

## ARTICLE

# Parental Equality in the European Human Rights Regime: Does European Human Rights Law Allow for Mothers and Fathers to be Evaluated by Different Standards in the Context of Custody Disputes?

*Tapio Pauli Alekski Koivula LL.M*

## 1. Introduction

International agreements and human rights movements have promoted an increased focus on the rights of children worldwide, and have also brought the rights of their parents to the forefront. Properly safeguarding these rights has been made more difficult by the increased divorce rates and extramarital relationships in Western societies, which has naturally led to an increase in custody disputes as well. In the Netherlands, for example, more than one in four children have to experience the separation of their parents,<sup>1</sup> while in countries like Sweden and Latvia, more than half of all marriages end in divorce.<sup>2</sup> Simultaneously, marriage rates in European Union (EU) countries have significantly dropped, even faster than divorce rates have risen.<sup>3</sup> In fact, the very foundations of the family model have undergone major shifts in recent decades, with the very concept of parenthood having been separated from the marriage union,<sup>4</sup> and around 42% of live births in the EU taking place outside of marriage (as of 2018).<sup>5</sup> These fundamental changes in family formation and perceptions of parenthood have challenged legal systems with regards to family relations and child custody. In these challenging and often volatile cases, many different rights are simultaneously at stake, rendering

1 N. Nikolina, 'The Influence of International Law on the Issue of Co-Parenting: Emerging Trends in International and European Instruments', *Utrecht Law Review* 2012 vol. 8, no. 1, p. 122-144, 122.

2 'Worldwide Divorce Statistics' (*Divorce* 2013), <http://divorce.com/worldwide-divorce-statistics/> (last accessed 7 March 2022).

3 Eurostat, 'Marriage and Divorce Statistics' (*Eurostat* 2019), [https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage\\_and\\_divorce\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics) (last accessed 7 March 2022).

4 A. Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights*, Cambridge: Cambridge University Press 2019, p. 6; K. Sodermans et al, 'Involved Fathers, Liberated Mothers? Joint Physical Custody and the Subjective Well-Being of Divorced Parents', *Soc Indic Res* 2015 vol. 122, no. 1, p. 257-277, 257; R. van Krieken, 'The "Best Interests of the Child" and Parental Separation: On the "Civilizing of Parents"', *Modern Law Review* 2005 vol. 68, no. 1, p. 25-48, 34.

5 Eurostat 2019; Eurostat, '42% of Births in the EU Are Outside Marriage' (*Eurostat* 2020), <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200717-1>, (last accessed 1 September 2021).

decision-making at the courts a highly delicate balancing act between different human rights.

Debates regarding custody policies have been characterized by changing gender roles and a battle for equality.<sup>6</sup> Gender-based parenting roles have grown increasingly blurry in Western countries, as they continue to equalize and become more comparable between mothers and fathers,<sup>7</sup> resulting in an outcry to change legal systems accordingly. In particular, fathers' rights movements have gained traction across the Western world,<sup>8</sup> due to a growing dissatisfaction with the generally perceived mother-focused approach to custody cases. Already in many Western States, joint parenthood is considered first after parental separation.<sup>9</sup>

The aim of this article is to identify what international agreements have to say with regards to the evaluation of parental qualities of mothers and fathers in custody disputes, and to answer the question of whether European human rights law leaves room for the use of different standards in the evaluation of care-giving qualities between parents in the context of custody. Essentially, the question is whether fatherhood and motherhood intrinsically carry any different implications on the exercise of parental rights, or call for different approaches to the interpretation of rights regarding children. The Convention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR) will be considered to constitute the most fundamental elements of European human rights law, due to their great influence on children's rights legislation and practice in Europe. The main idea is to discover whether the source of complaints relating to parental equality can be traced back to international law in any noticeable way. Law is generally slow to adapt to societal changes, especially on the international level, yet the global children's rights system is mostly based on international agreements and consensus among States. This makes it imperative to analyze the topic from the perspective of international law; a perspective that is still lacking in studies on the relationship between parenting and childhood.<sup>10</sup> Moreover, due to the great significance of the case law of the European Court of Human Rights (ECtHR) on European domestic

6 R. Mnookin, 'Child Custody Revisited', *Law and Contemporary Problems* 2014 vol. 77, p. 249-270, 255, 263.

7 Margaria 2019, p. 8; Mnookin 2014, p. 256-258.

8 M. Kaye & J. Tolmie, 'Fathers' Rights Groups in Australia and Their Engagement with Issues in Family Law', *Australian Journal of Family Law* 1998 vol. 12, p. 19-68; S. Gordan, 'Fathers' Day' (*Canadian Bar Association Magazine* 2010), <https://web.archive.org/web/20100131060827/http://www.cba.org:80/CBA/National/dec03/cover.aspx> (last accessed 7 March 2022).

9 A. Singer, 'Active Parenting or Solomon's Justice? Alternating Residence in Sweden for Children with Separated Parents', *Utrecht Law Review* 2008 vol. 4, p. 35-47, 35-37; F. Granet, 'Alternating Residence and Relocation: A View from France', *Utrecht Law Review* 2008 vol. 4, p. 48-54, 48-52; C.J. de Boer, 'Parental Relocation: Free Movement Rights and Joint Parenting', *Utrecht Law Review* 2008, vol. 4, p. 73-82.

10 C. Faircloth & R. Rosen, 'Childhood, Parenting Culture, and Adult-Child Relations in Global Perspectives', *Families, Relationships and Societies* 2020 vol. 9, no. 1, p. 3-6, 3.

legal systems,<sup>11</sup> studying the topic from that perspective holds great potential usefulness for domestic practice as well.

The analysis will be based on two international legal instruments, as well as views and case law from their supervisory bodies relating to their interpretation. Academic literature will also be drawn from. The legal instruments used are the CRC and the ECHR. As the backbone of international children's rights adjudication, and the source of the concept of the 'best interests of the child', the inclusion of the CRC is essential to understanding what European children's rights protection is built upon. It is also important for the purposes of comparing approaches to the best interests of the child and the role of parents between different treaties. The CRC and the ECHR together serve as a baseline and reveal common trends in European child adjudication – the interpretation and application of these instruments, particularly in the context of the best interests of the child, also form the basis of how mothers and fathers as caregivers are understood in European law, and how this factors into the assessment of the best interests of the child. The views of the Committee on the Rights of the Child (CRC Committee), as well as case law of the ECtHR are referred to, as they reflect the application of the relevant provisions of the chosen legal instruments within the European human rights regime. The ECtHR, in particular, has been among the most influential actors with regards to legal convergence in European human rights law.<sup>12</sup> Case law of the ECtHR has been selected on the basis of whether a custody dispute has formed a major part of the facts of the case, and in that context, whether the mother and father have been evaluated separately as potential guardians. The selected case law is non-exhaustive, but serves to offer concrete illustrations of potential differential assessment of motherhood and fatherhood, as well as the impact of the best interests of the child on these assessments.

Firstly, the CRC and the ECHR will be briefly analyzed to identify the position of the best interests of the child in the European human rights regime. Secondly, the relational character of the rights of the child and the rights of parents will be examined, as the latter derives from the former and cannot be taken in isolation. This is done to demonstrate the link between the best interests of the child and the rights of parents, in order to provide some much-needed contextual background for the issues discussed. Additionally, it serves to emphasize the need to avoid seeing parents and children in an antagonistic light in custody disputes – an approach that is easy to fall into due to the categorization of the different parties.<sup>13</sup> Thirdly, the main research question will be addressed by identifying two main factors that may leave room for parental inequalities in custody cases: 1) values and

11 H. Keller, 'Article 8 in the System of the Convention', in: A. Büchler & H. Keller (eds.), *Family Forms and Parenthood: Theory and Practice of Article 8 ECHR in Europe*, Cambridge: Intersentia 2016, p. 3-28, 3.

12 *Ibid.*

13 R. Rosen & C. Faircloth, 'Adult-Child Relations in Neoliberal Times: Insights from a Dialogue across Childhood and Parenting Culture Studies', *Families, Relationships and Societies* 2020 vol. 9, no. 1, p. 7-22, 12.

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perceptions of parenthood, and 2) the indeterminacy of the best interests of the child. This will be followed by concrete illustrations of different approaches to motherhood and fatherhood in the ECtHR in the context of custody disputes. Finally, these points will be brought together in an attempt to answer the main question: does European human rights law allow for mothers and fathers to be evaluated by different standards in the context of custody disputes?

## 2. International instruments featuring the best interests of the child

In the European context, some of the most important legal instruments besides the CRC are the ECHR and the EU Charter. These instruments have had a profound influence on children's rights protection in Europe, and most European countries have committed to following these conventions. These agreements and their monitoring bodies have made considerable developments with regards to handling custody disputes on an international level, such as increased cooperation between States and the introduction of common standards irrespective of State. This section will look at how the concept of the best interests of the child is presented in these instruments.

### 2.1 *Convention on the Rights of the Child*

The most well-recognized international treaty with respect to children's rights is the CRC, which came into force in 1990 and remains the most widely ratified treaty worldwide to this day.<sup>14</sup> The importance of this convention to the protection of children's rights cannot be understated.

The best interests of the child, a legal concept forming the backbone of children's rights protection, is laid out in Article 3(1) CRC. It provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>15</sup>

### 2.2 *European Convention on the Rights of the Child*

In the ECHR, the best interests principle is not directly mentioned. However, it has been incorporated into practice, as the ECtHR applies it in the context of rights provided for by the ECHR in child-related adjudication.<sup>16</sup> This organic development has been implicitly recognized by the Court itself, which stated in *Neulinger and Shuruk v. Switzerland* that:

14 S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague: Martinus Nijhoff Publishers 1999, p. 1.

15 Art. 3(1) CRC.

16 ECtHR 3 October 2014 (*Jeunesse v. The Netherlands*), no. 12738/10 [109]; C. Smyth, 'The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled Is the Court's Use of the Principle?', *European Journal of Migration and Law* 2015 vol. 17, p. 70-103, 71.

[...] there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount.<sup>17</sup>

Although the best interests principle is not explicitly mentioned in the main text of the ECHR, Protocol 7 of the Convention does reference the interests of children in connection to family separation in Article 5, which is particularly relevant for parental equality. It reads:

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.<sup>18</sup>

### 3. Relational character of the child and parents under European human rights law

The rights of parents are strongly linked to the rights of the child.<sup>19</sup> Because of this, the relational character of these rights is imperative to understanding the role of the parents in the best interests of the child, and the reason parental equality should be understood as being in those best interests. This is all the more important due to how easy it is to see parents and children almost as ‘opposing’ categories of parties in the context of custody.<sup>20</sup> This section will provide contextual background for the research of this article by examining the links between the rights of the parents and the child in the context of European human rights law, starting with the family unit, which binds all of these rights together under a single institution. This will be followed by an examination of the individual character of the rights of the family members, as well as an analysis on the connectedness of the rights of the parents with those of their children. The goal of this section is to contextualize the equality of the parents within the framework of the best interests of the child, demonstrating why the research question of this article is relevant from the point of view of the child (as opposed to merely the parents) and in need of further examination.

#### 3.1 *The family unit*

The family unit is recognized as the fundamental unit of society in international human rights law.<sup>21</sup> The CRC establishes the family unit as a highly important, underlying norm, and something that is by default in the best interests of the

17 ECtHR 6 July 2010 (*Neulinger and Shuruk v. Switzerland*), no. 41615/07 [135].

18 Art. 5 ECHR Protocol 7.

19 Smyth 2015, p. 88.

20 Rosen & Faircloth 2020, p. 12.

21 Art. 16(3) UDHR; Art. 23(1) ICCPR; Art. 10(1) ICESCR; ECtHR 24 March 1988 (*Olsson v. Sweden (No 1)*), no. 10465/83 [59], [72]; Margaria 2019, p. 4.

child.<sup>22</sup> The family is similarly protected in the EU Charter.<sup>23</sup> In the CRC, the role of the parents in the care of the child is emphasized throughout (such as in Arts. 5, 14(2), 18 and 27(2) CRC), and it is evident that the ‘traditional family model’ is seen as the ideal environment for the child. While the CRC Committee has not provided a definition of ‘parents’,<sup>24</sup> persons involved in the creation of the child are generally meant by the term,<sup>25</sup> including those with a strong social input.<sup>26</sup> However, the Committee has acknowledged a need for a broader understanding of ‘parent’<sup>27</sup> – interestingly, this may lead to situations where the rights of biological parents and other caregivers can be at odds, creating complicated scenarios.

The family unit plays an important role in the equality of the parents: it involves no distinction of parental or caregiving qualities, rather presuming both parents to be part of a single unit in relation to their children, giving them joint responsibility. Not only that, the concept of ‘family autonomy’ is closely related to the question of family unity, entailing a right to not be separated, and to family reunification.<sup>28</sup> In most cases it does not become relevant to compare the caregiving qualities of married parents with each other unless the family unit is being dissolved.

In ECtHR jurisprudence, family life does not depend on whether the parents are married or not.<sup>29</sup> The ‘mutual enjoyment by parent and child of each other’s company’ is seen as ‘a fundamental element of family life’ under Article 8 ECHR.<sup>30</sup> Still, the ECtHR does not always follow the presumption of family unity (in the context of biological connection),<sup>31</sup> despite the CRC Committee having emphasized its importance in situations such as migration.<sup>32</sup> The ECtHR has referred to the concept of ‘habituation’: the child’s adjustment to a particular environment and family setting, irrespective of biological ties. Sometimes this consideration overrides the aim of reunification of the child with a biological family member.<sup>33</sup>

22 CRC Preamble; ‘Day of General Discussion: Children without Parental Care (17 March 2006) CRC/C/153’ [644].

23 Art. 33(1) EU Charter.

24 J. Tobin, *The UN Convention on the Rights of the Child: A Commentary*, Oxford: Oxford University Press 2019, p. 258.

25 *Ibid.*, p. 241-242.

26 *Ibid.*, p. 241, 258.

27 Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return 2017 [27].

28 Detrick 1999, p. 303-304.

29 ECtHR 13 July 2000 (*Elsholz v. Germany*), no. 25735/94 [43]; ECtHR 5 February 2003 (*Yousef v. The Netherlands*), no. 33711/96 [51].

30 ECtHR 8 July 1987 (*B v. United Kingdom*), no. 9840/82 [60]; ECtHR 30 March 2021 (*Thompson v. Russia*), no. 36048/17 [54].

31 Smyth 2015, p. 88, 93; ECtHR 24 September 2012 (*Kautzor v. Germany*), no. 23338/09 [75]-[76].

32 General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Sixty-Second Session) 2013 (UN Doc CRC/C/GC/14) [66].

33 ECtHR 26 October 2011 (*Shaw v. Hungary*), no. 6457/09 [75]; *Neulinger and Shuruk v. Switzerland* [147]; *Yousef v. The Netherlands* [65], [72]; ECtHR 7 June 2017 (*RL and others v. Denmark*), no. 52629/11 [40], [47].

Reference to habituation does not preclude protection of the family unit, however – in fact, the ECtHR has stated that ‘the child’s ties with its family must be maintained, except in cases where the family has proved particularly unfit’.<sup>34</sup> It has also stressed the importance of both biological and social realities above legal presumptions.<sup>35</sup> The Court considers the child’s ties with their family important, but also something that must be balanced with the child’s ‘development in a sound environment’.<sup>36</sup>

### 3.2 *Parents and the child as individuals*

The task of European human rights law is the protection of ‘the individual’, which occupies the legal regime as its ‘basic foundational principle’.<sup>37</sup> An integral part of this concept is personal autonomy, as held by the ECtHR<sup>38</sup> – perhaps an interesting counterpart to ‘family autonomy’, as protected by the CRC. The position of the child in the context of these concepts is essential, because it helps identify the legal significance of the concept of the child, and will also demonstrate how the child is viewed before European human rights law. This is not simply a matter of determining *when* a person counts as a child (which in Europe is any person below the age of 18), but rather the legal significance of this specific category.

The CRC was the first human rights instrument to place the very identity of the child under protection,<sup>39</sup> with the same goal being reflected in Article 8 ECHR.<sup>40</sup> Under European human rights law, the child is a distinct legal entity from his or her parents,<sup>41</sup> and not dependent on the parents in matters of legal protection. The child as an individual entity largely manifests through the best interests principle.<sup>42</sup> With regards to the best interests of the child, the ECtHR takes a ‘personal development perspective’.<sup>43</sup> As part of this, a ‘secure and emotionally stable’ environment is regarded as a defining interest,<sup>44</sup> which connects to the aforementioned concept of habituation and explains why it can sometimes override the rights of parents. Related to this, the Court has stated that Article 8 ECHR does not allow measures for the benefit of a parent that would harm the development of the child or hinder the enjoyment of their rights.<sup>45</sup> Yet, the balancing of the interests of the parents and children is deemed important.<sup>46</sup>

34 *Neulinger and Shuruk v. Switzerland* [136]; *Thompson v. Russia* [50].

35 ECtHR 27 October 1994 (*Kroon and Others v. The Netherlands*), no. 18535/91 [40].

36 *Thompson v. Russia* [50].

37 S. Trotter, ‘The Child in European Human Rights Law’, *The Modern Law Review* 2018 vol. 81, no. 3, p. 452-479, 452.

38 ECtHR 11 July 2002 (*Goodwin v. UK*), no. 28957/95 [90]; ECtHR 29 July 2002 (*Pretty v. United Kingdom*), no. 2346/02 [61]; ECtHR 4 September 2002 (*Mikulic v. Croatia*), no. 53176/99 [54].

39 Tobin 2019, p. 282-283.

40 *Ibid.*, p. 285.

41 Trotter 2018, p. 453; See also Rosen & Faircloth 2020, p. 9.

42 Trotter 2018, p. 462.

43 *Neulinger and Shuruk v. Switzerland* [138].

44 ECtHR 07 August 1996 (*Johansen v. Norway*), no. 17383/90 [80]; ECtHR 10 January 2008 (*Kearns v. France*), no. 35991/04 [80].

45 *Neulinger and Shuruk v. Switzerland* [136]; *Yousef v. The Netherlands* [63].

46 *Yousef v. The Netherlands* [63].

### 3.3 *Connectedness of the parents and the child*

Despite the individual legal character of the child, it is through the parents that the rights of the child must be realized.<sup>47</sup> For example, both the child and the parents have the right to an adequate standard of living, but their rights in this case are intrinsically interconnected, as the child's right is largely dependent on the fulfilment of the same right with regards to the parents.<sup>48</sup> This is also apparent in the fact that, because of the role of the child in the rights of the parents, and vice versa, Article 8 ECHR imposes both positive and negative obligations on States.<sup>49</sup>

In ECtHR jurisprudence, the child and parents are therefore considered intrinsically connected due to their interconnected interests.<sup>50</sup> This is demonstrated, for example, by how the birth of a child to a couple, irrespective of the marital status of the parents, is enough to establish family life under Article 8 ECHR.<sup>51</sup> The parents are also often considered to be the defining factor in how a child turns out with regards to their development.<sup>52</sup> From this, an approach where the child is an 'extension' of the parents can be inferred – an approach that has its roots in the idea of parental authority that has existed throughout history.<sup>53</sup>

While the ECtHR recognizes a distinction between the interests of the child and the emotional well-being of the parents,<sup>54</sup> these interests are often linked, as expressed in the Dissenting Opinion of Judge Zupančič and others in *Nuutinen v. Finland*:

Our own case-law indicates that the best emotional interests of the child are inextricably bound up with the emotional interests of both parents – or even those of the grandparents and other relatives.<sup>55</sup>

Not only are the interests of the child and the parents linked, but the whole concept of a child arises from the concept of a parent, and the decision to become a parent is, in itself, an important right in the ECHR that enables the rights of the child.<sup>56</sup> In a similar fashion, the child and the desire for parenthood are also seen as sources of well-being for the parents, highlighting the mutual welfare between them.<sup>57</sup> The child also connects to the family life of the parents, as the parental commitment to and 'imagining' of the child plays a part in categorizing the child in the context of

47 Smyth 2015, p. 88; Arts. 3(2), 5, 14(2), 18, 23(2-3), 24(2)(e-f), 26(2) and 27 CRC.

48 Committee on the Rights of the Child, 'General Comment No. 7: Implementing Child Rights in Early Childhood (Fortieth Session)' (2005) CRC/C/ GC/7/Rev. 1 [20]; Smyth 2015, p. 92.

49 Trotter 2018, p. 463.

50 *Ibid.*, p. 457.

51 *Elsholz v. Germany* [43]; *Yousef v. The Netherlands* [51].

52 C. Faircloth, 'Intensive parenting and the expansion of parenting', in: E. Lee et al (eds.), *Parenting Culture Studies*, London: Palgrave Macmillan 2014, p. 45.

53 Trotter 2018, p. 457.

54 *Ibid.*, p. 464.

55 Dissenting Opinion of Judge Zupančič, joined by Judges Panțiru and Türmen, in ECtHR 27 June 2000 (*Nuutinen v. Finland*), no. 32842/96 [O-19].

56 ECtHR 10 April 2007 (*Evans v. UK*), no. 6339/05 [71]; Trotter 2018, p. 454.

57 Trotter 2018, p. 455.

family law.<sup>58</sup> This is apparent, for example, in *Anayo v. Germany*, in which the Court stated that a ‘potential relationship’ between a child and parent may be enough to qualify as ‘family life’ under Article 8 ECHR.<sup>59</sup> What this entails is that the Court may consider a group of people to fall within the scope of Article 8 ECHR on the basis of their perspective on the situation – thus, the parents’ perspective on their parenthood also affects the child. While this is an understandable approach from the point of view of guaranteeing the rights of Article 8, it does place the child in a somewhat turbulent category, depending on the will and intention of the parents. As Trotter puts it: “This child is located firmly in the relationship that exists (or once existed) between the parents’.<sup>60</sup> Therefore, the child and the parents are inherently intertwined from a legal point of view.

Because personal identity is connected to other people in questions of biological origin, it has been argued that the parties in custody cases can never be truly equally positioned.<sup>61</sup> In other words, due to the very nature of custody cases and their impact on the personal identity of both the child and the parents, there may not be a way to have a system where the parties have real equal standing in a practical sense.

### 3.4 Concluding remarks on the relational character of the child and parents

Following from the background presented in this section, it is evident that the family unit is a fundamental aspect of the rights of the child, as indicated in the CRC. Consequently, the principle is relevant in European human rights law – however, it is not always weighed as a priority, as the use of ‘habituation’ by the ECtHR demonstrates. The protection of the individual, on the other hand, is central to European human rights law, meaning that the individual legal character of the child is essential in children’s rights protection. It derives from the CRC, particularly the best interests principle, that the child is considered a distinct legal entity from their parents. In this vein, though the rights of parents and children are connected, they interact with each other in ways that show the distinctiveness of their legal identities. The highlighted importance of the personal development of children demonstrates this well, identifying the child as a subject of rights that is dependent on, but also distinct from the parents.

Still, there is no doubt that the interests of children are inextricably linked to those of their parents. The child needs parents and their parental rights to enjoy their own rights in turn. This point is further supported by the fact that the right of parents to have children in the first place binds their relational rights to those of the child, and their own perspectives on the child can greatly influence the exercise of their familial rights. In some ways, this contradicts the idea of the child as an

58 ECtHR 12 May 2013 (*Krisztián Barnabás Tóth v. Hungary*), no. 48494/06 [27]; ECtHR 21 March 2011 (*Anayo v. Germany*), no. 20578/07 [57]; Trotter 2018, p. 456.

59 *Anayo v. Germany* [57].

60 Trotter 2018, p. 456.

61 *Ibid.*, p. 461.

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individual subject of rights, but it is safer to say that the question is that of a delicate balancing act between the different interests.

What can these observations tell us about whether mothers and fathers can be evaluated by different standards in custody cases? The question at hand concerns parental equality, a topic that is easy to consider part of a gender debate and mistakenly separated from its context within children's rights. However, as has been observed, such questions automatically link back to the best interests of the child, due to the interdependency of the relevant interests. It is therefore imperative to consider the present question from the point of view of the child – if there indeed are differences in how mothers and fathers are evaluated by courts, is this approach justified by the rights of the child? The most relevant question is *how* parental equality is looked at in the context of the best interests of the child, and balanced with other relevant issues. With this broader context in mind, the research question can now be looked at with a unique lens that is often overlooked.

#### 4. Evaluation of care-giving qualities of mothers and fathers under European human rights law

With the previous two sections having established the relevant framework for the connection between the best interests of the child and the rights of parents, the main research question can now be addressed. Though there are great differences across Europe in how custody decisions are made between mothers and fathers, the general trend is that mothers are awarded custody more often than fathers. This is precluding the growing, yet still relatively low number of joint custody decisions. Data and statistics on these decisions are not always easy to find, and are often published sparingly, but they nevertheless show the trend to be true across Europe. In a study conducted in Finland in 2006, it was found that in custody cases before district courts, sole custody was given to the mother 80% of the time, while fathers were given sole custody in only about 14% of cases.<sup>62</sup> The figures changed when observing changes made to previous custody decisions, with fathers receiving custody in around 35% of cases.<sup>63</sup> About 85% of children living under a sole custody arrangement live with their mother.<sup>64</sup> Depending on the specifics of particular data used, the numbers differ, but nevertheless the ratio of custody decisions appears to strongly favour mothers.

In other European countries, the same trend can, at least from the outset, be observed. For instance, in Hungary, around 85% of all children living with a single

62 E. Valkama & M. Litmala, 'Lasten Huoltoriidat Käräjäoikeudessa', *Oikeuspoliittisen Tutkimuslaitoksen Julkaisuja* 2006 vol. 224, p. 63.

63 *Ibid.*

64 'Lapsen Asemassa Olevat Ikäryhmän Ja Perhetyypin Mukaan Alueittain' (*Tilastokeskus* 2021), [https://pxnet2.stat.fi/PXWeb/pxweb/fi/StatFin/StatFin\\_\\_vrm\\_\\_perh/statfin\\_perh\\_pxt\\_12c7.px/](https://pxnet2.stat.fi/PXWeb/pxweb/fi/StatFin/StatFin__vrm__perh/statfin_perh_pxt_12c7.px/) (last accessed 11 October 2021).

parent live with their mother.<sup>65</sup> Meanwhile in Greece, the number is even larger with an overwhelming 98%.<sup>66</sup> A study conducted in Norway in 2012 (based on a survey from 2004) found that in 81% of the separated families interviewed, the mother had sole custody of their children, while fathers only had it in 8% of the cases (the remainder 11% involved shared residence).<sup>67</sup> However, the proportion of joint custody was already rising at the time of the study. The role of joint custody has likewise grown in Spain, but in terms of the mother/father ratios in sole custody, fathers are still awarded custody in only about 5% of cases.<sup>68</sup> Joint custody has grown to account for over a quarter of custody decisions there, meaning that while fathers are increasingly factored in custody arrangements, mothers are still overwhelmingly favoured in cases where sole custody is applied.<sup>69</sup>

This trend in national legal systems begs the question of what factors contribute to it, and whether they are strictly societal, or influenced by law. As previously mentioned, the aim of this article is to focus on European human rights law as a highly influential piece of that puzzle, and to try and find out whether it allows or leaves room for mothers and fathers to be evaluated under different considerations in custody decisions. While the exact reasons for these societal trends remain beyond the scope of this article, understanding the human rights context can be helpful in identifying some fundamental points that influence practice on the national level.

This article will argue that two main points relating to European human rights law leave room for mothers and fathers to be evaluated by different standards in custody decisions: 1) values and perceptions of parenthood as they exist on the international and European level, and 2) the indeterminacy of the best interests of the child. The premise is that these two factors influence interpretation of the CRC and the ECHR so that they allow for mothers and fathers to be considered differently in certain situations, despite aims to safeguard parental equality. Utilizing the findings from Section 3, these two factors will then be linked to the best interests of the child through the notion of parental equality.

#### 4.1 Values and perceptions of parenthood under the European human rights regime

Gender-based differences influencing the legal position of parents is a phenomenon rooted in the long history of family law, with laws relating to parenthood both

65 C. Kiss, 'Society in Transition – Shared Parenting in Hungary' (International Scientific Conference on Best Interest of the Child and Shared Parenting, Málaga, 3 December 2019).

66 I. Bantekas, 'Discrimination against Fathers in Greek Child Custody Proceedings: Failing the Child's Best Interests', *International Journal of Children's Rights* 2016 vol. 24, p. 330-357, 330-332.

67 R. Kitterød & J. Lyngstad, 'Untraditional Caring Arrangements among Parents Living Apart: The Case of Norway', *Demographic Research* 2012 vol. 27, p. 121-152, 133.

68 M. Solsona & M. Ajenjo, 'Joint Custody: One More Step towards Gender Equality?', *Perspectives Demographiques* 2017 vol. 8, p. 1-4, 1.

69 *Ibid.*

affecting and being affected by the dominant parenthood practices and ideals.<sup>70</sup> In modern times, the traditional gender-based parenting ideals have increasingly fallen under scrutiny, as societal perceptions and values regarding gender roles have changed.<sup>71</sup> Still, the status quo in Europe retains many elements of the maternal presumption, at least in practice.<sup>72</sup> Additionally, it is a common trend in Western countries to try and ‘modify’ parents through law and policy to conform to an ideal standard of parenthood, based on psychological information about child development, in an effort to optimize the outcomes for their children.<sup>73</sup> This approach, while pursuing positive outcomes, carries the risk of diverting attention from the gap between ideals and reality, potentially even placing unrealistic expectations on families.

Perceptions of parenthood have always been shaped by ideologies and contemporary views on the division of responsibilities between mothers and fathers. The mother-child bond has traditionally been heavily emphasized in child-related adjudication, while for fathers marriage with the mother has typically been considered the main ‘vehicle’ connecting them with their children.<sup>74</sup>

This ideological backdrop of parenthood was examined by Alison Diduck, who argued that fathers and mothers are expected to possess somewhat differing characteristics in family law: men are expected to have authority, economic capacity and intention behind founding a family, whereas for women intentionality is the main component (precluding considerations related to the marriage union).<sup>75</sup> Thus, in situations involving divorce or unmarried partners, fathers are expected to ‘reproduce the ideology of motherhood’,<sup>76</sup> typically by meeting certain criteria. Fathers may therefore be expected to prove their care-giving capabilities, while mothers should merely demonstrate intentionality. Consequently, being an

70 C. Panter-Brick et al, ‘Practitioner Review: Engaging Fathers - Recommendations for a Game Change in Parenting Interventions Based on a Systemic Review of the Global Evidence’, *Journal of Child Psychology and Psychiatry* 2014 vol. 55, no. 11, p. 1187-1212, 1190.

71 Mnookin 2014, p. 262.

72 Margaria 2019, p. 4, 7; S. Harris-Short, J. Miles & R. George, *Family Law: Texts, Cases, and Materials*, Oxford: Oxford University Press 2015, p. 557; J. Eekelaar, ‘Beyond the Welfare Principle’, *Child and Family Law Quarterly* 2002 vol. 14, no. 1, p. 237-249, 238; A. Miettinen et al, ‘Lasten Vuoroasuminen Ja Sosiaaliturva: Vuoroasumisen Nykytila Ja Merkitys Etuus- Ja Palvelujärjestelmän Kannalta’, *Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja* 2020 vol. 51, p. 1-149, 26; Bantekas 2016, p. 330-332; R. Emery, R. Otto & W. O’Donohue, ‘A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System’, *Psychological Science in the Public Interest* 2005 vol. 6, no. 1, p. 1-29, 4; G. Papacharalampous, ‘Family Law’ (*Greek Law Digest* 2016), <http://www.greeklawdigest.gr/topics/aspects-of-greek-civil-law/item/25-family-law> (last accessed 8 April 2017); ECtHR 28 November 1984 (*Rasmussen v. Denmark*), no. 8777/79 [41].

73 Rosen & Faircloth 2020, p. 17.

74 Margaria 2019, p. 4, 7.

75 A. Diduck, ‘The Unmodified Family: The Child Support Act and the Construction of Legal Subjects’, *Journal of Law and Society* 1995 vol. 22, p. 527-548, 535.

76 Margaria 2019, p. 4; B. de Hart, ‘Superdads: Migrant Fathers’ Right to Family Life before the European Court of Human Rights’, *Men and Masculinities* 2015 vol. 18, no. 4, p. 448-467, 449; Panter-Brick et al 2014, p. 1190.

‘untypical’ mother could also hinder mothers in the same respects,<sup>77</sup> while a ‘typical’ mother would presumably have a default advantage. In law and policy, these perceptions have led to a greater focus on mothers in family interventions, often sidelining the role of fathers in such action.<sup>78</sup> These ideological backdrops are also present in some seemingly neutral practices, which may nevertheless favour one parent over the other by emphasizing some parental qualities over others (such as when division of responsibilities within the family is used as a deciding element of the custody decision).<sup>79</sup>

Different ideologies can both be advantageous or disadvantageous to a parent in custody disputes, depending on the particular circumstances of the parent and the way they compare to the contemporary ‘standards’.<sup>80</sup> While the backdrop of the nuclear family model is present in family law, it is also in conflict with the emerging trends in family structures, such as the increasing commonality of co-habitation and children being born outside marriage. In the present time, there is a lack of common societal consensus on well-defined gender roles,<sup>81</sup> which makes the best interests principle all the more significant in being the standard on which custody decisions are based.

While this is the context behind the creation of international children’s rights instruments, the ideologies have since shifted towards a greater emphasis on equality within the family, with both parents sharing equal amounts of responsibility over the upbringing of their children.<sup>82</sup> Whereas the father was considered more disconnected from the upbringing of children in the past, nowadays he is not only seen as connected to the child’s welfare, but also an essential component of it.<sup>83</sup> This shift has strongly been influenced by the modern idea of the best interests of the child.<sup>84</sup> In fact, one of the most important goals of the CRC was to shape mindsets in this direction and to bring about a change towards viewing children as rights-holders.<sup>85</sup> International instruments like the CRC are, therefore, both a product of a particular ideological backdrop, and they also greatly influence the development of ideologies.

77 De Hart 2015, p. 449.

78 Panter-Brick et al 2014, p. 1190.

79 Mnookin 2014, p. 262; E. Maccoby & R. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody*, Cambridge/London: Harvard University Press 1992, p. 283-284.

80 De Hart 2015, p. 449.

81 Mnookin 2014, p. 270.

82 De Hart 2015, p. 450.

83 *Ibid.*; J. Crowley, ‘Taking Custody of Motherhood: Fathers’ Rights Activists and the Politics of Parenting’, *Women’s Studies Quarterly* 2009 vol. 37, no. 3/4, p. 223-240, 223; F. Warren, ‘Father and Child Reunion: How to Bring the Dads We Need to the Children We Love’, *Library Journal* 2001 vol. 126, no. 4, p. 118, 118.

84 De Hart 2015, p. 450.

85 General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Sixty-Second Session) [12], [15(h)].

#### 4.2 Indeterminacy of the best interests of the child

Determinations of what the best interests of the child in a particular case are have a major impact on the outcome of custody cases. The principle was made open-ended enough to allow for adaptability in a wide spectrum of individual circumstances,<sup>86</sup> but as a consequence, it can also be very challenging to apply in a consistent and foreseeable manner.<sup>87</sup> Best interests determinations can be very subjective: the principle has even been described as ‘a vehicle for the furtherance of the interests or ideologies of others, not of the interests of children’,<sup>88</sup> highlighting how impactful subjective considerations can be in these assessments. Even the CRC Committee has acknowledged that the principle ‘may [...] leave room for manipulation’.<sup>89</sup> With regards to the present research question, this means that the best interests principle can easily leave room for various subjective views regarding the parental qualities of mothers and fathers. Yet, these subjective elements should not be automatically assumed to be ‘wrong’ or detrimental to decision-making, as the elimination of personal viewpoints in decision-making is neither feasible nor desirable. In fact, allowing for some degree of subjective reasoning is important for being able to balance rights in a diverse array of cases. However, differences in what aspects should be prioritized can be more problematic, as it can make the best interests of the child quite an unpredictable principle. Habituation in the ECtHR is an example of this, as it involves weighing stability over biological family connections – a prioritization not strictly deriving from the CRC itself. Similarly, the weighing of State interests and the interests of children and parents in migration cases before the ECtHR has been observed to sometimes be unforeseeable.<sup>90</sup>

The complex nature of custody decisions derives from the presence of two claimants, both with different qualities to provide for the development of the child.<sup>91</sup> In cases where neither parent poses a threat to the child, custody decisions become a delicate balancing act between the rights of multiple parties, without necessarily a clear-cut best option.<sup>92</sup> Indeterminate standards of what is in the best interests of the child often require judges to make custody decisions based primarily on their intuition about the relevant parties.<sup>93</sup> Not only does the principle afford considerable discretion to judges, but it also does so for social workers, who often

86 *Ibid.*, [1], [11].

87 Mnookin 2014, p. 251, 254; J. Zermatten, ‘The Best Interests of the Child: Literal Analysis, Function and Implementation’, (International Institute for the Rights of the Child 2010) Working Report, p. 19-20.

88 Smyth 2015, p. 72; J. Eekelaar, ‘The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism’, *International Journal of Law and the Family* 1994 vol. 8, p. 42-61, 58.

89 General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Sixty-Second Session) [34].

90 De Hart 2015, p. 464.

91 Mnookin 2014, p. 252-253.

92 *Ibid.*

93 K. Bartlett, ‘Prioritizing Past Caretaking in Child-Custody Decisionmaking’, *Law and Contemporary Problems* 2013 vol. 77, no. 1, p. 29-67, 29, 66-67; Mnookin 2014, p. 252; Court of Appeals of Iowa 26 May 2010 (*McKee v Dicus*), 785 N.W.2d 733 [738].

have a large role in determining what the best interests of a particular child are. This compounds the issues already seen with regards to legal professionals: different prioritization of factors across cases. Clarifying objective components of the best interests principle by means of ‘checklists’ has been proposed by some – however, this may also compromise the much-needed adaptability of the principle.

Interestingly, it has been pointed out that the ambiguity of the best interests principle is actually favoured by courts over more precise rules, for the reason that more detailed guidelines might turn out to favour either mothers or fathers in practice.<sup>94</sup> This, in turn, would place courts under extensive criticism by one group or the other.<sup>95</sup> Considering Diduck’s aforementioned observations, expecting such an outcome is not unreasonable. In that sense, narrowing down the best interests test could, ironically, hinder judges in evaluating each case on its own merits, also limiting their options with regards to parental equality. In this view, the indeterminate nature of the best interests principle may actually guard courts against a ‘coerced’ bias and offer them a degree of protection against partiality. Nevertheless, the question of whether clarifications of the best interests principle could better safeguard the rights of the child and parental equality warrants consideration. In any case, reasoning for any best interests determination should be particularly clear and well elaborated, even beyond what is required by law,<sup>96</sup> for the sake of legal certainty.

#### *4.3 Concrete illustrations of differing standards for mothers and fathers within the European human rights regime*

In the above sections, perceptions of parenthood and the indeterminacy of the best interests of the child were presented as factors that may have allowed for differences in standards when evaluating the care-giving qualities of mothers and fathers in custody cases. In order to see whether this is the case in reality, interpretation of the CRC and the ECHR must be examined. It should be noted that detailed evaluation of the parental qualities of mothers and fathers is generally the responsibility of national courts – international courts and monitoring bodies mainly supervise conformity with basic human rights principles in these evaluations.

Situations where interests relating to motherhood and fatherhood are given differing weight can be seen in certain contexts, such as with immigration policies. In such situations, observes De Hart, the ECtHR appears to allow the interests of mothers to override State interests more often than those of fathers – for example, migrant mothers tend to be granted residence despite a history of illegal residence and identity fraud, while migrant fathers with similar backgrounds are not.<sup>97</sup> The

94 Mnookin 2014, p. 262; E. Scott & R. Emery, ‘Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard’, *Law and Contemporary Problems* 2014 vol. 77, no. 1, p. 69-108, 82-83.

95 Mnookin 2014, p. 262; Scott & Emery 2014, p. 82-83.

96 *McKee v. Dicus* [738].

97 De Hart 2015, p. 464.

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question remains, however, whether anything similar can be seen with regards to custody.

There is some indication that the ECtHR has considered a maternal presumption acceptable in some cases. In *Rasmussen v. Denmark*, for example, the Court stated that the interests of mothers often coincide with those of the child.<sup>98</sup> It also acknowledged that, in most custody cases, it is the mother who is awarded custody.<sup>99</sup> Interestingly, on this basis the Court found acceptable a difference in treatment between husbands and wives with regards to time limits for challenging filiation.<sup>100</sup> The Court furthermore noted that, in assessing the proportionality of such difference in treatment, the circumstances and general background of the legislation in question must be taken into account, and that in the present case, it was justified by the aim of legal certainty and protecting the interests of the child.<sup>101</sup> Not only that, the ECtHR has considered some cases of differential treatment of parents in national legislation to fall within the State's margin of appreciation, as displayed in *Petrovic v. Austria*,<sup>102</sup> a case concerning parental leave allowances. The Court found that, since parental leave for fathers was a relatively recent development in Europe, Austria was justified in not awarding parental leave allowance to the father in the particular case, considering the time that such societal changes required.<sup>103</sup> This coincides with the suggestion that contemporary perceptions of parenthood have a strong influence on law – in fact, the ECtHR was quite explicit about this in *Petrovic*. Regardless of whether such difference of treatment is seen as justified or not, there is no doubt that it can greatly affect the position of the parents.

Though having been established a relatively long time ago, the lines of reasoning present in *Rasmussen* and *Petrovic* appear to be compatible with the more recent cases of *Zaunegger v. Germany* and *Sporer v. Austria*. In those cases, the ECtHR had an opportunity to react to national law that unequivocally set mothers and fathers in a different position with regards to custody of children born out of wedlock. In *Sporer*, the child was born out of wedlock to a mother and father living in the same building. Once the mother moved out of the house, the father requested sole custody, arguing that the mother was not capable of taking care of the child. The mother opposed the transfer of custody. Out of three expert opinions, two agreed that both parents were able to exercise custody. However, the end result was that the mother retained sole custody, with the father having right of access – the result of a provision in the Austrian Civil Code guaranteeing the mother of a child born out of wedlock sole custody unless the child's best interests were at risk (once again demonstrating the interdependence of the best interests of the child and the parents' exercise of their rights). It was this differential treatment that led the

98 *Rasmussen v. Denmark* [41].

99 *Ibid.*

100 *Ibid.*

101 *Ibid.*

102 ECtHR 27 March 1998 (*Petrovic v. Austria*), no. 20458/92 [38].

103 *Ibid.* [39]-[43].

father to complain of a violation of Article 14 coj Article 8 ECHR. The ECtHR noted that the Austrian courts did not even have the possibility of assessing whether joint custody would have been in the best interest of the child, since the Austrian Civil Code required agreement from the mother,<sup>104</sup> which had not been given in this case. This effectively blocked any kind of custody evaluation. The ECtHR thus found a difference in treatment – not only between mothers and fathers, but between unmarried and divorced fathers – under the Civil Code.<sup>105</sup> Similar situations have also been presented before the Court in cases such as *Buchs v. Switzerland* and *Hoppe v. Germany*.

In its reasoning in *Sporer*, the ECtHR referred to *Zaunegger v. Germany*, in which the Court had found a similar legal rule acceptable in ensuring that there would be someone to act for the child born out of wedlock in a legally binding way from the moment of birth.<sup>106</sup> What was different in *Zaunegger* compared to *Sporer* was that, in *Zaunegger*, the Court had not agreed with the assumption that joint custody against the will of the mother was necessarily against the child's interests. While there is no European consensus on the matter, most Member States base such decisions primarily on the child's best interests, and if a conflict between the parents exists, national courts evaluate the care-giving qualities of the parents to determine custody.<sup>107</sup> In *Sporer*, such an opportunity was not even provided, and the best interests assessment regarding joint custody could not be done in this way. Furthermore, the Austrian government had not submitted sufficient reasons to justify why the situation of the father should allow for less judicial scrutiny than divorced fathers.<sup>108</sup> The Court thus found a violation.

While the ECtHR found the treatment of unwed mothers and fathers differential under the Austrian Civil Code,<sup>109</sup> it did not, in principle, object to laws that grant automatic sole custody of children born out of wedlock to the mother, in the interests of giving the child someone to act for them in a legally binding way.<sup>110</sup> This demonstrates that some form of differential evaluation of mothers and fathers in the custody context has been interpreted as permissible under the ECHR, justified by the best interests of the child. However, the ECtHR has also pointed out that it examines domestic legislation solely in terms of how it has been applied in particular circumstances and whether such applications have led to an (unjustified) difference in treatment.<sup>111</sup> Moreover, the Court stated that

[...], very weighty reasons need to be put forward before a difference in treatment on the ground of sex or birth out of or within wedlock can be regarded as compatible with the Convention. The same is true for a difference

104 ECtHR 3 May 2011 (*Sporer v. Austria*), no. 35637/03 [80], [81].

105 *Ibid.* [77]-[78].

106 ECtHR 3 March 2010 (*Zaunegger v. Germany*), no. 22028/04 [50].

107 *Sporer v. Austria* [87].

108 *Ibid.* [89].

109 *Ibid.* [77]-[78].

110 *Ibid.* [85].

111 *Ibid.* [79].

in treatment of the father of a child born out of wedlock as compared with the father of a child born of a marriage-based relationship.<sup>112</sup>

Therefore, while the differential treatment can be seen as compatible with the requirements of the ECHR, justification for such action must be very compelling. In cases such as *Burghartz v. Switzerland* and *Konstantin Markin v. Russia*, the Court cited the Council of Europe's commitment to gender equality as a reason for the need to such a strict approach,<sup>113</sup> as well as that 'references to traditions, general assumptions or prevailing social attitudes' are not sufficient justifications in the context of parental leave.<sup>114</sup> The importance of proportionality has also been emphasized by the Court.<sup>115</sup>

The above examples demonstrate that a certain degree of differential treatment between mothers and fathers by virtue of their role as 'mother' or 'father' can sometimes be allowed under the European human rights regime. This differential treatment is also inherently linked to the best interests of the child, as it must serve as the justification to such treatment. It is noteworthy that Diduck's observations relating to fatherhood appear to be present here: for example, the father's commitment to the child was seen as a contributor to why a violation of his rights was declared in *Sporer*,<sup>116</sup> signaling the significance of intentionality with regards to the family.

#### 4.4 Concluding remarks on parental equality in European human rights law

In Section 4, two main aspects of children's rights protection were suggested as possible factors allowing mothers and fathers to be considered by different standards in custody disputes: 1) the role of values and perceptions of parenthood, and 2) indeterminacy of the best interests test. As mentioned at the beginning of the section, fathers (and mothers) are generally expected to fit a particular 'ideology of motherhood' in practice, which means that certain qualities most often associated with motherhood are regarded with favour in custody decisions.

Signs of acceptance towards some differential assessments of mothers and fathers can also be detected in the case law of the ECtHR. *Rasmussen* shows that the existence of a maternal presumption has been acknowledged, and even endorsed to a degree. *Sporer* and *Zaunegger* further demonstrate that the ECtHR finds acceptable different standards for mothers and fathers in certain limited contexts, as long as discrimination is not present and the parents are still evaluated on their individual merits. These differences are considered justified by the goal of safeguarding the best interests of the child, which are seen through contemporary perceptions of motherhood and fatherhood.

112 *Ibid.* [75]; *Zaunegger v. Germany* [51].

113 ECtHR 22 February 1994 (*Burghartz v. Switzerland*), no. 16213/90 [27]; ECtHR 22 March 2012 (*Konstantin Markin v. Russia*), no. 30078/06 [127].

114 *Konstantin Markin v. Russia* [127].

115 *Sporer v. Austria* [73].

116 *Ibid.* [71].

## 5. Conclusion

This article sought to answer whether European human rights law allows for mothers and fathers to be evaluated by different standards in the context of custody disputes. To set the stage for the examination of the research question, the relevant sources (CRC and the ECHR) were identified in Section 2, followed by a look at the relational character of the child and parents in Section 3.

Unsurprisingly, differential treatment of the parents in custody matters is not encouraged in the CRC or the ECHR. On the contrary, these instruments affirm the importance of family unity and the rights of both parents and children to be involved in each other's lives. This is evident in how the rights of the child and those of the parents relate to each other. The family unit forms a standard model in which both rights should ideally be fulfilled, but the child is also considered an individual rights-holder, an idea at the heart of the best interests of the child. In order for the child's best interests to be fulfilled, the child must also be seen in relation to their parents – this forms the basic premise for the present research question, as parental equality depends on the best interests of the child due to their interdependent interests. Rather than as mainly a gender equality issue, parental equality should be seen as a component of the best interests of the child.

With the relevant context having been established, analysis regarding the research question itself revealed that the goal of family unity seen in international human rights instruments does not preclude differential treatment of the parents in particular circumstances. Two main factors were suggested as leaving room for mothers and fathers to be evaluated by different standards: values and perceptions of parenthood, and the indeterminacy of the best interests test. As seen in Section 4, values relating to parenthood have produced an 'ideology of motherhood', which fathers (and mothers who do not meet the relevant expectations) are expected to meet. Qualities often associated with motherhood are thus regarded favourably in custody decisions. These values and perceptions are also present in the international human rights instruments, and have shaped the landscape of children's rights significantly. Meanwhile, the indeterminacy of the best interests principle places a heavy discretion and responsibility on judges and social workers, compelling them to make subjective decisions that may even go beyond their expertise. This allows for particular considerations to be weighed differently across cases – both a strength and a weakness of the principle itself, and one that can be seen even in the ECtHR. The concept of habituation is an example of setting priorities that require certain value judgments: in this case, stability over biological identity. Existing human rights instruments are both products of a particular societal framework and influencers of the modern state of family law.

Concrete illustrations of the effects of the aforementioned factors can be seen in case law of the ECtHR: in *Rasmussen v. Denmark*, the Court found a maternal presumption compatible with the provisions of the ECHR in certain contexts. Similarly, *Sporer* and *Zaunegger* show that different standards for mothers and fathers in limited contexts – such as automatic assignment of custody to mothers

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with regards to children born out of wedlock – can be justified by the best interests of the child. This does not equate to an acceptance of discrimination, however: parents must still be given the chance to be evaluated on individual merits, and the justification for national laws setting mothers and fathers in such different positions must be compelling. Yet, it can still be seen that differing evaluation of mothers and fathers in custody-related disputes is, to a certain degree, allowed by the European human rights regime, whenever such differences are deemed justified by the best interests of the child.