Ulrike Zartler and Jana Hierzer

Efforts to cut the Gordian knot. A sociological analysis regarding legal aspects of post-divorce parental responsibility

Bemühungen, den Gordischen Knoten zu durchtrennen. Eine soziologische Analyse der rechtlichen Aspekte elterlicher Verantwortung nach der Scheidung

Abstract
The organisation of parental responsibility is one of the most crucial and controversial issues in post-divorce family life. Based on the Austrian legal situation, this article first gives an overview of the historical development behind the legal organisation of parental roles and the position of children. Second, we explore how post-divorce parental responsibility has been discussed in the light of the most recent legal amendments. The contribution is based on two empirical sources: (a) 105 official written statements in the legislative process concerning the Parent Child Relations and Naming Rights Amendment Act of 2013, and (b) 14 qualitative interviews with lawyers, judges and legal experts. An outline of arguments related to parental responsibility after divorce or separation is developed and analysed from a sociological perspective, taking theories of recognition into consideration.

Key words: Divorce, separation, parental responsibility, custody regulations, child’s best interest, residency, family law, Austria

1. Introduction
One of the most crucial and controversial issues in post-divorce family life is the organisation of parental responsibility. While fathers’ rights movements have appealed for adopting a principle of pure equality between both parents, mothers predominantly argue...
in favour of models that prioritise one main caregiver and one primary place of residence. Children’s best interests are often used as an argument in the debate, but are rarely backed with children’s own perspectives.

Austria holds a specific position with regard to parental rights. Legal regulations include a history of inequality between mothers and fathers, mirror traditional role models, still allow the option of fault-based divorce and are centred on the principle of households. Recently, substantial legal amendments regarding the settlement of post-divorce and post-separation parental responsibility were made in the framework of the Parent Child Relations and Naming Rights Amendment Act of 2013 (Kindschafts- und Namensrechts-Änderungsgesetz 2013). The most important changes concern the obtainment and arrangement of (joint) custody, contact rights between children and parents, a definition of children’s best interests and changes in procedural law. An intensive public debate took place before the legal amendments came into force.

Against this background, the aim of the present article is twofold: First, we give an overview of the historical development behind the legal organisation of parental roles and the position of children in Austria. Second, we explore how post-divorce parental responsibility and children’s roles after parental separation have been discussed in the light of the recent legal amendments. The period of interest covers the legislative process and debate before the installation of these changes. As divorce of marriages and separations of nonmarital partnerships are constructed differently with regard to legal implications, both are included in the analysis.

The contribution is based on two empirical sources: (a) an analysis of 105 official written statements of diverse bodies and institutions in the legislative process concerning the Parent Child Relations and Naming Rights Amendment Act of 2013 and (b) 14 qualitative interviews with lawyers, judges and legal experts. By means of content analysis and thematic analysis, an outline of arguments related to parental responsibility is developed and investigated from a sociological perspective.

2. Parental responsibility and post-divorce family life

Post-divorce family life is considerably influenced by legal regulations. Over the past decades, the organisation of parental responsibility and the allocation of parental rights have proved to be particularly controversial in many European countries. In line with the detraditionalisation of gender and parent-child relationships, and changes in fathers’ roles, issues of post-divorce residence, custody and contact have been moving up the political agenda and have been discussed intensively in the scholarly literature and the public debate (Smart/Neale 1999; Collier/Sheldon 2006; Gilmore 2006; Trinder 2007; Probert et al. 2009; Schwarz 2011).

Existing research basically agrees that it is beneficial for the children of divorced parents to have regular and emotionally satisfying contacts with both parents (Amato/Gilbreth 1999; Amato 2000; Pryor/Rodgers 2001; Juby et al. 2007; Limmer 2007; Schneewind/Walper 2008). One possibility to provide extensive contact is joint custody – an issue which is discussed in a polarised way, particularly with regard to the condition of pa-
rental agreement (Bauserman 2002; Gilmore 2006; Bauserman 2012). Critics argue that joint custody against the will of one parent comprises old-fashioned values, exposes children to ongoing conflict and is only feasible for co-operating couples with a low level of conflict (Kuehl 1989; Smart 2004; Gisler et al. 2009). In contrast, others suggest that joint custody is, in essence, beneficial to child development and has the potential to guarantee gender equality (Bender 1994; Proksch 2002; Kruk 2005; 2011; Barth-Richtarz 2012; 2013).

Related debates contain powerful public narratives, that mostly rely on traditional concepts of the nuclear family (Gisler et al. 2009; Zartler 2012b), and are basically organised along a gender line, with some even referring to it as a “gender war zone” (Bala 1999). Feminist scholars argue that mothers and their care-giving activities have become increasingly invisible in family law, while fathers have gained undue importance. In contrast, fathers’ rights advocates claim that the courts give insufficient weight to the significance of fathers in the lives of their children, and argue that alimony payments should be related to time spent with the child(ren) (Boyd 2006; 2008; Kruk 2011; Collier 2014).

National family law is obliged to deal with these polarisations and is substantially influenced by international court rulings and treaties (e.g. European Convention on Human Rights, ECHR). As a consequence, joint custody regulations and dual residence models have become increasingly common in some countries (Bjarnason/Arnarson 2011; Cancian et al. 2014), although they are still heavily discussed as to their consequences for children (Smart 2004; Jensen 2009; Neoh/Mellor 2010; Nielsen 2011; Sünderhauf 2013). Recent studies have shown that divorcing parents’ decisions against joint custody primarily reflect the quality of the co-parental relationship and not necessarily parents’ considerations of their children’s best interests (Barth-Richtarz 2013; Jurczyk/Walper 2013). Based on international treaties, such as the UN Convention on the Rights of the Child, many countries place increasing emphasis on the wishes and feelings of children in family proceedings. Nevertheless, adults’ attempts to define children’s best interests and to share children equally have the potential to reduce children to passive objects (James/James 2004; Smart 2004; Jensen 2009).

In terms of sociological theory, further insights can be gained from theories of recognition, which understand human action as rooted in the need to establish mutual recognition of one’s own or one’s group’s identity and moral worth (Taylor 1994; Fraser 1995; Honneth 1995; Williams 1999; Fraser 2001; Honneth 2001; Lister 2001). Honneth (1995) has identified three distinct modes of recognition: close relationships among families and friendship that are constituted by strong emotional attachment (love); legally institutionalised relationships based on a stance of cognitive respect toward a group (rights); and networks or communities of shared values (solidarity). Taylor (1994) added that the more intensively given conditions are questioned, the more numerous the struggles for recognition among previously excluded groups. Fraser (1995) stated that recognition struggles always address issues of redistribution. In the case of parental responsibility after divorce, different resources need to be redistributed, e.g. time spent with the child or financial provision for the child.

A substantial step towards legal recognition is that “subjects reciprocally recognize each other with regard to their status as morally responsible” (Honneth 1995, 110). Imaginations of what constitutes a responsible person may differ during and after the process
of parental separation. From this perspective, recognition is linked with social respect and with the ability to claim one’s rights through a legal process, whereas denial of rights puts one’s social integrity and self-respect at stake. In this article, we conceptualise the debate surrounding parental responsibility after separation as connected with requirements of recognition by different involved groups – mothers, fathers, but also children (Smart 2004; Thomas 2012). This contribution explores the arguments that are used in this struggle.

3. Parental custody regulations: the Austrian context

This paper is based on empirical evidence from Austria, where divorce rates had been increasing over the last decades and decreased in the past years. After an all-time low in 1957 (14%), the total divorce rate reached its all-time high in 2007 (50%), steadily declining thereafter and currently (2013) totalling 40% (Statistics Austria 2013; 2014). Children’s risk to experience parental divorce before their 18th birthday amounts to 20% (Statistics Austria 2013) and reaches 30% if parental divorce and separation are included (Zartler/Berghammer 2013, 288). Mothers most frequently are the primary care-givers after divorce and remain the residential parents in 90% of shared custody cases (Figdor et al. 2006). This reflects couples’ traditional role models, as two third of the families with children under age 15 correspond to a (modified) male breadwinner model (full-time employed husband with unemployed or part-time employed wife) (Statistics Austria 2013).

Opinions regarding post-divorce custody appear to be polarised in Austria, as illustrated by the item “If parents divorce, it is better for children to stay with their mothers than with their fathers.” (Generations and Gender Survey 2012/13). Every fifth respondent (21%) (strongly) agreed, every fourth (25%) (strongly) disagreed, and more than half of the respondents (54%) were indecisive. Research based on qualitative data indicates that divorce still has a negative connotation, based on an idealisation of the nuclear family (Zartler 2012b; 2014).

Austrian family law mirrors traditional role models and adheres in part to empirically and theoretically obsolete concepts (Verschraegen 2011; Fischer-Czermak/Beclin 2012; Zartler 2012a). Legal regulations include a history of inequality between married and unmarried or divorced mothers and fathers, while being focussed on residential parents. Historically, marriage was the main way to legally connect men to children, and until the 1970s, Austrian fathers had substantially more legal rights in relation to children of a marriage than mothers did, e.g. only fathers were entitled to be children’s legal representatives and administrators. Marriage, in turn, generated economic obligations between fathers and children, whereas children of unmarried parents had limited rights only. Based on a patriarchal model, unmarried and divorced mothers could not obtain full custody for their children. They were only entrusted with everyday care and education; legal representation and the administration of property remained with the legal representative (i.e. father or youth welfare authorities). The fundamental family law reform of the 1970s brought an end to this situation, with the introduction of divorce by mutual consent and

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1 We would like to thank Caroline Berghammer for computation.
the possibility for divorced mothers to obtain full custody, while fathers were granted rights to maintain contact and obtain information, along with the freedom of expression.

With the Parent Child Relations Amendment Act of 2001 (*Kindschaftsrechts-Änderungsgesetz 2001*), the Austrian legislator provided for the first time the opportunity for parents to maintain joint custody after divorce, which was accompanied by an intensive public debate. Within this legal framework, joint parental custody could only be granted if (1) this was in the child(ren)’s best interest, (2) parents agreed on one primary place of residence for their child(ren), and (3) there was consensus between both parents (Roth/Stegner 2012). The evaluation of the *Parent Child Relations Amendment Act of 2001* indicated that joint custody is chosen by approximately half of all divorcing parents and is connected with positive outcomes regarding contact frequency, parental conflict and child support payments (Figdor et al. 2006; Barth-Richtarz 2012).

Until recently, custodial rights and application rights exercised by separated unmarried fathers were more restricted than those of divorced fathers. For formerly married parents, joint custody persisted after a divorce, unless this opposed the child’s best interest or parental consensus was missing. In these cases, sole custody was awarded to one parent after judicial case-by-case review. In contrast, unmarried mothers were granted sole custody unless both parents mutually filed for joint custody. Unmarried fathers were not allowed to go to court over custody issues or to apply for an individual judicial assessment. Obtaining sole custody was only possible de facto if the best interests of the child were endangered in case of sole maternal custody.

Some judgements of the European Court of Human Rights (Zaunegger vs. Germany², Sporer vs. Austria³) led to substantial modifications included in the *Parent Child Relations and Naming Rights Amendment Act of 2013* (Verschraegen 2010; Roth/Stegner 2012), regarding the obtainment and arrangement of (joint) custody, contact rights between children and parents, children’s best interests and procedural law (Barth/Jelinek 2013; Deixler-Hübner 2013; Doppel 2013; Deixler-Hübner et al. 2014). In principle, the legal framework now grants mothers and fathers equal rights, as laid down in Article 137, Section 1, of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*; abbreviated as *ABGB* below). Furthermore, Section 2 stipulates that “If and to the extent to which it is practical and possible, the parents should exercise joint custody.”

After parental separation, the legislator now allows for the continuity of joint custody for all parents who are entrusted with full custody, i.e. all married parents automatically and unmarried parents upon application. Unmarried fathers now have the right to apply for joint or sole custody (Article 180, Section 1, Clause 1, *ABGB*), while unmarried mothers are still entrusted with full custody after the birth of their child (Article 177, Section 2, *ABGB*). Regardless of the parents’ marital status, the legal amendments make it possible to impose joint custody against the will of one parent (Barth-Richtarz 2012; 2013; Beclin 2013). However, custody regulations always need to reflect the child’s best interests. Furthermore, rights of contact between children and their second parent have been accentuated and are considered to involve everyday care (Article 187, Clause 4, *ABGB*).

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2 ECHR, 03.12.2009 – 22028/04
3 ECHR, 03.02.2011 – 35637/0
In case of divorce or separation, the parents have to submit an agreement regarding parental custody and a primary place of residence for the child (Article 179, ABGB). In the absence of such an agreement or if one parent applies for sole custody, the law requires a period of provisional parental responsibility (“Phase der vorläufigen elterlichen Verantwortung”, Article 180, ABGB), the so-called “cooling-off phase”. Based on the experiences made during this (prolongable) period of six months, a court decision regarding custody has to be made, with the possibility to grant joint custody even in the absence of parental agreement if this is in the best interest of the child. Thereafter, custody changes can be required by either parent only on condition of significantly changed circumstances (Article 180, Section 3, ABGB) (Beck 2013).

Joint custody still requires an agreement on the child’s primary place of residence (Article 177, Section 4, ABGB), i.e. a place where the child spends more than 50% of the time. Consequently, the parent who lives at this place is the residential parent or the main caregiver and in any case is to be entrusted with full custody. Dual residence is legally not feasible. Nevertheless, a small – though statistically unverifiable – number of divorced parents lives in dual residence models (Barth-Richtarz 2009b; 2009a; Werneck 2011). The residential parent has the sole right to decide on the child’s place of residence (Article 162, Section 2, ABGB).

The Parent Child Relations and Naming Rights Amendment Act of 2013 explicitly defines the child’s best interest as the leading principle in all issues regarding custody and contact rights by means of twelve criteria (Article 138, ABGB). Participatory elements were included in this definition by direct reference to giving due weight to children’s views. Children must be heard by the judge from age ten onwards (Article 105, Section 1, Non-Contentious Proceedings Act; Außerstreitgesetz). Younger children may also be heard, which is usually conducted by other professionals (e.g. psychologists, social workers, staff members of youth welfare offices). Furthermore, children can be supported and accompanied to the court by a children’s counsellor in custody proceedings (Kinderbeistand, Article 104a, AußStrG). Children who have reached the age of 14 have rights of appeal and rights to obtain information (Article 104, Section 1, AußStrG). Contact rights are now defined as a duty of the non-custodial parent and as (enforceable) rights of the child (Article 186 ABGB), if in the child’s best interest. For example, children have the right to demand or to refuse contact with their parent once they have reached the age of 14 (Article 108, AußStrG).

With an emphasis on the child’s best interest, an overall goal of the Parent Child Relations and Naming Rights Amendment Act of 2013 was to shorten the duration of court proceedings (Article 13, Section 2 AußStrG) and to implement new instruments for the de-escalation of conflicts between parents to secure the child’s best interest (Deixler-Hübner/Mayrhofer 2013; Höllwerth 2013b; 2013a; Nademleinsky 2013). For example, a new instrument supporting families in court proceedings was implemented (Familiengerichtshilfe, Article 106a AußStrG), visit mediators (Besuchsmittler, Article 106b AußStrG) assist with regard to contacts between children and parents in conflictuous cases, and judges are entitled to order measures like family counselling, mediation or educational assistance (§ 107 Abs 3 AußStrG).
4. Empirical approach

This article is based on two empirical sources: (a) 105 official written statements of relevant bodies and institutions in the legislative process concerning the *Parent Child Relations and Naming Rights Amendment Act of 2013*, (b) 14 qualitative interviews with lawyers, judges and legal experts.

Initial negotiations and preliminary work for the legal reform started in 2009, resulting in a first draft law in February 2011. A revised draft law was published for examination and review on October 10, 2012, with a relatively short consultation period until November 5, 2012 (Roth/Stegner 2012; Jelinek 2013). The *Parent Child Relations and Naming Rights Amendment Act of 2013* entered into force on February 1, 2013.

The official written statements that provide the basis of the analysis were produced during the consultation period in 2012. The corpus material consists of 105 statements of five pages length on average, ranging from half a page to 20 pages. The statements can be allocated to five different groups of authors (see table 1). Approximately one quarter of all statements (26) was handed in by federal authorities and state administration bodies, i.e. federal ministries, provincial governments or civil registry offices. Another quarter of statements (24) was submitted by courts, judges and officials in the judicial context. Both groups of statements included comments on practical concerns for the judicial system, administrative changes and state budgetary issues, but also comments on parental responsibility and children’s rights following separation. Furthermore, nine statements from other legal experts, namely lawyers and jurists representing Austrian faculties of law, were included in the text corpus.

Forty statements were filed by pressure groups and NGOs who had diverse interests in the developments intended by the *Parent Child Relations and Naming Rights Amendment Act of 2013*. The statements can be allocated to the following subgroups: family counsellors, therapists or psychologists (7), Christian organisations (5), LGBT family initiatives (8), a dual residence platform (1), fathers’ rights groups (6), feminist organisations and NGOs concerned with violence against women and children (10) and children’s (rights) organisations (3). While some of these statements focused primarily on working conditions and rights for certain professions in the context of counselling, they included many arguments related to parental responsibility. Finally, six statements were emitted by individuals who were not part of one of the mentioned groups and whose statements were primarily based on their own experiences.

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4 This first draft was presented for public discussion, but did not undergo an official assessment procedure.

5 The parts regarding the Naming Right amendments came into force on April 1, 2013.
Table 1: Groups of official written statements

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<thead>
<tr>
<th>Group</th>
<th>Sub-group</th>
<th>Number</th>
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<tbody>
<tr>
<td>State administration</td>
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<td>26</td>
</tr>
<tr>
<td>Courts and judges</td>
<td></td>
<td>24</td>
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<tr>
<td>Legal experts, faculties of law</td>
<td></td>
<td>9</td>
</tr>
<tr>
<td>NGOs and pressure groups</td>
<td></td>
<td>40</td>
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<td></td>
<td>Family counselling, family therapy</td>
<td>7</td>
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<td></td>
<td>Christian organisations</td>
<td>5</td>
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<td></td>
<td>LGBT family initiatives</td>
<td>8</td>
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<tr>
<td></td>
<td>Dual residence platform</td>
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<tr>
<td></td>
<td>Fathers' rights groups</td>
<td>6</td>
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<tr>
<td></td>
<td>Feminist organisations, violence</td>
<td>10</td>
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<td></td>
<td>Children’s (rights) organisations</td>
<td>3</td>
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<tr>
<td>Individual statements</td>
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<td></td>
<td><strong>Total</strong></td>
<td><strong>105</strong></td>
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The data were analysed by means of content analysis (Mayring 2010). The arguments made in each written statement were first grouped by content and divided into discussed topics (e.g. joint custody after separation, application process, phase of provisional parental custody). Based on formal attributes with regard to particular amendments, the topics were then subcoded into diverse categories (e.g. conditions of joint custody) and related to group(s) raising those topics.

Additionally, 14 qualitative interviews with lawyers, judges and experts on family law were conducted between March and June 2011, referring to the first draft law. The interview partners were seven family judges, three high-ranking civil servants of the civil law division at the Federal Ministry of Economy, Family and Youth; two lawyers specialised in family law and divorce; the Austrian National Children’s and Youth Ombudsperson; and a university professor of family law. Seven female and seven male persons were interviewed.

The interviews were based on a topic guide, covering the legal construction of post-divorce families and parent-child relationships, an evaluation of the draft law, an international comparison of the Austrian legal situation and suggested needs for reform. The interviews lasted from one hour and 20 minutes to two hours. All interviews were transcribed verbatim and were analysed using content analysis (Mayring 2010) and thematic analysis (Froschauer/Lueger 2003).

In the next section, results from both empirical approaches are presented along four aspects of parental responsibility: parental rights and duties, children’s best interests, parental cooperation and custody regulations, and legal (in)equality. The results are illustrated with selected quotations.
5. Results

5.1 Parental rights and duties

The basis upon which parental rights were ascribed differed substantially in the data. Two types of arguments were retrieved: first, the notion that the obtainment of (custody) rights was connected to duties and an involvement in everyday care activities, second, a link between parental rights, biology and financial issues.

The main argument of feminist groups, several NGOs, faculties of law and interviewed experts was a definition of responsible parenthood via obligations and duties. In these constructions, actions were considered as the basis of parental responsibility. As a result, obtaining custodial rights was linked to concrete care and support activities such as child care, homework assistance or medical consultations. Thus, legal rights were not regarded as existing per se, but as being awarded after a parent had taken charge of specific duties:

“It is unacceptable that ‘biological fathers’ are granted rights but haven’t yet assumed or wanted to assume caring responsibilities and that they haven’t seen to a fair quality of relationships with their children and their children’s mothers” (9_Autonomous Women’s Shelters: 2).

Mothers were constructed as everyday caregivers both before and after divorce, which directly resulted in their central meaning for their children. This was regarded as being rooted in traditional role distributions with mothers as primary caregivers and fathers as providers of economic means. Based on these arguments, a demand was formulated that custody decisions in divorce proceedings should be primarily based on the parental role distribution during the upright partnership. Accordingly, fathers were constructed as parents who had to prove themselves as involved caregivers before being granted legal rights:

“I don’t think a simple statement of intent is sufficient, you’d have to include probation to some extent. It’s not enough that fathers just say they’re ready. I believe you ought to take a look at how they make an effort and what they do. And maybe also, how their children react. I don’t think it’s enough just to say ‘now, I could imagine custody’” (male civil servant, interview 4).

On the contrary, fathers’ rights groups as well as Christian organisations and some individual statements called for comprehensive custody rights for both biological parents, regardless of the previous fulfillment of duties and responsibilities. They asserted a construction of parenthood that obviated any significance of social parenting and based their arguments primarily on biological and ethical considerations:

“When women and men have children: Aren’t they mothers and fathers from that moment on, naturally, aren’t they ‘parents’ together, according to our civilising conventions […] and lawfully and necessarily to be obliged to obtain ‘joint custody’? And when the two separate from being a couple: Why should they have to or be allowed to stop being responsible, as mothers and fathers, for their children’s ‘custody’?” (61_Walter Stach: 1, individual statement).

In this understanding, parental rights were connected with economic aspects, and financial provision was regarded as an essential element of parental responsibility. Arguments for shared parental responsibility were linked to child support obligations, and fathers
were constructed as being paying fathers (“Zahlväter”). Accordingly, several interviewed experts regarded it as a major aim of the Parent Child Relations and Naming Rights Amendment Act of 2013 to put a focus on paternal rights, to strengthen fathers’ conscience of being responsible for their children, and to “overcome their role of unwilling payers and weekend visitors.” (male judge, interview 10).

The interviewed experts related the dichotomy of legal rights and everyday duties to a larger historical context, mainly referring to the fundamental family law reforms of the 1970s. They supposed that the strengthening of maternal rights had a negative impact on fathers’ self-esteem:

“It was really an unpleasant situation for women who only had duties but no rights. That changed with the family law reform. But then the men were the ones who lost their parental status (as fathers) and they turned into visiting uncles. That was a bad blow for men who suddenly were limited to visiting hours and, of course, they also had to pay alimony” (male civil servant, interview 7).

5.2 Children’s best interests

Children’s interests after parental divorce were a topic raised in almost all statements and interviews, though only three statements stemmed from children’s (rights) organisations or official bodies (Association of Ombudspersons for Children and Youth, National Youth Council, Federal Association of Child Protection Centres). Throughout both data sources, the legal definition of children’s best interests and its primacy in all judicial decisions was emphasised as particularly positive. Nevertheless, judges, civil servants and children’s rights lobbies characterised the use of the term *children’s best interests* as almost inflationary, which led to concerns of instrumentalisation. Some actors expressed their worries that children’s best interests would be misused during court procedures in order to pursue each parent’s particular interests:

“If you write children’s best interests into the wording of a law, that sounds great. But whatever happens then is a completely different story that has to do with power and mothers’ and fathers’ interests. Children’s rights are actually trodden on” (female civil servant, interview 1).

Only children’s (rights) associations’ and some feminist advocates’ statements highlighted children’s right to be adequately informed, their participation in decisions and their right to express their opinion during and after parental divorce as primary sources of children’s well-being. The Children’s and Youth Ombudspersons clearly highlighted contact rights as children’s rights. Feminist groups constructed children’s best interests primarily with regard to the right to refuse contact with the non-custodial or non-residential parent. Children’s best interests were closely linked to everyday care activities, and their independence from biological ties or a specific amount of contact with the other parent was underlined. While mothers were ascribed a long-term and all-embracing responsibility for their children’s well-being, fathers were presented as acting strategically in this regard:

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6 Two statements were submitted by groups that refer to children in their names, but are rooted in the fathers’ rights movement: “Action Group Children’s Rights” (Bürgerinitiative Kinderrechte, www.kind24.co.at) and “Dialogue for Children in Austria” (Verein Dialog für Kinder in Österreich, www.dialogfuerkinder.at).
“Our experience in counselling shows that men who are threatened with losing their children tend to take exaggerated measures that disturb the lives of their children and their children’s mothers. It should be noted that these measures do not serve the children’s well-being but rather that they are exclusively panic reactions of non-caring parents (mostly fathers) in upright partnerships” (41_Network Women’s and Girl’s Advice Centres: 4).

Therefore, it was argued that custody decisions should not be based mainly on fathers’ behaviour during the six-months period of preliminary parental responsibility, but on their activities during the upright partnership. This argumentation was connected with a plea for mothers’ superior custody rights.

Fathers’ rights groups connected children’s best interests primarily with (parental) contact rights. They argued that a consideration of children’s best interests absolutely, naturally and necessarily required the children’s unlimited contact with both biological parents. Comprehensive contact was constructed as the primary principle and as the basis for children’s well-being after parental divorce. Furthermore, statements brought forth by fathers’ rights groups distinguished between children’s will (as expressed by the child) and children’s best interests (as defined in terms of contact), calling into question whether children were able to express their will autonomously without being influenced by their mothers. Children were constructed as relatively passive beings, with fathers lobbying for children’s psychological health and being confronted with contraproductive maternal behaviour:

“It is imperative to note the difference between children’s will and children’s best interests. Children’s best interests do not imply total submission to children’s will. Such a procedure would overload their psyche and further result in personality disorders. Children are thereby talked into being guilty themselves if contact with their fathers no longer maintains. Those who deny the right of access should not be given the option to avoid responsibility at the expense of their children – just as much as institutions must not avoid responsibility under reference to children’s best interests, which actually means reference to children’s will. In current court hearings, those entitled to custody frequently argue that their children do not want visiting contacts. Such statements in hearings are often based on manipulations on the part of those entitled to custody” (1_Association “Vaterverbot”: 4).

Fathers’ rights groups blamed mothers for actively keeping them away from their children and manipulating their offspring. Psychological arguments were frequently used in this context, e.g. regret was expressed that the Parental Alienation Syndrome – describing the estrangement of a child from one parent, based on indoctrination by the other parent – was not included in the new legal regulations as one form of psychological violence against children.

5.3 Parental cooperation and custody regulations

The legal amendments as formulated in the Parent Child Relations and Naming Rights Amendment Act of 2013 imply major changes with regard to parental cooperation (see above). In particular, the question whether joint custody should require parental consensus had been lively discussed before the introduction of the legal amendments and was also an important topic in both data sources. A large majority of statements and interviewsapproved of joint custody as a means of active parenting after a divorce. Nevertheless, the conditions under which this was considered adequate differed considerably.
A large and heterogeneous group – consisting of lawyers, official and administrative bodies, children’s rights organisations, legal experts, and feminist groups – argued in principle in favour of joint custody, but called to consider specific conditions (e.g. cooperation between parents, a minimum of mutual respect and communication, low level of conflict, absence of violence). These actors argued that an order for joint custody in case of parental conflict and missing consensus, i.e. against the will of one parent (as stipulated by the legal amendments), would make parental cooperation impossible, lead to an escalation of conflicts, and thus have a negative impact on children’s wellbeing. In the case of parental conflict, sole custody was regarded as preferable and beneficial to children’s wellbeing:

“When parents agree, they require neither a verdict or judgement, and in the case of disagreement and conflict, it’s better for those involved if one party is solely responsible. Especially children and adolescents need a clear orientation as to who makes decisions” (51_Austrian Women’s Ring/Österreichischer Frauenring: 2)

In contrast, fathers’ rights activists and some clerical organisations rejected the formulation of conditions with regard to custodial rights and argued in favour of joint parental action even in the presence of conflict. It was assumed that joint custody would in general lead to a reduction of parental conflict, which, in turn, would prove beneficial for the involved children. A strong emphasis on the importance of parental cooperation, raised by fathers’ rights groups, was paired with serious accusations towards mothers who were described as “the blocking parents”. Two sources of parental conflict were identified: first, mothers were blamed “for monopolising sole custody by means of insufficient communication” (13_Fathers Without Rights: 3). Second, it was argued that parental conflict was mainly caused by legal inequalities and would thus be reduced once legal equality was granted. An unconditional continuation of joint custody after divorce was thus regarded as being able to de-escalate parental conflicts. Difficulties in accessing children and enforcing a right of custody were mentioned, and legal inequalities with regard to parental cooperation were described with drastic words:

“That leads to most of the conflicts, parents clinging to their children as if they owned them and thus sending the others who want to maintain their relationships to the mills of justice, accompanied by assessors, youth welfare services, enormous costs, lawyers and months of alienation. So it’s actually the rule of force that would win tentatively for the benefit of whoever could strip their children away and exclude their co-parents” (59_Association “In the Name of Parental Responsibility”: 4)

Some actors, mainly among official bodies, interviewed judges and civil servants, advocated for an intermediate position. They differentiated between various forms of conflict, argued in favour of a thorough case-by-case assessment and put parental behaviour after divorce into perspective:

“I don’t think it’s right to say that parents are not suitable for joint custody just because they argue over alimony, that’s too much of a gut reaction. Basically, you’re allowed to want something for your child together and care for your child together in some way or another and still quarrel about money. That isn’t a reason to disqualify people. But it still shows how reality is. Not all of them are just well-meaning, nicely co-operating people anxious to care for their children’s well-being” (female judge, interview 5).
These actors argued in favour of joint custody in general, but highlighted the necessity to deviate from this strategy if co-operation was no longer feasible. Nevertheless, even in the presence of conflict, a stronger impact on parental co-operation was proposed, in the medium term, to possibly contribute to a reduction of conflict resolution before the court.

Furthermore, parental co-operation was also discussed in the context of the phase of preliminary parental responsibility. Some official bodies, courts, judges and feminist groups supposed that by compelling parents (also those who file contradictory applications) to co-operate during this phase, the chances that both parents take the responsibility for parental tasks would rise. Hence, this instrument was regarded as considering both children’s best interests and parental contact rights, being in line with the right to family life, as formulated in Article 8 of the European Convention on Human Rights. Nevertheless, a thorough evaluation was considered to be important, and the fear was expressed that the other parent would use the “cooling-off” phase as a tactical tool to prioritise his or her own benefits over children’s interests by co-operating only during this period in order to influence the court decision. Thus, the validity and prognostic power of parental behaviour during this period was questioned:

“The six-month phase of pacification and probation is the first step toward de-escalation and should be extended, if necessary. But in order to decide whether joint custody should be enacted for the benefit of children’s best interests, you need to establish to what extent the parents have adhered or were able to adhere to the agreements made for this period. In other words, you need to know to what extent they have co-operated for the benefit of their children’s best interests” (47_Austrian Platform for Single Parents: 2).

Fathers’ rights activists and some official bodies raised concerns that the period of preliminary parental responsibility would promote an instrumentalisation of children and their alienation from the non-resident parent:

“It’s missing the point to call this arrangement a ‘cooling-off phase’, because this phase of probation and waiting is associated with a high risk of constraining parent-child relationships. It is to be expected that in this period, preparations for sole custody would move into high gear by instrumentalising the children. Finally, the court would rule in the presence of living conditions that have already lasted for more than six months” (13_Fathers Without Rights: 1).

Thus, the proponents called for intensive contact between the child and both parents over the phase of preliminary parental responsibility. Some official bodies (e.g. Federal Association of Psychotherapists, Child and Youth Ombudspersons) also considered the regulations as problematic, as they were characterised as determining a preliminary decision which could hardly be revised afterwards. Therefore, the expression “forced parenthood” was used, assuming that the “cooling-off phase” would provoke an escalation of conflicts rather than lead to a calming down effect.

5.4 Legal (in-)equality

The production of (in-)equality via legal regulations was particularly prominent in the statements of feminist advocates and fathers’ rights groups who, respectively, ascribed structural discrimination to mothers’ or fathers’ situation. Various other actors (e.g. judges, official bodies, NGOs) also elaborated on the planned amendments’ potential with this regard.
Actors who took the side of mothers connected structural discrimination with the attempt to install joint custody as a rule. Other mentioned aspects of structural discrimination were gender inequality in the workplace, economic disadvantages of divorced mothers or the missing appraisal of their care activities before court. Structural discrimination in this sense invoked conservative discourses on the family that implied paternal authority over mothers, regardless of caregiving patterns:

“The concept of this bill in particular, according to which one parent, as a rule, would take over most of the care while both parents have the same rights of co-determination in custody, is objectionable in view of the constitutional principle of equal treatment. That’s because it structurally discriminates the care-giving parent (mostly mothers) by imposing the burdens of everyday upbringing on them. At the same time, the broader competencies of decision-making with regard to child care and education that would usually accompany such burdens are not given consideration. In turn, fathers’ rights to make independent decisions that would subsequently impact the care-giving mothers’ lives even reminds of the concept of ‘paternal authority’ thought to be overcome since long” (35_Department of Civil Law, University of Vienna, Beclin: 8)

In contrast, fathers’ rights groups, Christian organisations and some individual authors of statements regarded legal equality as an unquestionable precondition for any kind of parental responsibility and considered joint custody as the basis. The argumentation was based on Article 8 of the European Convention on Human Rights and emphasised that unmarried fathers’ rights of application, although they were essential in order to prevent structural discrimination, were on no account sufficient. The planned legal amendments were harshly criticised for being too modest, and a plea for automatic and unconditional joint custody was formulated. Fathers were seen as being subjected to structural discrimination and exclusion, being tied with three issues: first, the fact that unmarried and divorced fathers still even had to apply for custody; second, the fact that mothers still had the right to appeal against a fathers’ application for joint custody; and third, the missing legal option of dual residence. Also judges’ wide margins of discretion in custody decisions were criticized, and a supposed undue preference for mothers in the legal system was regarded as complicit in excluding fathers from the lives of their children:

“A right of application is just a formal possibility to obtain joint custody and provides no legal certainty. Fathers again depend de facto on mothers’ wills and on official arbitrariness. Therefore, the draft law would need to be modified as to both parents’ right to joint custody as of child birth, regardless of gender and for unmarried and married parents in equal measure” (13_Fathers Without Rights: 1).

In general, the power of legal regulations with regard to parent-child relationships was questioned by many actors, both in the written statements and in the interviews. The influence of the law on the establishment and maintenance of personal relationships and emotion-based behaviour was regarded as limited: “You can’t accomplish a parent’s devotion to his or her child with legal measures. That’s where the law reaches its limits” (male civil servant, interview 7). Changing the letter of the law was regarded as inadequate or insufficient to induce changes in parental behaviour, which is why interventions like mediation, educational assistance or pedagogical support were positively highlighted.
6. Conclusions

Family law is a key element in mediating processes of social change. It comprises a system of principles that underpin the social construction of behaviours, attitudes, and relationships, it contributes to the conception of different family members, and it has a significant impact on the way they are treated and their interests are responded to (Teubner 1989; Schneider/Matthias-Bleck 1999; Fionda 2001; James/James 2004).

The original version of the Austrian Civil Code, dating from 1811, was based on the nuclear family model. Unmarried and divorced mothers were primarily entrusted with obligations and duties and were not entitled with legal rights towards their children, while fathers were in a particularly powerful position. Not until the 1970s were mothers granted with the possibility to obtain full custody, while divorced fathers only had limited rights. Based on new normative approaches towards fathers’ roles and related to decisions of European courts, divorced fathers have recently demanded an extension of their rights. Similarly, children's rights also play an increasingly prominent role. The question as to how adequate rights can be granted to these different actors forms the basis for lively discussions. These historical legal developments provide the framework for the current debate about post-divorce parental responsibility.

This article explored discussions about legal changes with regard to parental responsibility following divorce or separation, referring to the Austrian Parent Child Relations and Naming Rights Amendment Act of 2013. Based on 105 official written statements and 14 interviews with legal experts, considerable differences in the construction of parental rights became evident: Feminist groups, several NGOs and interviewed experts constructed parental rights and responsibilities as resulting from the fulfilment of obligations and (child care) duties. In contrast, fathers’ rights groups, Christian associations and several individuals connected parental rights with biological ties and financial provision. Accordingly, the former group requested specific conditions for awarding joint custody and argued in particular against joint custody in case of parental conflict, while the latter rejected the inclusion of any conditions into the wording of this amendment act.

Recognition of rights was an inherent topic in many statements. Both feminist groups and fathers’ rights advocates perceived structural discrimination related to their own groups and struggled for recognition. Attempts to attain recognition were based either on the fulfilment of parental duties (mothers) or on a principle of pure legal equality (fathers). Such a formal equality model does not consider power relations, gender differences or the division of care responsibilities before separation. In accordance, the statements were inconsistent as to whether equality meant equal time spent with children, equal care-giving responsibilities or equal decision-making authority.

Although children were constantly invoked, their views were poorly represented in the debate, and their requirements for recognition only played a minor role. Via an emphasis on children’s well-being, children’s rights were transferred to parental rights with regard to custody or contact. Children were constructed as passive victims of parental divorce whose best interests were to be interpreted or modified by an adult – either by their mothers as caregivers or by their fathers as advocates. Adult perspectives, agendas and interpretations dominated the debate on outcomes and regulations for children. This clearly has the potential to restrict children’s agency and to promote their instrumentalisation.
Principles of fairness and equality are difficult to establish for divorced or separated parents, yet it becomes even more complicated to cut this Gordian knot once children’s perspectives are considered adequately (Smart 2004; Jensen 2009; Nielsen 2011). The still existing, potentially unresolvable dilemma is how the wishes and needs of the involved children, mothers and fathers can be met without disadvantaging any of them. What weight should be given to children’s, mothers’ and fathers’ wishes? Shall the claims of all three groups be regarded and treated as equal? Is there a proper balance between the different views? Do parents prioritise parental rights over children’s best interests?

Existing legal approaches can only support divorcing families in finding the best possible approximation to solve these questions. Scholarly research has shown that neither one type of custody nor a “one size fits all” approach can be deemed to a satisfactory solution (Boyd 2006; Gilmore 2006). In an attempt to consider the principles embodied in the concept of recognition, courts are called to approach the allocation of parental custody with an open mind and to assess the appropriateness of a given arrangement based on considerations for every particular case. This requires flexibility and considerable resources in terms of time, money and personnel. It may prove useful not to limit the debate to legal rights, equality and justice, but to extend it towards greater recognition of the needs and interests of the involved individuals. For this reason, research that sheds light on the needs of all actors has to be further developed, together with a considerable enlargement of available data regarding the impact, the practical, theoretical and procedural implications of legal amendments.

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