 216 Cff; See also Swiss National Science Projects, Completed Projects of the NRP 52, *Childhood, Youth and Intergenerational Relationships*, National Research Programme NRP 52 (Bern, Juni 2007) 26-28, <https://media.snf.ch/s5He9pXmfhT3aZR/nfp52_zusammenfassungen_ergebnisse_dfe.pdf> (last visit 07.12.2021).

791 Schweizer Parlament, Amtliches Bulletin (07.10.2005) Nationalrat Herbstsession 2005 Siebzehnte Sitzung (07 Oktober 2005) no 04.3250; AB 2005 1496 / BO 2005 1496 (henceforth AB 2005) Votum Jaqueline Fehr, Anita Thanei, Ruth Gaby Vermot – Mangold (AB 2005 1496).

792 Before the law entered into force, in 2014 BGE 5A_105/2014, E.4.3.1; previously BGer 5A_779/2012, E. 4.2; BGE 5A_420/2010, E.3 and E.4; Choffat, 170 – 171.

793 AB 2005 1501-1502, Votum Nordmann, Votum Marti, Votum Amherd.

The Federal Council insisted on the need to focus the debate on the welfare of the child as the principle would be the centrepiece of the new law. Parliament approved a review of shared parental responsibility [794] and the Federal Office of Justice (FOJ) was ordered to propose a draft for the revision[795].

The preliminary project was presented in January 2009 and stated that the main purpose of the revision was to introduce shared parental responsibilities, to promote the welfare of the child and also the equity between father and mother[796]. For the child, the Office of Justice considered that the child may benefit from shared parental responsibilities as it promotes cooperation between both parents, provides more stability to their relationship with the child and reduces the emotional and practical consequences of the divorce on the child[797].

However, the definitive Bill was not redacted until 2011. Throughout this timeframe, the Federal Office of Justice changed hands from Eveline Widmer-Schlumpf to Simoneta Sommaruga. Widmer-Schlumpf was in favour of separating into two different reviews the modification of the joint parental responsibilities and the review on maintenance of children after divorce. Conversely, Sommaruga[798] decided to merge these two reviews, leading to the frustration of the father's rights organisations[799] who feared further de-

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794 AB 2005 1502.

795 see Bundesamt von Justiz, *Bericht zum Vorentwurf einer Teilrevision des Schweizerischen Zivilgesetzbuches (Elterliche Sorge) und des schweizerischen Strafgesetzbuches (Art.220)* [Januar 2009] and later on, Nationalrat, Motion Kommission für Rechtsfragen NR Gemeinsame elterliche Sorge als Regelfall und Neufassung der Rechtsbeziehungen zwischen Eltern und Kindern, Wortlaut der Motion vom 08 April 2011, <https://www.parlament.ch/centers/kb/Documents/2011/Kommissionsbericht_RK-S_11.3316_2011-11-15.pdf> (last visit 25.01.2022)

796 Bericht Elterliche Sorge (Januar 2009) 8.

797 Bericht Elterliche Sorge (Januar 2009) 16.

798 Amtliches Bulletin (AB) Nationalrat, Herbstsession 2012 (AB NR 2012) Zwölfte Sitzung 25 September 2012 No 11.070 Zivilgesetzbuch. Elterliche Sorge <https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=32546#votum3> (last visit 30.04.2021) Votum Vogler, 1627; AB NR 2012 Votum Schneider Schüttel, 1628; AB NR 2012 Votum Flach, 1629.

799 The father's organisations and the organisations in favour of the shared parental responsibilities began an action called 'Schick en Stei' (send a rock) to show their indignation. These organisations were: *Associazione genitori non affidatari* (AGNA) *Association jurassienne pour la coparentalité* (AJPC) *Fondation pour la Recherche d'Enfants Disparus International*; *Schweizerische*

lays in the amendment[800]. They also feared the shared parental responsibility as a rule will never enter into force if the Parliament continued to postpone the Review. Finally, on 4th April 2011, the Federal Council decided to go through the revision in 'two phases' keeping separate the review on shared parental responsibility and the maintenance revision of the Civil Code[801].

16th November 2011, the Federal Council finally presented the Bill of the Review of the Civil Code to introduce shared parental responsibility as the rule, independently of the civil status of the parents[802]. Most of the parliamentarians were in favour of approving shared parental responsibilities as the rule, but there was some vagueness about what to do in the case of harm to the well-being of the child[803]. Sole custody was only proposed in cases where the interests of the child would be damaged, but there were no specific criteria to allocate sole parental responsibility, except those criteria already present in the law of the withdrawal of parental responsibility ex-oficio[804]. Some parliamentarians considered there remained scope for other criteria[805] but in the end deemed the Bill of Review as already sufficient given its nature as a general clause[806]. Ultimately, the principle of well-being was the only determining criteria to establish sole custody[807]. However, the Federal Court established this criteria in the following years.

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*Vereinigung für gemeinsame Elternschaft*, *Kinder ohne Rechte*, *Mannschaft*, *Mannzipation*, *Pére pous tous*, *Verantwortungsvoll erziehende Väter und Mütter* (VeV), *Papatour*, *Doubtfire*. For more information, see <http://www.schickenstei.ch/verband.php>(last visit 01.12.2021)

800 See about Bürgisser, 24.

801 Nationalrat, Motion Kommission für Rechtsfragen NR Gemeinsame elterliche Sorge als Regelfall und Neufassung der Rechtsbeziehungen zwischen Eltern und Kindern, Wortlaut der Motion vom 08 April 2011, <https://www.parlament.ch/centers/kb/Documents/2011/Kommissionsbericht_RK-S_11.3316_2011-11-15.pdf> (last visit 25.01.2022)

802 Botschaft Elterliche Sorge BBI 2011.

803 BGE 141 III 472, E.4.2 about the allocation of sole parental responsibility, 475.

804 AB NR 2012 Votum Josistsch, Feri, Fehr, 1625 and 1644.

805 AB NR 2012 Votum Josistsch, Huber, 1636-1638.

806 AB NR 2012. Votum Sommaruga, Kniener Nellen, 1638 and 1646.

807 Botschaft Elterliche Sorge BBI 2011.

The 2011 Bill levels strong criticism against the old 1998 Review on shared parental responsibilities, especially what it regards it to be insufficient attention to the welfare of the child, discrimination against fathers and the stigma attached to unmarried parents. Concerning the *Kindeswohl*, the Federal Council criticised that if only one parent holds parental responsibility, it practically means the child 'loses' one parent. For this reason, it was considered that shared parental responsibility contributed to the well-being of the child[808].

Eliminating the difference in meaning between 'legal' custody and 'de facto' custody was also proposed, subsequently introducing into the content of parental responsibility the decision on the child's residence. This revision means a significant change in Swiss Law, as it aims to avoid any conflict between the parents on the residence and the custody of the child and to give them more autonomy. The Revision also confirms the idea that it is for the welfare of the child to have an on-going relationship with both parents and that both jointly decide where the child lives. Between 2011 and 2013, the Bill was reviewed with approval by Parliament finally taking place the 21 June 2013[809]. The Review of the Civil Code entered into force the 1st July 2014.

## 5.4 SHARED PARENTAL RESPONSIBILITY AND KINDESWOHL AFTER 2014

The main revision of the Civil Code in 2014 principally implied articles 296 Abs 2 and 298 Abs 2, which sanctioned the shared parental responsibilities to both parents, independently of their civil status and establish the shared parental responsibility as the rule. Two main concepts were modified: the concept of custody and the notion of well-being of the child. The changes to the concept of custody also widens the scope of parental responsibility to include the right to determine the residence of the child[810].

808 see Botschaft Elterliche Sorge BBI 2011, 9087.

809 Die Bundesversammlung der Schweizerischen Eidgenossenschaft, Schweizerisches Zivilgesetzbuch (Elterliche Sorge) Änderung vom 21 Juni 2013 (AS 2014 357) BG (21 Juni 2013)

810 ZGB, art 301a Abs 1.

The new amendment also establishes shared parental responsibility as the rule for unmarried parents. The mother has automatic parental responsibility from the birth of her child. However, before July 2014, the father did not have any parental responsibility without agreement from the mother. After the 2014 Review, unmarried parents both hold parental responsibility after the acknowledgement of paternity by the father or by court decision. Prior to the 2014 Review, a situation in which there was no agreement from the mother[811], meant the protection authorities could only establish joint parental responsibility if requested by the father and after an assessment of the *Kindeswohl* (*Kindeswoh*lprüfung). For unmarried parents -especially fathers – the change is crucial, as they no longer need to prove their capability to take care and make decisions on behalf of their children. Before this significant amendment, fathers who did not reach an agreement with the mother felt they had to 'demonstrate' their ability to care for the child in court as well as the court having to verify this capability, as joint parental responsibility was considered an exception. Now, the capacity of unmarried fathers to take care of their child is assumed from the beginning.

For divorced parents, it means that the divorce does not change the rights and duties of the parents towards the child after the divorce. Before the change, one parent had custody and the other visiting rights and the right to a personal relationship with the child[812]. With the 2014 Review, both parents can make decisions together concerning the child. However, the continuation of parental responsibility after divorce is still not left to the sole decision of the parents, but to the court who decides whether parental responsibility should be bestowed upon both parents or one parent. The court, in any case, must ensure that the conditions for joint parental responsibility are met and decides on the particularities of the parents' responsibilities towards their children. This means that the court should establish the conditions of custody, the communication between parents and children and the maintenance[813]. For this reason, a part of the doctrine considers that article 133 Abs 1 ZGB – which refers particularly to the situation

811 ZGB, art 298a Abs 2.

812 Wilhelm von Felder and others, 'Gemeinsame elterliche Sorge und Kindeswohl' (2014) 150 Zeitschrift des bernischen Juristenvereins (ZBJV) 892, 903.

813 ZGB, art 133; Büchler and Vetterli, 241.

of divorced parents – is a mere referral norm and that the priority of the shared parental responsibility intended by the legislator is not sufficiently expressed in the legal text[814].

### 5.4.1 SHARED PARENTAL RESPONSIBILITIES AS THE RULE

The 2014 Review brought about parental responsibility as the rule independent of the civil status of the parents. Through this new amendment, unmarried fathers and divorce parents are not unduly discriminated against by the Law[815]. With the new 2014 Review, it is considered that shared parental responsibility should be the norm with sole-parental responsibility being the exception.

According to the Message of the 2014 Review, to shared parental responsibility means that the parents decide together all that concerns the child[816]. However, such a model would be impractical in everyday life[817] especially for divorced parents, who already have experienced tension and disputes during the divorce proceedings. Shared parental responsibility must also work for those parents who do not live together under the same household and where the arrangements may become more difficult. For this reason, the new law introduced by the amendment of 1 July 2014, article 301 Abs 1bis involves this potential area of tension[818]. The provision states that one parent may decide alone in some cases[819]. Article 301 Abs 1bis states that one parent can decide alone if the matter is routine or urgent or if the other parent cannot be consulted without incurring unreasonable trouble or expense[820].

814 Andrea Büchler and Sandro Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung' (2018) 1 Fampra.ch 1, 2-3.

815 On this idea, Guillod and Burgat, 141 Rz 238.

816 Botschaft Elterliche Sorge BBI 2011, 9108.

817 Nora Bertschi and Luca Maranta, '«Wir ziehen um?!» – wenn Eltern über den Aufenthaltsort ihres Kindes streiten' (2017) 3 FamPra.ch 649, 649.

818 FamKomm Scheidung Büchler and Clausen, ZGB art 301 (1) N 1.

819 ZGB, art 301 (1).

820 ZGB, art 301 (1) bis.

The exercise of parental responsibility now in Switzerland is led by the idea of non-discrimination and equal opportunities of both parents towards the child[821]. However, exercising parental responsibility together does not mean that both parents should act in an identical manner[822] but that both cooperate when making decisions regarding the child. However, it depends on the situation of the parents if this collaboration is workable.

In light of the 2014 Review, the paradigm is completely the opposite. The old law regarded sole parental responsibility as best for the child, and therefore, required close inspection of the principle to grant shared parental responsibility. With the 2014 Review, shared parental responsibility is now integrated into the *Kindeswohl* and therefore, works in favour of this higher interests[823].

#### 5.4.1.1 THE POSITION OF DIVORCED AND UNMARRIED PARENTS

For divorced parents, the 2014 Review has changed the understanding of parental responsibility, as it presents the idea that the civil status of the parents – divorced, married or unmarried – does not significantly change the relationship of the parents towards the child. The parents are still parents even when they are no longer together. In the case of parents who are divorce, the main position of the 2014 Review is that parenting, and consequently the related responsibilities, do not end with divorce even if there is a need for an arrangement to decide how the parenting will evolve.

For Büchler and Clausen, the wording of the Review emphasizes that in principle, divorce should not change the rights and duties related to parental responsibility[824]. For the authors, the 2014 Review has challenged and weakened the institutional thinking of divorce as a threat to the well-being of the children affected by it[825]. The new amendment reduces the intervention of the public authorities on the divorce proceedings – rein-

821 see Botschaft Elterliche Sorge BBI 2011, 9077.

822 BSK ZGB I Schwenzer and Cottier, ZGB art 296 N 8c.

823 Choffat, 180.

824 ZGB, art 133 (1); Büchler and Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 3; Botschaft Elterliche Sorge 2011, 9101.

825 FamKomm Scheidung Büchler and Clausen, ZGB art 298 N 2; see also Bger 5A_105/2016, E.2.2.

forcing the autonomy of the family – and considers that shared parental responsibility is best for children, also following a divorce. According to Choffat, the paradigm is totally the inverse, with shared parental responsibility the rule and the sole allocation of parental responsibility the exception[826]. Therefore, divorce proceedings focus only on the reorganisation of the family and the concrete management of the family dynamics, modified by the divorce[827].

Article 298 Abs 1 ZGB states that parental responsibility is in principle shared by both parents. However, the court must ensure that conditions for shared parental responsibility are met and that the interests of the child is not compromised by the joint arrangement[828]. Shared parental responsibility is thus considered the optimal solution for divorced parents and the child. Sole-parental responsibility is a strictly limited exception, granted to one of the parents only in cases where such an arrangement is necessary to safeguard the child's well-being in accordance with article 298 ZGB[829].

The well-being of the child is therefore the only principle applicable to allocate sole-parental responsibility to one parent, as it is considered that the rule should be that both parents decide together. The Federal Court has already expressed its reservations about the vagueness of the Law on the allocation of sole parental responsibility for the welfare of the child and considers that there should be some conditions to allocate sole parental responsibility, apart from those already included in the law in cases of abuse, violence or incapacity of the other parent[830]. Also, Schwenzer and Cottier believe that the scope of shared parental responsibility is not sufficiently articulated in the law and does not clearly explain the conditions to allocate the sole parental responsibility for the well-being of the child[831]. As mentioned before, some parliamentarians have criticized the imprecision of the law on this point.

826 Choffat, 178.

827 BSK-ZGB I Schwenzer and Cottier, ZGB art 298 N 2; see also FamKomm Scheidung Büchler and Clausen, ZGB art 298 N 4.

828 ZGB, art 298 Abs 1 and Abs 2; Botschaft Elterliche Sorge BBI 2011, 9103

829 BSK-ZGB I Schwenzer and Cottier, ZGB art 298b N 3; Botschaft Elterliche Sorge BBI 2011, 9102; BGE 5A_875/2017, N 1; BGE 142 III 1, E. 3.3; BGE 141 III 472, E. 4.7.

830 BGE 141 III 472, 474 E.4.1.

831 BSK-ZGB I Schwenzer and Cottier, ZGB art 298 N 1.

However, the Federal Court has cleared these criteria and considers that sole parental responsibility can be granted where there is irreconcilable conflict between the parents or a persistent incapability to communicate. If these situations are judged to have a negative impact on the well-being of the child, then the remedy is sole allocation of parental responsibility[832]. For Maranta, to allocate sole parental responsibility assumes that the well-being of the child appears considerably compromised under joint parental responsibility and that the harm inflicted to the well-being of the child can be avoided by the allocation of parental responsibility to one of the parents[833].

According to the new article 133 Abs 1 ZGB, the Divorce Court rules parental rights and duties according to the parent-child relationship, taking into account that it is considered that the shared parental responsibility is the rule. In particular, the Divorce Court concretises the custody, parental responsibility and the personal relationships with the child and his or her maintenance[834]. However, as Maranta states, the courts must take into account all circumstances that are important to the welfare of the child, including the joint application of the parents and – when possible – the child's opinion[835].

According to Maranta, article 133 Abs 2 and article 298 ZGB contradict each other. The author states that both articles are in conflict because article 298 Abs 1 considers that parental responsibility should be allocated to one parent only in case of harm to the well-being of the child, while article 133 Abs 2 ZGB considers that both parents must agree for the court to grant sole parental custody to one of them[836]. If the parents decide that one of them should have the sole parental custody, then there is a certain contradiction with the consideration that both parents should hold parental responsibilities.

However, to protect the well-being of the child and also the idea that the parents should make decisions together, the court can authorize parental responsibility to both parents

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832 BGE 141 III 472, E. 4.3, E. 4.7; BSK-ZGB I Schwenzer and Cottier, ZGB art 298 N 13, N 14.

833 Luca Maranta in Jolanta Kren Kostkiewicz and others, *Orell Füssli Kommentar* (3rd edn, Orell Füssli 2016) (henceforth OFK) ZGB art 298 N 3.

834 ZGB, art 133 Abs 1.

835 OFK Maranta, ZGB art 298 N 2; see also Büchler and Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 3-4.

836 OFK Maranta, ZGB art 298 N 2.

but add limitations to the custody, the personal relationships (visiting rights etc) and the care of the child to protect the well-being of the child. Nevertheless, the Court can regulate only this point if there is no prospect of the parents coming to agreement. If the parents do agree, the Court must only determine that the parents continue to exercise parental responsibility jointly [837].

The Federal Court established that custody and care arrangements – implemented if the parents do not agree about these points – must be based on the relationship of the parents with the child, on their educational abilities and their willingness and capacity to have their children under their own care and take care of them personally. Additionally, considerations should be based on the children's need for stability in the relationship, necessary for a harmonious development from a physical, mental and spiritual point of view[838]. The question the court must answer is whether a parent is willing and able to provide personal care and nurturing to a large extent, offering the necessary stability for harmonious development[839].

The new review ended discrimination against the unmarried fathers. The establishment of shared parental responsibility as the rule, independently of the parents' civil status has made it possible for unmarried fathers to exercise parental responsibility without agreement from the mother after the birth of the child[840].

Shared parental responsibility for unmarried parents is not automatic. If they agree, both parents have to present a declaration that they are ready to share with each other parental responsibility and their agreement on custody, personal relationships, and care arrangements for the child[841]. Contrary to prior amendments of the law, parents do not have to specify the arrangements they have decided but only that they agree to hold parental responsibilities[842]. The declaration of shared parental responsibility is made

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837 Andrea Büchler and Luca Maranta, 'Das neue Recht der elterlichen Sorge' [2014] Jusletter 11. August 2014 3, 4.

838 BGer 5A_105/2016, E.2.2; BGer 5A_450/2015, E.2.7.

839 BGer 5A_105/2016, E.2.3.

840 Botschaft Elterliche Sorge BBI 2011, 9077, E. 1.3.2; ZGB, art 298b; ZGB, art 298c.

841 BSK ZGB I Schwenzer and Cottier, ZGB art 298a N 2.

842 Choffat, 178; Guillod and Burgat, 145 Rz.242.

either simultaneously with the recognition of the child by the father before the Civil Register Office or if made later, before the Child Protection Authority[843]. Contrary to what is asserted in the old law, the Child Protection Authority does not have to examine whether the agreement is in the interests of the child[844]. In a way, there is major autonomy for unmarried parents to make decisions concerning their child, and at the same time, there is less action of the public authorities to examine if an agreement is made in the interests of the child. As it has been already noted before, the new shared parenting laws in the three countries – Spain, England and Switzerland – gave more autonomy to the parents to decide their arrangements and relationships with their children.

As said already, this 'no examination' ended the discrimination against unmarried fathers with married and divorce parents and is essential for their legal and social position as now unmarried fathers – who have increased in the last decade – do not have to 'demonstrate' to the court their capability to take care and decide for their children. The approach reflects the desire of lawmakers to make unmarried parents responsible for their own duties and recognises that the unmarried parents are able to collaborate, communicate and agree on the arrangements on their child[845] without any intervention of the authorities. The legislator then equates and trusts co-habitants as it would do with married couples.

The main change for unmarried fathers comes with article 298b and 298c, for cases where the parents do not agree to shared parental responsibility. The 2014 Review states that, when one of the parents does not agree with the terms of shared parental responsibility, then the other parent – usually the father, as the mother already has parental responsibility following the birth – can ask the regional child protection authority to hold shared parental responsibility with the mother[846]. If he presents a declaration of paternity, he can also ask the court[847]. Therefore, fathers no longer depend on the agree-

843 ZGB, art 298a Abs 1.

844 ZGB, art 298a Abs 4; Hausheer, Geiser and Aebi-Müller, 409 Rz 17.79; see also BSK ZGB I Schwenzer and Cottier, ZGB art 298a N 13.

845 Choffat, 178.

846 ZGB, art 298b; see also AS 2014 357.

847 ZGB, art 298c.

ment of the mother to hold parental responsibility and have an equal voice in decisions concerning main issues of the child. Usually, the child protection authority will grant shared parental responsibility if it does not cause harm to the well-being of the child.

Article 298b is the counterpart – for unmarried parents – of article 298 on the settlement of parental responsibility in divorce proceedings, even if the State intervention is more restrained for unmarried parents. If parents agree on joint parental responsibility during the proceedings before court or the Child Protection Authority, a joint declaration agreeing on shared parental responsibility is possible at any time. Büchler and Clausen state that, as a matter of principle, sole allocation of parental responsibility for unmarried parents is only possible under the same strict conditions that apply to divorced parents[848] and therefore, it should be always an exception and in alignment with the *Kindeswohl*.

Consequently, the premise for shared parental responsibility and the review is that there is no reason for allocation of the sole-parental responsibility to one parent[849] if the well-being of the child allows it. As said in the proposal of the law, the 2014 Review was also directed to end discrimination against unmarried fathers and to promote an equal exercise of parental responsibilities, independently of the civil status of the parents – whether divorced, married or unmarried. For some authors, the wording of the law is confusing and not completely convincing but – with a view in the well-being of the child – it is clear that there must be a minimum of willingness of cooperation to carry out shared parental responsibility, the custody and the care of the child[850]. Establishing the criteria to grant sole parental responsibility – of which one is continuous conflict between parents – the Federal Court implied that cooperation between parents is a prerequisite for shared parental responsibility to be granted.

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848 Büchler and Vetterli, 243.

849 BSK-ZGB I Schwenzer and Cottier, ZGB art 298b N 3.

850 Breitschmid in CHK-ZGB – art 298a, 298b, 298c, 298d, N 3; Thomas Geiser, 'Umsetzung der gemeinsamen elterlichen Sorge durch die Gerichte' (2015) 8 Aktuelle Juristische Praxis 1099, 1099; BSK-ZGB I Schwenzer and Cottier, ZGB art 298 N 1.

### 5.4.1.2 THE NEW CONTENT OF PARENTAL RESPONSIBILITY

Parental responsibility applies more to the decisional capability of the parents concerning the child than with the care or the relationship of the parents towards the child[851]. For Swiss lawmakers, the new definition of shared parental responsibility means that parents make all decisions concerning the child[852]. To clarify the content and the decisional capability of the parents granted shared parental responsibility – established in article 301, article 301a and 301 Abs 1bis ZGB – the amendment specifies situations where both parents must make decisions together and where they can decide alone.

There are two new articles concerning the exercise of parental responsibility and its content. Firstly, article 301a ZGB – so-called relocation article – about the decision of the residence of the child and secondly, the capability of the parents to decide alone in the all-day or urgent decisions. Through the so-called 'Zügelartikel' (relocation article) article 301a ZGB, the decision about the residence of the child belongs now to the content of the parental responsibility and no longer to the custody[853].

Article 301a ZGB deals mainly with the relocation of the custodial parent of the child. With the new amendment, the change of residence of the child requires – in case of joint parental responsibility – the consent of the other parent. If the child's new place of residence is abroad or has a significant impact on the exercise of the parental responsibility or the personal relationships with the child, it needs a decision of the Court or the child protection authorities[854]. Depending on the case, relocation has significant impact on the ability to exercise parental responsibility and on the welfare of the child and therefore requires agreement between parents whether the existing care-model can be continued unchanged with minor adjustments or whether this model would no longer be possible after relocating[855]. The main idea behind this provision is that

851 Büchler and Maranta, 'Das neue Recht der elterlichen Sorge', Rz 8.

852 Botschaft Elterliche Sorge BBI 2011, 9077.

853 Regina Aebi-Müller, 'Elterliche Sorge: Betreuungsrecht – Betreuungspflicht – Aufenthaltsbestimmungsrecht' in Alexandra Jungo and Christiana Fountoulakis (eds), *Elterliche Sorge, Betreungsunterhalt, Vorsorgeausgleich und weitere Herausforderungen* (Schulthess 2018) 30-65.

854 Büchler and Vetterli, 250; ZGB, art 301a (2).

855 ZGB, art 134; ZGB, art 301a Abs 2; BGer 5A_985/2014, E. 3.2.1.; BGer 5A_47/2017, E. 4; BGer 5A_266/2015, E. 4.2.2.2; BGE 136 III 353, E.3.2.; Philippe Meier and Thomas Häberli, 'Übersicht

the relationship of the child with the parents also depends on the child's whereabouts, so the parents must agree if the child's transfer significantly affects the exercise of the other parent's rights[856].

During the parliamentary debate and in the doctrine, the relocation article has been discussed as a limit of the autonomy of the parents to decide their whereabouts, their freedom of establishment and freedom of movement. To resolve this debate, the Law ensures the freedom of either of the parents to move, and therefore making necessary an adjustment to the other parent-child relationship[857]. However, all decisions – and therefore also the relocation of the child – must be based on the guideline of the well-being of the child. Thus, the premise is that, if a parent wishes to move, it is necessary to regulate the new situation. In the case of disagreement, the court or the *Kindesschutzbehörde* (Child Protection Authority) must make a decision for the well-being of the child[858].

The principle of shared parental responsibility is that both parents decide together all issues concerning the child. However, this principle is impractical in everyday life when the parents do not live together. To avoid any permanent dispute about everyday matters, Swiss Parliament introduced a provision defining situations in which a parent can decide alone where it is an ordinary matter or an urgent situation or the other parent cannot be reached with reasonable effort[859]. This possibility was not included before, as shared parental responsibility was an exception and not the rule and these decisions were included in the custody (legal or 'de facto'). The new article 301 Abs 1bis legalises the sole-decision capability of the custodial parent or caring parent and establishes

zur Rechtsprechung im Kindes- und Erwachsenenschutzrecht' [2015] Zeitschrift für Kindes- und Erwachsenenschutz ZKE 447, 459; Büchler and Vetterli, 250

856 BGE 142 III 481, E 2.3; BGE 5A_985/2014, E. 3.2.1.

857 ZGB, art 301a Abs 5; BGE 142 III 481, E. 2.5; BGE 136 III 353, E. 3.3.

858 BGE 136 III 353 (2010), E. 3.3; BGE 142 III 481, E. 2.6; BGer 5A_985/2014, E. 3.1.1.

859 ZGB, art 301 Abs 1bis; BSK ZGB I- Schwenzer and Cottier, ZGB art 301 N 3; see also, FamKomm Scheidung Büchler and Clausen, ZGB art 301 N 3; Alexandra Rumo-Jungo and Christine Arndt, 'Barunterhalt der Kinder: Bedeutung von Obhut und Betreuung der Eltern' (2019) 3 FamPra.ch 750, 753.

the exception of the principle according to which the parents decide together all issues regarding the child[860].

The question that remains is which issues are considered 'ordinary' and 'urgent'. These issues are – according to the Message of the Bill – nutrition, leisure, or clothing[861]. However, the legislator has not drawn more extensive boundaries, as the categorisation of ordinary decisions needs to be specified[862]. Ordinary decisions do not mean only those of a mundane or daily nature, but decisions of considerable significance. When identifying ordinary decisions, therefore, it is less important to consider the regularity than the scope of the decision in question. The ordinary character should be judged according to an objective standard and not according to what a parent subjectively considers to be everyday decision[863] or, on the contrary, there is the risk for a constant dispute about what is considered 'ordinary'. 'Ordinary' and 'urgent' decisions are made, therefore, during the time the child is under the care by one of the parents[864]. The responsibility to unilaterally decide urgent and ordinary matters applies vis-à-vis the State, third parties or the child.

The non-ordinary decisions are intimately bonded to the parental responsibility and the general well-being of the child. These decisions can significantly impact the daily life of the child and the exercise of parental responsibility and thus must be decided together by the parents. These decisions are medical procedures, the change of school, the choice of a general third-party care (day-care, nursery school, grandparents, etc) and since the 2014 Review – as it was mentioned before – also the change of residence of the child, especially if this change can deeply affect the exercise of parental responsibility by the other parent[865]. As Bucher states, each parent must obtain consent from

860 FamKomm Scheidung Büchler and Clausen, ZGB art 301 N 3; Rumo- Jungo and Arndt, 753.

861 Botschaft Elterliche Sorge BBI 2011, 9077.

862 FammKomm Büchler and Clausen, ZGB art 301 N 6.

863 FammKomm Büchler and Clausen, ZGB art 301 N 7.

864 Rumo-Jungo and Arndt, 752; FammKomm Büchler and Clausen, ZGB art 301 N 7 Cff; BSK ZGB I-Schwenzer and Cottier, ZGB art 301 N 3b.

865 BGE 136 III 357, 358 E. 3.2; BSK ZGB I Schwenzer and Cottier, ZGB art 301 N 3c; BK Affolter-Fringeli and Vogel, ZGB art 301 N 34; Büchler and Maranta, 'Das neue Recht der elterlichen Sorge', Rz 68.

the other parent if the decision goes beyond the area of responsibility and affects the situation of the other parent[866].

Shared parental responsibility obliges parents to jointly care for the well-being of the child, which in general requires consensual action and decisions[867]. Where there is disagreement on central issues concerning the education and development of the child and where conflict deeply affects the well-being of the child or the parental responsibility, the parents can call the competent authority or the Court to examine measures to protect the best interests of the child, including a new regulation of the custody[868]. In addition, the parents can also write an agreement where they establish which matters they can decide alone. However, it is important to note that a restriction of the decisional capability of the custodial parent is contrary to the purpose of the norm, while an extension of this capability can help the cooperation of the parents[869] and to safeguard the well-being of the child.

The content of parental responsibility changed to accommodate lobbying from fathers to be able to be considered in decisions on the residence of the child and to protect the statement of the law. Specifically, the presumption is the notion that both parents are responsible for the child and that a divorce or the fact that both are not married does not change the responsibilities and duties of parenting, including everyday decisions and where the child will live. The main problem is deciding which issues are 'urgent' and ordinary on each case and the law is unclear on this subject.

One of the main concepts that has been modified with the 2014 Review is the concept of custody (obhut, garde). Before the Review, custody was understood to include two

866 Andreas Bucher, 'Elterliche Sorge im schweizerischen und internationalen Kontext' in Alexandra Rumo-Jungo and Christiana Fountoulakis, *Familien in Zeiten grenzüberschreitender Beziehungen* (Schulthess 2013) 62 Rz 139; BGE 5A_47/2017, E. 4; BGE 136 III 357, 358 E. 3.2.

867 BK Affolter-Fringeli and Vogel, ZGB art 301 N 42.

868 BSK ZGB I-Schwenzer and Cottier, ZGB art 301 N 3; BK Affolter-Fringeli and Vogel, ZGB art 301 N 42; Urs Gloor and Jonas Schweighauser, 'Die Reform des Rechts der elterlichen Sorge – eine Würdigung aus praktischer Sicht' (2014) 1 FamPra.ch 1, 15-16; Büchler and Maranta, 'Das neue Recht der elterlichen Sorge', Rz 10 and Rz 68; FamKomm Scheidung Büchler and Clausen, ZGB art 301 N 20.

869 Büchler and Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 17; Büchler and Maranta, 'Das neue Recht der elterlichen Sorge', Rz 66.

main notions: the 'legal custody' as the right to decide about the residence and the whereabouts of the child[870] and the 'de facto custody' the actual living together with the child in a common household. However, custody is not defined in the law. With the 2014 Review, legal custody falls under the scope of parental responsibility and is conferred to both parents – if shared parental responsibility is established – allowing both to decide the residence of the child. Therefore, the Review has redefined the whole concept of custody[871].

For some authors, custody has only reduced its significance and is now overshadowed by the living arrangement between the child and single parent[872] and the care in everyday life of the minor[873]. The Federal Court established the term 'garde' as '*prise en charge effective de l'enfant*'[874] the effective care of the child and consider that the custody is now reduced to 'de facto' custody. The Federal Court establishes that custody now gives the right – to the parent or person holding custody – to live with the child under the same roof, the custodian must provide daily care for the child and exercise the rights and duties related to the child's care and ongoing education[875].

As the Federal Court also considers, the concept of 'legal custody' – a term already issued by the doctrine – has been replaced by 'the right to determine the child's place of residence'[876]. Therefore, the generic concept of custody is now limited to the 'de facto custody', the daily care of the child and the rights and duties related with the associated care and education[877]. Some authors now simply refer to 'de facto' custody[878] directly as

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870 BGE 136 353, E 3.2; BGE 142 III 612, E.4.1.

871 Nino Gloor, 'Der Begriff der Obhut' (2015) 2 FamPra.ch 331, 331-334.

872 OFK Maranta, ZGB art 298 N 4; Michelle Cottier and others, 'La Garde Alternée : Une Étude Interdisciplinaire sur ses Conditions-cadre' (2018) 19 (2) La Practice du Droit de la Famille 297, 299; BSK ZGB I, Schwenzer and Cottier, ZGB art 298 N 4.

873 Büchler and Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 10; BGE 142 III 612, 614 E 4.1.

874 TFA 5A_985/2014 E. 3.1.1.

875 BGE 142 III 612, E. 4.1; BGE 142 III 617 E. 3.2.2; BGE 136 I 178, E. 5.3.

876 BGer 5A_147/2019 SJ 2020, E. 2.1.

877 BGer 5A_147/2019 SJ 2020, E. 2.1.

878 Gloor, 'Der Begriff der Obhut', 331; Bucher, 80 – 81; Büchler and Maranta, 'Das neue Recht der elterlichen Sorge', 27.

'custody' without any reference to the difference between 'legal' and 'de facto' custody. Geiser, on the other hand, defends the new amendment asserting that it allows the parent with current care of the child to make timely decisions on ordinary and urgent matters, therefore giving custody no other legal meaning or status[879] and thus is implicitly recognized in article 301 Abs 1bis. Some authors recommend substituting the concept of 'de facto' custody with the more accurate concept of 'care'[880], while others suggest avoiding any reference to the concept of custody as the notion has lost its true meaning or must be explicitly defined in each case what is meant by the term[881]. For Büchler and Clausen, shared parental responsibility only means that parents split care and the educational duties, but also consider that shared parental responsibility does not have any impact on the care of the child, as it does not automatically establish the custody model of the child's care[882]. Even if both parents hold parental responsibility, it can be that one parent exercises the custody while the other has visiting rights, or they decide an alternate custody model[883].

The new amendment promotes a new ideal in family law: that the child should be cared by both parents after a divorce or if the parents do not live together[884] and that both parents are responsible and can share the everyday tasks of the family in every circumstance. This ideal has been reinforced with the new amendment entered into force in 2017 on Child Maintenance, which establishes that the parents can decide to share custody of the child on an alternate basis.

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879 Geiser, 1104.

880 Büchler and Maranta, 'Das neue Recht der elterlichen Sorge', 9.

881 Philippe Meier and Martin Stettler, *Droit civil suisse, Droit de la filiation* (Schultess 2014) 567; Gloor, 'Der Begriff der Obhut', 352.

882 Büchler and Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 10; also referred in FamKomm Scheidung Büchler and Clausen, ZGB art 298 N 3.

883 Geiser, 1.099; Büchler and Clausen , 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 10; Cottier and others, 'La Garde Alternée : Une Étude Interdisciplinaire sur ses Conditions-cadre', 297.

884 Michelle Cottier and Sandro Clausen, 'Obhut und Betreuung bei gemeinsamer elterlicher Sorge' in Roland Fankhauser and Andrea Büchler, *Neunte Schweizer Familienrechtstage* (Stämpfli 2018) 167.

The new rules on parental custody are intended to improve the position of fathers, who were increasingly involved in the child's care yet often remained excluded from the main decisions concerning the child[885]. For this reason, the decision on the child's residence was included within the scope of parental responsibility, reinforcing the position of fathers, and ending discrimination against unmarried fathers[886]. With the new amendment, the concept of custody has not disappeared but has changed its content to a more specific definition of what care of the child means.

With the new Review 2014 and the incorporation of the decision on the child's residence into the content of parental responsibility, it was established that both parents decide together about the child and exercise together parental responsibility. However, the decision of the child's residence must be agreed by both parents and without an alternate care between the parents it is difficult to put it in practice. As previously noted, Parliament decided that the reform of shared parental responsibility would be accomplished in two phases. The first one, the introduction of shared parental responsibility as the rule in 2014 and the second one – which entered into force in 2017 – the possibility for alternate custody[887] and some changes on the maintenance of the child. The changes of the amendment concerning child's maintenance and the alternating custody will be analysed briefly.

Alternating custody is the situation in which parents exercising joint parental authority share custody or care for, more or less, equal periods which may be fixed in days or weeks or even months[888]. The entry into force of the new regulation on shared parental responsibility allows both parents to hold this responsibility and to live together with the child without a formal agreement but must be in accordance with the well-being of the child and the parents' ability to cooperate[889]. With the change regarding the right to child maintenance that came into force on 1st January 2017, it is expressly established

885 FamKomm Scheidung, Büchler and Clausen, ZGB art 298 N 3; Botschaft Elterliche Sorge BBI 2011, E. 1.2.3.

886 Botschaft Elterliche Sorge BBI 2011, 9107.

887 ZGB änderung (Kindesunterhalt) AS 2015 4299; ZGB art 298 Abs 2ter.

888 BGE 5A_794/2017, E. 3.1 ; TFA 5A_200/2019, E. 3.1.2

889 ZGB, art 298; BGE 141 III 472, E. 4.3, E. 4.7; BGE 5A_200/2019, E. 3.1.2.

that the court must examine – according to the child's best interests – the possibility of establishing an alternating custody if the father, the mother, or the child requests it[890].

The instauration of the alternate custody does not necessarily require the agreement of the parents. The modification of the law in 2017 expressly establishes that the judge should examine, for the well-being of the child, the possibility to establish the alternate custody if the parents or the child requests it[891]. The principle of shared parental responsibility remains, while the well-being of the child is the paramount principle for the attribution of the parents' rights and thus, the parent's interests are relegated to second place[892]. The primary aim of the amendment on child maintenance is the improvement of the care of the child and the non-discrimination against children born out of wedlock or with divorced parents. Parliament explicitly commits the Law to the primacy of the well-being of the child and the amendment has been introduced to allow personal care for all children – including children born out of wedlock – provided that this care model is in the best interests of the child[893]. Two principles, therefore, should lead the care-model of the child: the well-being of the child and the criteria of stability and continuity of the parent's relationship with the child in the best way possible[894].

Case law dictates that the court must assess whether the introduction of alternating custody can safeguard the child's welfare. This assessment must be based on the current situation of the parents and the child, as well as the situation prior to the separation of

890 ZGB änderung (Kindesunterhalt) AS 2015 4299; ZGB art 298 Abs 2ter ; BGer 5A_200/2019 E. 3.1.2; Sabrina Burgat, 'Autoritè parentale et prise en charge de l'enfant : état des lieux in Le nouveau droit de l'entretien de l'enfant et du partage de la prèvonance' in Francois Bohnet and Anne-Sylvie Dupont, *Le nouveau droit de l'entretien de l'enfant et du partage de la prévoyance* (Helbing Lichtenhahn 2016) 122 Rz. 51.

891 ZGB, art 298 Abs 2ter; Bundesamt für Justiz, Botschaft zu einer änderung der Zivilgesetzbuches (Kindesunterhalt) BBI 2014 52 [29 November 2013] AS 2015 4299; BGer 5A_805/2019, E. 4.1 ; BGer 5A_200/2019, E. 3.1.2.

892 BGE 141 III 328 E. 5.4, 340 ;BGE 131 III 209 E. 5, 212; Bger 5A_266/2015 E. 4.2.2.1

893 Jonas Schweighauser and Diego Stoll, 'Neues Kindesunterhaltsrecht- Bilanz nach einem Jahr' (2018) 3 Fampra.ch 613, 624; see also Roland Fankhauser, 'Der Betreuungsunterhalt. Zur Spurensuche und -deutung anhand von Materialien' in Roland Fankhauser and others, *Das Zivilrecht und seine Durchsetzung* (Schultess 2016) 801.

894 Roland Fankhauser, 'Klares und Unklares zum Betreuungsunterhalt. Eine Spurensuche' Referat anlässlich der Leuenbergtagung der BLRV vom 17. Juni 2016, <www.blrv.ch/referate/Fankhauser – BLRV-2016-Betreuungsunterhalt.pdf> (last visit 10.11.2021) 6.

the parties[895]. Therefore, the judge has to examine the parents' capability of educate the child in a suitable environment and – most important in case of shared parental responsibility – their capability to communicate and cooperate together for the interests of the child and respect the times and the periods of custody between them[896]. As for shared parental responsibility, a marked and persistent conflict between parents suggests difficulty in collaborating between themselves, which could appear to be contrary to the interests of the child. Alternating care arrangements require certain organisational measures and constant information and presupposes (and needs) the parents' ability to cooperate and to reach agreements in every aspect of the child's life[897]. However, the amendment has also faced criticism – as the 2014 Review of shared parental responsibility – for being confusing and vague in determining the criteria to establish the alternate custody[898], criteria that the Federal Court would establish in recent years. These criteria are,

- the capability to take care of the child,
- the co-operational ability of the parents,
- stability of the relationships between the parents and the child,
- the distance and geographical conditions of both residences,
- the desire of the child,
- the possibility of a personal care of the child of the parents – specially for small children –
- the maintenance as far as possible of the social context of the child[899].

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895 BGE 142 III 617, E. 3.2.3; TFA 5A_200/2019, E. 3.1.2; BGE 5A_425/2016, E.3.4.2.

896 BGer 5A_425/2016, E.3.4.2, BGE 142 III 617, 5A_904/2015, E.3.2.4; BGE 142 III 612, E. 4.4; see also Sabrina Burgat and Laura Amey, 'Les conditions relatives à l'instauration d'une garde alternée, analyse de l'arrêt du Tribunal fédéral 5A_425/2016' [2017] DroitMatrimonial.ch 2, 7 – 8.

897 5A_425/2016, E.3.4.2; BGE 142 III 612, E. 4.3, see Gisela Kilde and Liselotte Staub, 'Kriterien der Zuteilung von elterlicher Sorge und Obhut bei Trennung der Eltern' in Alexandra Rumo-Jungo and Christiana Fontulakis, *Elterliche Sorge, Betreeungsunterhalt, Vorsorgeausgleich und weitere Herausforderungen* (Schultess 2018) 215-236.

898 Luca Maranta and Patrick Fassbind, 'Interessenkollisionen im Kindesunterhaltsrecht? Berührungspunkte zwischen dem Kindesunterhaltsrecht und dem Kindesschutzrecht' (2016) 6 Zeitschrift für Kindes- und Erwachsenenschutz 454, 461; Gloor, 347; Patrick Fassbind, 'Inhalt des gemeinsamen Sorgerechts, der Obhut und des Aufenthaltsbestimmungsrechts im Lichte des neuen gemeinsamen Sorgerechts als Regelfall' (2014) 5 Aktuelle Juristische Praxis 692, 694; Bucher E.85; Cottier and Clausen, 'Obhut und Betreuung bei gemeinsamer elterlicher Sorge', 168.

899 See Bger 5A_794/2017, E.3.1, E.3.2; BGE 142 III 612, E. 4.3; BGE 142 III 617, E.3.2.3., see also Cottier and Clausen, 'Obhut und Betreuung bei gemeinsamer elterlicher Sorge', 168; Burgat and

The importance of the 2017 amendment essentially lies– without going too deep in it as it is not the subject of this study – on giving a practical response to the Review 2014 and shared parental responsibility as the rule. It can be said that the 2014 Review was the first step and general clause which establishes shared parental responsibility as the rule, and subsequently changed the concept of the well-being of the child. The second step was the amendment on the child's maintenance, which specifies the model which can be used – but not obligatorily, only at the request of one of the parents or the child – to manage the family organisation, respecting the well-being of the child and the principle of the continuity and stability of the relationships between parents and their children.

## 5.5. THE KINDESWOHL AND THE NEW AMENDMENT

Reform on shared parental responsibility has brought deep transformations in the concept of the well-being of the child. Lawmakers assume that the well-being of the child is best served by shared parental responsibility, independently of the civil status of the parent and only will be revoked if another solution is better for the child. Therefore, any other arrangement for the child will be considered exceptional. Shared parental responsibility began a new phase in Swiss family law, as the paradigm of parental responsibility and the well-being of the child changed to the exact opposite. Sole parental responsibility has become the exception and shared parental responsibility is now considered the best solution for children[900].

The introduction of shared parental responsibility is not exempt from controversy and some measures introduced by the amendment are considered vague and confusing by some authors[901]. However, the Federal Council's statements in parliament place em-

Amey, 2; Monika Leuenberger, 'Alternierende Obhut auf einseitigen Antrag' (2019) 4 FamPra.ch 1100, 1104-1105.

900 Botschaft Elterliche Sorge BBI 2011; AS 2014 357; FamKomm Scheidung Büchler and Clausen, ZGB art 298 N 1; BGE 142 III 1, E 3.3; BGer 5A_346/2016 E. 7.3.2.

901 BSK-ZGB I Schwenzer and Cottier, ZGB art 298 N 1; OFK Maranta, ZGB art 298 N 5; Büchler and Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 3-4; Bucher, 51 Rz 108.

phasis on designing the whole law provision as a general clause that can give room in the future for further interpretations, that will be concretized in the courts[902].

The first controversy was the possibility to allocate sole parental responsibility if it better serves the well-being of the child. First, the criteria to allocate sole parental responsibility – as it has been seen previously – were not clear and the Federal Court has 'solved' the problem in the following years. The Court considered that a critical and constant conflict between the parents cannot allow the fluent communication that the child needs for his or her development. Therefore, sole parental responsibility can be granted if the conflict is judged to have a negative impact on the child's welfare[903]. Other criteria to allocate sole parental responsibility is the incapability to cooperate and the unreasonable expectations or demands of one parent in relation to the other[904]. However, Büchler and Clausen have the opinion that sole allocation of parental responsibility in some cases is a better solution for the child – under the revised law – no longer justifies deviation from the principle of shared parental responsibility[905]. In fact, the *Kindeswohl* should be weighed against the principle of shared parental responsibility and the equality between the parents. Yet, none of these principles should prevail over the well-being of the child[906].

As analysed previously, there are different changes for unmarried and for divorced parents. For unmarried parents, there are two main changes. Firstly, the establishment of shared parental responsibility as a rule signifies that they can have joint responsibility without an agreement between them. Concretely, for unmarried fathers, they can hold parental responsibility if they make such a request to the courts or the child protection authority, depending on the case.

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902 Büchler and Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 18; AB NR 2012 Votum Sommaruga, Votum Kniener Nellen, 1638 and 1646.

903 BGE 141 III 472 E. 4.6; BGE 5A_805/2019 E 4.1.

904 Büchler and Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 31.

905 Büchler and Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 7.

906 BGer 5A_63/2011 E.2.4.1; BGE 142 III 617 E 3.2.3; BGE 141 III 472 E. 4.6; BSK- ZGB I-Schwenzer and Cottier, ZGB art 298 N 5; Büchler and Clausen, 'Die elterliche Sorge- Entwicklungen in Lehre und Rechtsprechung', 8.

Another change is that, if there is agreement between parents, the establishment of shared parental responsibility also means that unmarried fathers – who do not have parental responsibility automatically – do not have to demonstrate capability of taking care of the child and can therefore take part in the upbringing of the child. The courts and child protection authorities should – as a general rule – grant shared parental responsibility to unmarried parents without any examination of the arrangements reached. As outlined earlier, the Review 2014 – together with the Review 2017 – is designed to give major autonomy for unmarried parents to decide on the child's behalf without intervention from the authorities, who do not have to examine if those agreements are made in the interests of the child. The old law relegated fathers a secondary role, even when they wanted to hold absolute responsibility for their children[907]. The cutting of the examination requirement has conferred a new social – and legal – position for unmarried fathers, whose status has become nearly the same as married parents.

For divorced parents, the 2014 review diminished the social stigma of legal separation[908] and states that parenting continues even if the couple is not together anymore. That means that the parents still have the same responsibility, duties and rights towards the child, and that the parents have to cooperate in any circumstance for the well-being of the child. Therefore, the well-being of the child is not threatened by the divorce, as the relationship and the status of the parents towards the child remains unchanged and as similar to the previous situation as possible. Also, the amendment gives more autonomy to the parents to decide the arrangements to reorganise and manage the family, if they agree on new arrangements.

The 2014 Review also states that in case of shared parental responsibilities, both parents make all necessary decisions together[909] while each parent decides alone only if the matter is 'urgent' or 'routine' or the other parent 'cannot be consulted without incurring unreasonable trouble or expense'[910]. Therefore, the new revision endeavours to focus more on the development of solutions for the welfare of the child and not so much on

907 Geiser, 'Umsetzung der gemeinsamen elterlichen Sorge durch die Gerichte', 1100.

908 FamKomm Scheidung Büchler and Clausen, ZGB art 298 N 2; see also Bger 5A_105/2016 E.2.2.

909 Unless the child has capacity to act, ZGB art 301 Abs 1bis.

910 ZGB art 301 Abs 1bis.

the possible conflict of the couple on decisions[911]. The main purpose of this measure is to focus on the promotion of an equal education and care of the child and less so on the discussion and conflict of the parents. The amendment states that the parents have independence when they care of the child and avoid the conflict between them.

The principle of the well-being of the child is, therefore, the main principle for the allocation of the parental responsibility and – at least nominally – the core of the reform. The amendment states that the parents and their responsibilities towards the child continue even if their relationship changes. The 2014 Review harmonizes Swiss Law with other European countries on shared parental responsibilities and recognises that the child needs an ongoing relationship with both parents for his or her well-being. Also, it ends discrimination against unmarried parents, especially the fathers and eliminates obstacles to grant shared parental responsibility.

It is now considered that the sole allocation of parental responsibility will be an exception and the only limit to shared parental responsibility will be always the well-being of the child. The vagueness of the Law responds also to the fact that the amendment sought to answer the demands of interests groups and is made by parliamentarians, who are not always experts on the questions reported. However, it cannot be ignored that the influence of interests groups for equality between parents had a significant impact on reform and how the amendment was proposed and the direction the debates took as a result of these activities. The impact of these special interests groups in Switzerland was more neutral than in the other countries studied, yet remained a key influence. The role of such groups will be explored in greater detail in the forthcoming chapters.

911 Bürgisser, 26.

# 6 LAW, MEDIA AND BEST INTERESTS OF THE CHILD

Different actors have played a role during the introduction of shared parenting in the three countries under study and contributed to the transformation of the best interests of the child: the political actors (political leaders, parties and deputies) social movements (associations, lobbies) and the media. The analysis on the media regarding shared parental responsibilities will focus especially on newspapers, as 'content engines'[912] for other media.

## 6.1 THE MEDIA INTERPRETATION IN THE POSTMODERN SOCIETY

Cultural, communication and sociological studies suggest that media messages indirectly impact the way that we see or understand society. These messages become part of our knowledge, which combined with our interactions with other individuals design our beliefs about social phenomena such family and children. Media portrayals of family have an important impact on how we understand family and the roles that each individual has inside its structure[913].

As Descartes and Kottak explain, media messages are cultural products that communicate norms and standards. From their point of view, media reveal and express changes taking place in society[914]. For all topics, any message communicated by the media in some way shapes the world view of the consumer, reinforcing the consumers' point of view of consumers or influence them to take opposing views[915]. That does not mean that individuals follow media without reflection, without a critical analysis of the concepts that we receive from the media. It means that messages from the media become part of our experience and understanding of the world in which we live. Films, newspapers,

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912 Keane, 7.

913 Arnold Lorin Basden, *Family Communication: Theory and Research* (Allyn and Bacon 2008) Cff 373-374; Elisabeth Perse and Jennifer Lambe, *Media Effects and Society* (2nd edn, Routledge 2017) 143-146.

914 Laura Descartes and Conrad Kottak, *Media and Middle-class moms. Images and realities of Work and Family* (Routledge 2010) 2.

915 Descartes and Kottak, 39.

opinion columns and messages from media shape our understanding of life, relationships, politics, society and family[916].

Public authorities, civil society, and the international community, as well as media owners and journalist's organisations have important roles to play that range from law enforcement, education, monitoring and setting universal standards to ethical conduct and self-regulation[917]. In this landscape, opinion leaders, political and social groups play a central role in setting up the public opinion to benefit their own interests.

### 6.1.1 THE INFLUENCE OF THE MEDIA IN FAMILY PORTRAYALS

Present day western society is living in an era of dramatic change and transition, in a world that is being transformed rapidly by complex financial and political systems and revolutionary information or medical technologies. Mass media, for decades, has presented different family structures that children will come into contact with in their daily lives. News programmes, print media columns, TV series, radio programs all spread a culture that gradually is being introduced in our society and in our knowledge. The media are faster and more superficial than before, but also the family patterns that we see or read in television, newspapers and the Internet have changed through the years[918] and this change is accelerating due to social media.

For example, nuclear families (mother-father-child) have been often portrayed in a very positive way, especially in American TV series of the 80's or '90's as the most viable type of family unit. In the last decade, however, American TV series' – such as *Modern Family, Beautiful People, six feet under, The Fosters, Gilmore Girls, Baby Daddy, Judge Amy, Pretty Little Liars, Gossip Girl* – have shown various structures of family and roles that were unthinkable some decades ago[919]. Recent and current media representations include

916 Descartes and Kottak, 39-41.

917 Papademas, 7-14.

918 Descartes and Kottak, 2

919 For example, *Modern Family* show the extended family of Jay Prittchett, which includes his stepson, and infant son, together with his two adult children with their own households (one nuclear family and a homosexual marriage). In *Judge Amy* is represented a three generation of three women living together. *Baby Daddy* show a young father, his roomates and his daughter. The *Gossip Girl* series show different relationships between the protagonists. *The fosters* show an

also co-resident friends[920], extended families and homosexual couples[921], unmarried couples[922], single parents[923] and a long list of different relationships that live under the same roof. Nonetheless, media also offer alternatives that may not be available in a local or national setting but could be added to our consciousness if they repeat messaging sufficiently. As Basden explains, if over time 'these images are repeated enough, they can become a part of our social understanding of family and family processes'[924]. In this way, media not only support our idea of family, but enable us to see and spread different models of families in our societies.

Media also have a fundamental role in influencing the law-making processes. As will be covered in the next paragraphs, the media are the link and bridge between all social and political actors. Most of these actors try to involve media in order to win their support for the policies and laws they want to enact. The main power of the media is their capacity to 'mobilize public opinion'[925] for or against a particular issue. This study focuses on this effect of the media during the shared parenting law-making processes in the three countries under research.

### 6.1.2 THE MEDIA SYSTEM AND ACTION OF SOCIAL MOVEMENTS

The media system is substantively influenced by the action of social movements. A social movement's main objective is to foster change regarding an issue in society through their actions and demands. In an information society as ours, the action of

interracial lesbian couple with their children. *Beautiful people* show a divorce mother with her two daughters. *Girlmore Girls* the protagonists are a mother with her daughter. *Six feet under* show the Fisher family running a funeral business, with a widow, a daughter and two brothers.

920 For example, TV series as *New Girl, Friends, How I met your mother, Baby Daddy, the Big Bang Theory.*

921 For example, *Modern Family, Six feet under, Two and Half Men.*

922 For example, *Friends, How I met your mother, Grey's Anatomy.*

923 For example, *Gilmore Girls, Baby Daddy, Castle, The Good Wife, Judging Amy, Beautiful People.*

924 Basden, 376.

925 Sigrid Koch-Baumgarten Sigrid and Katrin Voltmer, Public *Policy and Mass Media, the Interplay of mass communication and political decision making* (Routledge 2010) 5. See also Marko Kovic, *Agenda-Setting zwischen Parlament und Medien: Normative Herleitung und empirische Untersuchung am Beispiel der Schweiz* (Springer 2017) 29 about how it has changed with the digital arena.

social movements through media outlets is essential to reach their claims. Coglianese defines social movement as a 'broad set of sustained organizational efforts to change the structure of society or the distribution of society's resources'[926]. For Grossman and Helpmann a social movement can be understood as an 'organized group that undertakes political actions on behalf of a number of citizens'[927]. Snow, Soule, Kriesi and McCammon define them as a social form through which collectives 'give voice to their grievances and concerns about the rights, welfare, and well-being of themselves and others by engaging in various types of collective action'[928].

In debates about social and policy issues, interests groups play a central role in making the issue relevant to both policymakers and the media[929]. According to Coglianese, social movements encourage social change through different methods, as 'law reform, public opinion, mobilization of voters or creating non-legal forms of behaviour'[930]. Through their actions, social movements try to influence society to advance their own interests and demands. The media, as Koch-Baumgarten and Voltmer assert, are the link between politicians, social movements and public opinion and have the 'capacity to bridge' the different spheres of society during the law-making and policy-making processes[931]. Coglianese asserts then that law, social movements and public opinion are intrinsically connected, as social movements influence the public opinion about issues they want to introduce into society. The changes in public opinion 'can feed back into the legal system and affect the prospects for a law reform and enhance the effective implementation of legislation'[932]. Finally, legislation has an impact on public opinion, returning to the initial point[933]. Therefore, as the authors assert, the relationship between policies, media and social movements are a circle that feedbacks into each other.

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926 Coglianese, 85.

927 Gene Grossman and Elhana Helpman, *Special Interests Politics* (MIT Press 2001) 103.

928 David A Snow and others (eds), *The Wiley Blackwell Companion to Social Movements* (2nd edn, Wiley Blackwell 2019) 1.

929 Julie Andsager, 'How interests groups attempt to shape public opinion with competing news frames' (2000) 77 (3) Journalism and Mass Communication 577, 577.

930 Coglianese, 86.

931 Koch-Baumgarten and Voltmer, 3.

932 Coglianese, 86.

933 Coglianese, 86.

Organized social movements undertake a variety of activities to advance their political agenda and to get the attention of lawmakers and the media. Many of these activities entail the collection and dissemination of information[934] and others are directed to gain access to political representatives and media coverage[935]. Most policy decisions are made not by one person but by a group of elected representatives acting as a legislative body. Even when the legislature is controlled by a single party, the delegation members do not always follow the instructions of their party leaders, as for example in Switzerland or United States. In situations with multiple, independent legislators, interests groups face a subtle problem in deciding how best to use their resources to influence policy choices. A social movement must decide where to concentrate its bid for influence and what actions it should take to affect and that will depend on the rules of the legislative process[936].

Regarding different types of actions, attention will be focussed on the Snyder model, a legislative model which considers the social movements as 'agenda setters'. The Snyder model, while analytically convenient, gives too much power to the interests group. Not only can the social movements use its resources to influence legislators' voting behaviour, but it can also dictate the provisions of the law that stands as an alternative to the status quo. In reality, interests groups have no such authority to introduce bills to the legislature. But they can use their resources to influence those who do have this authority[937].

If the Snyder Model is considered, it could be stated that the social movements can also influence the media on this 'agenda setting'. As both, social movements and media are 'agenda setters' they can influence each other on this function towards society and legislation and, as in the case of the research, influence also legal principles as the best interests of the child.

Within this study – shared parenting and best interests of the child- the influential social movements are the father's rights organizations with occasional public disagreements

934 It is natural for these groups to 'deal with the information' for two reasons: First, the members of an interests group 'accumulate knowledge about certain policy issues in the course of performing their everyday activities'. Second, interests groups may have an 'incentive to conduct research on issues of concern to their members' see Grossman and Helpman, 104.

935 Andsager, 578; Coglianese, 86 -87.

936 Grossman and Helpman, 104.

937 Grossman and Helpman Cff 291.

with women's associations, although it cannot be said this relationship is adversarial in absolute terms. In the analysis this study presents, social movements will be looked at from the standpoint of the media, more specifically from the view of different newspapers and how the social movements have influenced the media and used them as megaphones for their interests and their agendas before and during the law-making process of the laws about shared parenting. At the same time, this analysis finds that the media have used their function as 'agenda setters' also for the legalization of shared parenting, as it has become one predominant topic in the news during law-making processes in the Spain, Switzerland and the United Kingdom.

### 6.1.3 THE POLITICAL POWER AND THE MEDIA

The media are the basis of the democracy, as without freedom of expression and, most important, freedom of speech, the democracy is without one of the pillars that constitute it. As the decision of the Supreme Court of the United States about the Pentagon Papers and the New York Times, the press was to serve the governed, not the governors[938]. There is no such thing as an open, democratic society without an independent news media[939]. Media outlets are essential for democratic societies in the Western world, and it is through their transmission of opinions and information that they create a

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938 *New York Times Company, Petitioner, v. United States; United States, Petitioner, v The Washington Post Company and others* 403 U.S. 713 (1971) Per Curiam para 9.
In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

939 William A Hachten, *The Troubles of Journalism* (3rd edn, Routledge 2005) 12; see also Thomas Hammarberg (ed) *Human Rights and a changing media landscape* (Council of Europe Publications 2011) 7.

common environment for social interactions[940]. The media's duties to democracy are firstly, to supervise the State – Government, lawmakers and even courts – but also to give 'accurate and sufficient information' about the main issues considered in the public opinion and 'to represent the people in the sense of adequately reflecting the spectrum of public opinion and political competition'[941]. The media have become indispensable for democracy, and it seems they dominate or at least influence the whole political and policy process[942] of the laws and policies of the governors. The main duty is, therefore, to give an adequate information and to act as a 'watchdog' against the other three powers of democracy (executive, legislative and judiciary).

However, the power of the media can also be misused to the extent that the very functioning of democracy is threatened. The interests of governments and economic forces can use the media as propaganda megaphones to maintain their power or to safeguard influential groups[943]. There have been many instances where policymakers have had to revisit decisions and change policies under the unrelenting spotlight of media pressure[944].

Freedom of the press is sometimes subjected to the will of directors, owners and the political ideology governing any journal, television and new media. These factors alongside economic considerations mean many newsrooms operate with limited autonomy and the independence of the press is threatened. Even in some countries that are 'functioning democracies', institutional bodies and public entities decide what the press is going to publish[945], as they can inform less or more to the press about their actions and use the media for their interests. For example, a Government can use the media informing about a new policy that afterwards results it is not going to happen, only to make time for other issues. Also, the Governments and economic powers can

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940 Saúl Lòpez, 'Democracia y Medios de Comunicación' (2007) 26 Isonomía: Revista de Teoría y Filosofía del Derecho 49, 51; Binakuromo Ogbebor, *British Media Coverage of the Press Reform Debate: Journalists Reporting Journalism* (Palgrave MacMillan 2020) 53-54.

941 Margaret Scammell and Holli Semetko, *The Media, Journalism and Democracy* (Ashgate 2000) 13.

942 Koch-Baumgarten and Voltmer, 1; Ogbebor, 54; Denis McQuail and Mark Deuze, *McQuail's Media and Mass Communication Theory* (6th edn, Sage Publications 2010) 38; Kovic, 29.

943 Hammarberg, 7.

944 Koch-Baumgarten and Voltmer, 1.

945 Gabriel Galdón, *Introducción a la Comunicación y a la Información* (Ariel 2001) 92-93.

ask the newspapers not to publish some issues that maybe will not be in their interests, pressuring the newspapers with actions as taking off publicity or their support.

Brooks, for example, defends that the majoritarian democracy is frustrated by an elite-dominated political system[946]. Luttbeg speaks about the 'pressure group model', which its purest model conceives society as composed of 'very few individuals un-associated with at least one group and government policy as the product of competition among groups each fighting for its preferences'[947]. According to Luttbeg, such groups originate opinion or summarize it and 'are the source of all opinion or that of importance'[948].

As the new media have been introduced to the political dynamics, they have also become 'major actors' in public policy as the 'fourth estate' of government and political actors heavily influencing the other three branches[949]. It could be said that media framing is a 'central political activity' because the entrenchment of some terms, and the disappearance of others is often 'a signal of political triumph and defeat'[950].

A democratic society requires a diversity of views and new sources to be truly pluralistic. In theory, the democratic process assumes that 'individual citizens have the capacity to hold elected officials accountable' but in practice, political accountability needs the media system to deliver 'a sufficient supply of meaningful public affairs information to

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946 Joe Brooks, 'Democratic Frustration in the Anglo-American Politics: A Quantification of Inconsistency between Mass Public Opinion and Public Policy' (1985) 38 (2) The Western Political Quarterly 250, 251 – 259; David Kennamer, *Public Opinion, The Press and Public Policy* (Praeger 1992) 4.

947 Norman Luttbeg, *Public Opinion and Public Policy: models of political linkage* (Dorsey Press 1968) 187, see also Kennamer, 4.

948 Luttbeg, 187; Kennamer, 4; Patrick McCurdy, 'Social Movements, Protest and Mainstream Media' (2012) 6 (3) Sociology Compass 244, 245-246.

949 Thomas A Birkland, *An Introduction to the Policy Process, Theories, Concepts and Models of Public Policy Making* (5th edn, Routledge 2020) 171; Coglianese, 85; Robert Entman and Atidrew Rojecki, 'Freezing Out the Public: Elite and Media Framing of the U.S. Anti-Nuclear Movement' (1993) 10 Political Communication 154, 156.

950 Karen Callaghan and Frauke Schnell, 'Assessing the democratic debate: how the news media frame elite policy discourse' (2001) 18 Political Communication 183, 183-212; see also Olga Baysha and Kirk Hallahan, 'Media Framing of the Ukrainian political crisis, 2000-2001' (2004) 5 Journalism studies 233, 246; Michele Adams and Scott Coltrane, 'Framing Divorce Reform: Media, Morality and the Politics of Family' (2007) 46 (1) Family Process 17, 25.

catch the eye of relatively inattentive citizens'[951]. Political parties and Governments in democracy assume the leading role in the setting of the agenda and the configuration of the debate in certain issues[952]. Other actors, especially social movements undertake some specific political actions that can influence the agenda and inform the debate and place their demands in the spotlight[953]. The media work as a bridge between all political and social actors and public opinion, proposing the agenda that both actors- governors and social movements – shape.

Moreover, the Internet has given global society a new arena to express opinions and to communicate directly with citizens, without the intermediaries of the media. The Internet has also introduced 'new actors' to the public arena and the press have adapted to this new situation, multiplying their influence through blogs, images and new forms and content[954]. With the Internet has changing the way people communicate globally, the press has yet another powerful tool influence in the public space and policymakers and lawmakers, as they understand the media as a 'manifestation of public opinion'[955]. This change is only being accelerated by the increasingly popular use of social media, a platform on which print media heavily relies on to engage readers.

The interaction between the media and political groups has grown increasingly common, and the Internet has intensified this interaction. The social 'elites' assume a big role in framing the news and the central role of the media in the creation of these frames gives them a relevant role in our societies[956]. The media are responsible for curating social issues for public consumption and doing so, determine the attention of the public[957]. Some studies report strong and considerable media effects on policy-making and – as

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951 James Curran and others, 'Media system, public knowledge, and democracy: a comparative study' in James Curran, *Media and Democracy* (Routledge 2011) 47-61.

952 Laura Alonso-Muñoz and Andreu Casero Ripollés, 'La influencia del discurso sobre cambio social en la agenda de los medios. El caso de la plataforma de afectados por la hipoteca' (2016) 11 (1) Observatorio Europeo de Tendencias Sociales (OETS): Revista de Ciencias Sociales 25, 29-30.

953 See the research of Adams and Coltrane, 25-26; Coglianese, 85-118.

954 Koch-Baumgarten and Voltmer, 3; Birkland, 171.

955 Koch-Baumgarten and Voltmer, 3.

956 Alonso-Muñoz and Casero Ripollés, 31.

957 Alonso-Muñoz and Casero Ripollés, 31-32.

Koch-Baumgarten and Voltmer state – indicate that the media 'can be a relevant force in the policy process'[958]. On this direction, it can be said that the media outlets use two interconnected processes to determine the visibility of certain policies and social issues: the 'agenda' setting and establishing the 'frame'[959].

## 6.2 THE MEDIA AS AGENDA SETTERS AND FRAMERS OF REALITY

Researchers have established several theories to understand the link between the media, policy making and public opinion, with the consequent influence to the mass audiences. Agenda setting and framing are 'the most elaborated approaches'[960] that describe the role of the media during the law-making and policy-making processes. The media act in the society setting the agenda of the important issues to debate in the public opinion and frame and put in context these issues in the debate.

### 6.2.1 THE AGENDA SETTING

The main aspect of influence of the media in the public policy is their capacity to set the agenda, the topics and issues that are important for the society and should be debated in the public opinion. Through the agenda setting, the influence of the media is clearly strong in the proposal of policies and laws that in a long-term period will shape the society. In so doing, the media can propose policies, ideas and highlight certain issues to politicians, social actors, and lobbies and capture the institutional attention to certain problems[961].

The 'agenda setting' approach states that the frequency with which certain issues are treated in the media have a direct impact on the meaning that the public will assign to these issues. The more the media propose and highlight certain issues, the greater the

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958 Koch-Baumgarten and Voltmer, 2.

959 Alonso-Muñoz and Casero Ripollés, 30-33.

960 Koch-Baumgarten and Voltmer, 7.

961 Birkland, 177. The agenda setting theory is worldwide known and was led by Bernard Cohen in 1963. See more in Bernard Cohen, *The Press and Foreign Policy* (1st edn 1963, 2nd edn, Princeton Legacy Policy 1993) 1-16.

public will consider these topics important. This theory does not refer to the formation of attitudes but to the perception of social reality by the public that receives the media messages[962]. One important effect of the media – according to this theory – is to establish the topics of concern and conversation of the public. Therefore, different actors compete to determine what issues should be reported by the media and should be important in society, turning political agendas 'into hypercompetitive environments'[963]. More an aspect or issue is treated on the media, more the public will be attracted to it[964] and for this reason, the media is typically seen as a powerful medium of persuasion during policy making processes[965]. Gaining access to the media agenda is 'essential to place a topic in the spotlight of public attention'[966] and for this reason social movements (powerful or not) and governors try to gain access to them. They would reach this access when 'their stories are sufficiently compelling to attract news coverage'[967]. This is the basis of movements as fathers4Justice, which actions included a father dressed as Batman in the top of Buckingham Palace to demand the attention of media about shared parenting[968].

Public opinion has a significant effect on public policy. Political leaders follow public debates – created by the media – to a greater and lesser extent and shape the policies for the society. Lawmakers, the media, and social movements interact together to settle which issues are important to address and highlight[969]. In so doing, society cedes its decision-making power to media who comprise a minority to prioritize the most important topics in society. In this line, some authors explain that the collective

962 Bentele, Brosius and Jarren,13; see also Maxwell E Mc Combs and Donald L Shaw, 'The Agenda-Setting Function of Mass Media' (1972) 36 (2) The Public Opinion Quarterly 176, 176-187.

963 Arjen Van Dalen Arjen and Peter Van Aelst, 'The media as Political Agenda-setters: Journalists Perceptions of media Power in Eight West European Countries' (2014) 37 (1) West European Politics,42-44.

964 Cohen, McCombs and Shaw cited in Kennamer, 7-8; see also Kovic, 71.

965 Van Dalen and Van Aelst, 44; Entman and Rojecki, 156.

966 Alonso-Muñoz and Casero Ripollés,30.

967 Birkland, 177.

968 See 'Fathers' rights protester scales Buckingham Palace' *The Guardian* (London, 13 September 2004) <https://www.theguardian.com/society/2004/sep/13/childrensservices.uknews> (last visit 10.11.2021)

969 Alonso-Muñoz and Casero Ripollés, 25-51. see also Kennamer, 8.

public expression addressed by the media has a 'powerful impact' on the behaviour of politicians and the public policies they promulgate[970]. Therefore, interests' groups, new media and policymakers shape and characterize the public itself as a justification for policies[971]. As Van Danlen and Van Aelst maintain, politicians 'react to media coverage as they anticipate an effect on the audience or because it can help them to promote their own agenda'[972]. However, this process does not go only one-way, as the media agenda depends also on the political agenda, so the agenda-setting approach can be regarded as a 'circular and reciprocal' process[973]. The agenda is, therefore, shaped by at least three actors: social movements – who present their demands to the media to ultimately reach public opinion – policy makers – who see the demands of social movements – and media, who legitimize the other two actors' activities by including them in their agenda, and presenting to the society the topics that policy makers and social movements have offered.

### 6.2.2 THE MEDIA FRAMING

Another principle to consider is the 'framing' of the news. The media not only set the agenda for the public opinion, establishing which topics should be taken into consideration, but also which angle or opinion must have an information or issue, highlighting one aspect or another. This approach is called the 'frame', the construction of the news reported[974]. As Entmann states, framing is 'the process of culling a few elements of perceived reality and assembling a narrative that highlights connections among them to promote a particular interpretation'[975]. The frame of the media contributes to the construction of the public opinion and ultimately, influence the public opinion[976].

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970 Gary King, Benjamin Schneer and Ariel White, 'How the news media active public expression and influence national agendas' (2017) 358 (6364) Science 776, 776.

971 Kennamer, 8.

972 Van Dalen and Van Aelst, 44.

973 Van Dalen and Van Aelst, 44.

974 Kennamer, 8.

975 Robert M Entman, 'Framing Bias: Media in the Distribution of Power' (2007) 57 Journal of Communication 163, 164.

976 Adams and Coltrane, 17 – 34.

Similar to agenda-setting, this approach can be viewed as a circular process with the media not only reflecting public opinion but also shaping it.

The agenda-setting approach also illustrates the media's role in 'framing' the news, deciding the construction of the news and not only reporting it[977]. Media 'reflect public opinion and contribute to its creation'[978] establishing a frame of the reality. Frames define problems, determine what a causal agent is doing with what costs and benefits, diagnose causes, identify actors creating the problem and even make moral judgments, evaluate and suggest remedies for the problems[979]. The media create context by framing the circumstances surrounding the issue they are reporting, establishing who want which policy, why they want it or how they want it. The frame of the reports of the media can change public opinion on a particular policy or about the movements that promote that policy. One example is the Catalan independence movement which took the media spotlight in 2017 with the referendum and subsequent declaration of independence. Depending on the specific newspaper reporting on developments in this movement and their framing, the movement is seen as better or worse for the Catalan society. For instance, readers of *El Periodico* – for the independence movement – overwhelmingly had a favourable view of Catalan independence[980] while readers of the national newspaper *ABC* had an unfavourable view.

Framing is another way in which the media influence the public opinion. Every story has a frame, with key themes identified and ideological lines the media set as being the most relevant. The way a story is 'framed' determines the moral value, the attribution of

977 Kennamer, 8.

978 Adams and Coltrane, 25.

979 Robert M Entman, 'Framing: Toward clarification of a fractured paradigm' (1993) 43 Journal of Communication, 51, 52; Alonso-Muñoz and Casero Ripollés, 44-45; Galdón, 'Desinformación, Manipulación y Uso de Internet' 27-58.

980 See the frontpage of El Periodico on the 1st October 2017, day of the referendum, 'Nada volvera a ser como antes' *El Periodico* (Barcelona, 1 Octubre 2017) <https://www.elperiodico.com/es/politica/20170930/resaca-referendum-paisaje-nuevo-catalunya-espana-6322352> (last visit 14.02.2021) On the other side, the ABC said 'Cataluña siempre España' *ABC* (frontpage, Madrid, 01 Octubre 2017) <https://www.abc.es/archivo/periodicos/abc-madrid-20171001.html> (last visit 14.02.2021)

responsibilities, the causes, the effect and even a possible solution[981]. However, as will be explored later in the chapter, the media lack a comprehensive understanding of the legal ramifications of their reporting about the policies the legislators are proposing and thus misinform the public.

Several studies demonstrate that media agendas and media framing in issues of family and national policies have influenced decision-making of individuals in society[982]. The public is ultimately trained to understand reality and the news in particular ways, as media frames 'provide the boundaries of reasonable discourse and the limits of rational argument'[983]. Framing thus shapes the understanding of each event[984]. In setting the agenda and the frame, news providers are capable of influencing the perception that the citizens have about certain issues and the social movements that support these issues[985]. The central role of the media in determining public opinion encourages great competition between social movements, political actors, and lobbies to enter and influence the media discourse[986].

However, the question must be explored – and will be analysed in the next chapters – whether the media are 'producers' of the agenda, setting the issues that should be debated or whether they just adopt the arguments of policy and social actors[987]. As Jones

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981 Entman, 'Toward clarification of a fractured paradigm', 52.

982 See, for example, Maria Isabel Serrano Maillo, *Prensa, Derecho y poder politico. El caso Pinochet en España* (Dykinson 2002) 355-357; Lotte Melenhorst , 'The Media's Role in Lawmaking: A Case Study Analysis' (2015) 20 (3) The International Journal of Press/Politics 297, 311; Heather Jacobson, 'Framing Adoption: The Media and Parental Decision Making' (2014) 35 (5) Journal of Family Issues, 654, 675 -676; Adams and Coltrane, 29; Alonso-Muñoz and Casero-Ripollés, 49-50; Andsager, 589 Cff.

983 Adams and Coltrane, 25.

984 Alonso-Muñoz and Casero-Ripollés 25-51; Andsager 577.

985 Alonso-Muñoz and Casero-Ripollés 25-51.

986 Benjamin Gonzalez O'Brien and others, 'Framing Refuge: Media, Framing, and Sanctuary Cities' (2019) 22 (6) Mass Communication and Society 756, 758; King, Schneer and White, 776; Alonso-Muñoz and Casero-Ripollés, 25-51.

987 This question is discussed more widely Bryan D Jones and Michelle Wolfe, 'Public policy, and the mass media. An information processing approach' in Sigrid Koch – Baumgarten and Katrin Voltmer, Public Policy and the Mass Media (Routledge 2010) 18-43; see also Corbett, 43; King, Schneer and White, 776

and Wolfe state, there is no simple answer to the question of 'who leads whom?'[988] as relations between media, politics, legal proceedings and social movements are not linear and function as information is made available and depends on the issue and the action of each actor during the law-making process[989]. This relation is more a circular than linear. What is clear is that the three main actors operate during a law-making proceeding are social movements, the government and policymakers (politicians, parliament etc) and the media. The next chapter will analyse interaction between the three actors and how it has shaped the transformation of the best interests principle.

Across the three countries in this study, the shared parenting discussion has been led by social movements and several political leaders, in favour of or against shared parental responsibilities. To gain access to the media and to politicians, the different social movements used several social actions (through protests, academic debates, dialogue with the politicians, etc) and assuring the media coverage. The discussion was simultaneously picked up by the mass media, therefore setting the agenda for public opinion to be shaped. As mentioned before, public opinion then has a high impact on public policy and legal proceedings. The next chapters will explore these interactions between social movements, political leaders and media have influenced the transformation of the best interests of the child and the capacity of social movements and political leaders to introduce their demands into the debate on shared parenting in the broad frameworks of media outlets.

### 6.2.3 THE MEDIA AND THE PARADOX OF INFORMATION

Before we discuss the action of the media in the law-making process of the shared parenting, the research will examine how the media act in the society, the effects of a globalized society on the information we receive and some basic principles of journalism.

Most essential news informing our lives in a democratic society come from different media channels, as newspapers, radio, and Television, without forgetting the new digital media who now lead the flow of information in society. However, we are in a new paradox: we have access to more information, yet we are less informed about the essential

988 Jones and Wolfe, 26-29.

989 Jones and Wolfe, 29.

issues that can influence our lives. Superficial information is the norm in most of the media we consume daily. Quantity and quality are not synonyms. More information does not mean we have the necessary information on a given matter, but that we have a lot of information about several issues.

In society, it is possible to be informed about anything 'instantly'. However, that does not mean the quality of the journalism is better. We have more information, but the information we receive lacks quality and nuance for several reasons. These include the lack of time available for journalists to go in depth on the issue they are reporting on, or the attempts of the economic, political and social lobbies to influence the frame. As Hargraves states, journalism 'entered the twenty-first century caught in a paradox'[990] as we have more news and information than in previous centuries, but at the same time, the action of the media[991] has been threatened more than ever by politics, economic and social groups[992] who try to minimize the influence of accurate and objective reporting in society or even control the news itself. Therefore, most information we receive from the media outlets is superficial or manipulated.

Another problem is the lack of media objectivity. While the news media should be impartial, it is difficult to be objective when there are always two or more frames with which to present reality[993]. If political, economic, or social movements and lobbies influence the media, we will receive all the information they want to release into the public domain. These types of manipulated and superficial information fall into two categories. 'Disinformation' – happens where there is an intentional attempt to manipulate the consumer and is a subset of misinformation 'that is deliberately propagated'[994]. 'Misinformation' takes place where there is accidental and non-deliberate false

990 Ian Hargraves, *Journalism, a Very Short Introduction* (Oxford University Press 2014) 1.

991 As media we understand newspapers, radio and Television. Globally, social media platforms are not considered 'media' in the traditional understanding of the concept, as they do not follow the same rules – and specially laws – as the Information Media.

992 Hargraves, 1.

993 Kevin Williams, *Understanding Media Theory* (2nd edn, Bloomsbury 2013) 125.

994 Andrew M. Guess and Benjamin A Lyons, 'Misinformation, Disinformation and Online Propaganda' in Nathaniel Persily and Joshua A Tucker, *Social Media and Democracy. The State of the Field and Prospects for the Reform* (Cambridge University Press 2020) 3.

information[995]. Both concern 'false or misleading messages spread under the guise of informative content'[996]. Inaccurate and misleading information – whether resulting from a mistake, negligence, unconscious bias or intentional deception – can damage the information that the public receives[997]. Galdón goes a step further stating that all inaccurate reporting, whether intentional or unintentional, can be labelled as disinformation defining it as 'the absence of true information or truthful information'[998] . Some authors explain several reasons that provoke a 'misinformed' or 'disinformed' society. McQuail and Street state the question of the 'bias', or the tendency of the media and journalists to interpret 'in favour or to sympathise with one cause'[999]. These biases do not have to be intentional but can respond to a series of personal or professional prejudices of the journalist or for ideological reasons of the media in question. As already highlighted, the action of social movements and political leaders can also influence media focus on one aspect or another when they release information. This information always presents only one side of the matter in question, whereas it is the journalist's job to cover all aspects of the information they receive.

Galdón and Becchelloni also observe that an overabundance of information produces disinformation or misinformation – whether intentionally or not – as the ‚particular interests' of social movements can be easily 'interchanged for truth' as 'a truth can be

995 Differentiation from Peter Hernon,'Disinformation and Misinformation through the Internet: Findings of an Exploratory Study' (1995) 12 2 Government Information Quarterly 133, 133-139; see also Bernd Carsten Stahl, 'On the Difference or Equality of Information, Misinformation, and Disinformation: A Critical Research Perspective' (2006) 9 Informing Science Journal Volume 86, 86; Guess and Lyons, 2; For the High-Level Expert Group on Fake News and Online Disinformation of the European Union Commission, 'Disinformation … includes all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. European Commission, EU Code of Disinformation, <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> (last visit 02.12.2022)

996 Guess and Lyons, 2.

997 Fallis, 401-426.

998 Gabriel Galdón, 'Desinformación, Manipulación y Uso de Internet. La Necesaria Educación del Sentido Crítico ante los Contenidos de los Medios de Información' in Monica Viñarás Abad and Maria Solano Altaba, *Las Nuevas Tecnologías en la Familia y la Educación: retos y riesgos de una realidad inevitable* (CEU ediciones 2014) 27-58.

999 Street, 20-21; McQuail and Deuze, 416; Williams, 125.

easily rejected by a culture of suspicion which de-legitimizes any truth'[1000]. In other words, the overabundance of information has led to groups, whether social movements, political parties, or the media itself to more easily use non-material facts to delegitimize the truth and vice versa. This has created a culture where to certain segments of the public receiving the news, truth is in the eye of the messenger.

Another main reason for the proliferation of misinformation is the acceleration of the news cycle with emphasis on 'breaking news'. This news reports the most recent developments which are actually not the most important regarding the facts and are also without the required depth underpinning the reporting[1001]. This overemphasis on 'breaking news' –being the first to report an issue – can produce artificial, half-baked or even incorrect information, as journalists do not have time to investigate the facts that really matter. In this way, journalism often omits the essential when it covers an issue for the public[1002]. As Galdón states, even if the topic is crucial, it can be treated as superficial, as it receives the same level of coverage as other information which may not have the same importance[1003]. The consequence is that we receive superficial and incomplete information, which does not help us to understand the whole story. Commercial imperatives, superficial and oversimplified coverage of events and issues foster the necessary conditions for misinformation to thrive[1004]. As it has been mentioned in the research, one of the main problems when the media reported the introduction of shared parenting policies was the lack of knowledge about the legal consequences of the law and their effects for children and their best interests. They focused on the demands of social movements and the actions of the lawmakers, without making a good examination about the law and the significance for the families affected by it. One of the main problems of the press currently is the lack of investigation that the reporters work out about any issue.

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[1000] Giovanni Bechelloni, *Giornalismo o Post Giornalismo? Studi per pensare il modelo italiano* (Liguore 1995) 6; Galdón, 'Desinformación, Manipulación y Uso de Internet…', 27-58.

[1001] Galdón, 'Desinformación, Manipulación y Uso de Internet…', 27-58.

[1002] Galdón, 'Desinformación, Manipulación y Uso de Internet…', 27-58.

[1003] Gabriel Galdón (ed), *Introducción a la Comunicación y a la Información* (Ariel 2001) 58.

[1004] Williams, 127-128.

A central effect of this overreliance on speedy release of information, is the increase of stereotypes, which can distort what is happening, as there is 'no time nor opportunity for intimate acquaintance'[1005]. Williams states that the stereotypes are 'necessary' to process the overabundance of information the citizens receive everyday[1006] but at the same time can deepen 'misunderstanding and prejudice' to some groups and social actors[1007]. Some organisations warned about media's representation of children, as journalists use children to 'sell the story' or are portrayed negatively or positively, depending on the interests of the journalists[1008] and their narrative bias. The narrative theory also warns about the stories the media tell, as each one is governed by certain 'features' and create disinformation. As Williams demonstrates, media could use a structure in the news to make a narrative that applies preference to a certain group[1009] on different issues, confronting several positions.

Another cause of disinformation is the action of pressure groups. As pointed out before, social, political, and economic lobbies are positioned to benefit enormously from an accurate or inaccurate information given to the public about issues of their interests[1010]. They provide documents, facts and pronouncements needed by the journalist to disseminate the information, they are the sources of the journalists, but it is difficult to imagine that each source gives objective information. Media outlets (be they newspapers, televisions, radios, or other type of media) are also businesses, that depend on clients (readers) and their own interests[1011]. However, the lobbying groups must have the organisation and influence to make their own voice heard. The reality therefore

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1005 Walter Lippmann and Martin Curtis, *Public Opinion* (1st edn MacMillan 1922, 2nd edn Transaction 1998) 89; Williams, 130; Galdón, 'Desinformación, Manipulación y Uso de Internet…', 27-58.

1006 Williams, 130.

1007 Williams, 131-132

1008 see about media portrayals of children in UNICEF Regional Office for Central and Eastern Europe and the Commonwealth of Independent States (CEE/CIS), Children's Rights and Journalism Practice- a Rights-based perspective (Dublin Institute of Technology – UNICEF, 2007) 23-25; Williams, 132.

1009 See Williams, 142, about the Gulf War in the British press in 1991.

1010 Galdón, 'Desinformación, Manipulación y Uso de Internet…', 27-58

1011 King, Schneer and White, 776-780.

is that some groups do not have this influence and at in end are silenced[1012] as they do not have the structure and knowledge of the communication proceedings to make their own voice heard.

It is important to note the difference between misinformation – unintentional – and disinformation – intentional. Misinformation is only the absence of true information, for different reasons that have been already covered. Manipulation or disinformation is the intentionally misleading information reported resulting from political and/or social interests and permeates into part of the societal consciousness[1013]. Misinformation can be due to external circumstances which include

time pressures surrounding release of an article, personal opinions and hidden bias and commercial considerations of the chief editors amongst other factors. On the other hand, disinformation or manipulation has a clear purpose of influencing society, usually for political or ideological reasons. An example of misinformation is the An example of manipulation is some political dictatures have used media as propaganda megaphones for their politics.

The next chapter explores whether newspaper reporting has been carried out with an intention to influence society. It also explores whether news coverage has been more a product of misinformation, specifically quick turnaround times in breaking news, a lack of deep knowledge of the media on judicial questions surrounding shared parenting arrangements and the best interests of the child and finally the influence of social movements and politicians on the media itself.

### 6.2.4 CONCLUSION

Media have an important role to play in the law-making process and in the construction of public opinion. Media set the agenda, deciding which issues are covered more frequently and the importance of the issue for political and social debate. At the same time, media framing selects the aspects covered in the information, how much relevance should be given to each element or question, evaluating possible consequences

[1012] Galdón, 'Desinformación, Manipulación y Uso de Internet…', 27-58.

[1013] Galdón, 'Desinformación, Manipulación y Uso de Internet…', 27-58; Bernd Carsten Stahl, 86.

of a particular issue, the responsibilities of the individuals involved and, in the end, determining the moral value of each angle of story.

The media are not alone in this role. Interaction between lawmakers, social movements, commercial lobbies, and media further mould public opinion. Today's journalism is afflicted by disinformation and misinformation, making it difficult to report objectively and devoid of the depth and nuance needed to give a fuller and more accurate picture to the public. The speed in which information is released, the dubious commoditization of journalism and pressure campaigns by well-funded special interests groups, has substantially degraded the quality of accurate information the media disseminate to the public. All these factors may illicit further bias amongst the political discourse and the legal process.

Family is one of the main issues that has changed the most in the last decade, especially from a political and legally perspective. During the introduction of shared parental responsibilities in the countries in this study, different actors contributed – perhaps without realising – to the transformation of the best interests of the child. Political leaders, social movements or lobbying groups and the media triangulated during the proceedings spreading their ideas and views about shared parenting which afterwards were delivered to the public. This context contributed to the widely accepted idea in each of the countries under study that a shared parenting law was needed. However, the consequences that the law could bring to the families were not fully pondered.

This chapter has explored the ways in which how social movements and lobbying groups and political leaders worked together with the media during the law-making processes in general, from a theoretical point of view. The next chapter focus on how these actors behave for the approval of the shared parental responsibilities and how they influenced the transformation of the best interests principle. The research finds that the matter proposed by the social movements – the need for shared parental responsibilities – was taken by the lawmakers and the media as a main topic, establishing the agenda. In addition, media framing has been analysed, specifically whether this frame prioritized the best interests of the child and how all these interactions between media, lawmakers and social movements influenced in the transformation of the best interests of the child.

# 7 THE MEDIA INTERPRETATION OF THE BEST INTERESTS OF THE CHILD IN ENGLAND AND WALES, SWITZERLAND, AND SPAIN AFTER 2000

## 7.1 INTRODUCTION TO THE PRESS-ANALYSIS

After analysing shared parenting laws in the three countries, an analysis will be presented of the actions of newspapers and other media during the law-making process. As previously mentioned, the media are responsible for setting the agenda and also 'framing' law and policy issues for public opinion. However, it is important to reiterate the previous chapter's assertion that the influence of the media does not go 'one-way', but rather is part of a circular process where lawmakers, the social-movements and the media outlets interact.

### 7.1.1 PURPOSE

The link between news and law-making or policy making proceedings is an important factor, as the news are the main source of information for the public and the main players within the debates themselves. Media and those involved in the law making proceedings – parliamentarians, public institutions and social movements- are the ones who have the general vision of the questions under discussion and through the media, the politicians and lawmakers can analyse and examine the impact and reactions of the subject in the public opinion and of course have crucial insight into the mindset of those opposing their efforts. As previously noted, the media frame the information received and set the agenda, inevitably prioritizing some issues over others.

The legal debate selected to analyse the impact of the media in the evolution of the best interests of the child is the introduction of shared parental responsibilities after a family breakdown or unmarried parents. In each country, the initiative has been treated differently and at different points of time, but all of them were introduced in between 2000 and 2015.

The press analysis endeavours to answer the following questions: Which 'agenda' was set during the approval of shared parenting? Which frame was established during this

period and how were these frames used? Are the media the ones who establish the agenda and the frame or do they just spread the ideas they receive? Were the shared parenting bills in the three countries made thinking about the content of the best interests of the child or about the equality between the parents?

The main question to answer is whether the newspapers have influenced the transformation of the concept of the best interests of the child that asserts that the child is to be with one parent to the view in all three countries that both parents should be involved in the main decisions concerning their development and education. An equally important question is whether this solution has been provided with the best interests of the child or whether 'fairness' to the parents is the paramount consideration. The study seeks to further inform debates surrounding this question involving the three main actors that set the agenda and frame the public dialogue surrounding shared parental responsibilities in the three countries.

### 7.1.2 METHODOLOGY

The aim of this media analysis is to explore whether information provided by newspapers has really influenced the transformation of the best interests of the child towards a 'dual parenting' approach in the three countries. This analysis has used a 'content analytic' approach to address the aforementioned questions, focusing on articles from the newspapers *The Guardian* and *The Times* (England and Wales) *El Mundo* and *El Pais* (Spain) and *Neue Zürcher Zeitung* and *Le Temps*[1014] (Switzerland) available in the online databases of *Factiva*, *Proquest* and the catalogues from the Spanish National Library and the Zentralbibliothek Zürich. The analysis draws on articles, opinion columns and features which carry any coverage of the debate of shared parenting.

The period of interests is 2000-2015, even if the periods change with the countries studied. In England and Wales, this study analyses articles from *The Guardian* (54) and *The Times* (62) in the between 2009-2015, before and after the approval of the law. In Spain, have been analyzed articles from *El Pais* (53) and *El Mundo* (48) in the period between 2003-2005. In Switzerland, articles are drawn from the *Neue Zürcher*

[1014] Including oficial websites and Sunday editions.

*Zeitung* (43) and *Le Temps* (57) between 2009-2015. The search terms have been, for each country, the following:

- For England and Wales : shared parenting, parenting, welfare of children, child's welfare, parental responsibility, joint custody, joint residence orders, parents-4custody (model association of the requirement for the shared residence orders)
- For Switzerland: gemeinsame elterliche sorge, scheidung, kindeswohl, sorgerecht, bien del enfant, autorité parentale conjointe, autorité parentale, garde, divorce.
- For Spain: custodia compartida, interés superior del niño, divorcio, bien del niño, patria potestad.

The newspaper content analysis has excluded any reference to same-sex relationships, articles with no clear 'shared parenting', 'parental responsibilities' or 'best interests of the child' frame and articles with no clear link to the topic of shared parental responsibilities. The analysis has focused on the general position of each journalist about shared parental responsibilities – if from a general point of view the article is in favour or against the shared parental responsibilities – on the emphasis of each article on the child (the best interests of the child) the position of the article about the equality between the parents or discrimination of one of them, the co-responsibility (cooperation between the parents) and the incorrect conflation between 'time spent with the child' or custody/access and 'parental responsibility'. It is noteworthy that legal concepts are reported by the media using different frames yet from a more generalist perspective. For example, usually the media in the three countries and their different languages do not discuss the 'welfare of the child' but rather 'the benefit' or 'the child should be important'. Also they focus on the access and time that parents spend with children when the legal notions should be residence, custody or parental responsibilities. This confusion is one of the main pillars of the influence of the media in the public opinion.

Therefore, there are two main frames in each article that will be analysed, aside from others. The first one, the welfare of the child and the second one, equality between parents. Both frames are sometimes opposed, as the articles analysed focus more on the equality between parents and not on the welfare of the child.

The analysis uses the frame 'welfare of the child' and 'best interests of the child' when referring to the child's interests. As stated in the first chapter, the best interests of the

child can be translated in all rights included in the CRC. For this reason, it is considered the frame of the child's interests considering all mentions to these rights, as education, upbringing and stability for the child and the priority of the child's needs above those of the parents, and not only a direct reference to the best interests of the child. The frame 'equality' refers to perceived discrimination against one of the parents in the allocation of the parental responsibilities of the child, the need of the parents to be 'equal' in the upbringing of the child and to have the same opportunities to have contact with him or her. This analysis confronts these two frames, to explore whether the media spread the idea that shared parental responsibilities are in the best interests of the child or whether they spread the idea that both parents should be 'equal' in the upbringing of the child and have the same opportunities, or if they are discriminated against.

In their coverage of shared parental responsibilities, the newspapers under study did not demonstrate a strong grasp of the notion of parental responsibility and created some confusion, which was one of the main debates during the proceedings and the main criticism levelled by several authors on the debate during the law-making process between politicians, media, and social movements. The analysis focusses on the confusion between time spent with the child, custody and parental responsibilities. In addition, another frame that has been taken into account in the analysis of the newspapers has been whether the articles focus more on the need of a family co-responsibility of both parents in raising the child and the sharing of the family tasks between both parents or in the 'right' of the parents to have a continuous relationship with the child, without mentioning the need for co-responsibility of both genders in the upbringing.

In addition, the actions of social movements have been analysed (for example, Fathers-4Justice in United Kingdom, Padres Separados, SOS Papá and the association 'Themis' in Spain or the associations in Switzerland) and the actions of politicians and the Government appearing in news coverage. The media do not only cover shared parenting but also use frames maintained by social movements by using quotes, interviews and campaigns done by them. The question is if the media are 'receivers' of information or 'influencers' in the political context.

There are also some limitations to the study. Additional representation can be achieved by including analysis of a greater number of newspapers, incorporating diversity in terms

of region or ideological approach, for instance the autonomous regions in Spain, the cantons of Switzerland and Scotland and Northern Ireland in the case of the United Kingdom. An additional limitation is the number of articles, which are, during time period covered, are not as representative as expected, only increasing to a significant level during the law-making process. The interests of the media – and therefore of the public opinion – about the family laws was very low in comparison to the change that the reviews would bring to society. In addition, some frames and issues overlap and may be less defined than our analysis would suggest. Another limitation is the omission of emerging media platforms, namely social media. However, the impact of social media in the period studied was not as big as it one would imagine[1015]. Some authors note that the social media are incapable of reaching the same volume of public as the conventional media[1016] and highlighted before, all newspapers already have their own social media channels and are the same 'content engines' for TV, Radio and also for social media.

Nevertheless, this analysis provides a robust baseline for future research about the transformation of the best interests of the child in Europe and the influence of media in Family Law.

## 7.2 RESULTS

The treatment of shared parental responsibilities and best interests of the child in the three countries in this study had different approaches. First, the concept and criteria in the three countries on the best interests of the child around different, as it has been analysed before. Secondly, in each country, shared parental responsibilities have been treated differently, going from joint custody in Spain to the presumption of shared parental responsibilities in Switzerland. England and Wales has seen the concept of well-being of the child change, notably the 'involvement of both parents' as presumption for the welfare of the child.

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[1015] See for the social media impact and influence, Christian Fuchs and Marisol Sandoval, 'The Political Economy of Capitalist and Alternative Social Media' in Chris Atton, *The Routledge Companion to Alternative and Community Media* (Routledge 2015) 168.

[1016] Alonso-Muñoz and Casero Ripollés, 25-51.

The first research question that will be answered is whether the media are adequately informed about the best interests of the child in their reporting during the introduction of the shared parental responsibility. The purpose of this research question is to analyse the inclusion in media reporting of the different aspects of the well-being of the child, in the different ways that the issue can be framed. Also, the analysis explores whether the media reported more on the need for equal treatment of the parents than the interests of children, comparing it to media reports about co-responsibility of both parents in decisions concerning the child.

The second question – whether the media has influenced in any way the debate for shared parental responsibilities – involves a quantitative and qualitative analysis during the period before and after the shared parental responsibilities law in each country entered into force. The analysis includes also a view of the action of social movements during the law-making process.

### 7.2.1 ENGLAND AND WALES

In England and Wales, *The Guardian* and *The Times*, two newspapers with high circulation have been analysed. Analysis covers the period 2008-2014, before and after the Children and Families Act entered into force. The analysis comprises 59 articles and editorials in *The Guardian* and 65 articles in *The Times* during the period of the introduction of the shared parenting through the Children and Families Act 2014 (2008-2014) in England and Wales. The results have been separately examined, and afterwards in aggregate, with a socio-political contextualisation of the Children and Families Act 2014. In fact, the Children and Families Act was promoted by the Conservative-Liberal Government coalition led by then-Prime Minister David Cameron and Nicholas Clegg, which already provoked some discussions inside the Government[1017].

*The Guardian* published (Figure 1) 59 articles between 2008 and 2014, being the most intensive period between 2012 and 2013. The Children and Families Act 2014 was not the main news of the period, but it was however important, being in the frontpage four times. The analysis reviews also news appeared in the webpage of the newspaper.

[1017] See for example, Laura Pittel and Rosemary Bennet, 'Clegg casts doubt over relaxing the rules on childcare' *The Times* (News, 10 May 2013) 12.

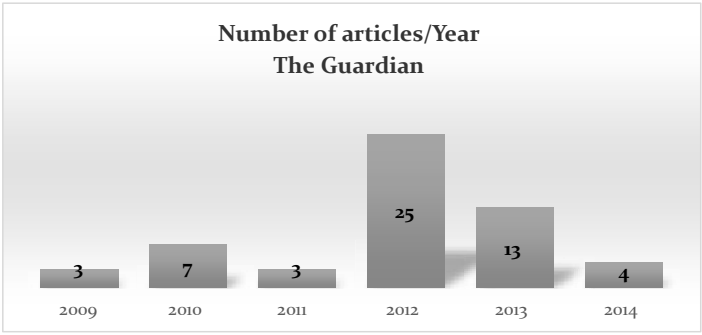


**Figure 1 The Guardian *articles/year***

Of *The Guardian's* 59 articles, 26 address the welfare of the child (in several forms, specifically covering welfare or about the benefit or the best for the child) while 40 of these 59 editorials and articles address the frame of the equality between the parents and the need for both parents to have regular contact and live with their children (Figure 2). *The Guardian* has a favourable view of shared parental responsibilities. *The Guardian's* coverage also includes the concerns of judges and lawyers[1018] on the Children Act's notion that shared parental responsibilities benefit the child. Also, the newspaper's editorials and commentary reflect the misunderstandings that brought the law – which it was already analysed in chapter four[1019]. These misunderstandings are, for example, the lack of clarity of what means 'involvement' of both parents for the benefit of the child and the erroneous belief that the shared parental responsibilities will bring more time spent of the parents – specially fathers – with the child, without considering the responsibilities that the shared parenting brings. As it has been already

[1018] See Owen Bowcott, 'Justice minister rejects warning on shared parenting rights' *The Guardian* (London, 07 February 2012) 8; Alexandra Topping, 'Divorced parent rights put victims of violence at risk' *The Guardian* (London, 06 November 2012) 17.

[1019] Jack O'Sullivan Nicola Clark Liz Edwards (Resolution) Martin Narey, 'Children and families bill: our panel responds' https://www.theguardian.com/commentisfree/2013/feb/05/children-family-bill-panel-responds (theguardian.com, 5 February 2013)

said, the introduction of the statement that the involvement of both parents will benefit the child, for some authors, has only a symbolic function[1020].

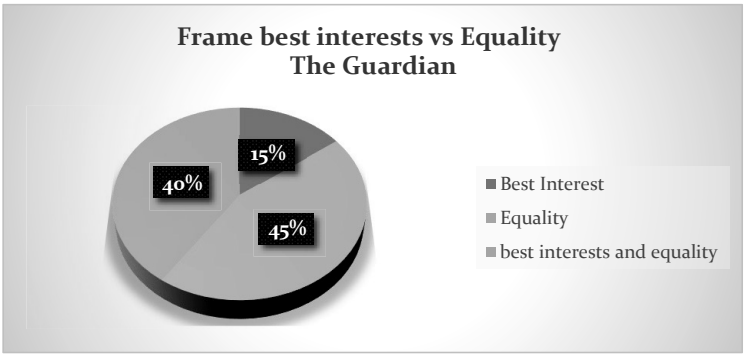


**Figure 2 The Guardian *Best Interests vs Equality (1)***

Of the different positions in favour of shared parental responsibility 10 of 59 articles opine that shared parental responsibility is the best option for the welfare of the child after divorce or separation. 15 editorials state the shared parental responsibilities should be the rule, applying to all couples and only 1 opinion piece argues against shared parental responsibilities. 15 articles consider the involvement of both parents as necessary for the welfare of the child and 2 articles speak about the implications for unmarried parents.

From this point of view, it is apparent that equality between the parents is covered more by *The Guardian* (Figure 3) than the best interests of the child, a trend shared by the other newspapers analysed. Shared parental responsibility is seen more as a solution to a problem between the parents rather than for the children and their welfare. The 45% of the articles refer only to the equality between the parents, while only 15% refers exclusively to the welfare of the child. The other 40% refers to the welfare of the child but also referring to the equality between the parents. On the

[1020] See Kaganas 'A presumption that involvement…', 270; Trinder, 13-14; Fortin, Hunt and Scanlan, 343.

whole, the equality frame is being reported by 61% of the articles, while the welfare of the child only the 39%.

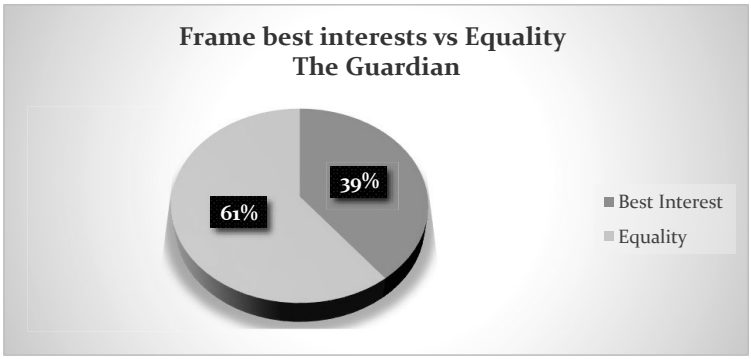


**Figure 3 The Guardian *Best interests vs Equality (2)***

On the other side, not all articles take a position for or against shared parental responsibilities. Only 25 of 59 (a little less than 50%) explicitly support shared parental responsibilities, but only one is clearly against. However, 15 articles consider the need for both parents involvement in the life of the child. As it has been said before, the introduction of an statement about the involvement of both parents in the notion of the welfare of the child is the main effect of the media in the Children and Families Act 2014.

Considering the debates amongst social movements, 25 of 59 articles by *the Guardian* (Figure 4) focus on civil society and the activities of different groups acting in this space. In the case of England and Wales Fathers4Justice was principal advocacy group for shared parental responsibilities, lobbying the need for fathers to 'see' and have contact with their children, while 9 articles look at government proposals. That means that half the news appearing in the period before and after approval of the law covered the activities and demands of the social movements.

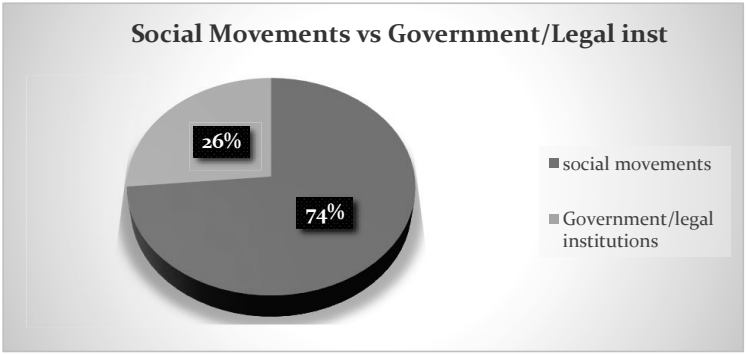


**Figure 4 The Guardian *Government vs Social Movements***

The most intensive period of news coverage was 2012, beginning in February in parallel to the proposal to change the Law by the Government and the beginning of the parliamentary proceeding. 24 of the whole period's 59 articles were written on this period. Of *the Guardian's* articles (Figure 5) in 2012, 18 cover the welfare of the child and the Bill's implications on the notion, while 19 cover equality between parents. This means that the welfare of the child was also a main topic during parliamentary proceedings, but not during the whole period. However, there are 9 editorials that consider shared parenting to be essential for the child and the family, meaning co-responsibility as collaboration of the parents in the upbringing of the child. 5 editorials assert that shared parental responsibility benefits the child, while 2 view the involvement of the parents is essential. 9 editorials support the idea that shared parental responsibilities should be the rule, while 8 articles favour the demands of the parents to have more 'time' with their children, causing confusion in the public between custody and parental responsibilities from the legal point of view. In this intensive period of coverage in 2012, the social movements were mentioned in 8 of 24 articles, while another 8 articles mentioned the Government and the political institutions.

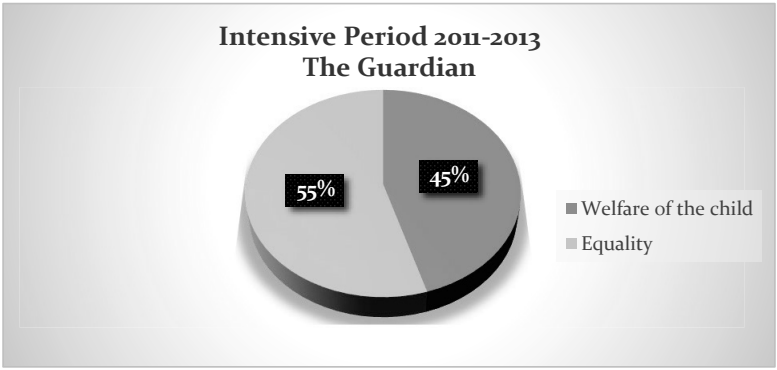


**Figure 5 The Guardian *Equality vs Best Interests (2011-2013)***

In 2013, another intensive period of coverage surrounded the Bill as it was time for the parliamentary process of the law, 13 articles covered shared parenting and the Bill, of which 4 prioritize the welfare of the child as paramount and 4 are shown in favour of a change in the law for shared parental responsibilities as the rule to benefit the child. However, 9 articles highlight the need for equality between mothers and fathers in the law, while 5 articles mistakenly conflate parental responsibilities with time or custody with the child. As it has been seen in chapter 4, parental responsibilities imply more than custody or how much time spends the child with the father or the mother, but the media only focus on the debate between parents about how much time is the child with each of them. Precisely, these 5 articles show the demands of the parents to have more time with the child, without considering other responsibilities attached. Only 2 articles speak objectively about a continuous co-responsibility of both parents towards the child and consider the shared parental responsibilities as a whole set of responsibilities towards the child. Despite of this, 4 articles of 13 articles in the year 2013 consider the involvement of both parents as necessary for the welfare of the child while not considering the legal consequences of the statement about the involvement of both parents in the life of children and families[1021]. The social movements, especially Fathers4Justice appeared in the articles analysed seven times of 13 articles of the period of 2013.

[1021] See Kaganas 'A presumption that involvement…', 270; Trinder, 13-14; Fortin, Hunt and Scanlan, 343.

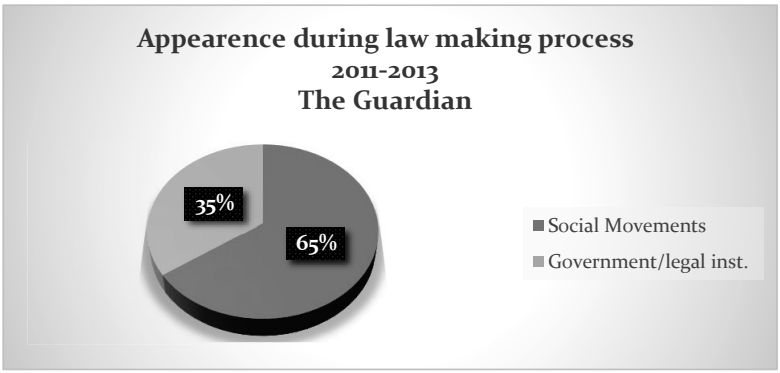


**Figure 6 The Guardian *Gov vs Social Movements (2011-2013)***

In the intensive news cycle concerning the Children and Families Act, the welfare of the child was covered more in 2012 than in 2013, when the welfare appeared only four times. In addition, equality between parents was supported in both periods, growing the difference between the Guardian's coverage of child's welfare and equality between parents in 2013. However, one key issue is the greater amount of coverage by *the Guardian* on the demands of the different social movements and institutions and 'custody battles' and the need of 'justice' for fathers[1022] over the actual legal implications of shared parental responsibilities. *The Guardian* covered Fathers4Justice's activities[1023] in 15 articles between 2012 and 2013. *The Guardian* has covered the activities of the fathers associations more frequently than *The Times*, which will be explored below.

*The Times* refers to shared parental responsibilities in human interests' stories usually in the sections on 'Features' or 'National' 'News' and 'Law' during the law-making process of the Children and Families Act. Of the 65 articles and editorials covering shared

[1022] See for example, Jack O'Sullivan, 'Fathers finally get equal access rights to children. So why now?' *The Guardian* (London, 13 June 2012) <https://www.theguardian.com/commentisfree/2012/jun/13/fathers-rights-overlooked-law-welcome> (last visit 14.01.2022) ; Damien Pearse, 'Divorce fathers to get more access to children' *The Guardian* (London, 03 February 2012) 1.

[1023] At least 22 articles mention Fathers4Justice and their actions in the whole period between 2008 and 2014, being more mentioned in the years 2012 and 2013, during the Bill discussion in the parliament.

parental responsibilities between 2008-2014 (Figure 7) only 14 discuss the law and legal consequences for families in general, including children. Also, only seven articles are in the newspaper's 'Law' section and are the most accurate concerning the legal questions that the Children and Families Act 2014 will bring to Family Law. 5 articles analysed are opinion pieces, all of which assert welfare of the child to be central to the law, but only two are against the presumption of the involvement of both parents will benefit the child.

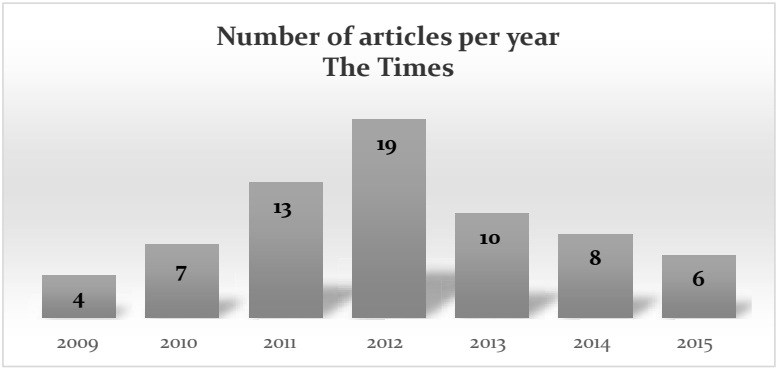


**Figure 7 The Times *articles/year***

Frames used by *the Times* referencing welfare of the child and equality between parents in duties concerning their child's upbringing appear in 31 articles between 2008-2014. Of these 31 articles, 24 consider favourable the involvement of both parents in the life of the child, as the Government proposed, with a change on section 1 of the Children Act. Also 22 articles agree with the proposal to consider shared parental responsibilities for both parents and the need for a corresponding law, while only 3 are against. The other two articles are neutral and raise questions and doubts on both proposals, against and in favour of the involvement of both parents in the life of the child.

Of 65 articles, 44 cover the equality between the parents and their 'right' to share responsibility for the child, with no discrimination to one of the parents, usually the father. Therefore, of 65 articles (Figure 8) the 45% refer exclusively to the equality between parents, while only the 20% refer only to the welfare of the child, while the other 35% refer to both.

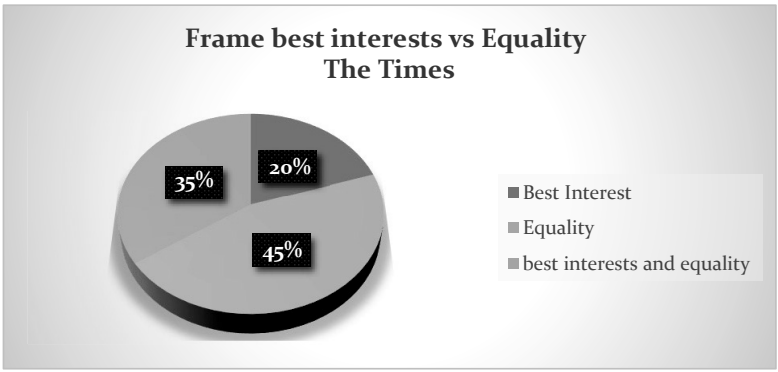


**Figure 8 The Times *Best Interests vs Equality (1)***

24 of 65 *the Times*'s articles mistakenly conflate time spent with the child, custody and shared parental responsibilities all while demonstrating bias toward equal distribution of time or custody between the parents. Most of these articles cover access and custody and not the involvement of both parents or the responsibilities of the parents towards the children. Only 26 articles editorialize support for a shared parenting model, with equal distribution of responsibilities and home assignments between both parents. On the other hand, 34 articles favour the need to involve both parents for the benefit the child, but without mentioning how such an arrangement would work.

Five articles promote the need for a father figure for children, while four promote the need of the mother. Five articles give a bad image of the father – for example, fathers who do not want a complete involvement in the life of the child[1024] or pressure the women about custody[1025]. Only four articles assess potential implications of the law on unmarried parents. These frames also show that some articles are more focused on battles between mothers and fathers or between partners, without considering the legal implications for children, as the split between two households after divorce or

[1024] For example, Soraya Kishtwari, 'child support overhaul to target fathers who won't pay up' *the-times.com (*London,11 July 2011) Caroline Scott, 'Mothers' ruin; Fathers often lose contact with their children after divorce' *The Sunday Times* (London, 17 June 2012) 18-23.

[1025] Lucy Cavendish, 'I've lost my kids, my husband got custody and I'm the breadwinner' *The Times* (London, 14 April 2012) 44-45.

the continuous fighting of the parents in some cases. Also, the fact that only one article takes into consideration the consequences for unmarried parents demonstrates the ignorance of media concerning the main changes of the law.

Some articles were key for the debate and the parliament discussion. First of all, the opinion of Judge Buttler Sloss and other judges, who call to the risks about the presumption for children when their welfare is in danger[1026]. Another key article was the opinion of actress Kate Winslet against shared parenting, who was used by the group Fathers4Justice for one of their campaigns before the Bill was approved. The statement of Winslet was also recorded by *the Guardian*[1027].

From the point of view of the social movements and political institutions, 16 of 63 articles in the six year period cover the demands of social movements and fathers associations (Figure 9), especially Fathers4Justice, while nine articles focus on government proposals. Therefore, the social movements are covered by the 59% of the articles, while the Government and more informed institutions only 41%.

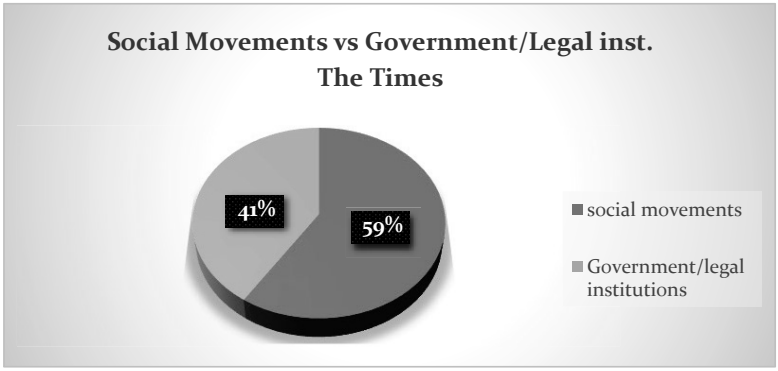


**Figure 9 The Times *Gov vs Social Movements***

[1026] See Frances Gibb, 'Parents who inflict emotional cruelty ‚should be treated like criminals'' *The Times* (London, 13 April 2013). See also this concern about the shared parenting law proposed by Sir Alan in Frances Gibb, 'Concern over 'flaws' in shared parenting plan' *The Times* (London, Politics, 19 July 2012)

[1027] Rosemary Bennet, 'Winslet threatens fathers' group over parenting ‚slur'' *The Times* (London, 20 December 2013) 11; Deborah Orr, 'There's a lesson for Kate Winslet in all of this' *The Guardian* (London, 21 December 2013) 41.

The most intensive period coverage by *The Times* came 2011-2013, especially 2012, when 19 articles of the 63 articles were published, making up a third of relevant coverage between 2008 and 2014. The main period is between February and June 2012, when the proposal was presented. In a five month period in 2012, 19 articles were published, mostly covering the debate on the Bill between Government and social movements and utilizing the frame of equality between the parents in their care for the child than on the best interests of the child itself. It is also notable to remember that while the Interim Report from the Justice Review was published in 2011[1028] it was only between 2012 and 2013, when the whole parliamentary process took place . Between 2011-2013, the articles and editorials focus more on the debate between associations and Government, leaving the child in a second place on the discussion.

Of the 19 articles published in 2012, 9 prioritize the welfare of the child in their statements (Figure 10) but five of them favour shared parental responsibilities as the best model for the child , while four of them do not swing clearly in favour of shared parental responsibilities. However, 12 articles of these 19 articles approve the introduction of an statement in the law that prioritize the involvement of both parents, suggesting that it will benefit the child, against the opinion of experts who consider this statement was unnecessary and could bring some confusion. Only one editorial considers shared parental responsibilities as detrimental to the child. Therefore, the newspaper's favourable view towards shared parental responsibilities as being in the best interests of the child is clear.

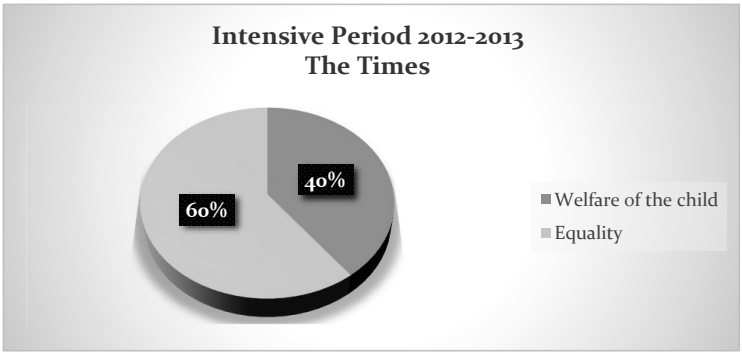


**Figure 10 The Times *Welfare of the child vs Equality (2012-2013)***

[1028] Family Justice Review, *Interim Report* (March 2011).

Concerning the relation between equality between the parents and co-responsibility, 16 of 19 articles assert that the father and the mother should have equal 'rights' in raising the child, considering that neither of them should be privileged concerning the distribution of time and responsibilities with the child. 9 articles mistakenly conflate parental responsibilities and custody and opine that both parents should spend more time with the child. On the other hand, only 6 articles speak about the other concept, co-responsibility, meaning the collaboration and co-responsibility of both parents in raising the child. In addition, eight of the 19 articles promote the need for involvement of both parents in the upbringing of the child and view it as beneficial to the welfare of the child.

Regarding the action of social movements and political institutions (Figure 10), eight articles in 2012 promote and consider the social movements and lobbies in favour of shared parental responsibilities, while five articles mention or promote government or political proposals. In 2013, only eight articles on parental responsibilities were written, four of which cover welfare of the child, three which assert that shared responsibility benefits the child, while five take into account 'equality' or the discrimination of the father or the mother. Three articles consider the involvement of both parents in the upbringing of the child to be essential.

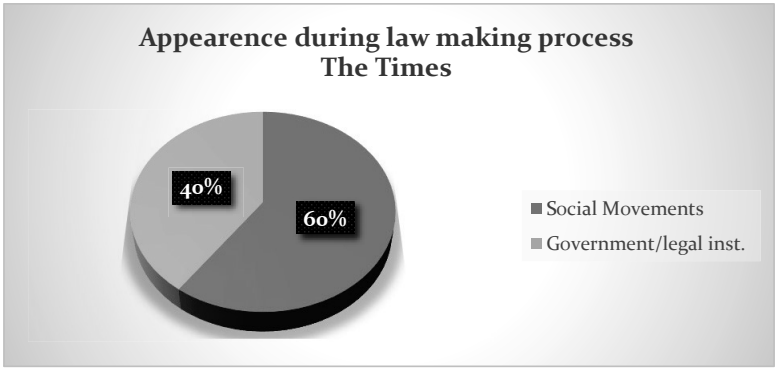


**Figure 11 The Times *Social Movements vs Gov (2012-2013)***

In summation, it can be said that both newspapers cover the welfare of the child less than the need for 'equality' between both parents. As well, this study reveals mistaken

conflating of 'shared parental responsibilities' and shared 'custody' or access to the child, especially in *The Guardian*. As mentioned before, also some authors have criticized this confusion[1029], as social movements, politicians and media would focus only on 'custody' without taking into consideration the broad sense of shared parental responsibilities and the legal term 'involvement of both parents' as part of the welfare of the child.

A main subject that should be considered is the focus of newspapers on shared parental responsibilities issue only during the beginning of the law-making process. After that, the coverage of shared parental responsibilities decreased in favour of other social issues including the smoking ban in cars with children[1030] or adoption[1031], both reforms included in the Children and Families Act 2014.

Another main issue for England and Wales and *the Times* and *the Guardian* is that between 2010 and 2011, the news coverage of shared parental responsibilities were in sections as 'features' – considered more secondary sections – while in 2012 and 2013 there was more news on shared parental responsibilities making it into sections with a higher readership especially sections on national news and opinion columns. That gives the view of the change of importance of the Bill and how the influence of the media, proposing stories about the problems faced by divorced and unmarried parents, can give a view of the problems in society and therefore, suggest the possibility of a change on the Law.

In England and Wales, the analysis showed up that the best interests principle was mentioned, first *in the Guardian* only in the 39% of the articles in the whole period, against the 61% of articles asking for a major equality between the parents. *The Times* was more balance, but also with a great difference between the percentages, as the

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[1029] See Bromleys ed Lowe and Douglas, 481.

[1030] For example, James Meikle, 'Teenagers want plain cigarette packs with bold health warnings' *The Guardian* (London, 7 October 2013) 7; Mark Hookhamand and Isabel Oakeshott, 'Labour plan to stub out smoking in cars with children' *The Times* (26 January 2014) 9.

[1031] For example, Ruth Gledhill, 'Adopters will be able to browse photographs of waiting children' *The Times* (London, 30 November 2013) 25-26; 'This isn't just about speed: The government fails to realise that post-adoption support is as important as finding families quickly' *The Guardian (*London, 6 March 2013) 30.

welfare principle was mentioned in the 41% of the articles, while the 59% of the articles refer to the equality between the parents.

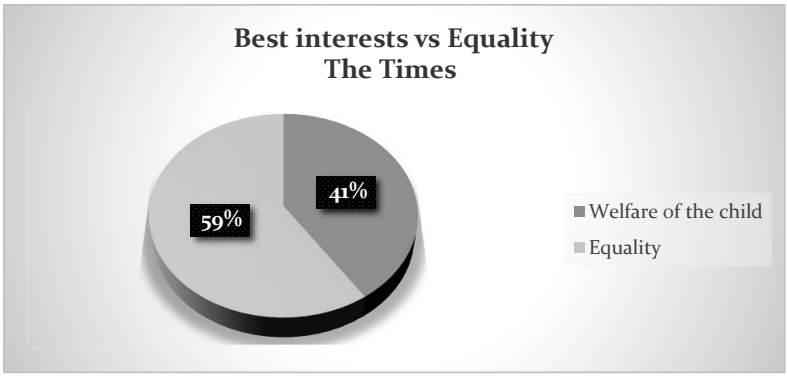


Figure 12 The Times ***Welfare vs Equality (2)***

### 7.2.2 SPAIN

In Spain, this study analyses *El País* and *El Mundo* in the period 2003-2005. These are the main national reference newspapers with higher circulation and accurate reflectors of public opinion and political discourse in the period under analysis. As explored previously, joint custody in Spain entered into force 30th of June 2005, but the first reporting on the matter goes back to 2003. The first articles were written to cover the demonstrations of fathers' rights associations, with these social movements acting as the main sources of information surrounding joint custody in the first period, between 2003 and 2004. Parliamentary processes concerning the drafting of the law took place 17 September 2004 to 30 June 2005, when news also increased in both newspapers, putting the debate on joint custody at the centre of the political discussion.

In *El País* there were 54 articles between 2003 and 2006 covering joint custody (Figure 13) . As it has been said before, there are two frames that had to be analysed, first the best interests of the child – so the impact of the principle in the news appeared in the period – and secondly the focus on the equality of both parents or the discrimination of one of them.

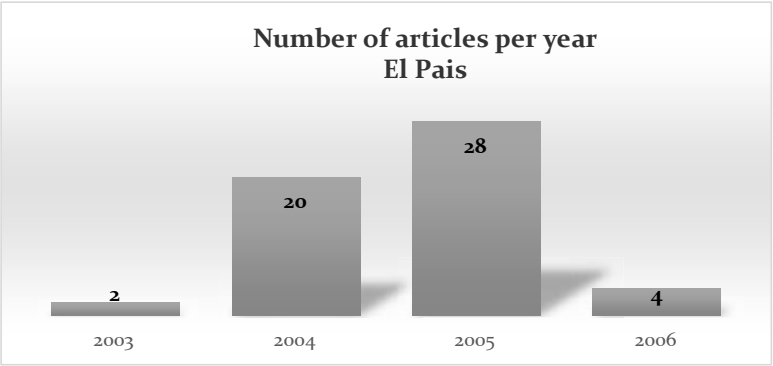


**Figure 13 El País** *articles/year*

Of these 54 articles appeared, 36 cover best interests, of which 25 editorials assert that shared custody is beneficial to the child and 11 opine that shared custody should be only with agreement to benefit the child. Therefore, all articles covering the best interests of the child are – to a greater or lesser extent – in favour of shared custody. However, the 15% of the articles considers the shared custody is beneficial for the child only with agreement between the parents, while 33% of articles consider the shared custody is for the welfare of the child with or without agreement of the parents. Adding the two results together, 48% of the articles speak of the best interests of the child, but mainly in favour of joint custody.

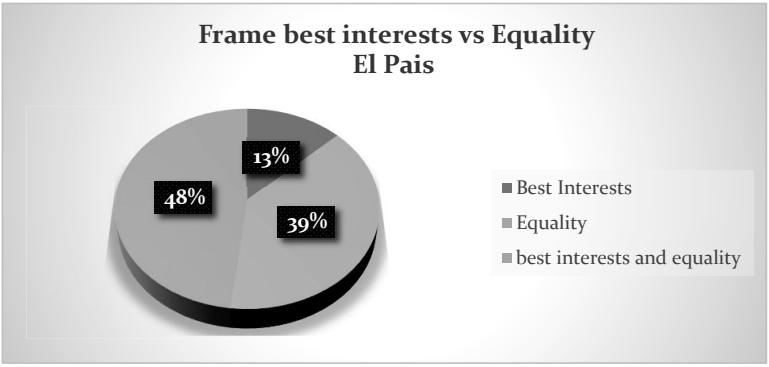


**Figure 14 El País** ***Best interests vs Equality (1)***

Though, 39 articles discuss discrimination against one of the parents and the need of equality between genders in the upbringing of the child. Therefore, in the period between 2003 and 2006, the 52% of the articles defend the shared parental responsibilities to reach the equality between the parents, while the 48% refer to the best interests of the child. The 15% of the articles are against the shared custody without an agreement between the parents (Figure 14).

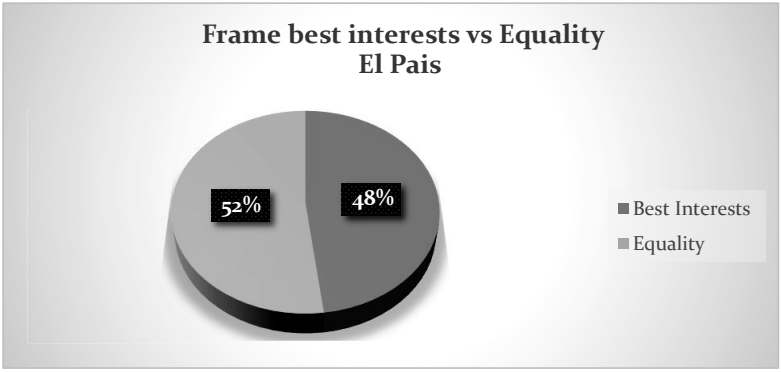


**Figure 15 El País *Best Interests vs Equality (2)***

14 articles only cover the aspect of 'time' spent with the child and make the confusion between custody and time spent with the child, which is not exactly the same from a legal point of view and gives the image that custody is more a right than a responsibility of the parents. Therefore, those articles do not take into account the responsibility attached to the concept of custody of the child and speak only about time or access to the child. However, 19 articles consider this co-responsibility and the equal distribution of the duties relating to the child, which gives the idea that *El Pais* takes into account the custody more as a responsibility of the parents than a right of the parents.

The most intensive period of news coverage in *El País* falls between 29 August 2004 and 30 June 2005. During this period, *El País* published 40 articles on joint custody and the best interests of the child. In effect, 80% of the news appeared in the period analysed appeared in a 10-month period. In this period, 27 articles cover the best interests of the child, while 26 cover discrimination and the need for equality between parents in custody cases. Only 14 consider the co-responsibility of both parents and

the distribution of the responsibility related to the raising of the child, which should be – as the Law states – the main objective in custody arrangements. Therefore, it can be concluded that the two frames, equality between parents and best interests of the child are treated equally during the main period of news and the parliamentary proceeding (Figure 16). Also, during this lapse of time, 4 articles have a legal explanation of the reform, which gives a more informed opinion about the law to the public opinion, even if it is still deficient[1032].

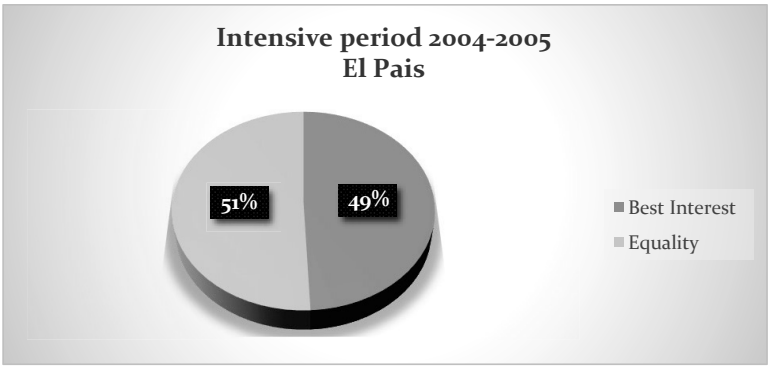


**Figure 16 El País *Best Interests vs Equality (2004-2005)***

Regarding the influence of social movements, this study focusses on female legal professional societies and several organisations of separated and divorced fathers (Figure 17). News coverage of these social movements first appeared in 2003 on the demonstrations of fathers demanding introduction of a joint custody law, and articles exposing the situation of fathers who do not have any contact with their children[1033].

[1032] See for example, 'Reforma pragmática' *El Pais* (Madrid, 17 September 2004); Charo Nogueira, 'Pros y Contras de la Custodia Compartida' *El Pais* (Madrid, 21 April 2005); Marisa Soleto, 'A vueltas con la custodia compartida' *El Pais* (Madrid, 06 June 2005).

[1033] '10 padres separados protestan vestidos de nazarenos' *El Pais* (Madrid, 18 April 2003); 'Padres separados se movilizan para pedir la custodia compartida de sus hijos' *El Pais* (Madrid, 19 July 2003); Concha Monserrat, 'La Interpol localiza a un niño en Huesca secuestrado por su madre' *El Pais* (Madrid, 07 July 2004); Julio M Lázaro, 'La ley de divorcio se aplicará a decenas de miles de procesos pendientes' *El Pais* (Madrid, 17 September 2004) 32.

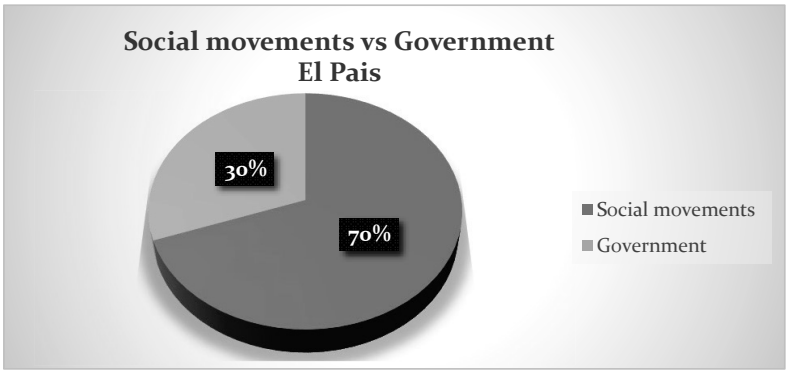


**Figure 17 El País *Social movements vs Government***

15 articles appeared between 2003 and 2005, but the most intensive period of coverage came between April and June 2005 with 7 articles mentioning and promoting these social movements in the three month period, focusing on the debate between these associations and not more on the content of the law. The proposals of the Government and other political institutions appeared only seven times in the whole period between 2003-2005 (Figure 18) which gives the view that the social movements were more present on the media than other legal institutions, who know the consequences that the amendments could bring to the legal praxis.

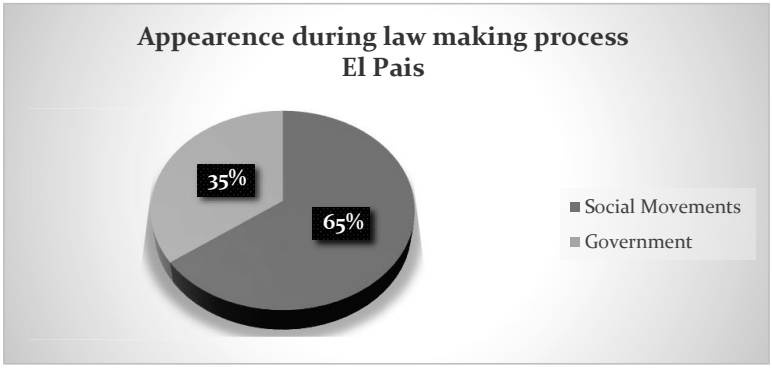


**Figure 18 El País *Social Movements vs Government (2004-2005)***

Precisely, one of the main impacts of the media on the law was the claim to protect those women and children victims of domestic violence – a claim made by the women's associations – which was later included in the law[1034]. As it will be seen in Switzerland, the social movements and their demands were more mentioned than the deliberative law-making proceedings. This aspect will be further analysed later in this chapter and as well the conclusion, but it is nevertheless important to note that the combative nature of the debates attracts more attention from the media than the deliberative and more tedious law-making proceedings. News coverage of joint custody first appeared in the local section of *El Pais* – in 2003 news relating to Madrid- to later move to other and more national sections including 'society', especially between April 2004 and December 2005. The joint custody law appeared on the Front Page on two separate occasions: on the 17th September 2004 – when the Law was presented in Parliament – and 30th June 2005, when the joint custody law was approved.

In *El Mundo*, the analysis has found 49 articles (Figure 19) on shared custody between 2003 and 2005, of which 23 take into account the best interests of the child, 14 support shared custody as beneficial for the child, while nine are against if the shared arrangement is granted without agreement from the sole custody-holder, usually the mother. This means that the 50% of the articles take into account the best interests of the child (Figure 20) but usually to support the idea of shared custody as beneficial, with or without agreement between the parents.

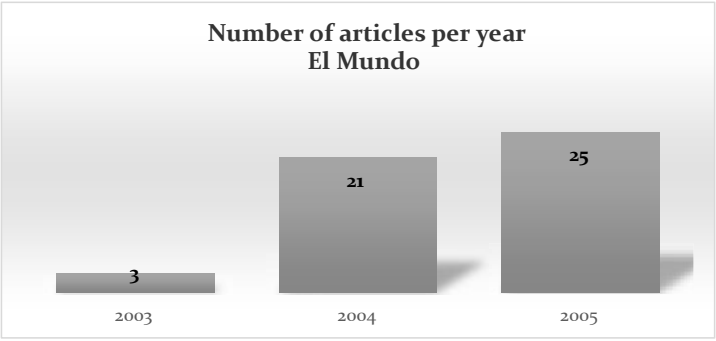


**Figure 19 El Mundo *articles/year***

[1034] Charo Nogueira, 'Las asociaciones feministas critican la custodia compartida y los abogados de familia creen que es una alternativa más' *El Pais* (Madrid, 17 September 2004) 32; Julio M Lázaro, 'La custodia compartida no se otorgará en casos de maltrato reconocidos por el fiscal' *El Pais* (Madrid, 23 November 2004) 29.

Of the 49 articles, 34 refer to equality between genders and the possibility of discrimination against the parent without shared custody, which as it was mentioned earlier, it was the main frame to support the shared custody. However, only six articles refer to custody and time spent with the child, while 17 refer to the need of a co-responsibility between the parents in the upbringing of the child. Therefore, the view of *El Mundo* is focus more on the shared custody as an opportunity for parents to share their responsibilities towards the child than a right of access to the child.


**Figure 20 El Mundo** *Best Interests vs Equality (1)*

The parliamentary process, between 17 September 2004 and 30 June 2005, is the most intensive period of news coverage with the highest number of articles from 2003-2005 in *El Mundo*. It is during this nine-month period that 35 of the 49 articles were published in *El Mundo*. However, only 17 of these 35 articles mention the best interests of the child, while 27 refer to equality between the father and mother and the possibility of discrimination against the parents without shared custody (Figure 21). This shows how the debate in the newspaper of *El Mundo* has been biased towards the equality of the parents and not focused on the welfare of the child. However, 11 articles refer to co-responsibility and the essential distribution of roles at home and in raising the child, which gives also the view that the shared custody should be a responsibility of the parents and not a right. Two reports focussing on women *El Mundo's* magazine called 'Yo Dona' cover co-responsibility and the benefits of shared custody that appear in the period before the

approval of the law (April and June 2005) strengthens the idea of shared custody as beneficial not only for the child, but also to society[1035]. An important article in *El Mundo* is the opinion of a famous journalist in Spain – Isabel San Sebastian – who considers the law is made for the parents and not for the child[1036].

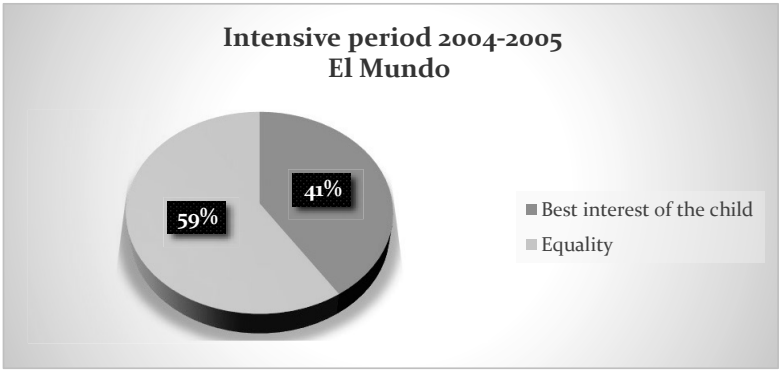


**Figure 21 El Mundo *Best interests vs Equality (2004-2005)***

The analysis of the overall period 2003-2005 reveals 16 articles which mention and promote the proposals and demands of different social movements (associations like *Themis* of women's jurists against the shared custody and *Padres separados* favouring the reform). Most of these articles appeared in the intensive period between the 17 September 2004 and 30 June 2005. The newspaper *El Mundo* covers more the claims of the different associations than the newspaper of *El Pais* during the debate in the Parliament, appearing these associations 14 times in *El Mundo* and 7 in *El Pais*. However, in the whole period between 2003 and 2005 the covering of both newspapers is similar (Figure 22).

[1035] Isabel Garcia-Zarza, 'El Paraiso de la Igualdad' *Yo Dona-El Mundo* (Madrid, 24 April 2005) 66; Gonzalo Salmerón, 'Divorcio, ¿Que cambia la ley?' *Yo Dona-El Mundo* (Madrid, 15 May 2005) 116.

[1036] Editorial, 'Un Divorcio mas sencillo y una Custodia compartida discutible' (Madrid, 18 September 2004) 3.

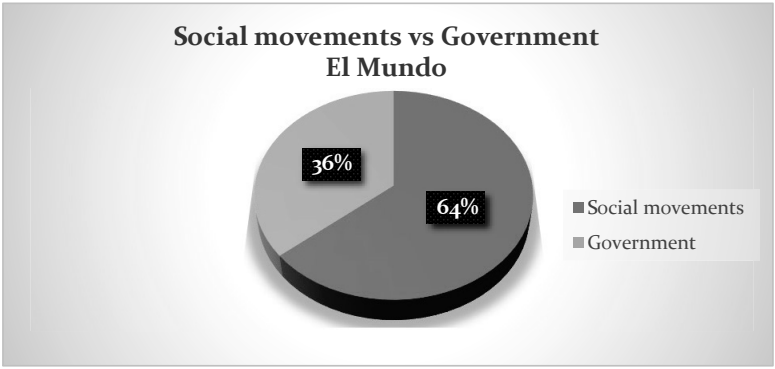


**Figure 22 El Mundo *Social Movements vs Government***

It is notable that during the parliamentary proceeding, social movements were more present in the news and in the debate on shared custody, demonstrating that the media also give voice to these movements and promote, consciously or sub-consciously, the debate between the different parties (Figure 23). Precisely, one of the main debated issues in the media was the claim of women's associations of the need to protect children and their mothers from domestic violence. This lobbying introduced the possibility of not granting shared custody when either parent is the subject of a criminal proceeding for domestic violence[1037]. This issue became central in the media and in the debate between the different social movements and was introduced later in the law[1038].

[1037] CC, art 92 (7).

[1038] Charo Nogueira 'Las asociaciones feministas critican la custodia compartida y los abogados de familia creen que es una alternativa más' *El Pais* (Madrid, 17 September 2004); Julio M Lázaro, 'La custodia compartida no se otorgará en casos de maltrato reconocidos por el fiscal' *El Pais* (Madrid, 23 November 2004) 'El presidente Zapatero promete a las feministas estudiar que la custodia compartida se decida de mutuo acuerdo' *El Mundo* (Madrid, 21 April 2005); Olga R. Sanmartin and Rafael J Alvarez 'las feministas, defraudadas con el PSOE por la custodia compartida' *El Mundo* (Madrid, 25 May 2005); Olga Sanmartin, 'Imponen la custodia compartida sin quererlo los cónyuges' *El Mundo* (Madrid, 08 Abril 2005).

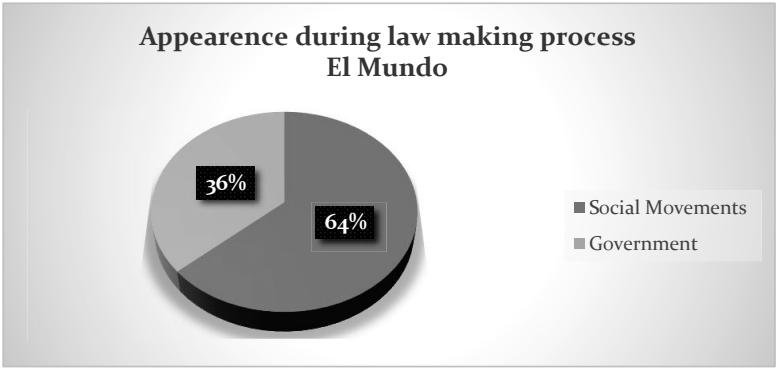


**Figure 23 El Mundo *Social Movements vs Government (2004-2005)***

It can be concluded that in Spain, the intensive nine-month period of news corresponds with the parliamentary process, which lasted less than a year. In addition, and similar to the context of England and Wales, there was more news coverage on equality between parents than coverage on the best interests of the child, even if the coverage is more even. However, when best interests of the child is covered, it is usually in relation to a favourable view of shared custody, which promotes joint custody as the arrangement that is best for the child.

### 7.2.3 SWITZERLAND

In Switzerland, this study has analysed *Die Neue Zürcher Zeitung* and *Le Temps*, to consider the two main language regions of Switzerland. *Die Neue Zürcher Zeitung* (NZZ) is the newspaper with higher circulation in the German-speaking regions of Switzerland while *Le Temps* is the newspaper with the highest readership in the French-speaking regions of the country and the reference newspaper in the region. Both newspapers follow their mother-tongue press in Germany and France respectively and, as the Law, both countries are reference from a media point of view. It has been not included magazines as *20 Minuten* or *Blick*, as they are tabloids or 'yellow journalism', which refers to a sensational style of reporting that seeks illicit an emotional response rather than

provide accurate coverage[1039]. In addition, it has not been included other newspapers of the other language regions of Switzerland, as Tessin or Graubünden, as the press on these regions follow other cantons and they are very bonded with the other regions in Switzerland.

This study looks at *NZZ* between 2010 and 2015 (Figure 24). 44 articles have been published during this period, of which 30 refer to the *Kindeswohl* and a further 12 of these 30 consider that shared parental responsibilities are in better interests of the child.

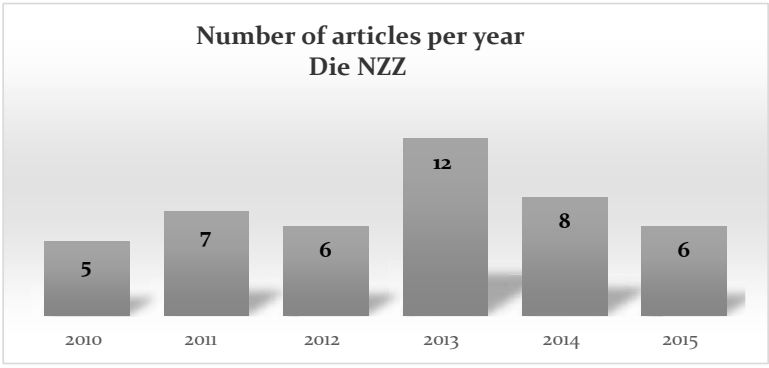


**Figure 24 Die NZZ *articles/year***

28 of the 44 articles appeared in the whole period favour shared parental responsibilities, while six articles consider the shared parental responsibilities should be granted only where there is agreement of both parents and not as a presumption, therefore considering that the shared parental responsibilities are in the best of the child if there is an agreement and against the presumption that afterwards entered into force. Ten articles take into consideration the need for greater autonomy of the family to manage family affairs without intervention of the authorities. Therefore, about the frame of *Kindeswohl*,

[1039] See for example this recent articles from both sides `Verzweifelte Beizer schmeissen den Bettel hin') *Blick.ch* (Schweiz, 16 February 2021) https://www.blick.ch/wirtschaft/rekordzahl-von-beizen-zur-miete-ausgeschrieben-verzweifelte-beizer-schmeissen-den-bettel-hin-id16350565.html, (last visit 11.01.2022); 'Mitte-Chef rüffelt Nationalrat wegen Teilnahme an Fasnacht' *20min.ch* (Schweiz, 16 February 2021) <https://www.20min.ch/story/mitte-chef-rueffelt-nationalrat-wegen-teilnahme-an-fasnacht-126565499189> (last visit 31.01.2022).

the *NZZ* clearly takes into account the *Kindeswohl*, but usually – as other newspapers in the other countries analysed – favouring the shared parental responsibility, which gives the view to the public that the best model for the child will be the shared parental responsibility, without considering other opinions or views.

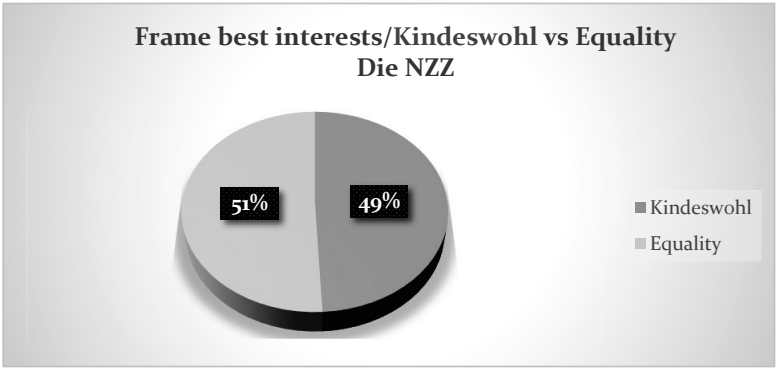


**Figure 25 Die NZZ** *Kindeswohl vs Equality*

On the other hand, 31 of the 44 articles refer to the need for equal treatment of both genders (Figure 25) when deciding shared parental responsibilities, while 17 articles refer to custody and time spent with the child, mistakenly conflating shared custody and shared parental responsibilities. Shared parental responsibilities are strictly mentioned only ten times in the whole period. As explored before in section 5.4.1.1., the situation of unmarried parents and the discrimination against children born outside wedlock was also a main issue debated in parliament. For the five-year period, *NZZ* refers 13 times in its articles to the position of unmarried parents and the need for them to be granted shared parental responsibilities.

The most intensive period of news came in 2013, with the publishing of 12 articles referring to shared parental responsibilities, and generally consistent coverage of the notion between 2011-2013. This wider period saw the publishing of 25 articles on shared parental responsibilities[1040] on which 16 favour the shared parental responsibilities, with or without agreement. Of these 25 articles appeared between 2011 and 2013 (Figure 26) 14

[1040] *Gemeinsame elterliche Sorge* in German.

refer to *Kindeswohl*[1041] and seven assert that shared parental responsibilities are to benefit the child, while 14 of the 25 promote the need for a shared parental responsibilities. Between 2011-2013, 19 articles cover the equality and the need of an equal treatment of both genders when it comes to deciding about shared parental responsibilities, while 12 articles refer to custody as time spent with the child, which legally it is not exactly the same as the custody implies more responsibilities towards the child than only the time the parents spent with him or her. Only six articles refer to the issue of shared parental responsibilities and not to custody and therefore taking into account the whole legal consequences that the law will bring for the families – not only the custody and access to the child – while three opine the need of a collaboration between parents at home and in the upbringing of the child as a shared duty between the parents.

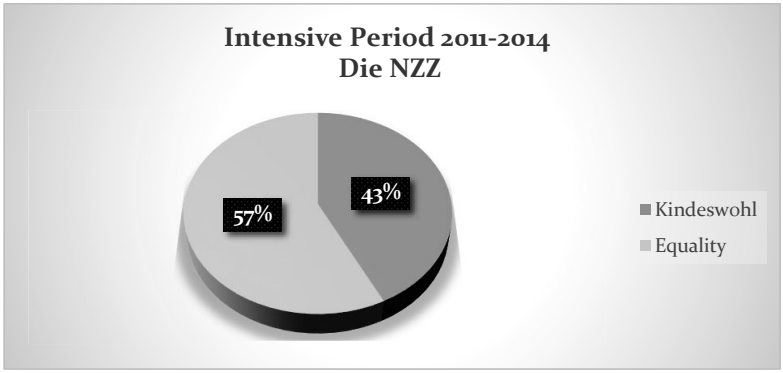


**Figure 26 Die NZZ** *Kindeswohl vs Equality (2011-2014)*

Social movements and different associations appear 12 times in *NZZ* articles in the whole period 2010-2015 while the government proposals appear 11 times in the period between 2010-2015 (Figure 27)

[1041] *Kindeswoh*l in German. In other chapters we have already addressed the differences between *Kindeswohl* and Welfare of the child.

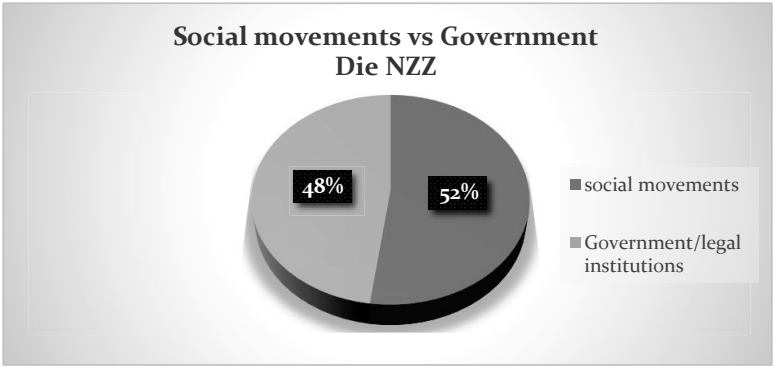


**Figure 27 Die NZZ *Social Movements vs Government***

Most references to social movements (11 articles) appear between 2011-2013, during the parliamentary proceeding (Figure 28) and with a critical point of view towards the social movements[1042], while eight articles in this period – from 25 articles appeared about the issue in this three year period – cover government proposals and the debate between the social movements and the Government. One interesting issue in Die NZZ is the covering of the newspaper of the opinion of the experts and institutions about the law and the consequences from a legal point of view. Even if it is not the majority of articles which cover these issues, it is important to note that Die NZZ considers also their point of view[1043].

[1042] Katarina Fontana, 'Männer bedrängen Bundesrätin Sommaruga' *Die Neue Zûrcher Zeitung* (Bern, 06 March 2011) 13; Katarina Fontana, 'Zündstoff für den Geschlechterkampf, Schwierige Fragen rund um die Unterhaltpflicht der geschiedenen Männer' *Die Neue Zûrcher Zeitung* (Bern, 27 January 2011) 11.

[1043] Regina Aebi Müller, 'Nacheheliche Solidarität kommt unter Druck; Schwierige Fragen rund um die geplante Revision des Unterhaltsrechts' *Die Neue Zûrcher Zeitung* (Zürich, 15 May 2013) 13.

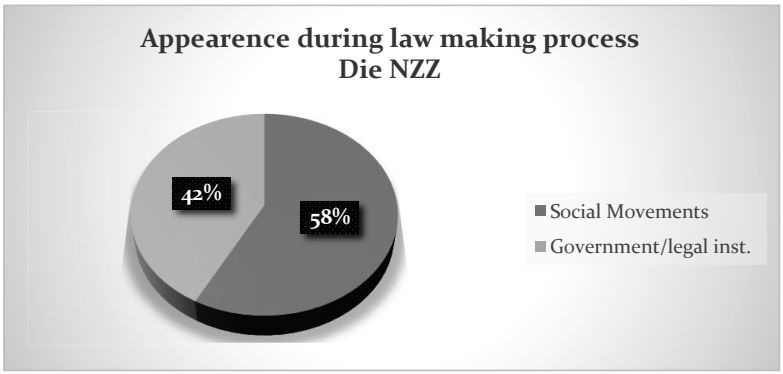


**Figure 28 Die NZZ *Social Movements vs Government (2011-2014)***

The analysis of *Le Temps* comprises the period 2009-2014 (Figure 29). Nine articles were published in February 2009, when the proposal was presented. In the period 2009-2014, *Le Temps* published 58 articles covering shared parental responsibilities, 31 of which refer to the 'bien de l'enfant' or welfare of the child. 16 of these 31 articles promote shared parental responsibilities as beneficial to the child and the best option.

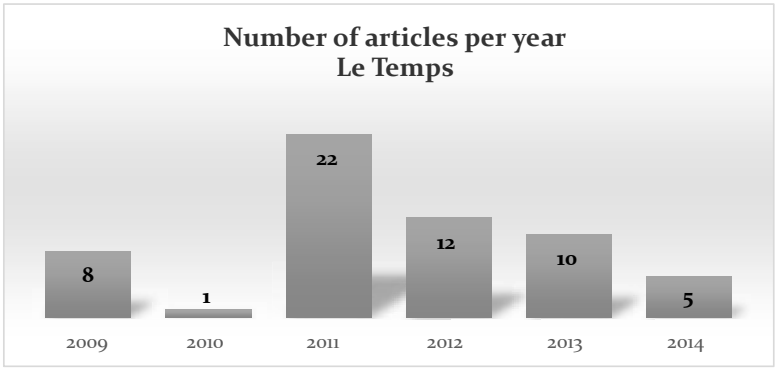


**Figure 29 Le Temps *articles/year***

In addition, 43 of the 58 articles support shared parental responsibilities for a variety of reasons which include the courts not having to decide 'winners and losers'; the need

for a fair and equal treatment of men; and the need to follow the trend in Europe[1044] towards shared parenting. Only three articles oppose granting shared parental without agreement from both parents, which shows how the Swiss-French newspaper was in favour of the Reform.

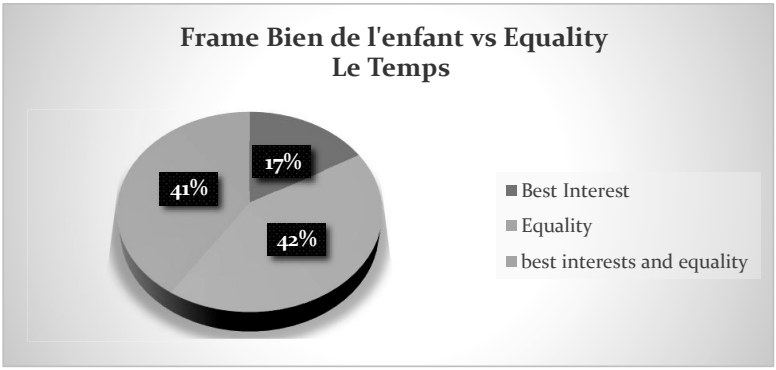


**Figure 30 Le Temps *Best interests vs Equality (1)***

45 of 58 articles promote the need of parity between both genders in the upbringing of the child and when it comes to deciding the child's arrangements, while only 19 refer to the cooperation of both parents in the upbringing of the child which shows *Le Temps*' bias towards the frame of equality between parents and focus on equality between parents and not on the co-responsibility of both genders towards the child (Figure 31). One difference between *NZZ* and *Le Temps* is the behaviour towards the custody and the parental responsibilities. While 14 articles define custody only within the scope of amount of time spent between the parents and child – 18 articles refer to parental

[1044] Pierre-Emmanuel Buss, 'Patrick Robinson, une voix engagée pour les pères en souffrance; Le président de la Coordination romande des organisations paternelles multiplie les interventions pour défendre la cause des pères.
Un combat nourri par son passé d'homme battu. Portrait' *Le Temps* (Geneva, homepage, 11 February 2009) **1 ;** Anna Lieti, 'Sortir du mariage par le haut, L'autorité parentale conjointe est salutaire pour tout le monde, et d'abord peut etre pour les mères' *Le Temps* (Geneva, homepage, 21 September 2011) 1 ; 'La loi aujourd'hui , demain ailleurs; L'autoritè parentale conjointe est la règle en Europe' *Le Temps* (Geneva, 28 September 2011).

responsibilities implying a wider scope of duty than only custody. Only 17 articles cover the situation of unmarried parents and the changes that the reform will bring for them.

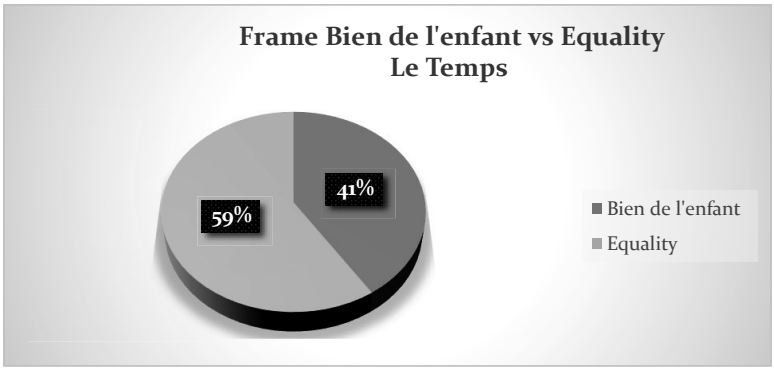


**Figure 31 Le Temps *Bien de l'enfant vs Equality (2)***

The most intensive period of articles published by *Le Temps* falls in 2011, before the Message was published in the parliament[1045] (16 November 2011), with September and November the months with the highest percentage of coverage on shared parental responsibilities that year, around 50% of the news appeared on this year are in three main days, the 27 and 28 September – before the National Council adopted the Amendment – and the 17th of November, after the Bill was published. 22 *Le Temps* articles published in 2011 promote the shared parental responsibilities, compared to just 12 on the topic and in 2013 only 10. In 2013, the Act was finally published in the last session of the parliament before the holidays (21 June 2013) and the articles were published before this date.

Concerning coverage of shared responsibilities, 2011-2013 is the most intensive period of articles with 44 published. Of these 44 articles, only half (24 articles) refer to the welfare of the child, while 12 support the idea of shared parental responsibilities as beneficial to the child. On the other hand, 33 refer to the equality between the parents and the need for equal treatment of the father or the mother in the allocation of parental responsibilities (Figure 32). Therefore, the view is clearly in favour of shared parental

[1045] Botschaft Elterliche Sorge BBI 2011 Cff 9082.

responsibilities, but rendering the child secondary consideration *vis-a-vis* coverage of the parents. However, the frame of child welfare is used in 24 articles versus the 33 on equality between the parents. This means that child welfare does get substantial coverage in news concerning shared parental responsibilities even if not the primary consideration.

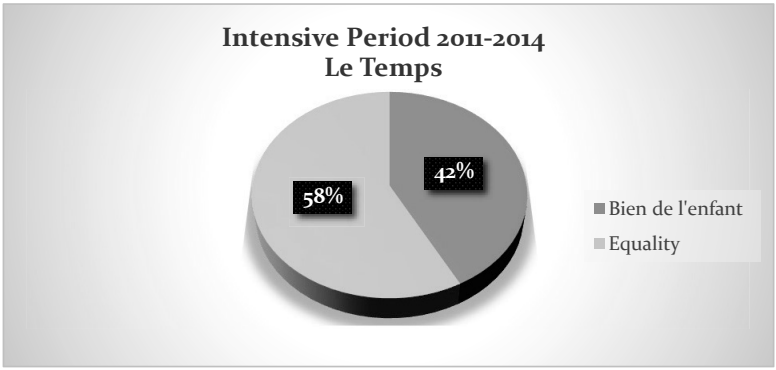


**Figure 32 Le Temps *Bien de l'enfant vs Equality (2011-2014)***

It is notable that 25 articles between 2009-2014 cover the different social movements (Figure 33). Of these 25 articles, 20 were published during three-year period in which the parliamentary process took place (2011-2013) and cover the different social movements –the vast majority covering fathers' rights organisations with only two articles giving voice other organisations less biased – the association for co-parentality[1046] and *Federation Suisse des familles monoparentales*[1047].

[1046] Called Association jurassienne pour la coparentalité (AJCP) see Denise Masmejan, 'Simonetta Sommaruga annonce une révision des contributions d'entretien des parents séparés' *Le Temps* (Geneva, 01 May 2012).

[1047] 'Des péres en croisade pour reformer les pensions alimentaires' *Le Temps* (Bern, 13 July 2012).

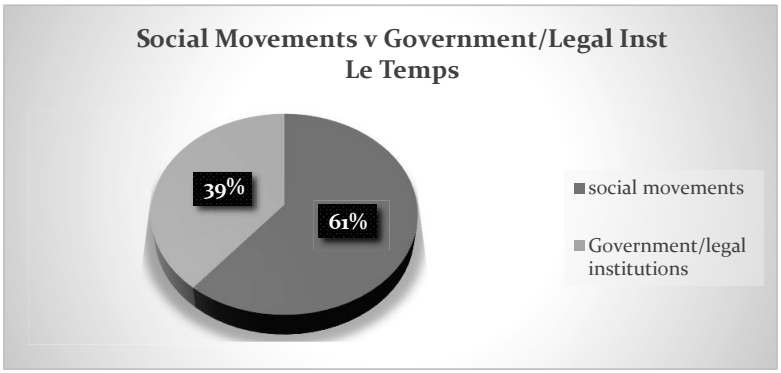


**Figure 33 Le Temps *Social Movements vs Government***

Therefore, the media were more focused on the social movements during the parliamentary proceedings. Additionally, between 2009-2014, there are 16 articles covering parliamentary proposals of the legislative (Parliament) in 44 articles appeared in *Le Temps*, while 13 of these 16 references appeared only in the period 2011-2013 (Figure 34).

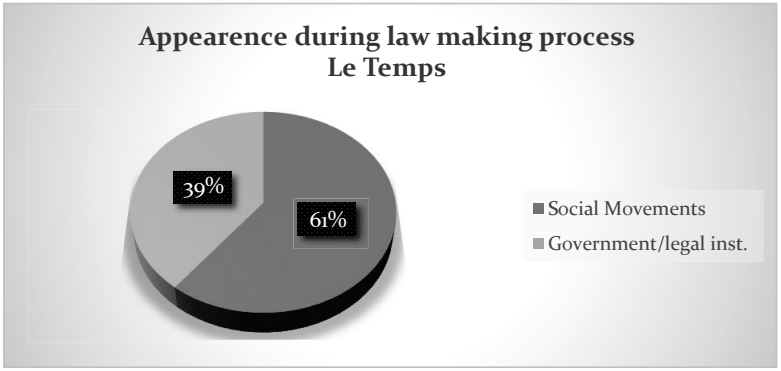


**Figure 34 Le Temps *Social Movements vs Government (2011-2014)***

It is notable that similar to Spain, the period of parliamentary proceedings saw the spirited debate involving social movements receiving more coverage than the dryer and more deliberative law-making processes of Parliament and the Federal Council (Swiss

Executive Branch). The dispute between social movements and the institutions took place in between 2011 and 2013. It important to bear in mind the debate between the Justice Minister Simonetta Sommaruga and the father's rights organisations– previously mentioned in chapter 5 – where they made several actions to avoid the delays by the Ministry to approve shared parental responsibility. However, in Switzerland, coverage of the whole law-making process was more focussed on the interests of the child than media coverage in Spain or even in England and Wales.

2011 is the period with the most intensive publishing of *Le Temps* articles concerning the debates between the social movements of fathers and the Government. As mentioned above, there was a large debate between Justice Minister Sommaruga, and the associations of fathers, who saw how – through the new government's proposed changes – time could be extended to achieve shared parental responsibilities, if reached[1048]. The final debate was settled in favour of the father's rights organisations, as the law on shared parental responsibility entered into force in the foreseen period. This debate was covered substantially by the media throughout the year. Between February and November 2011, 12 articles mention the demands from the father's rights organisations and the indignation of their members and defended the idea that shared parental responsibilities were essential to achieve the welfare of the child and to safeguard rights for fathers (Figure 34).

However, the debate between social movements and government was not shown with the same intensity in *NZZ*, who only cover shared parental responsibilities in 7 articles in 2011, even if all articles did favour the father's organisations. However, the welfare of the child was mentioned in the *NZZ* only 4 times in 2011, while the associations and their demands were mentioned in all 7 articles between February and November 2011. Therefore, it can be stated that the main issue reported is the demands of the father's

[1048] The fathers' organisations and the organisations in favour of the shared parental responsibilities began an action called 'Schick en Stei' (send a rock) to show their indignation. These organisations were: *Associazione genitori non affidatari* (AGNA) *Association jurassienne pour la coparentalité* (AJPC) *Fondation pour la Recherche d'Enfants Disparus International*; *Schweizerische Vereinigung für gemeinsame Elternschaft, Kinder ohne Rechte, Mannschaft, Mannzipation, Pére pous tous, Verantwortungsvoll erziehende Väter und Mütter* (VeV), *Papatour, Doubtfire*. For more information, see http://www.schickenstei.ch/verband.php. (last visit 31.01.2022)

organisations, which like the other two countries received more coverage than welfare of the child, which should be the paramount consideration, even for the media.

## 7.3 COMPARISON AND DISCUSSION

The scope of media coverage during parliamentary proceedings in the three countries in this study was central during the period (2000-2015) the project is discussing. Shared parental responsibilities were a leading topic in the newspapers during periods of parliamentary approval in the three countries leaving the best interests of the child as a secondary condition compared to the discussion on equality between parents. Approximately 70% of articles in the three countries use parental equality as a main frame, while the frame of best interests of the child is a little higher than the 50%. Some of the articles use multiple frames, including equality and best interests of the child in the same article, but it is clear the majority of editorials where equality is the main frame. However, the vast majority of articles covering the best interests of the child also favour shared parental responsibilities. Articles against parental equality reforms are a minority view in all the three countries.

The previous chapter's analysis first calculates the number of news articles before and after the law entered into force, exploring the influencing and messaging that the public receives and secondly, the dominant frames of the period referring to the law, to analyse to what extent the best interests of the child was present in news coverage on shared parental responsibility.

First, every newspaper covered the activities of the father's rights organisations, who demanded more time with their children and a law for shared parental responsibilities in the three countries under study. The reports were not sufficiently vast to consider that the media were the only ones shaping the launch of the law, but it is evident that it influenced the outcome, as the laws were presented in the Parliament short after the action of social movements and their impact on the media. The interrelationship noted in chapter 1 of this Dissertation between media, social movements and lawmakers is evident. These three actors act together to influence the law-making process, confusing the legal proceedings and helping drive the transformation of the concept of the best interests of the child.

Concerning media actions surrounding the transformation of the principle of the best interests of the child, the research focus on the framing of the news. The analysis identifies two opposing frames with the best interests of the child on one side and the equality among the parents on the other. In addition, media influence on the debates is evident given their reporting on the entire debate on shared parental responsibilities by giving a platform for the different social movements to expand their reach amongst the public. Most of the press analysed in the three countries supported shared parental responsibilities and the position of social movements, especially the father's rights organizations.

The level of coverage of the best interests of the child and the frame of the equality between the parents depends on the country. In England and Wales – between 2008 and 2014- the welfare of the child is a secondary consideration to equality between parents. It is only during the intensive periods of news coverage where the welfare of the child becomes a central topic, rivalling parental equality in terms of number of articles. It's as if the intensive law-making periods reminded media that its coverage should be focussed on the welfare of the child and not the debates between parents, associations, and institutions. As stated previously, 80% of *The Guardian*'s articles and 68% of *The Times's* articles defend the frame of the equality between the parents and the conflict between them, while only 44% of articles in *the Guardian* and 46% in *the Times* refer to the welfare of the child. Most articles that refer to welfare of the child are in favour of shared parental responsibilities in the law-making process.

In Switzerland, both frames are central during the whole period – between 2010 and 2014 – as the frame of equality or fairness between parents appears the same number of times as the frame of welfare of the child. *Die NZZ* is the more neutral in the general period, as both frames are covered similarly. However, during the more intensive period of news coverage – between 2011 and 2013 – the frame of parental equality is higher than the welfare of the child in *Die NZZ,* covering the welfare of the child in 14 of 25 articles (56%) while parental equality appears in 19 of these 25 (75%). On the other hand, *Le Temps* gives more coverage to the frame of parental equality than on the issue of child welfare in the general period, with 78% covering the former and 53% covering the latter. However, both newspapers employ a similar scope of coverage during the law-making process (2011-2013) as 54% of *Le Temps*'s articles refer to the welfare of the child which

is less than the coverage of the frame of parental equality which is mentioned in 75% of coverage between 2011 and 2013.

*Le Temps* also focus more on the debate between social movements and the Government than Di*e NZZ* throughout the whole period and especially during the intensive period of law-making proceedings, this is 2011-2013. *Le Temps* also makes a higher coverage of the shared parental responsibility debate, giving more room to the social movements than to the informed sources, while Die NZZ stays on a more neutral position, giving same room to both actors.

In Spain, the best interests principle is also a main topic, equivalent in coverage to the debate on parental equality. Concerning the child welfare debate, Spanish media tend to support joint custody, with or without agreement between both parents. During the parliamentary proceedings where the most intensive media coverage took place – 2004 to 2005 – *El País* would treat both frames equally, while *El Mundo* gives greater attention to the parental equality debate in its coverage.

It can be asserted that – regardless of the country – the debate on shared parental responsibilities has been dominated by the idea that both parents should be equal, with the perspective and welfare of the child covered to some extent depending on the country and the newspapers. In a sense, this conclusion lends credence to the notion that the media has used its coverage of the new amendments as a tool to realize equal treatment of both parents and not the welfare of the child. The debates focused on the parents, the need for each parent to be 'involved' in the life of their children, thereby substantially covering the view of adults and less so the perspective of the child. Therefore, in the development of a law that affects the child as a whole – as it implies who will be responsible for his or her education, development, and care – the child is not the paramount subject, but a secondary actor.

The other 'frame' this study focusses on is co-parenting and the mistaken conflation of shared parental responsibilities and the access and contact or time spent by the child with both parents. This frame is the one that shows more this feedback between law-makers, media and social movements. It can be concluded that the media fail to make a distinction between parental responsibilities and 'custody', which brings a public misconception that the parents will have more *time* or *access* with the child than before.

As seen in all three countries, parliamentary and legal doctrine rules that the law and the statements of shared parental responsibilities were – to a certain extent – confused, partly due to the picture of new amendments given by the media. This confusion is even less clear in Spain than the other two countries, as the law only defends joint custody, since shared parental responsibilities are already automatically conferred in Spain from the moment the child is recognised by the father. The law speaks therefore only about time and residence with the child, and not the overall responsibilities of the parents towards the child and the press follows suit in this regard. Switzerland also shows this conflation between shared parental responsibilities and custody, but less present as in England and Wales. In Switzerland, the term *Obhut* has been changed and the residence of the child is now an element of the parental responsibilities. This can be considered a consequence of the influence of this loop between media, lawmakers, and social movements. The term 'involvement' of both parents, present in the Children and Families Act 2014 in England and Wales, is a demonstration of this mistaken conflation created by the media, as some critics have already criticized the media for giving a false impression that with the new Act, the parents (especially fathers) will have more access and contact with their children, without the fundamental tenet that the scope of shared parental responsibilities go well beyond access to the child. Precisely, the co-parenting or sharing of family responsibilities between both partners, is present in most news coverage of parental responsibilities, but not in a contextually relevant manner that would give the public an accurate understanding of the scope of these responsibilities. The only angle clearly presented in such coverage is the demand for more time and access to the children.

The actions of these social movements were more frequent and intense during the parliamentary proceedings and in the leadup to the law being presented. As previously explored, before the law was presented to Parliament in the three countries, father's rights organisations made their voices and demands heard using the media to amplify their request to have a shared parental responsibilities law that would give more access and more scope to make decisions concerning their children. The analysis reveals that their demands were more mentioned by the media during the parliamentary proceedings, shaping and establishing the frames on the news and information on the new Bill in the three countries under study. This influence is clear in the case of the conflation

between 'custody' and 'parental responsibilities', as social movements demand more access to the child, but do not mention other duties implied in parental responsibilities, same conflation that makes the media outlets and afterwards lawmakers in the debates, especially in England and Wales and in Spain. Lawmakers – parliamentarians – refer also to the demands of social movements and implications of the law on the pressure groups who participate on them and make the same mistakes as them, as the mistaken conflation between custody and parental responsibilities.

As mentioned in Chapter 1, this issue demonstrates the circular feedback twist of lawmakers, media and social movements, being influencers to each other during the approbation of laws. With the social media, this influence has been accentuated.

Therefore, social movements seek to win over public opinion by attracting media coverage through their campaigning activities. The campaigning activities of social movements drives a circular feedback loop between the media, policymaking and social movements with each actor influencing and being influenced by the other. For instance, policymakers and social movements have set the media agenda as evidenced by the more intensive coverage of the parliamentary proceedings. Made aware by such coverage, social movements intensify their activities further attracting media attention and thus influencing public opinion and the end influencing the law. As previously explored, the social movements promote their own demands but without understanding the nuance of the law proposed – as the case with Switzerland and the debate about delaying the reform. This confusion is promoted by the information of the media, who only focus on the conflict the debate provokes without giving an informed and more knowledgeable information. The last actor, the policymakers, receive all the information from the loudest voices – social movements – to another – the media – and translate this confusion into Law. Caught in this feedback loop between actors, the main subject of the law – the child – is the most forgotten, a casualty of the debate and conflict between the other actors. At the end, the 'biggest loser' is the one who cannot defend their own interests, the child.

# 8 CONCLUSION

The transformation of the principle of the best interests of the child through shared parental responsibility is an important development from a legal and media point of view. This study examines the relationship between the changes in family law in recent years in the three countries under study and the media influence on these changes, while paying attention to the impact that social movements and politics can have on public opinion through the media.

Both areas – judicial and journalistic – are two fundamental links in the chain of the rule of law, two of the four pillars that comprise a democracy. While the family – and therefore the child – is the main beneficiary of protection by the rule of law, the information bodies and the media facilitate society's awareness of, and reaction to, the laws and rules that govern it. The rule of law has – or should have – the sole purpose of protecting and promoting the most vulnerable of the population, i.e., the child. Hence, this study has attempted to answer the question of whether the media and the law are performing that function, taking as an example the approval of shared parental responsibilities in the three European countries.

The thesis of this study identifies an evolution in the concept of the best interests of the child towards a new legal interpretation – which considers that a consistent relationship between both parents and the child will benefit the child – and that the media used different frames for this interpretation, also influencing this transformation. To answer how and why the shared parenting debate prioritises parental equality, therefore setting child welfare as a secondary consideration in a regulation that affects them directly, it is essential to define the principal actors involved in the legislative process, including governments and their legal institutions, social movements, and the media.

In the three countries, shared parental responsibilities have been introduced relatively recently from the turn of the century, with Spain being the first to introduce it. In all three countries, the shared responsibilities were essential to promote equality between both parents and to avoid discrimination against unmarried or divorced parents. Prior to these laws, it was considered that it was best for the child – after a divorce or when the parents were unmarried – that custody and parental responsibilities should be held by

one parent, leaving the other – usually the father – with a marginal or at least unequal role relative to the other parent. From the turn of the century, public opinion and the law has shifted to a stance that the child needs a fluid relationship with both parents for its well-being. This includes custodial arrangements and all accompanying legal responsibilities, and the concept of shared parenting, all which have been promoted by governments, social movements, and the media.

As covered throughout this study, supranational institutions have in recent years also promoted the idea that the legal concept of shared parental responsibilities benefit the child. Both the Committee on the Rights of the Child and European bodies have ruled that in order to achieve greater equality between parents in situations of family breakdown and to avoid further discrimination against unmarried parents, it is necessary to promote shared parental responsibilities which, in their view, aligns more to the best interests of the child and the right of the child to have an ongoing relationship with both parents.

It is therefore viewed at the supranational level that the best interests principle is best served when article 18 of the CRC is promoted, meaning the right of the child to be cared for and be educated by both parents without discrimination. Two ideas underpin the transformation of the best interests principle and the promotion of shared parental responsibilities in its different forms. The first principle is that the best interests of the child also include the relationship of the child with both parents, who should have an ongoing and permanent relationship with the child. The second principle is to not discriminate against any child due to the civil status of the parents. A tertiary notion that has indirectly influenced the transformation is the idea that both parents should be treated equally by the authorities and therefore must have the same rights and duties towards the child and exercise them together. However, the reference by the supranational agreements to the best interests of the child has been – according to the research – secondary or at least has not been the main argument to defend shared parental responsibility. Similar to the media, both national and supranational institutions tend to prioritise the position of parents over the best interests, despite the International legal framework stating that the best interests principle should be a primary consideration. Similar to the media, the reference by the supranational agreements to the best interests of the child has been secondary or ultimately has not

been used as the main argument to defend shared parental responsibility. Herein lies the main challenge, as the best interests principle should be balanced with primary consideration shifting towards the child and away from the interests of parents instead of the current paradigm.

The introduction of shared parenting in its different forms within the three countries under study was not the extent of discussion. In fact, in all countries analysed, both jurists and institutions claim that the laws are confusing and that the reforms have been proposed with the main goal to reach the parity between the parents, without giving much attention to the consequences that the law may have on the children concerned. As previously stated, this study does not ponder the morality of the law but attempts to raise the issue that the legal and public debate of the laws defending the shared parental responsibilities has been driven by an 'adult' view of the problem, without bearing in mind very much the principle that should be at the heart of the law, that is, the best interests of the child.

The introduction of shared parental responsibilities has brought some changes to the allocation of children and therefore influenced the interpretation of the best interests of the child. The main change that is seen across all three countries included in this study is the oft-mentioned notion that it is in the best interests of the child that both parents are involved and are responsible for the decisions concerning the child. The differences between the countries lie in the extension of this involvement. The country where the involvement of both parents is most reduced – according to the amendments studied – is Spain, where only the custody terms are changed the by the 2005 law which does not consider that shared custody is in the best interests of the child but remains a possible allocation model. Switzerland and England and Wales change considerably the concept of the best interests of the child. Switzerland states the shared parental responsibilities as the rule and so, changes deeply the concept of *Kindeswohl*. After the amendment of 2014, it is considered that all couples irrespective of relationship status, should share all responsibilities for the child. England and Wales – despite the confusion created by the Children and Families Act 2014 – is the one that most clearly recognises the involvement of both parents as beneficial to the child, including this statement in the section 1 of the Children Act referring to the welfare of the child.

One of the goals of shared parenting laws approved in England and Wales, Switzerland and Spain was to provide more autonomy to the families to reorganize and decide autonomously the arrangements for their children. Another identical change is the concern to safeguard equality between the parents when it comes to decide about the allocation of their children. In the three countries, a main guiding principle for the laws is the need to balance the responsibilities of the parents when they do not live together and to not discriminate against the parents due to their civil status. The ultimate goal therefore is that their position as parents continues, independently of their status and in a balanced way.

In all countries under study, the courts were applying the shared parental responsibilities principle for several years before the law entered into force. However, the lawmakers and social movements considered that the efforts of the courts towards the shared parental responsibility goals were not sufficient. In England and Wales, the Government held the view that the common law being applied was insufficient to fully achieve shared parental responsibilities and therefore, the Children and Families Act was deemed necessary.

In Spain, shared custody is not a given right under the law and therefore, does not substantially change the concept of the best interests of the child. The changes brought by the Law 15/2005 were mistakenly conflated with Spanish lawmakers, not recognising shared parenting as the best model for children. Spain is the country where the lawmaker has been more cautious regarding the introduction of the notion of shared parenting. However, the approval of the joint custody law recognises that both parents should be equal when it comes to decisions concerning their children and widened the scope of the parental responsibilities. As in the other countries under study, several institutions in Spain have criticized the ambiguity of the law and the parental view regarding the problem of the children's allocation without considering the child's perspective. Following the approval of the Law, there has been a shift towards a full recognition of the co-responsibility of both parents, first by the High Court and subsequently the proposal of a Bill of Co-responsibility. For Spain, the significance of shared custody has been seen as a step forward towards the transformation of the best interests principle, but much remains to be achieved to establish true co-parenting and to include the child's requirements.

For Switzerland as well as England and Wales, the respective concepts of *Kindeswohl* and Welfare of the Child have profoundly changed the core of the best interests principle at the national level.

With the introduction of shared parental responsibility in Switzerland as the rule, *Kindeswohl*'s scope has widened so as to mandate that both parents work together to make decisions concerning the child's arrangements and maintain contact with the child. With this change, entering into force in 2014, Swiss family law began a new phase whereby the paradigm that ruled until then was changed to exactly the inverse: sole parental responsibility is the exception and shared parental responsibility the rule. Also divorced parents have seen a diminishing of the social and institutional stigma that a failed marriage is a threat to the well-being of the child. Also, it has triggered a shift in public opinion that a change in the relationship status does not change the quality of their parenting or the situation of their child. Moreover, the unmarried fathers no longer have to demonstrate to the court their parenting capabilities, as this competence is assumed when they register the child's birth. For divorced parents, the Court will rule the decisions about their child's residence, maintenance, and other particularities if they do not agree on them, but the court has to rule based on the shared parental responsibilities principle. Therefore, only in exceptional cases will the court establish a sole parental responsibility to one of the parents – the *Kindeswohl* of the child being the main criteria to allocate it. Therefore, the amendment entered into force in Switzerland places all parents – regardless of their relationship status – on the same level.

For England and Wales, the principle of 'involvement of both parents' has been included in the welfare principle, with the law specifically ruling that involvement of both parents benefits the child. Also, the new Child's Arrangements Orders (CAO) give parental responsibilities to any of the parents that will ask them before the court. Moreover, unmarried parents and divorcees do not have to demonstrate their capabilities to care the child, as their involvement is considered beneficial to the child. Within this framework, the court will not apply the principle of both parents' involvement if the child is at risk of suffering harm, or the shared parental responsibility will provoke a harm to the child. Therefore, according to the amendments introduced by the Children and Families Act 2014, only in exceptional cases should sole parental responsibility be granted. As well as in Switzerland, the social stigma of unmarried and divorce parents

is avoided and presents all parents at the same level, as long as they collaborate and answer to the needs of the best interests principle.

However, amendments in both countries – England and Wales as well as Switzerland – were deeply contradictory with the doctrine regarding shared parenting. The doctrine asserted that the amendments failed to account for the difficulties that the new rules would present to the concept and to the determination of the best interests principle. For example, in England and Wales, the judge must assess the capacity of the parents to care for the child before setting custodial parameters for the children. At the same time, the judge must follow the statement of the new amendment that the involvement of both parents in the life of the child will benefit the child. The situation is contradictory in situations where the judge must take into account the principle of involvement of both parents but must also ensure that both parents are capable of caring for the child. In Switzerland, the doctrine demands a confirmation of the criteria to allocate sole parental responsibility in those exceptional cases, including situations where the parents are in continuous conflict or where one of the parents makes unreasonable demands; a vacuum which is solved in the end by the High Court.

The courts in all three countries have attempted to resolve the ambiguity and confusion proposed by the shared parenting laws. Both in Switzerland and in Spain, the High Court have established several analogous criteria to allocate the shared parental responsibilities. These are mainly the need for a collaboration between the parents – the principal condition to grant shared parental responsibility – as well as the opinion of the child according to his or her age. If the conflict between the parents is so intense that it affects the welfare of the child, then the courts usually favour granting sole parental responsibility. In England and Wales, the courts continue to apply the same criteria as before, that is, the welfare checklist. Only the regional courts have initiated applying the principle of both parents' involvement.

By introducing the shared parental responsibilities – in different forms – the three countries under study have change deeply the regional Family Law, following the trend in the European framework. Even if Spain was the first of the three countries to introduce the possibility of joint custody, it seems that the movement towards a real change on the child's arrangements in the country has been delayed. Switzerland and England and

Wales are now one step further, recognising the child's need for an ongoing relationship with both parents to benefit his or her development. However, mistakes were made on the three countries, which proliferated public misunderstandings in passing their respective national laws, by not responding to the implications on the best interests of the child and other common legal consequences.

When asked whether political or legal criteria were followed in approving the various shared parenting laws studied, this study asserts that in all three countries under study, the recognition of the shared parenting as the best solution for children has been deeply debated by the general public and essentially driven by this debate.

In Spain, the Government's activity has been influenced by the lobbying activities of the different social movements that received substantial media coverage during the parliamentary proceedings – both for and against shared custody, which has led to widespread misunderstanding of the implications of approval of the law – misunderstanding amplified by the media's mistaken conflation of shared parenting and custody. This mistaken conflation has led to a very confusing amendment that received substantial criticism by scholars and also by father's rights organisations. As previously explored, the joint custody should be granted by a Law on parental responsibilities, and not on a law on divorce – which it was what happened – resulting in unmarried fathers being discriminated against in only being addressed by the law in divorce proceedings.

In England and Wales, the shared parenting debate, and the principle of involvement of both parents have been polarising. The father's rights organisations amongst other social movements were very active in public campaigning activities surrounding the Law. In response, the Government tried to pacify the disparate factions through the Law recognising the involvement of both parents for the well-being of the child. However, this recognition went against the opinion of some judicial institutions, who viewed the statement as unnecessary with potential to bring even more conflict between parents and therefore court cases that are difficult to solve. Subsequent case law confirms the concerns of these institutions, as cases in subsequent years have not referenced in significant numbers the principle. This suggests that the reference to involvement of both parents is more symbolic than practical. However, the statement has changed the

interpretation of the best interests principle and therefore illustrating how some statements proposed by lawmakers can change the interpretation of several legal concepts.

In Switzerland, the changes are not limited to the best interests of the child, but also to the status of unmarried and divorced parents. As previously explored, the father's rights organisations also lobbied for shared parental responsibility and asked not to delay the amendment. Therefore, shared parental responsibility was accomplished in two different phases, the first being the recognition of shared parental responsibility as the rule and the second the concretisation of it. The doctrine and courts warned of issues arising from not clarifying the law and not considering the potential consequences that shared parental responsibility as a rule would present in practice. For example, the lack of concrete criteria for allocating sole parental responsibility in situations where the judge must consider whether shared parental responsibilities may harm the child.

Therefore, it can be concluded that the criteria established to create the law were driven not only by juridical criteria, but – specially in England and Spain – by political pressures that influenced the approval of the law. The demonstration that the legal criteria to establish the law were less considered during its drafting is the experts' criticism received by the laws in the three countries under study.

One of the principal actors of the evolution towards shared parenting in the three countries under study are the media. Their implication and level of influence depends on the country and media system, but there are commonalities than differences between the three countries.

The first common factor across the three countries is the media's general support of the law of shared parental responsibility or joint custody. In all three countries, it is difficult to find any negative media coverage regarding negative consequences of laws on shared parenting. Switzerland – especially *Die NZZ* – is the most neutral country, presenting the doubts and questions that the law proposes both for the best interests of the child and the rights of the parents.

Another common point is that in the public debate on shared parental responsibilities – or joint custody in the case of Spain – the dominant idea is that both parents should be treated equally. Children rights were also present but clearly into a lesser degree. The

discussion initiated by the media does not include the legal problems that co-parenting can cause when the parents do not live together. This study, specifically the previous chapter finds that the debate on shared parenting and parental responsibility has been dominated by the idea of parental equality, rendering the best interests of the child a secondary consideration. This finding leads to the conclusion that – at least in public opinion – the legal changes were framed by the media as an instrument to promote and achieve greater equality between parents in the upbringing of their children, in spite of the intended paramountcy and centrality of the best interests principle in deciding the child's arrangements.

Precisely, the main and most problematic common thread across the three countries is the lack of legal knowledge in the media and a lack of understanding of the havoc that the mistaken conflation they feed the public can inflict on legal practice. Such inaccurate reporting misinforms, vitiates, and sometimes inflames public debate, often creating unrealistic expectations amongst parents, who incorrectly think they will have more time to spend with children, without considering the additional responsibility that the involvement entails.

Another common point and area of influence is the media setting the agenda for public opinion. The press decides what the public consumes and therefore talks about and, even more significant, what policies and laws are needed in society. Setting the agenda, the media create the needs of society and make visible the debate surrounding policy making and the laws. Here, social movements' activities were essential to creating a perceived need amongst parliamentarians for a law addressing those issues. Heightened media coverage of the parliamentary proceedings also influenced the information reported to the public -and lawmakers – on the law that was going to be approved, showing only a one-sided frame – shared parental responsibilities are good for society – without showing other opinions or potential consequences of the law.

Before the law was presented to parliaments in the three countries, the media covered some demonstrations and demands of the father's rights organisations for a law which grants more access to their children and for shared parental responsibilities. While media coverage has not had an outsize influence, they have been consistent enough in framing the demands of social movements as a societal need to push lawmakers during

parliamentary proceedings to try to address these demands. Therefore, it can be said that social movements established the agenda and shaped the frames of information about the relevant law proposals in all three countries. The media's influence is clear in the case of the mistaken conflation between parental responsibility and custody often visible in the talking points of parents' associations which promote the need access and time with the children without mentioning other duties shared parental responsibilities entail. This misinformed feedback loop is solidified when the messaging of social movements informs media reporting and even politicians in the debates, especially in England and Wales and Spain. Law-making bodies do not act as factchecking actors for media and social movements, and therefore the misunderstandings persist, and also – as previously explored – are included in the law. The most neutral and well-informed amendment is the one made by Switzerland, where the influence of social movements on media coverage is lower than in Spain and England and Wales, to the point where they failed to prevent postponement of the approval of the law. In Switzerland, nevertheless, the child remains a secondary subject of the amendment, prioritizing the rights of the parents.

However, there are differences between the three countries. A central theme of the study has been the level of media involvement depending on the country, as well as the action of social movements. On this point, the first difference is the level of intensity and action of social movements setting and influencing the media's agenda. The actions of social movements are clearly intense in England and Wales, where associations such as *Fathers4Justice* and even the government recognize the need to include the statement on the principle of involvement of both parents to benefit the child, a statement which in the end has been shown to be relatively superfluous in practice, as some institutions and doctrine had warned. The actions of social movements in Switzerland and Spain are less intense, although their involvement is noteworthy, especially in Spain. In Switzerland, the actions of the father's rights organisations allowed for the approval of shared guardianship in two phases, to avoid further delays in the reform and also promoted shared parental responsibilities as the rule, but the amendment is more accurate than those of the other two countries, as it considers the differences for divorce and unmarried parents or the inclusion of the decision of the residence in the concept of parental responsibilities. However, the change does not refer to the consequences for the *Kindeswoh*l, considering the child practically as a secondary issue. In

Spain, social movements supported the presentation of the law and maintained intense debate during its approval.

Another difference between the countries is the intensity with which shared custody is defended by the press. Although all countries promote shared parental responsibility – or shared custody in the case of Spain – as proposed by social movements, it is true that the intensity of media pressure depends on the country. Switzerland is the country whose media provides the most neutral coverage of the issue, while the press in England and Wales and Spain make a strong appeal for shared parental responsibility or joint custody.

However, the most important point is the way in which shared custody has been treated and the corresponding frames. To determine whether the media has influenced the transformation of the concept of the best interests of the child, it is necessary to analyse framing of shared parental responsibilities and the best interests or welfare of the child during the law-making processes in the three countries. To make this determination, two contrasting frames have been analysed. The first frame involves newspaper coverage of the needs of the child and how, according to the media, shared parental responsibilities contribute to the welfare or interests of the child. The second frame involves the demand for equality between parents or the discrimination against one of them – usually the father – with the old law. This analysis from chapter 7 of this study shows that, although not completely ignored by the media, the principle is not the central matter in the public shared parenting debate. This study also finds that the media – in the three countries – focus more on the demands of equality and the discrimination against the parents by the old law than on the needs of the child and the right of the child to be cared by both parents. An analysis of this study's results shows that the positive image of the shared parental responsibilities does not incorporate the perspective and needs of the child to justify the creation of the law.

Though, the management by the media of the two opposing frames differs depending on the country. In England and Wales, the welfare of the child is clearly not the main topic. However, in periods of more intensive news coverage, usually during parliamentary proceedings, child welfare becomes a central topic, rivalling in terms of number of articles, the opposing frame of parental equality. It can be said that the media 'remembered' during the law-making process that the debate should focus on the child over

the interests of parents. In Spain, the frame of parental equality is clearly prioritised compared to the needs and best interests, especially during the parliamentary proceeding. However, as the concept of the best interests of the child in the country has not changed deeply, it cannot be said that the media influenced the concept. However, it can be said that the Spanish media promoted the introduction of joint custody in the country. Switzerland is a special case amongst the three countries with both frames being used equally during whole period of study with the *Die NZZ* the most balanced in this area amongst all newspapers.

According to these frames analysed, the study concludes that in all three countries, the debate on shared parental responsibilities has been dominated by the idea that both parents should be equal and do have the same rights to take care of the child, even if the position and welfare of the child are also present but secondary. That conclusion reveals that the law was used by the media as an avenue to achieve equality between parents not a way to improve understanding of child welfare. The debates focused on the need for parents to get involved in the life of children and not on the child or their needs.

In conclusion, it can be said that the media has indirectly influenced the transformation of the best interests of the child. In promoting shared parental responsibilities and giving visibility of the demands of the social movements, the media has contributed to the transformation of the principle. The best interests of the child are now transformed and include the involvement of both parents in the life of the child and therefore comprises the shared parental responsibilities as the best model for the allocation of children.

First of all, the frames were settled amplifying the voice of social movements and sharing the position of the parents, taking into account the child as a 'beneficiary' of the law but not the main subject. According to the wording of the laws in the three countries and even at the supranational level, the measures are approved to respond to the right of the child to be cared by his or her parents. However, the analysis provided by this study and its results, the notion and subsequent concretisation of shared parental responsibilities is used more as a convenient avenue to pacify the demands of social movements and reach parental equality rather than as the main purpose.

The trilateral relationship explored in this study between lawmakers, media and social movements, confirms a principal assertion made in chapter 2 of the research -that

social movements presented their demands through different actions, demonstrations and declarations, catching the attention of the media, who shared their plight with the public and lawmakers. As previously explored, the ignorance of the media on legal issues and lack of awareness of the practical legal implications of the proposed laws led to the press presenting shared parental responsibilities superficially. The result was therefore an incomplete and inaccurate picture of shared parental responsibilities that misinformed the public and social movements alike.

However, it cannot be said that the media in the three countries were manipulative in their coverage of the best interests of the child. Rather the media's mistaken conflation of shared parental responsibilities and custody can be regarded as misinformation, together with the inaccurate reporting of the issue. This unintentionally inaccurate reporting can be attributed to the speed and constant churn of the news cycle, setting the agenda to cover the social movements' actions and position of lawmakers – but neither being the basis for, or implications of, the laws. Therefore, media didn't ask enough questions or thoroughly investigate the effects of the law on children and families, further misinforming the public on shared parental responsibilities and the consequences on the best interests principle. Shared parental responsibilities were introduced to publics in the countries by a relatively uninformed media with never-theless strong views leaning towards one side of the argument and against the opinion of institutions and experts. A common thread, in fact, is that the media will always cover conflict ahead of more informed but also more tedious and deliberative legal narrative, as conflict always will attract more attention from the public. Also, children are less heard on the media – clearly due to their status as minors – so the main view reported is that of the parents and adults.

Therefore, it can be concluded that during the debates about shared parental responsibilities, the media always favoured the change of the law and focussed coverage on conflict between the parents rather than focusing on children's needs. It can be said that the laws entered into force with children as a paramount consideration but without hearing or giving a voice to their actual interests and needs. Most critical is that the law in all three countries has named the child as the main subject yet has not considered the consequences of transforming the best interests principle on the child. Another common thread – less so in Switzerland than in other countries – is lawmakers joining

the media in not taking enough time to understand the implications on whether the law is in fact in the child's best interests. As a matter of fact, lawmakers follow the media to stay informed on public attitudes, and therefore, make the same mistakes as the media. It is unfair to expect comprehensive knowledge of the media in its coverage, but it is a right for citizens to expect exhaustive grasp of the issues amongst lawmakers, as they should represent us in conforming the law that governs our societies.

The main question future research should aim to answer is whether the Law, the positive norms that rule our society are made only by the representative institutions of democracy, or whether there are other actors that can influence the whole process for their own interests. This dissertation has brought to light the heavy combined influence of the media's reporting and the lobbying activities of social movements on the legal process. The symbiosis of these seemingly parallel activities has resulted in paradigmatic change in one of the core principles of family law. This carries greater societal meaning that the rule of law in democracy is susceptible to manipulation by any one group, if they dominate the public agenda with their actions and subsequently attract outsize media coverage. As the contemporary makeup of the family now takes increasingly diverse forms and attracts more attention by media, society and finally lawmakers, it cannot be said that family law will experience less influence by these actors in meeting their policy objectives. From the period covered by this study through to the present day, the question persists of whether protection of the best interests of the child is in fact a top priority in democracies such as those covered by this study. As there is no common understanding of what the best interests entail, and it is an indeterminate concept that depends on the circumstances of the individual child – the principle is subject to the dynamics of law-making processes involving media, social movements and lawmakers. If individual groups have the attention of the media and their demands are amplified thus shaping public opinion, then an individual interpretation of the best interests of the child can be transformed into ‚social opinion' that will later become the law assumed by the society.

If the setting of the media's agenda and subsequent framing of messages, social movements, and institutions – as the study shows – cover the needs and demands of adults, lawmakers will naturally run the risk of succumbing to this pressure and not addressing the needs of every child. The transformation of the best interests of the child is therefore one of substance, yet one that could fail to address the core value of the principle: the well-being of the child.

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