

EUROPEAN CHILDREN AND THE DIVORCE OF THEIR PARENTS

This document is the result of a research work regarding the habits of 15 European countries on the subject of the protection of children's right to co-parenting.

Author: Vittorio Vezzetti, paediatrician at ASL Varese, Scientific Director of the European platform Colibri, National Association of Italian Family Professionals and the Association "Aiutiamo le famiglie" A. le F.

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ABSTRACT

It is universally acknowledged that the role of a parental figure has a huge direct influence on children's health, both from a psychological and physical point of view. After divorce of the parental couple many European children lose the possibility to keep in contact with one of their parents, with dramatic social and biomedical consequences.

This research aims at providing a general overview on the different practices of several European countries on the subject of the protection of children's interests. This survey shows that there are still very different conceptions of children's protection, varying from country to country (contrary to the medical world where shared and common guidelines usually exist) and there is also a global inadequate perception of the importance of co-parenting principle: in most cases, one of the parents is originally marginalised as a consequence of judicial disposition. An intervention of the EU institutions aimed at guaranteeing the protection of children's rights and harmonising existing good practices (as would happen in medical science) seems therefore urgently needed. There is also a clear need for switching from a formal-legal language to a scientific language, which could be understood and applied by all Member States as well as introduced into the relevant legal systems (in order to avoid discrimination based on children's nationality).

INTRODUCTION

It is universally acknowledged that the role of a parental figure has a huge influence on children's health, both from a psychological and physical point of view. The most evident effects can be traced in life satisfaction level and in hormonal balance (oxytocin, cortisol, vasopressin, growth hormone etc.) as well as an increase in the probability of suffering from panic attacks in adult life and even consequences on chromosomal integrity with possible effects on progeny. (1,2,3,4,5,6)

From a social point of view, there are clear evidences of the effects on micro-criminality, on school dropout rate, on tobacco addiction, on unintended pregnancy rate as well as on economic status. (7,8,9)

It is therefore unwise to link this topic exclusively to the field of family law, considering that biomedical and psychological aspects are also involved.

Unfortunately, it often happens that the child loses contact with one of the two parental figures and, in industrialised countries, this event is mainly linked to divorce, to the birth of children out of wedlock or to changes in cohabitation conditions (parents not sharing the same house). (10)

Concerning the event of divorce, a case which is more and more common in Europe (see Table 1),

Table1: divorce rate per 1000 Europeans (Source Eurostat)

	1960	1970	1980	1990	2000	2010
UE-27 (1)	:	7.9	6.8	6.3	5.2	4.5
Belgique	7.1	7.6	6.7	6.5	4.4	4.2
Bulgarie	8.8	8.6	7.9	6.9	4.3	3.2
République tchèque	7.7	9.2	7.6	6.6	5.4	4.4
Danemark	7.8	7.4	5.2	6.1	7.2	5.6
Allemagne	9.5	7.4	6.3	6.5	5.1	4.7
Estonie	10.0	9.1	8.8	7.5	4.0	3.8
Irlande	5.5	7.0	6.4	5.1	5.0	4.6
Grèce	7.0	7.7	6.5	5.8	4.5	5.1
Espagne	7.8	7.3	5.9	5.7	5.4	3.6
France (2)	7.0	7.8	6.2	5.1	5.0	3.8
Italie	7.7	7.4	5.7	5.6	5.0	3.6
Chypre (1)(3)	:	8.6	7.7	9.7	13.4	7.9
Lettonie	11.0	10.2	9.8	8.9	3.9	4.2
Lituanie	10.1	9.5	9.2	9.8	4.8	5.7
Luxembourg	7.1	6.4	5.9	6.1	4.9	3.5
Hongrie	8.9	9.4	7.5	6.4	4.7	3.6
Malte	6.0	7.9	8.8	7.1	6.7	6.2
Pays-Bas (1)	7.7	9.5	6.4	6.5	5.5	4.4
Autriche	8.3	7.1	6.2	5.9	4.9	4.5
Pologne	8.2	8.6	8.6	6.7	5.5	6.0
Portugal	7.8	9.4	7.4	7.2	6.2	3.7
Roumanie	10.7	7.2	8.2	8.3	6.1	5.4
Slovénie	8.8	8.3	6.5	4.3	3.6	3.2
Slovaquie	7.9	7.9	8.0	7.6	4.8	4.7
Finlande	7.4	8.8	6.2	5.0	5.1	5.6
Suède	6.7	5.4	4.5	4.7	4.5	5.3
Royaume-Uni (1)	7.5	8.5	7.4	6.6	5.2	4.3
Islande	7.5	7.8	5.7	4.5	6.3	4.9
Liechtenstein	5.7	5.9	7.1	5.6	7.2	5.0
Norvège	6.6	7.6	5.4	5.2	5.0	4.8
Suisse	7.8	7.6	5.7	6.9	5.5	5.5
Monténégro	:	:	:	:	:	6.0
Croatie	8.9	8.5	7.2	5.9	4.9	4.8
ARY de Macédoine	8.6	9.0	8.5	8.3	7.0	6.9
Turquie	:	:	8.2	:	:	8.0

The Author wanted to provide a general overview of the different approaches adopted by European legal system. This research turned out to be very complex to carry out and it revealed very interesting information concerning the lack of official data in many Countries (especially Eastern Europe countries), which made it necessary to rely on data from local studies. On the other hand, in some cases, the data and the information were only available in the national language and not in English, so it was necessary to rely on the skills of professional translators. The use of professional translators was fundamental because of the need to compare different cultural systems, different terminologies and different legal backgrounds frameworks. In addition to this, un-married couples tend not to address the courts for solutions to family issues. Moreover, each local administration body tends to publish official data that seem to be in contrast with the real situation determined by the application of the law.

In this sense, the Italian case is striking (although not isolated): on one hand, there is a formal 'idyllic' law ensuring the children's right to have and keep significant and stable relationships with both parents after divorce/separation (joint legal custody is formally applied in 89% of cases). But the partition of the time between the parents is 83% by "primary parent" and 17% by the "less involved parent" (also called "Parent B"): but this formal situation is not actually reflected in reality since time allotment is often different from what is attested by official data. For this reason Italy has been convicted several times by the European Court of Strasbourg for not properly protecting the relationship between a child and a divorced parent. Around 1 child out of 3 does not have a stable relationship with one of his/her parents after divorce or separation (11). MEP Roberta Angelilli presented a written interrogation (E-000713/2013) to the European Commission about this issue, and the European Commission replied to it admitting that it has actually no information and data about studies and best practices regarding joint custody of children or/and co-parenting. The EC also stated that the definition of "joint custody" is to be determined by national family law since it does not concern the spectrum of competences of the European Union (it shall therefore be regulated according to Member States national normative framework).

According to the EC, this passage clarifies why there are still remarkable differences among national legal systems regarding the definition of the concept of "joint custody" and its actual application in real situations. (12)

There are also significant differences according to whether the child is born in or out of the wedlock. In all of Member States, the mother actually exercises parental responsibility as well as the (married) father. On the contrary, the normative framework determining rights and obligations of an un-married father varies from country to country, with remarkable indirect consequences on children's co-parenting rights.

This research was carried out thanks to the cooperation of many European associations which are working to promote the co-parenting model and professionals in this field who are able to provide us with real and comparable data.

The results of this research are undeniably important but, given the lack of official data, their value is not totally absolute.

THE SITUATION IN EUROPE

According to official data, in **Slovakia**, the sole custody of a child in 2002 was granted to the mother in 89,42% of cases and to the father in 6,63% of cases. The law has been modified recently and from 2010 has allowed a joint custody option. According to Otcovia.sk association, the mind-changing is extremely slow and in 2011 (official data) the custody was awarded to the mother in 80,94% of cases and to the father in 9.36% of cases. Joint legal custody was decided by courts in 4,59% of cases. The joint legal custody of a child generally does not imply an equal 50%-50% time allotment (which is an extremely rare circumstance) between the two parents: it can imply also a 70% - 30% time allotment or even a 90% - 10% partition in a typical sole custody.

According to un-official data provided by Otcovia.sk, the most common judge disposition awards the sole custody of the child to the mother and calls for limited contacts with the father, which are equal to 12-15% of the total amount of time (during the school period, two weekends per month, mainly on Saturdays and Sundays, less frequently from Friday. Younger children are allowed to spend generally less time with their father compared to pre adolescents / adolescents). During summertime, children have the possibility to spend more time the parent B, generally 2 weeks in July and August while 4/5 days are reserved for Christmas and Easter time.

According to the very well known research work by Bjarnason and Arnarsson (based on interviews addressed to pre-adolescents aged between 11 -13-15), the equal time allotment rate is set around 6%. However, this survey tends to underestimate the rate of equal custody in countries with high rates of equal time allotment (such as Sweden or Belgium) and overestimate in countries where equal custody is rare (as in Italy, where the percentage of equal custody is around 2% while in the research of Bjarnason and Arnarsson would be 9%!).

In **Czech Republic** (an independent Country from Slovakia since 1991), joint legal custody has been existing since 1998: but also in this case it is about a quite marginal institution (custody with equal time division is extremely rare and its rate is certainly overestimated by Bjarnason and Arnarsson, who put the this rate at 3,5%).

In 2002, joint legal custody rate was estimated to be at 2,09% (official data) and at 7,83% in 2011. Sole mother custody rate decreased from 90,33% to 84,75% while sole father custody from 7,17% to 7,08% (which allows us to infer that joint custody gained ground on sole mother custody). According to Spravedlnost Detem association, in practical terms, time is allotted very similarly as it happens in Slovakia: the child can spend two short weekends per month with the parent B (Saturday and Sunday), one afternoon during the week, 15 days during summertime and 6 during Christmas time.

Until 1st October 2011, in **Romania** (where 35,000 couples with children divorce each year) legal joint custody of children was not envisaged by the law. Sole mother custody was granted in 80-85% of cases while sole father custody was granted in 15% of cases (a quite uncommon rate in Europe) but only because the percentage of women leaving the Country to find a job abroad was (and yet is still today) very high.

According to an official survey carried out in 2009, 84,5% of mono-parental families were represented by a single mother with her children while in 15,5% of the cases were represented by a single father with his children (14). After the Civil Code reform, the law has introduced joint legal custody of the child but, according to the local association for shared custody ARPCC, many judges and lawyers tend to ignore the norm and accept the fact that one of the parents intentionally renounce their custody rights. As a result, according to a survey carried out on some hundreds cases analysed by this association, only 48% of children can currently benefit from joint custody and only 2% benefit from equal time allotment (if parents reach an agreement in this sense, judges tend to accept the terms of the agreement without any hesitation). On the other hand, about 50% of children are subject to sole custody, often as a consequence of renouncement by one of the parents.

According to Bjarnason and Arnarsson, shared custody with exact division of time (50% vs 50%) only occurs in 0,5% of cases within the three categories taken into consideration (children aged 11, 13 and 15).

Before the reform, children had the possibility to spend time with parent B twice per month (2 nights - from Friday to Sunday) and around half the summer vacation.

According to ARPCC association, the reform did not actually bring remarkable changes: inveterate jurisprudence has been opposed to the law and therefore most of judge dispositions are still oriented towards the traditional model of two weekends to be spent with parent B. However, there seems to be a small opening towards the possibility to allow the child to spend one or two afternoons during weekdays with the secondary parent.

One of the biggest problems, throughout all of European countries, is the respect of court dispositions: if one of the parents impedes or encumbers encounters with the other parent, rarely does an authority intervene to fix the situation and as a result the child loses the opportunity to keep in contact with one of the parents, despite the judge disposition.

According to some data provided by ARPCC association, public prosecutor started a prosecution in less than 8 cases out of 1800 cases of notification of irregularities.

On the contrary, in **Greece** the law does not envisage the option of joint custody yet (although it is not prohibited) and children are cared solely by the mother in 90% of cases. Sole father custody is granted in less than 10% of cases (although around 30% of fathers require sole custody of their children, according to local association Gonis).

Actors of the field of family law as well as many Greek politicians are not in favour of shared-joint custody.

Theoretically, the amount of time children spend with the parent B is between 18 and 20% of the total amount of time, according to Gonis: seven days during Christmas time, seven days during Easter time, four weeks during summertime, two short weekends per month plus often an afternoon during weekdays. Shared custody with exact division of time are extremely rare, under 3% of the total, according to Bjarnason and Arnarsson. Data about custody categories come from a survey carried out taking into consideration more that 2600 cases managed by the Athens High Court between 1998 and 2007.

Our analysis will now look at Northern Europe countries, such as **Sweden**, which is regarded as an excellent worldwide model for children's interest protection.

The situation in this country is actually very different from the countries we have taken into consideration so far and children can benefit from a higher degree of equity in terms of access to relationship with both parents, when the couple is divorced. The Swedish system seems to rely more on consensual separation: the habit of relying on the advice of family mediation structures, the economic independence of women, the acknowledgement of the importance of the paternal figure, the possibility to interchange the parental role (mother vs father), enable couples to rely on consensual separation from the very beginning. Joint custody is the most common option and it implies equal allotment of time to be spent with the mother and the father in about 30% of cases: a real European record, close to Washington and Wisconsin rates (15,16,17). A considerable number of children can benefit from the so called physical shared custody (30/35% of the total amount of time spent with the parent B).

According to a survey carried out by MinPappa, a local association, regarding 3,800 cases in the Southern Sweden, when a couple who intend to divorce arrives at court there are still significant differences in treatment (in this class of self-selected cases, sole mother custody reaches 80%, sole father custody 10% and joint custody 10%).

Many parents, even if they do not exercise real alternative custody and exact time division, try to negotiate an agreement about upbringing guidelines and encounter plans. However, we have to underline that when a disposition is decided by the Court after a (rare) actual trial (but honestly this happens in a particular, self-selected population), it does not seem to be too different from the most commons standards: two long weekends per month (from Friday afternoon to Monday morning), an afternoon among weekdays (with possible overnight stay), two or three weeks during summertime, seven days during Christmas time, four days during Easter time (about 20-25% of the total amount of time).

Alternating custody is quite uncommon after an actual trial, although it is not considered a taboo as it happens in Italy, for instance.

There are, however, some critical points in the Swedish system as well: many parents denounce the lack of an adequate sanctioning system in case of attempt of manipulation and obstructive behaviour by one of the parents who, for instance, tries to impede the relationship between children and the other parent.

In **France**, sole custody is ordered by a Court in around 5% of cases (data provided by Geoerges Manaut and basically confirmed by official statistics): less than 2% when the couple is divorced and less than 7% in case of cohabitant couple.

Joint custody is ordered in 95% of the cases.

In 10% of these cases, the child lives on a regular basis with his/her father (in 50% of cases due to explicit renouncement of the mother and in 50% due to illness or other impediments).

In 2009, alternating custody (in most cases, one week with the father and one week with the mother) and physical joint custody were ordered in 16,9% of cases (one of the highest rates in the countries studied), and the tendency is slowly increasing (data provided by Statistiques de Jurisdictions). Alternating custody is more and more frequent in consensual divorce rather than in judges dispositions. The child

lives with his/her mother in 72% of the cases. The judge is entitled to order the alternating custody even against the will of one of the parents (in order to eliminate that sort of mother's veto power against the alternating custody) (18).

Actually, things are different: an official survey carried out in 2003, revealed that 95% of alternating custody was a result of an agreement between the parents and that judges refused to impose the alternating custody in 75% of cases, if one of the parent did not agree with this decision (19). In 2007, the gap between alternating custody derived from an agreement between the parents and alternating custody imposed by a judge seemed to decrease (from 21,5% to 14,5%).

Georges Manaut also denounces the fact that often the judge does not impede the forced and unilateral displacement of the child decided by one of the parent, even if this would jeopardise the possibility to maintain a stable relationship with the secondary parent.

In case of primary residency, the child's right to maintain a stable relationship with the parent B is limited to two long weekends per month, often one afternoon during weekdays as well as 50% of school holidays (20-25% of total amount of time).

According to Georges Manaut, however, in France there are huge problems in terms of application of judge disposition, if one of the parents does not respect the decision of the court and prevents the child to keep in touch with the other parent (often, the father) after divorce (20).

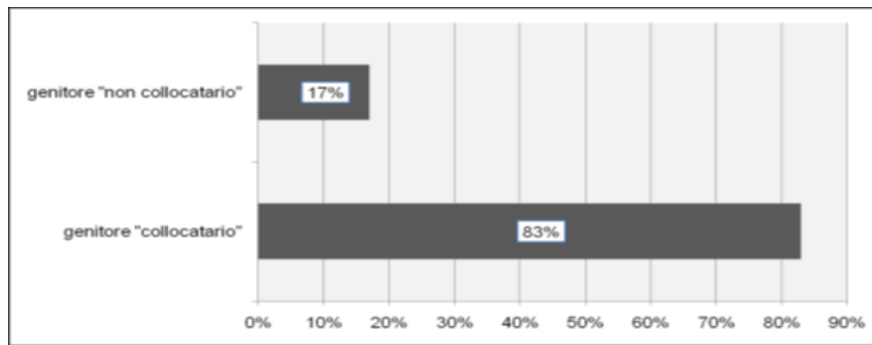
In particular, only 1% of denounces (26,000) and official statements (60,000) presented to the authority for non-observance of judge disposition, is acknowledged by the court (and a trial is started).

Although the situation in France is one the best in Europe for children's right to co-parenting, according to an official report carried out by the French Social Affairs authority, in 2011 the French legal system included some sentences that seem to exercise gender-based discrimination against parents. There seems to be a general tendency to discriminate against the paternal figure. In 2011 there were many people complaining about the fact that, despite a clear law on the subject, only 14% of children could benefit from shared custody arrangement - *garde partagée* - and that only in 7% of cases, the judge ordered sole father custody. For comparison, in Italy, alternating custody represents 1-2% of cases and sole father custody represents 0,8-1,9% of the case. (21)

In **Italy**, the situation is even worse: although joint custody formally represents over 89,8% of cases (official data provided by ISTAT¹ 2012, referring to solar year 2010), most judge dispositions are based on sole custody habits. The parent B (i.e. the father in 92% of cases and the mother in less than 5% of cases), can spend with his/her children approximately 17% of the total amount of time - which is equal to roughly two weekends per month and one afternoon during weekdays, two weeks during summertime and one week during Christmas time - see table n.2 (as confirmed by an accurate survey taking into consideration 1020 sentences). (22).

Table 2: average time allotment between primary and secondary ("less involved") parent.

¹ Italian National Statistics Institute.



In Italy we also have some paradoxical, rare cases of "joint custody" excluding any right to visit the child for the parent B (no contact at all).

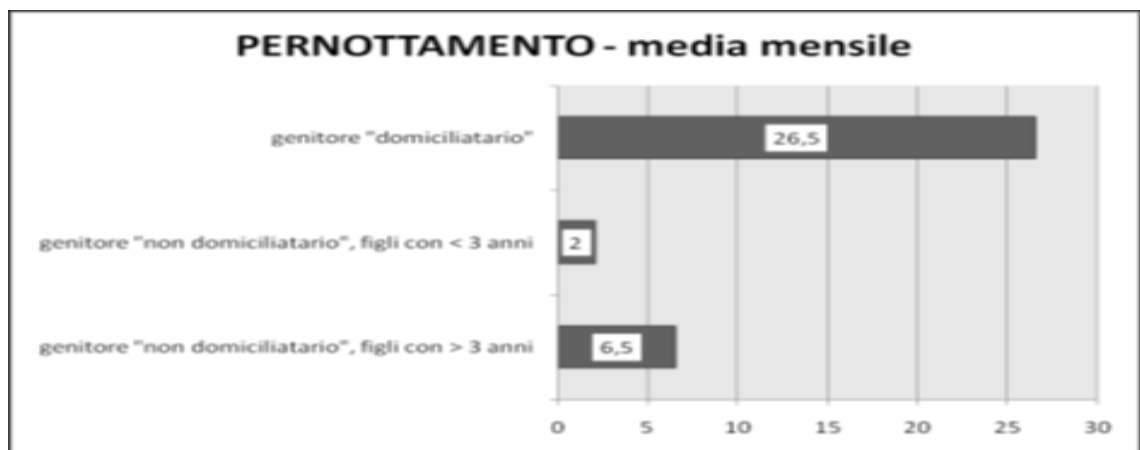
The alternating custody rate is about 2% but it is limited to some cases where parents get to reach an informal agreement (actually, these agreement are rejected by judges who tend to consider *a priori* this kind of custody as harmful or dangerous).

Physical joint custody (at least 30% of the total amount of time spent with the parent B) is basically unknown in Italy. Physical joint custody (3 days per week out of 7) and alternating custody (50%-50% exact time division) represent about 3,1% of cases. (23)

Sole father custody represents 1,09% of cases (official data provided by ISTAT).

As far as overnight stay is concerned, the situation is well described in table 3. (22)

Table 3: Monthly overnight stay average in Italy.



National Colibrì association representatives also point out a general tendency to non-observance of court dispositions (social services and police forces do not usually intervene if one of the parents impedes the contact between the child and the other parent). This tendency is also confirmed by official 2008 data provided by ISTAT, according to which, 1 child out of 3 loses significant contacts with one of the parents

after separation: these children are called "involuntary orphans" or "living-parent orphan".

Italian judges usually do not impede the forced and unilateral displacement of the child on initiative of one of the parent.

Another huge problem in the Italian panorama is represented by the tendency to bare false accusations: according to a survey carried out by Camerini et al, 92% of accusations of abuse on children are found to be unfounded (although the psychological damage on the long term was the same for abused and not abused children).

The phenomenon of false accusations is quite common in Europe: for instance, a recent official survey carried out in the Netherlands showed that during divorce procedure 95% denounces of abuse on children are unfounded. (25)

In Spain the official sources declare that in 2008 out of 142.125 accusations, in about 126.491 (87,3%) the men were not guilty. (25,26)

According to ISTAT official data, sole custody during separation procedure is granted to the mother in 9% of cases, while it is granted to father in 0,8% (definitely the lowest rate in Europe and with a decreasing trend).

In case of divorce (which usually occurs at least three years after separation), sole father custody is ordered in 1,9% of cases, sole mother custody in 23,4% and (formal/theoretical) joint custody in 73,8% of cases.

As it happens in many other European countries, such as Greece, family mediation does not work due to several reasons: unfair behaviour of the Courts between the two parents during the separation/divorce procedure (which makes it harder to reach an agreement) and an extremely high number of lawyers (almost 9 times more compared to Sweden).

Another important aspect is linked to the background of lawyers and prosecutors, who are often criticised for relying their work on a theoretical and formal knowledge of family law, being far from real and concrete needs of families and children.

In **Germany**, where the notion of divorce due to lack of marriage obligation fulfilment ("divorzio per colpa") does not exist, if both parents jointly exercise parental authority and they decide to divorce, joint parental authority keeps on being exercised. Joint parental authority is questioned only if one of the parents calls for exclusive authority (and, of course, if child safety is at risk). Such request for exclusive custody shall be accepted only if joint parental authority can be revoked and, of course, if this condition would lead to real well-being of the child. German legal system is based on the general postulate that the child will benefit from stable relationships with both parents and it therefore recognises on one hand the right of child to have contacts with both parents and, on the other hand, the right of both parents to have contacts with the child.

The situation in Germany is however unique: according to a survey carried out by Barbara Schwarz in 2008 and published in 2011, there is in Germany a surprisingly high percentage of third party custody cases as well as custody of child granted to institutions (21,06%). (27)

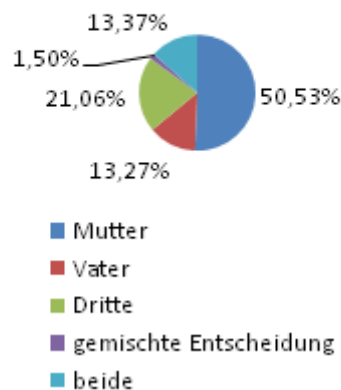
Sole mother custody represents 50,53% of cases, sole father custody 13,27% and joint custody represents 13,37% of the total amount of cases. (see Figure 1).

The amount of time spent with the parent B is about 20 to 30% of the total (more than time spent in Italy by children under joint custody). (28)

According to a research carried out by Prof. Suenderhaus-Kravets, based on the data collected by Shwarz, cases of exact time division are at least 4% of the total (as it was also pointed out by Bjarnason and Arnarsson' research).

Figure 1: Custody categories rate in Germany.

**Abb. 5. Gerichtliche
Sorgerechtsentscheidungen
(2008)**



Switzerland seems to be a mono-parental country, although the legal notion of divorce has been existent for a long time (especially in Protestant cantons). Mandatory civil marriage was introduced by a law in 1874 and it recognised the general notion of divorce, regardless of religious beliefs while the effects of divorce were still managed and regulated by each single Canton independently.

Although there is still a controversial debate about children's custody, the current situation is described below (2010 data): shared parental authority in 45,54% of cases, sole mother parental authority in 50,57% and sole father parental authority in 3,77% of cases. Since June 2013 shared parental authority has become the rule.

In case of shared parental authority, there shall be, at least on a theoretical basis, equal responsibility (which is not the case for over 50% of Swiss children) but there is in practice a primary residency for the child.

According to data collected by the local associations Movimento Papageno and Donna2, alternating custody is denied by judges and its rate is definitely negligible (under 1% according to Movimento Papageno and Donna2 and around 5,5% according to Bjarnason and Arnarsson - which does not seem to be a very realistic data).

Children live in most cases at their mother's house (93% of cases according to Maennerpartei). Judges tend to marginalise the parent B and the minimum threshold for visits is very restrictive, even in case of shared parental responsibility. Generally (with small differences from Canton to Canton), the child can spend two days in two weeks with the parent B (from Saturday 9 a.m. to Sunday 7 p.m.), two days during Easter holydays, as well as two days during Christmas time and

Pentecost (or alternatively, the entire holydays period but only once every two years), two holydays weeks per year (less if the child is < 3 years old, a bit more if the child is > 6-7 years old). In particular circumstances, in Canton Ticino children have up to 5-6 weeks to be spent with the parent B.

Austria is basically a mono-parental country too: 54% of divorced couples can benefit from joint custody of the child ("gemeinsame Obsorge") but, actually, it is only a formal situation, as happens in Italy or in other European countries.

Generally, depending on the age of the child, there is a strong predominance of the primary parent: according to a survey carried out by Hannes Hausbischler, youngest children are only allowed to spend about 2 hours per week with the parent B. Children aged between 4-14 are allowed to spend one day every two weeks with an overnight stay.

38% of cases is represented by sole mother custody, while only 3,5% is represented by sole father custody. (29).

Alternating custody with exact time division is extremely rare, probably under 1% (4,7% according to Bjarnason and Arnarsson). In Austria, as in many other European countries, as we saw, there is a problem concerning the incapacity to ensure that judges dispositions are respected.

In **Portugal**, local association Igualdade Parental, points out a general lack of official data. Generally, the tendency is to order joint custody (although the Portuguese legal system only recognises the notions of "resident parent" and "non-resident parent" and there is no definition of "custody" itself), which represents over 90-95% of cases. However, as it happens in many other European countries, there is no real physical joint custody: in 2008, the Direcção Geral de Políticas de Justiça pointed out that real shared physical custody (from 30-35% to 50% of the total amount of time spent with the parent B), represented in 2007 around 3% (while it turned out to represent 6% according to the famous Bjarnason and Arnarsson's survey).

The association Igualdade Parental remarked that the most common provision ordered by judges includes 2 weekends per month with parent B plus, most recently, an additional contact during the week (with dinner and sometimes even overnight stay).

Concerning the holidays, the general tendency is to grant to the child one month to be spent with the parent B (who is, according to Igualdade Parental association, the father in 85% of cases). The amount of time represented by Christmas and Easter holydays is also equally divided between the parent A and the parent B. Sole custody does not exist in Portuguese legal system.

In **Belgium**, a 2006 law aimed at fostering the equal residence ("hébergement égalitaire") has led to good results. The custody is mostly joint but, according to psychologist Jan Piet de Man, the percentage of custody with exact time division is a bit higher than 20%, with an increasing tendency considering the good results achieved (according to Bjarnason and Arnarsson, it was about 11,1% of the cases).

In particular, a survey carried out in the areas of Brussels city and Charleroi found 20,94% of equal custody 50-50 (compared to 10% in 2004), although most cases are

the result of an informal agreement between the parents (who seem to prefer this formula in 28% of cases) rather than as a result of a judge's disposition (who orders this formula only in 12,8% of cases). (30)

Similar data (see Figure 2), have been pointed out in Lovanio, in the framework of LAGO project (Leuvens Adolescenten-en Gezinnen Onderzoek) where, from 2008 to now, 6,000 children (mainly Flemish children) aged between 12 and 18 have been interviewed about different aspects of their life. 25% of these children were son/daughter to divorced couples and among them equal custody reached 23% of cases.

Figure 2:

Always with mother 35%
Usually with mother and sometimes with father 32%
Alternating 23%
Usually with father and sometimes with mother 4%



The request for custody with exact time division in Brussels and Charleroi survey was refused by the judge in 63% of the cases. The reasons for refusal were mainly the following: very young age of children, underway investigation of social services, excessive conflicts between parents, the perceived need for children for a progressive trial period for getting used to equal custody, necessity of an increased amount of time spent with the mother, unsuitable logistic and work situation, educational gaps.

In 37% of the cases, on the other hand, the request is accepted by the judge with the following motivations: no prohibitive circumstances, real need of equal relationship with both parents, child's opinion (over 12 years old), alternating custody being already exercised.

What is really peculiar of the Belgian situation is the presence of a highly varied form of custody, much more tailored on the concrete single situation than in the rest of Europe.

If there is no agreement between the parents, the judge can order one weekend out of two or even less to be spent with the mother (14,4% of the cases), 4-5 days out of 14 days with the mother (2,1% of the cases), one weekend out of two or even less with the father (58,6% of the cases), 3-5 days out of 14 with the father (12% of the cases) or even alternating custody with exact time division (ordered by a judge in 12,8% of the cases).

This Belgian law is regarded as one of the most cutting-edge in Europe. Here below you will find a passage from the text:

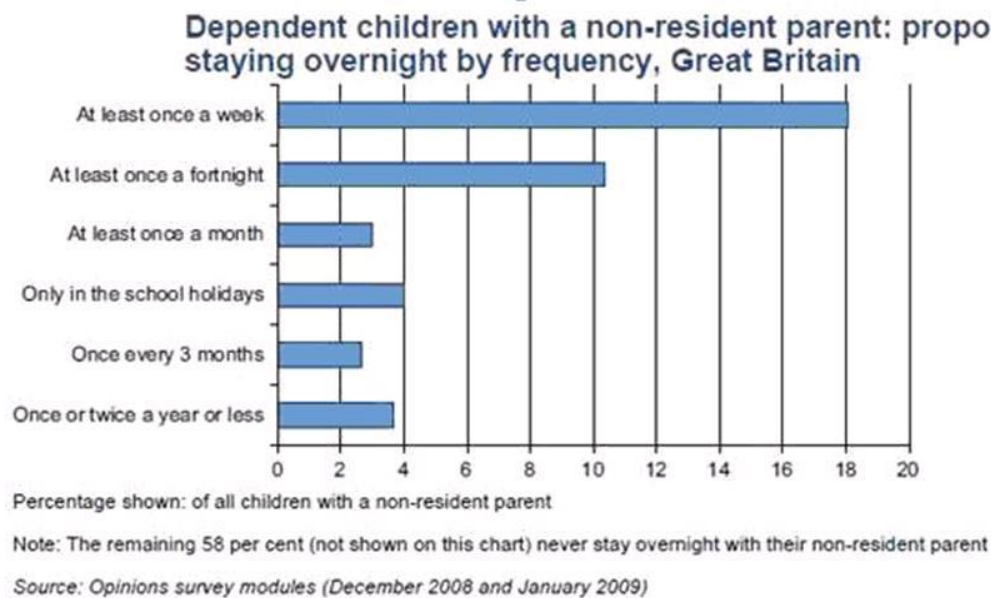
"Art. 374 ...[§ 2. Lorsque les parents ne vivent pas ensemble et qu'ils saisissent le tribunal de leur litige, l'accord relatif à l'hébergement des enfants est homologué par le tribunal sauf s'il est manifestement contraire à l'intérêt de l'enfant. A défaut d'accord, en cas d'autorité parentale conjointe, le tribunal examine prioritairement, à la demande d'un des parents au moins, la possibilité de fixer l'hébergement de l'enfant de manière égalitaire entre ses parents. Toutefois, si le tribunal estime que l'hébergement égalitaire n'est pas la formule la plus appropriée, il peut décider de fixer un hébergement non-égalitaire. Le tribunal statue en tout état de cause par un jugement spécialement motivé, en tenant compte des circonstances concrètes de la cause et de l'intérêt des enfants et des parents.] <L 2006-07-18/38, art. 2, 029; En vigueur : 14-09-2006"

In the **UK**, joint legal custody does not exist (while it exists in the USA). There is on the contrary a "joint parental responsibility" which does not imply an automatic right to have contacts with the child but only the right to be informed about the child's upbringing and his/her wellbeing as well as the right to take decision about medical treatments and decisions linked to school. On the other hand, this kind of custody implies many obligations to be fulfilled by the parent B (who is generally the father): all of the mothers can benefit from joint parental responsibility while, for the biological father this only happens if his name is marked on the child's birth certificate or if he (the father) is married to the mother of the child. The child has his/her legal residence at the mother's home in over 90% of cases, while, according to Robert Whiston from Platform European Fathers, shared custody with exact time division are not more than 5%. This data are also confirmed by a survey carried out in 2011 according to which, 3,1% of the small sample group taken into consideration, can benefit from shared custody with exact time division (31). According to Bjarnason and Arnarsson, the percentage of adolescents subject to shared custody with exact time division was over 6%.

The situation for non-resident parents is always the same (if children are not so young): two weekends per month plus four afternoons per month, 15-20 days during summertime, 5-6 days during Christmas time (15-20% of the total amount of time). Time allotment tends to decrease if children are very young (<4). Non-observance of judge dispositions represents a thorny question in UK too: according to an official survey, 58% of children stated that they never stay overnight with the non-resident parent.

Interviews-based surveys show that mothers generally tend to declare that she spends shorter time period with her child/children while fathers tend to report higher figures. Moreover, time spent with non-resident parents is less if the couples are not married or if they have never lived together.

Figure 3



According to a survey carried out in 1991, 40% of fathers used to lose contact with children 2 years after the divorce (Bradshaw & Millar, *Lone-parent families in the UK*).

Latest surveys have showed that this percentage is actually lower (from 15 to 28%, according to LCD Baseline Survey, only 9% according to Home Office Citizenship Survey). (32).

Minister for Childhood, Mr. Tim Loughton, stated, during a radio interview released on 13th June 2012, that up to 87,000 children are subject to judges dispositions regarding the right to have contact with their parents and that up to 1/3 of these 87,000 children loses contact with their non-resident parent.

In **Spain**, the first law about divorce dates back to 1981 but it is actually only from the first reform of 2005 that joint custody is accepted and applied more widely. Moreover, joint custody used to require two precise pre-conditions: an agreement between the parents and the green light of the judge (this last condition was removed last year).

Because of the law against violence on women published in 2004, it is actually very difficult for fathers to gain joint custody: a denunciation for harassment, even if clearly specious (and not followed by any condemnation), is sufficient to exclude the possibility to have a joint custody. A peculiar situation is detected in Cataluña region, Aragon region and in Comunidad Valenciana because of the local laws. In Cataluña,

73% of children live with their mother, 5,3% with their father while joint custody represents 20,6% of cases ("custodia compartida").

In Aragon, 73,2% of children live with their mother, 7,6% live with their father and joint custody is represented by 18,9%. In Comunidad Valenciana, 80% of children lives with their mother, 5,4% lives with their father and joint custody is represented by 13,8% of cases (although regional law there seems to be no remarkable difference compared to national Spanish data).

According to Spanish National Institute of Statistics, the national data in 2011 is the following: 81,7% sole mother custody, 5,3% sole father custody, 12,3% joint custody. Joint custody does not generally imply exact time division between the two parents (it usually envisages very long periods to be spent with the non-resident parent).

In case of sole mother custody, time scheme is the following (over 50% of holidays, ensuring, in this way, over 20% of time to be spent with the non-resident parent). See Table IV

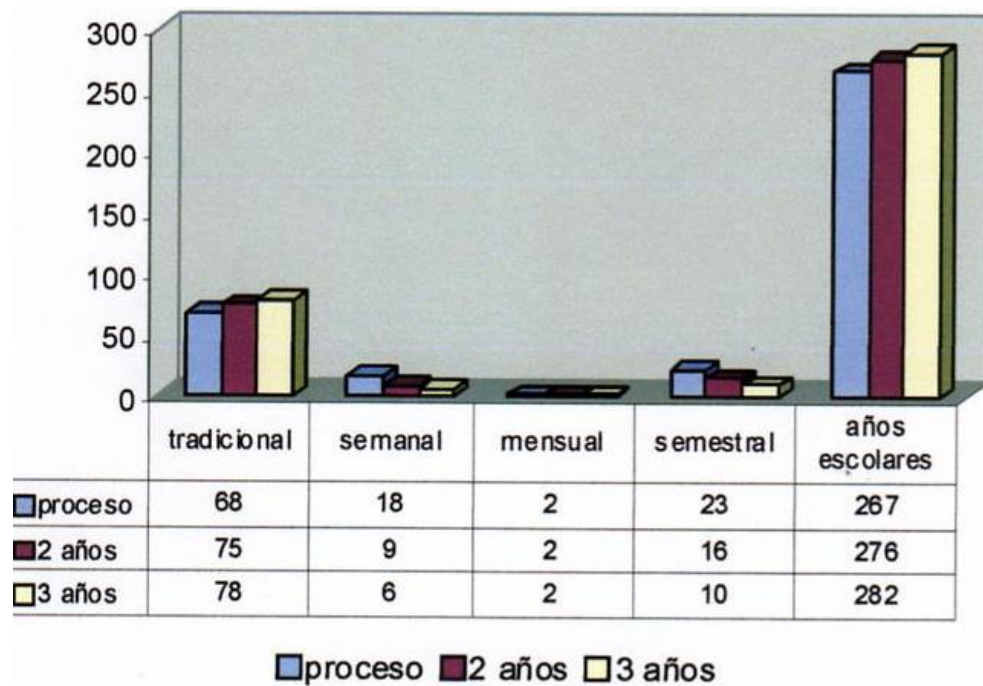
Table IV

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
mother	mother	m-f-m	mother	mother	mother	mother
mother	mother	m-f-m	mother	m-f	father	f-m
mother	mother	m-f-m	mother	mother	mother	mother
mother	mother	m-f-m	mother	m-f	father	f-m

According to a survey carried out by lawyer and family mediator José Luis Sariago Morillo taking into consideration 5,000 cases, in 8% of cases there was an extension of the weekend (from Friday right after school to Monday morning).

It is also very difficult to have realistic data about how many children subject to joint custody ("custodia compartida") do actually live with in alternating residency, but of course they are a large majority. Another survey carried out by Sariago Morillo on 378 families (with an average 2,1 children per couple) focused the attention on the aspect of time division and the evolution in the first three years. (33)

Figure 4



Definitions were:

1) Traditional legal joint custody i.e. children living with one the two parents while the other parent has the possibility to spend a lot of time with the children is represented by 50% of the total cases.

After three years from the beginning of shared custody, the percentage turns down to 20,63%, while 79,37% preferred equal time division, as shown below. (Figure 4).

2) Joint custody with alternating weeks residence (mother's and father's house or in one house with parents alternating their presence - this case is represented by 1,58% after three years). This is the judges' most preferred arrangement while parents usually prefer to reach an agreement between them, as described in Table V:

Table V:

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
f-m	mother	m-f	f-m	mother	mother	mother
m-f	father	f-m	m-f	father	father	father
f-m	mother	m-f	f-m	mother	mother	mother
m-f	father	f-m	m-f	father	father	father

3) Joint custody on a monthly basis (0,53% of the case): as described about but on a monthly basis (one month by the father, one month by the mother).

4) Joint custody on a six-months period basis (2,64%)

5) Joint custody on alternating school year basis, i.e. changing the resident parent during school holidays. (74,6%). This arrangement seems to be preferred when the family is advised by a family mediator. These three latest arrangements derive from an informal agreement between parents which is then ratified by the judge.

What is striking in the Spanish situation is that, although legal joint custody is not ordered, Spanish children have a wide possibility to spend large amounts of time with the parent B (not rarely, the average is 33% vs 66%, with lower rates if the child is younger than three years old).

In **Denmark**, the research has been carried out taking into consideration the reform of the law regarding child custody. An important survey was carried out in 2009 and included an analysis on all of the divorced couples with children having taken legal action. (34) First of all, it is important to underline that in Denmark, 90% of divorces is not ruled by court disposition as parents (on their own or advised by the Social Services) are usually able to reach an agreement for shared custody arrangement and children can benefit from large amounts of time to be spent with both parents.

In 2009, 1782 divorces were ruled by judges: in most cases, the problem concerned the legal custody of the child, in 40% of cases it concerned only (or also) the residence of the child. In 46% of cases, the judge ordered joint custody against the will of one of the parents, in 44% of cases the judge ordered sole mother custody and in 10% of cases the judge ordered sole father custody.

The judge ordered that the child should live with his/her mother in 63% of cases and with the father in 27% of cases. Very often parents reach an informal agreement instead of observing the judge's decision. For this reason, time division does not represent a huge problem for most families (only 18% of divorce trials took this aspect into consideration). Court decisions were therefore the following:

- up to 3 nights per month with non-resident parent (32% of judge's decisions)
- two alternating weekends per month with non-resident parent (32% of judge's decisions)
- up to 12 nights with non-resident parent (38% of judge's decisions)
- alternating custody 50-50 (18% of judge's decisions)
- prevailing co-living with non-residence parent due to temporary circumstances (2% of judge's decisions).

Another survey was carried out taking into consideration, on a long term basis, 6,000 Danish children born in 1995 (35). The survey analysed the family situation of these children when they were aged 4-5 months, 3 years and a half, 7 years, 11 years and 15 years and it took into consideration the interviews to both parents and children aged under 11 and 15. At the age of 15, one child out of three turned out to be child to a divorced couple.

64% of them, could benefit from joint custody of both parents, 32% sole mother custody and 4% sole father custody.

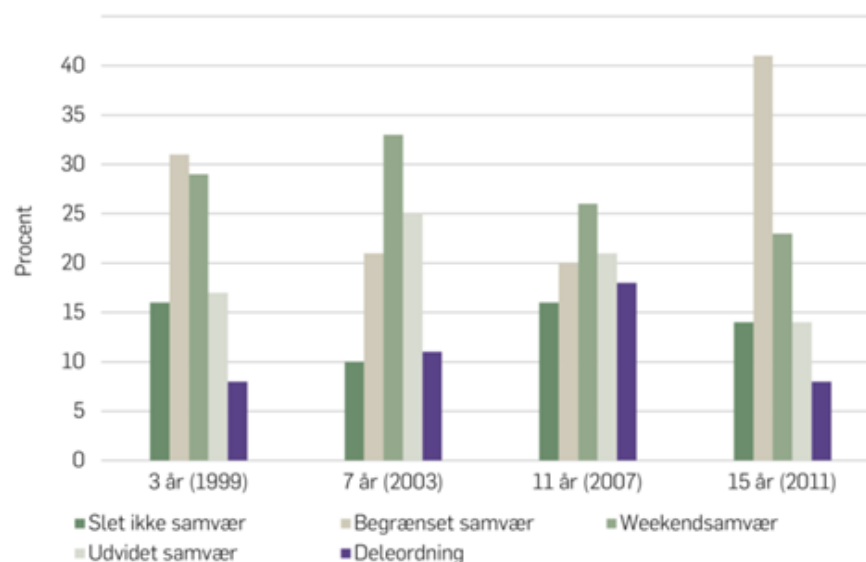
At the age of three, the child usually formally lived with his/her mother in 95% of cases. At the age of 7 and 11, he/she lived his/her mother in 92% of cases. At the age

of 15, he/she lived with his/her mother in 88% of cases. In that period (the survey dates back to 1995), actual shared custody and the alternating custody were largely exercised: alternating custody reached a level of 18% for 11-years-old children (it was about 10% according to Bjarnason and Arnarsson). See Figure 5.

The sum of equal custody with exact time division and shared custody reached, among children aged 7 and 11, 39%. Among children aged 15, the percentage was 22% (in 2011). Changes in custody arrangements, which are very frequent (almost 92% of the total amount of cases) are rarely due to dispositions ordered by judges, as they are rather the result of agreements between the parents (15% of cases), of children's will (40% of the cases), of health or job reasons (14%), emigration (16%), strong conflict between parents (11%). See Figure 5.

A fundamental condition to a successful joint/alternating custody is a reasonable distance between the two houses (the mother's and the father's house): 60% of successful joint/alternating custody cases was related to couples of parents living within 15 minutes away (by public transport) from each other. 30% was related to couples of parents living 15/30 minutes away from each other. Harmony between parents and flexibility seemed to be other factors for a success story of joint/alternating physical custody.

Figure 5. Different kind of custody trend on 6,000 children born in 1995.



Slet ikke samvær: no living together

Begraenset samvær: limited 'living together' (1-3 nights per month with parent B)

Weekendsamvær: weekend 'living together' (6 nights per month with parent B)

Udvidet samvær: extended 'living together' (until 11 nights with parents B)

Deleordning: shared 'living together' or 50-50

DISCUSSION

Despite the evident and direct consequences of maintaining a stable relationship with both parents on psychological and physical children's wellbeing, one of the most striking and clear results of this survey is that children are not treated all in the same way when their parents got divorced.

This survey actually pointed out remarkable differences in the treatment of children of divorced couples, differences that could be considered real discriminations regarding the right to co-parenting and the access to best practices according to their nationality.

Greek and Italian children's rights, for instance, are protected in a very different way compared to French or Swedish children's. And French or Swedish children's right are, for their part, differently protected compared to Romanian or Slovakian children's right. It is actually possible to monitor and assess the level of respect of children's rights concerning co-parenting through several parameters, which are all discretionary but also very explanatory.

For instance, it is possible to develop a Model 1 by evaluating the average amount of time theoretically available for children to be spent with secondary parent (although this method could be only applied for those Countries using the so called "photocopy sentences" - such as Italy - i.e. prepared forms to be filled with personal data of people involved while it would lead to inaccurate results in those Countries where each single cases is assessed and managed by analysing it in deep details.)

See Table VI

Table VI

Estimate average amount of time to be spent with the second parent

LESS THAN 16%	BETWEEN 16% AND 20%	OVER 20%
Switzerland	UK	Sweden
Austria	Italy	Belgium
Czech Republic	Portugal	France
Slovakia	Greece	Germany
	Romania	Spain
		Denmark

Alternatively, a second model can be developed (Model 2) by assessing the number of cases with exact time division (Table VII).

Table VII: protection of children's right to co-parenting in case of divorce in different European countries

SECTION 1	Sweden	Exact time division > 25%
SECTION 2	Belgium	Exact time division > 20%
SECTION 3	France, Denmark, Spain	Exact time division 8-20%
SECTION 4	UK, Germany,	Exact time division 3-8%
SECTION 5	Romania, Austria, Czech Republic, Slovakia, Italy, Greece, Switzerland, Portugal	Exact time division <3%

Another criterion that could be adopted in order to assess the co-parenting trend of each single country would be through an evaluation of the number of children that lose contact with one their parents after the separation/divorce (although we cannot rely on reliable data about this topic). Alternatively, we might take into consideration the percentage of children under physical joint-shared custody (see Table VIII). It is important to specify that by "physical joint (shared) custody" we mean, in this survey, that form of custody in which the child spend from 30% to 50% of the total amount of time with the secondary parent.

Table VIII

Physical shared custody<15%	15%< physical shared custody< 30%	Physical shared custody >30%
Italy, Switzerland, Greece, Austria, Germany	France	Sweden, Spain, Belgium, Denmark
Czech Republic, Slovakia		
UK, Romania		
Portugal		

An important aspect to underline on this matter is the frequent lack of official data on measures taken by judges in these cases: the expression “shared custody”, “joint custody” can assume different meanings according to different legal systems and in order to understand the actual meaning in each country, it was necessary to ask for the cooperation of local associations, which are active to promote the idea of co-parenting.

It is useful to remind ourselves that Robert Bauserman, in his famous meta-analysis published in 2002 and including a comparison between the “physical joint custody” and the “sole custody”, set the formal threshold of 25% of the amount of time to be spent with the parent B. Under this minimum threshold we shall talk about “sole custody”, regardless of the legal formal framework. (36)

It is interesting to point out that, in this perspective, almost the totality of European countries would be included in a sole custody framework, despite the professed and advertised institution of joint custody.

According to the different countries, we talk about “physical joint custody” starting from a minimum threshold of 30%, of 33,3% or 35% (up to 50% of the total amount of time). In UK, we talk about “shared parenting” (a range of time division from 30 vs 70 to 50 vs 50).

Generally speaking, the situation is undoubtedly grim: there are hundreds of thousands of European children losing a stable relationship with one of their parents (most frequently, the father) after the separation and legal systems seem to be unable to take this situation under control. This will undoubtedly lead to heavy consequences in the next years both on biomedical and social level.

One of the main reasons that led to this situation is that this kind of issue has always been treated from a legal point of view: moreover, the European Union consider family law as a national competence, so each Member State has the right to autonomously rule this field. This autonomy led to localisms which are often far from the best practices already followed in most advanced legal systems.

In fact in most Member States, it is Ministry of Justice (and not Ministry for Childhood or for Health!) that usually manages this kind of topic.

According to the Author of the study, there seems to be the need to finally change the language and start facing the issue of children’s treatment in case of divorce from a scientific point of view. This change of perspective would lead to the creation of a comprehensive language as well as the reduction in terms of discrimination and damage on children, of course, always ensuring the full legal autonomy of the single Member State.

The European Union could publish a general recommendation that might act as a booster element for Member States to develop a common harmonised code of conduct based on best practices already tested in other countries through a process which, in medical science, is called “clinical audit”.

Another aspect is linked to the European judicial traditions which, a part from some rare exceptions, seem not to be in line with most advanced scientific data (although there are remarkable progress in scientific research every 15-20 years, legal systems seem to be completely static) which clearly show how good for children relationships with both parents are.

In her remarkable revision, Linda Nielsen points out four conclusive aspects:

- 1) Children under physical joint custody (according to Nielsen, from 35% to 50% of total amount of the time with the secondary parent) seem to live as well as or even better than children living exclusively with their mother.
- 2) Parents (dispelling a widely spread myth in courthouses) do not need to be extremely cooperative, particularly enthusiastic about shared custody institution, nor totally free from conflicts).
- 3) After years, those children who experienced the shared custody usually report a full satisfaction.
- 4) Most industrialised countries seem to experience a change in terms of legal framework as well as a change in public opinion with regards to shared custody institution. (37)

The problem is, actually, not only legal but rather cultural and it gives rise to ideological conflicts: an interesting case study is provided by an article published by Oxford University, financed by an English charity association which is not in favour of shared custody. The article is based on the Australian experience and it reports clear evidences which seem to prove the supposed negative effects on children under 4 years of age of shared/alternating custody. The article is also mentioned in a survey financed by the European Union, carried out by the “Coordinadora española para el lobby europeo de mujeres” (“Spanish Coordinator of European Women Lobby”). (38,39)

The Australian survey, which assessed the new 2006 law on children custody, actually pointed out that, given the small number of sample cases taken into consideration, it was not possible to formulate statistic assessments nor general conclusions: these specifics, however, were not reported in the article Oxford University. (40)

The Australian law, published in 2006, imposed shared-equal custody in case of agreement between parents and it led to an increased level of family consensus (only a small percentage of these families decided for a 50% vs 50% time subdivision). (Table IX)

Table IX: Recourse to federal magistrates’ court and family court in Australia

Year	Family court	Federal Magistrates Court
2003-2004	45.004	70.261
2004-2005	37.394	73.853
2005-2006	35.066	73.287
2006-2007	27.313	76.807
2007-2008	20.337	77.169
2008-2009	18.633	79.441

Another serious aspect is related to the fact that many judicial decisions are not actually implemented and in case of non-observance of the decision, there seem not

to be appropriate and effective sanctions. It is also interesting to notice the remarkable difference between official data provided by governmental offices or by national institutes of statistics and the actual reality that the European citizens have to face in their everyday life.

For instance, if we compare the official Swedish data (92,1% of legal joint custody) with the Italian official data (89,8%), it may seem that the two countries are in a very similar situation in terms of protection of children's right to co-parenting.

In Sweden, over 30% of children have the possibility of keeping contact with both parents with exact time division while in Italy, the number of those children is irrelevant (the parent who, through a formal request, asks for equal custody, may also lose the right to legal joint custody!).

According to the author, it is not by chance that some countries which have been using the institution of divorce for a long time, and where there are very high divorce rates, have already started to develop some strategies to minimize the effect of divorce on the society. Moreover, these countries seem to be among the highest European ranking in terms of protection of children's right to co-parenting (namely Belgium and France, with raw rate equal to 2,6%: here divorce has been existing since 1789).

According to the author it is also true that social and cultural factors only have a slight influence on the application of physical joint custody with exact time division: the situation in Switzerland is enlightening. In this country there are three main cultural and linguistic communities but, in case of divorce, children belonging to the Francophone community are treated in a very different way compared to the children living beyond the national boundaries, in France and similarly if we compare how children belonging to the Germanophone community and German children are treated in case of divorce (the same difference in treatment can also be traced between Italian children and children living beyond the national boundaries).

The European trend is, however, slowly evolving in a positive way: 20 years ago there were fewer States recognising the institution of joint custody and those countries which introduced this institution in their legal system, had never removed it. The number of cases of shared custody with equal time division is slowly increasing in most of European countries (more rapidly in those countries that began to foster it earlier on, like Belgium) but it has to be highlighted that this is mainly due to informal agreement between the parents rather than because of judge decisions. It actually seems that courts are prone to ignore scientific evidence showing the positive consequences that such custody arrangement may bring to children and, by doing so, courts are demonstrating the existence of an ideal (Cartesian) barrier between the world of Human Knowledge (hereby included, the Law) and the Nature Knowledge (Medicine, Biology, Psychology). (41)

Leaving the central topic of this survey for just one moment, it might be interesting to point out that, in Europe, there is a general scanty consideration of male biological parenting, with very high peaks in certain European countries (namely, Italy, where sole father custody is exercised in 0,8% of the cases, despite the reassurances of authoritative representatives of Italian courts about the absolute impartiality and neutrality of the judges).

In practical terms, if we compare the figures, in many countries sole father custody **is** almost never justified, even in extreme circumstances such as acute mental disorders, unhealthy addictions or deleterious/dangerous behaviour on the part of the mother.

In line with this European trend, an official French report carried out in 2011 by the French Ministry for Social Affairs pointed out that, even in a father friendly country such as France, some indicators seem to prove the presence of discriminating sentences, based on gender. Generally speaking, there seems to be a tendency to avoid any form of paternal custody. (42)

Nevertheless, although the EU has never dealt with such violation of the equal opportunities principle, there would be many measures that could be promoted by the EU in order to increase the level of involvement of fathers in child's care, even before the divorce (just think about umbilical cord cutting, double signature on school report cards and on optional school activities, which is not required yet in many EU countries, as well as the obligation to authorization of both parents to change child's residency) saving the clear benefits from the involvement of a male role figure. (4, 13, 28, 43, 44, 45, 46,47, 48, 49)

On this last point the Author highlights the outcomes of national Swedish research of 2009 (45).

Joint physical custody seems to be a good way to avoid the loss of stable contacts between father and child/children (only 1,1% on children under alternating custody vs 21% of children living mainly with their mother, according to a reliable French survey). (50)

Another important factor affecting the relationship between secondary parent and child/children is the physical distance: there seems to be a point of no-return when the distance is so great that the parent is not able to determinate accurately the duration of the trip (in this case 81% of children lose contact with the parent B); beyond 4 hours of distance between the two residencies 33% of children lose definitively contact with the parent B. For this reason, the judge should assess with extreme accuracy each single case in which one of the two parents expresses his/her will to go far from his/her spouse bringing children with him/her. (50)

CONCLUSIONS

European governments are not able to provide us with concrete, real data about the application of joint custody, as they are only able to give us, and even then not always, official data.

In certain countries, children's rights to have a stable relationship with both parents is not even respected on the formal level, as established by the Convention on the Rights of the Child (1989).

In some other countries, real data, provided by local associations, show the lack of the respect for such children's right.

European children are treated differently (and sometimes with clear differences in the fundamental Right to Health) according to their nationalities and the legal system they are subject to.

It is necessary to make practices more harmonised by taking example from most advanced countries. Considering the consequences on children's psychological and physical health, this might be possible only by replacing the dominant "sectionalist" legal language with a more universal scientific language allowing all children to have an equal right to health.

There are complaints coming from several actors related to the lack of application of court decisions, which leads hundreds of thousands of children to lose their contact with one of their parents every year.

The consequences of this loss of contact between one of the parents and the child/children will turn out to be heavy on future European generations, both from a biomedical and social point of view (as shown by the best survey carried out so far).

It seems to be clear that children are prevented from having a stable relationship with their male parent and it therefore seems to be a concrete violation of the right to equal opportunities for parents.

"Children do not care if their parents adopted joint custody, sole custody, parental responsibility. Children only care about the amount of time they will be allowed to spend with their parents after divorce"

J. García Sanchez.

"Europe cannot be defined as truly "equal and fair" until it does not ensure the same care and attention for all of its children".

Gianadalberto Maria Aquilani

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