

## PARENTAL RESPONSIBILITY AFTER DIVORCE: THE LAW OF KOSOVO IN A COMPARATIVE CONTEXT

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### **Abstract**

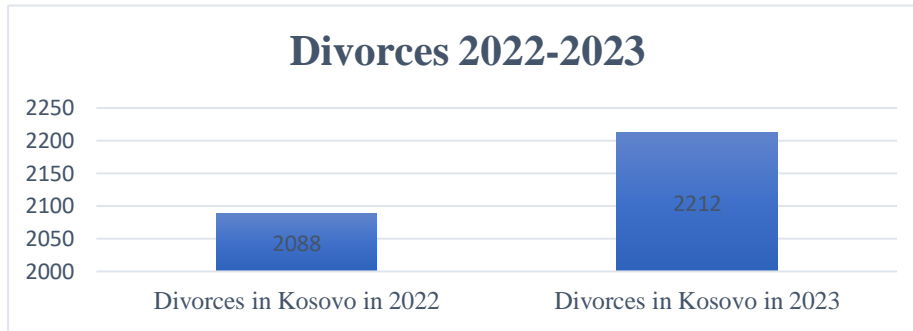
Parental responsibility as a legal institution includes rights and obligations both parents have towards their children, including making decisions about their health, education, and overall welfare. This responsibility, inexorable among third parties, flows throughout the marriage or its annulment, after divorce, and during the factual relationship. The legal norms that regulate this institution are imperative, meaning that the subjects exercising parental rights cannot alter them by their own volition, transfer them to others, or inherit them, as they are of an *"intuitu personae"*. This institution is of paramount importance because it safeguards the fundamental rights of children, always respecting the best interest of them and is valid until they reach the age of 18, and in exceptional cases even beyond this age.

The aim of this paper is to help parents develop an understanding of parental responsibility after divorce, which faces many challenges that can affect the well-being of children and the relationship of parents, while always prioritising the best interests of the child. The most challenging questions that ex-spouses ask themselves are *who will our children live with? What happens if we cannot agree on where the children will live and how often will I see our children?* Effective communication between parents is crucial but can be challenging, especially after a divorce. Divorce can be difficult and causes trauma to the ex-spouse in terms of the division of parental responsibility, and challenges often arise as to who the common child will live with.

**Keywords:** *parental responsibility, children, divorce, child custody*

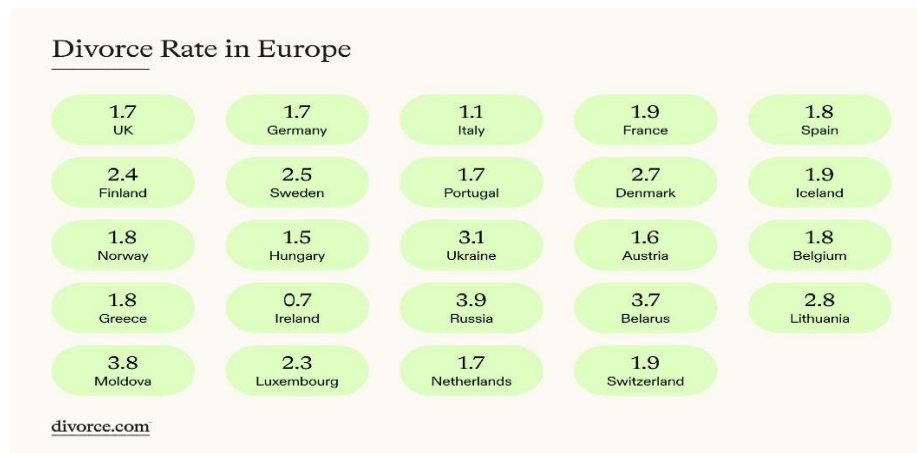
### **1. Introduction**

Family disputes, particularly parental ones, have marked a significant increase in recent times, and such a phenomenon results in resolving marriage through divorce. Divorce as a growing trend is presented to us in enormous numbers, based on the statistics of recent years. Regarding this, the Kosovo Agency of Statistics has also published statistics concerning the number of divorces for the year 2023. From these agency data, it is observed that in 2023 there was an enormous increase in the number of divorced couples, compared to the previous year. This represents an alarming and very concerning situation of this growing phenomenon. According to the Kosovo Agency of Statistics, in 2023, 2,212 divorces were registered. The highest number of divorces, by municipalities, was in Prizren (199 cases) or 9.0%; Pristina (185 cases) or 8.4%; Mitrovica (165 cases) or 7.5%, etc. Regarding to the duration of the marriage, the second year dominated with 9.8%, the first year with 8.0%, and the fourth year with 7.1% of the divorces, etc. From the statistical data, it is seen that divorces (within Kosovo) were registered more in 2023, compared to 2022'. (Kosovo Agency of Statistics, 2024).

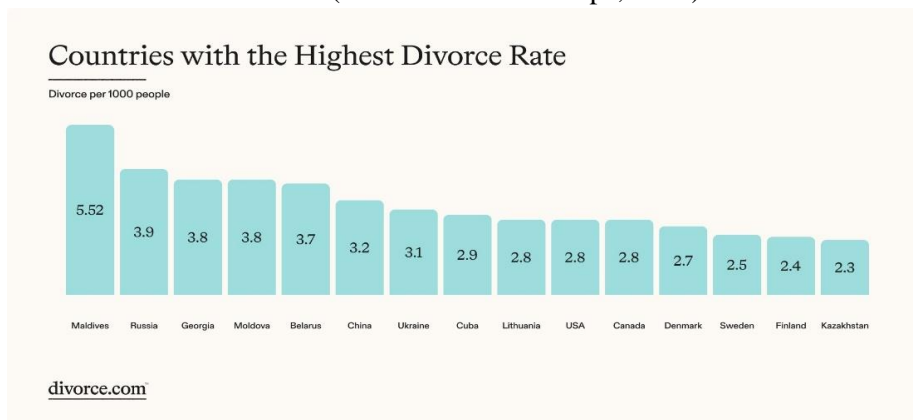


Moreover, the divorce rate within the European Union has experienced fluctuations over recent decades. Divorce rates in European countries have traditionally been higher compared to other parts of the world.

We can say that factors that have influenced high divorce rates are *socio-economic factors, cultural and legal factors, pandemic impact etc.* Socio-economic factors: such as lack of economic stability, and unemployment can impact marriage stability. Otherwise, employment opportunities can survive divorce financially. Cultural factors play a significant role in influencing divorce rates. These factors encompass societal norms, religious beliefs, gender roles, and family structures, among others. Legal factors such as laws that favour joint custody can reduce conflict and facilitate the divorce process. Conversely, contentious custody battles can complicate and prolong divorces. The complexity of divorce procedures can impact divorce rates. Simplified procedures tend to facilitate higher divorce rates.



(Divorce Rate in Europe, 2024).



(Divorce Rate in Europe, 2024).

This phenomenon mostly affects the children who have been accustomed to living with both parents, thus damaging their psychological and emotional development. However, it must be emphasized that parental responsibility continues despite this situation and does not cease with the termination of marriage. The responsibility of parents towards children's rights even though they are divorced remains attached until the child reaches adulthood and can be independent. In family disputes where children are involved, the court and other institutions are obliged to provide adequate protection for them.

We can say that the social consequences after divorce that negatively affect children are related to the change in the family environment without one parent, changes in residence, changes in social settings or schools and in some situations the obligation for children of divorced parents to work before reaching adulthood due to the poor economic condition of the parent to whom the child has been entrusted, and the possibility of these children becoming involved in criminal activities. Whereas the legal consequences are related to the court's decision of which parent the minor child will be entrusted to and then the method of facilitating contact. Based on the challenges emphasized above, the focus of this paper is on finding effective strategies and approaches to navigate the challenges of parenting after divorce, while always prioritizing the best interests of the child.

## **2. Parental responsibility after divorce in Kosovo**

Parental rights in Kosovo are regulated through positive norms of Law No. 2004/32 on Family, specifically articles 128 – 159. According to this law, *"Parental responsibility includes rights and obligations, aiming to ensure emotional, social and material welfare of the child, by looking after the child, preserving personal relations, providing proper growth, education, vocational training, legal representation and administration of property"*. (Law No.2004/32, Family Law of Kosovo, article 141, 2006). The protection of children's rights is also guaranteed through international legal frameworks. Among the very important legal instruments aimed at protecting children and empowering their rights are: the Convention on the Rights of the Child, the European Convention on the Exercise of Children's Rights and the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation, concerning parental responsibility and measures for the protection of the children. The Convention on the Rights of the Child, as an international protective instrument, finds direct application in the Constitution of the Republic of Kosovo. This Convention, since its preamble, has stipulated that a child needs legal protection and must be treated with special care for their full personality development, especially the need for their upbringing in a family environment filled with happiness, love, and understanding. (Convention on the Rights of the Child, 1989).

Parents are subjects to whom, through specific laws, the right to parental care is recognized. Therefore, both parents equally exercise parental care towards their children, undertaking all the rights and obligations derived from the law and respecting *"the principle of equality"*, between spouses. (Constitution of the Republic of Kosovo, 2008). This parental responsibility as a personal right, exists regardless of whether the marriage has been annulled or dissolved. Additionally, parents can also by agreement, decide on the manner of exercising parental care towards their children, by dividing the actions that each of them will undertake. So, which actions one parent will take and which the other will undertake, such as determining who will take the children to school or the doctor, or who will buy clothes for them, and such actions, depend exclusively on their mutual consent.

Parents are morally and legally obliged to exercise their rights and obligations towards their children while respecting the *"principle of the child's best interest"*. Among the rights and duties, we enumerate maintenance, sheltering, education, schooling, legal representation, property administration,

collection and disposition of fruits from the children's property, alimentation, financial support, etc. (Podvorica, H., 2011). In daily life, we have encountered situations where children are cared for by only one parent. The impossibility of exercising parental responsibility by both parents and its exercise by the single parent arises due to changes in biological, legal, psychological circumstances etc. For example, the death of one parent is considered a natural fact, so the other parent exercises parental rights, or when one of the parents is incapable of acting because their legal capacity has been revoked. (Law No.03/L-007 on Out Contentious Procedure, article 108, 2009).

The Law on Family in Kosovo has enumerated the principles of parental responsibility as follows: *"Parental responsibility primarily results from the right for parental care and custody". A child is under parental responsibility until the age of majority. Parents are obliged to ensure at any time that the principles laid out in Article 125 of this Law are utilized for the protection of their minor children. Parental responsibility includes rights and obligations, aiming to ensure emotional, social and material welfare of the child, preserving personal relations, providing proper growth, education, vocational training, legal representation and administration of property. By applying these principles parents shall consider skills, inclinations and desires, tendencies, and desires of their children "* (Law No.2004/32 on Family of Kosovo, article 128, 2006).

### 3. Child Custody

Regarding parental responsibility in cases of dissolution of marriage, parents may regulate the exercise of parental rights through a child custody agreement. However, if such an agreement is absent or does not meet the interests of the children, in that case, the Court will decide ex officio, after considering the opinion and proposal of the Custody Authority, taking into account the child's wishes, if the child is capable of expressing their views. Law No. 2004/32 on Family in Kosovo has stipulated that *"The court or the Custodian Body which brings a decision for the entrustment of a child for care and education is obliged to properly investigate all circumstances which are important for proper physical and mental development and education of the child. In case the child is older than ten years, the court shall consider in particular the emotional situation of the child. If deemed necessary, the court shall take into consideration the opinion of experts"*. (Law No.2004/32 Family Law of Kosovo, article 144, 2006). Usually, sole physical custody is granted to only one parent, while the other parent has the right to maintain contact with the children. There are several types of child custody, such as joint custody and sole custody each offering the parents different rights. Joint physical custody is often favored because it allows the child to maintain a strong and stable relationship with both parents. In Kosovo, in cases of divorce where joint custody is not possible or in the child's best interest, the court may award sole custody to one parent. *"Sole legal custody (also called sole parental responsibility) is when one parent has full responsibility to make major decisions for the child. The other parent doesn't have a say, but often has visitation rights and the responsibility to pay child support"*. (Sole Legal Custody Defined, n.d.). When a parent is granted sole custody, they typically have both physical and legal custody.

The consequences of sole child custody are related to one parent who has full responsibility to make major decisions for the child, while the other parent has no custodial rights and has no say in decisions that affect the child. Sole legal custody may have a bad effect on the emotional development of the child because one parent lives with the children and it can go a long time without seeing the other parent. We consider that joint parental custody would positively affect the maintenance of healthy relationships between parents and their children, positively impacting their emotional and psychological development. *"Joint custody is an arrangement where two co-parents share responsibility for a child—even if the parents do not live together and are not raising the child together in one household"*. (Bieber, Ch., 2023). *"Data collected by K2.0 from the Kosovo Agency of Statistics shows that there were*

3,637 divorces between 2010 and 2019 where couples had children. Of these, 2,188 children went into the custody of their mothers and 1,214 into the custody of their fathers. The two parents shared custody in 196 cases, while in 38 cases someone else received custody'' (Gashi, 2020). Both parents, regardless of the custody arrangement, are responsible for the child's upbringing and welfare. '*Both parents shall decide by agreement for issues of essential importance for the development of the child, even in cases when based on their agreement or the decision of the Custodian Body or the court decision only one of them exercises parental custody. When the parent who does not exercise parental custody does not agree with any measure or action of the other parent in exercising parental custody on matters of essential importance, he may inform the competent court, which is obliged to decide whether the measure or such action is in favor of the child's interests*'. (Law No.2004/32, Family Law of Kosovo, article 141, 2006)

The child's right to express his or her opinion applies in all proceedings concerning parental responsibilities. Based on the findings from the practice of the Court of Appeal, it has found that some legal provisions of the Law on Family, have been violated by lower instance Courts in some situations. Legal violations have to do with the failure to invite the Custodian Body and experts of the relevant fields, such as psychologists, sociologists etc., to the court hearings when the opinion of a minor child regarding parental custody has been obtained. These violations, are considered by the court as fundamental breaches of the procedural provisions, as the child is not represented by the competent authority, and other violations by the court include failure to obtain the opinion of a child who has reached the age of 10 and another failure is the lack of obtaining the child's opinion in the presence of experts of the relevant fields, such as psychologists, sociologists, etc. (Lulluni et al., 2019).

Based on our legislation, we can say that the court is required to ask children aged 10 and older to give their opinion when parental responsibility is assigned. Unlike our legislation, Dutch legislation considers the age of 12 as the appropriate age for obtaining the child's opinion. '*Children aged 12 and older whose parents file a divorce petition are automatically sent a notification by the court stating when they are expected to appear in court. It is up to the child to decide whether he or she wishes to appear. The child has the right to be heard and is therefore given the opportunity to tell the court what he or she thinks about certain matters with respect to the break-up. If a child under 12 asks to be heard, the court will invite him or her to attend the hearing*'. ( Government of the Netherlands, n.d.).

**Case from judicial practice:** The Basic Court in Peja, in the case of an attempt to enforce the decision regarding divorce and custody of four children, while two children were living with the mother and two others with the father, encountered difficulties in enforcing the same. The children who were with the father resisted, clinging to him and asking him not to let them go to join the mother. Under these circumstances, the psychologist requested that enforcement actions should be suspended. In the impossibility of enforcing this decision, this Court sought legal opinion from the Supreme Court, through the filed submission dated July 11, 2016, whether in such cases children should be taken by force. *What is considered the best interest of the child and whether the opinion of the psychologist should be respected?* In this regard, the panel of the Supreme Court of Kosovo found that expedited decisions in such cases must be applied necessarily. (Legal Opinion of the Supreme Court of Kosovo, 2016). With the Decision of the Civil Panel of the Supreme Court of the Republic of Kosovo, it has been emphasized that *"in cases where, by expedited decision, children have been entrusted to one parent, but despite this, the children continue to live with the other parent, a change in the decision is allowed so that the children are entrusted to the parent with whom they have lived, even though the circumstances have not changed since the issuance of the initial decision if these circumstances indicate that this is in the best interest of the children. Financial support for minor children is a legal obligation of both parents regardless of whether they live together or not. In this context, parents cannot waive*

*their financial support obligations towards their minor children or be exempted from this obligation''.* (Decision, 2022).

#### **4. Removal of parental responsibility**

The removal of parental rights is presented as one of the most severe sanctions that can be imposed on the parents of a child. This deprivation arises as a result of the misuse of parental responsibility. When parents abuse their children by physically and psychologically mistreating them, encouraging them to engage in illegal activities, or seriously neglecting the exercise of parental rights, the Custody Authority or the Court *ex officio* can revoke this right. (Gashi et al., 2012).

*Case from judicial practice:* With the decision No. 3/22, the Basic Court in Pristina - Branch in Lipjan, approved the proposal of the Center for Social Work, for the temporary deprivation of parental care for the minors N. P. and M. P. against the mother A. K. and father and V. P. The Court has approved this proposal based on the ongoing conflicts between the two parents of the minors, where as a result of their disputes, they have both neglected parental care, physically abusing them, and disregarding their parental duties altogether, such as the right to food, lack of hygiene, and threatening them etc. The court has decided to temporarily deprive the parents of the minor children of parental care, leaving them under the care of the Custody Authority - the Center for Social Work in Lipjan. Furthermore, it has obligated the Custody Authority to facilitate visitation for the parents of minor children, as follows: in the first 6 months of the year 2023, visits were conducted once a month, while in the last 6 months of the year 2023 and onwards, visits were conducted twice a month, at the home of the parents A. K. and V. P. The handover and return of the two children were carried out through the Center for Social Work in Lipjan, taking the children from the shelter and sending them to the parent's home and vice versa. Moreover, the Court in the decision emphasizes that the visits between the parents and their children will be supervised by Social Workers of the Custody Authority. (Decision, 2022).

#### **5. Parental responsibility after divorce in a comparative context**

Parental responsibility after divorce varies significantly across different legal systems, reflecting diverse cultural, social, and legal traditions. In this paper, we will approach how parental responsibility is addressed in a few representative jurisdictions. As for contemporary European Legislation, the importance of addressing parental rights is at a very high level. According to this legislation and to implement the best interests of the child, a large number of European states have stipulated that the need for joint care by both mother and father should not depend on parental status. *"In this sense, a considerable number of European legislations provide for parents to equally exercise parental rights even after divorce. Mention should be made of France, Italy, the United Kingdom, Germany, Switzerland, the Netherlands, the Czech Republic, Scandinavian countries, and other European countries".* (Zendeli et al., 2020). *"One of the most important and challenging issues remains the habitual residence of the child after divorce. Today, shared residence is an increasingly popular solution among divorced parents and the courts in different European countries are starting to consider shared residence as a more viable option than before. Basically, there are two possibilities: either a child can live with one parent and have regular contact with the other, or live with both parents. The former option is called sole physical custody. The latter one, joint physical custody, is an increasingly popular solution among divorced parents. Because living in two houses alter nately, it is also called a shared residence''.* (Kamińska, K., 2023).

*In France*, until 1970, parental responsibilities belonged solely to the father, who made all decisions concerning the child. A very important reform such as Act No. 70-459 of 4 June 1970 put both parents in equal position so they both had parental responsibilities but had to use them in the child's

best interest. (Ferrand, F., n.d.). To respect the principle of equality between spouses as well as the principle of the child's best interest, in *France*, parental responsibility after divorce is exercised jointly by both parents, which means that divorce or the cessation of the parents' joint life has no negative consequences regarding the exercise of parental responsibility. Therefore, as a result of changes made in French legislation, the child may live proportionally both with the mother and with the father, specifically having the right to have two residences. (Zendeli et al., 2020).

**In Germany**, unlike French law, parents continue to exercise parental rights jointly after divorce without the need for a court decision. However, the right of either parent to independently seek to exercise parental rights from the court is not excluded. The interruption of joint parental care will be approved by the court if it assesses that it is in the best interest of the child, but with some prerequisites such as obtaining consent from the other parent and if the child has reached the age of 14. (European Union, n.d.). German law emphasizes the importance of both parents remaining actively involved in the child's life after divorce.

**In Italy**, parental rights are similarly exercised jointly even after divorce as in France and Germany, and with the agreement of the spouses. However, the Court may make decisions, exceptionally granting exclusive rights to one parent to exercise parental authority, who has broader authorizations regarding this care, while allowing personal contact with the other parent who has more limited rights. When parents have to make important decisions about their children, they must decide jointly. In case of disagreement between them on these major issues regarding the child, the court will provide a solution by issuing decisions. (Boele - Woekli et al., 2005).

**In Switzerland**, a joint exercise of parental responsibility also exists. However, parental care can be entrusted to only one of the parents, when it is assessed that this parent can offer better conditions for the child's psychological development and stable well-being. *'According to the Swiss Civil Code, both biological parents generally retain parental custody of the child after a divorce or separation. Custody is only granted to one parent in exceptional cases. Within joint parental custody, parents have various options to arrange the shared care (parental supervision) in a manner that best serves the child's interests'*. (Who Gets Custody After a Divorce?, n.d.).

**In Albania**, the exercise of parental responsibility after divorce belongs to only one parent. After divorce, spouses can regulate child custody through an agreement if approved by the court. However, if an agreement is not reached, then it is at the discretion of the court to decide which parent the child will be entrusted to for custody, upbringing, and care. *'The parent who has not been entrusted with the child's upbringing retains the right to oversee the child's maintenance and education and consequently be informed and consulted about significant decisions related to their life. They contribute in relation to their own resources and those of the other parent. The right to visitation and residence, according to the conditions set by the court, cannot be refused except for serious reasons that harm the interests of the child'*. (Family Code of Albania, article 158, 2003).

**In Japan**, after divorce, only one parent exercises legal parental responsibility for the child. *'When parents divorce, they must agree on who will take the sole custody of their children'*. (Child Custody in Japan, n.d.). The mother is given parental authority in almost 90 % of cases. Therefore courts usually give sole custody and parental responsibility to the parent who has taken care of the child most recently. Japan's sole custody laws have been criticized for a long time and need to be changed because they don't recognize joint custody, where both parents can spend time with their children after a breakup. In this regard, *'Japan's parliament on May 17, 2024, passed a revision to the country's Civil Code that will allow divorced parents the option of joint child custody, a change that brings the nation in line with many other countries. The revision, the first to custody rights in nearly 80 years, is to take effect by 2026. It will allow divorced parents to choose either dual or single custody while requiring*

them to cooperate in ensuring their children's rights and well-being". (Japan passes revised law allowing joint child custody for divorced parents, 2024). Japanese family law takes a somewhat different approach.

*In United States*, after a divorce, a mother was usually granted custody and a father paid child-support. He was excluded from the daily activities of his child. Currently, with the evolution of the US legislations, the father is no longer the only breadwinner responsible for providing the family an adequate standard for living, and the mother is no longer primarily responsible for the duties of childrearing. The changes taking place are reflected in the struggle for equal treatment in the award of custody. The majority of the states in the USA have adopted the principle of the child's welfare either statutorily or in the case law in the context of parenting after divorce which keeps evolving. (Kamińska, K., 2023). Child custody following the divorce of the parents are to be decided according to the best interests of the child. The law directs that mothers and fathers be treated equally. The two main types are legal custody and physical custody. **Legal Custody determines** the right to make important decisions about the child's upbringing, including education, health care, and religious instruction. It can be jointly shared by both parents or solely awarded to one parent. **Physical Custody determines** with whom the child will live. This can also be joint (the child spends significant time with both parents) or sole (the child lives primarily with one parent). (Atkinson, 2010).

*In the United Kingdom*, parental responsibility after divorce is governed by several legal principles and statutes designed to ensure the welfare of children. The definition of parental responsibilities is provided in paragraph 1 of section 3 of the Children Act 1989. " *Parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property*". (Children Act, 1989). In the UK, when parents divorce, each parent continues to have parental responsibility regardless of who the child lives with. They must be recognized as legal parents. This means that both parents retain equal rights and duties under the law, even if a residence order has been made in favour of one parent. If the child (mainly) lives with one parent, the residence order is made in favour of that parent. If the child stays the same amount of time with both parents, a shared residence order is made in favor of both parents.

We can say that the legislation in Family Law in the United Kingdom was not advanced enough by excluding the granting of custody to one parent over the child and allowing the other parent contact. However, this creates an unequal division and a very unpleasant position for the other parent of the joint children.

" *With the coming into force of the Children Act 1989, the term 'custody' has been replaced with the term 'parental responsibility' and the idea that both parents should hold and exercise parental responsibilities together in harmony, consulting each other when making important decisions on the upbringing of the child*". (Nikolin, 2015.)

Based on the Children Act 1989, all biological mothers automatically (ex-lege) gain parental responsibilities at the moment of birth. Unlike fathers the situation is different. Fathers can only obtain parental responsibilities with the cooperation of the mother or through the court. (Nikolin, 2015., p. 54). Parental responsibility after divorce can differ significantly between European and non-European countries due to variations in legal traditions, cultural norms, and policy objectives.

Overall, while the core principle of prioritizing the child's welfare is consistent, the implementation of parental responsibility after divorce is deeply shaped by each country's legal traditions and cultural context. The comparative analysis of these jurisdictions reveals some key themes:

- **Joint vs. Sole Custody:** While the U.S, UK, Germany and most other European countries emphasize joint custody and shared parental responsibility unlike these, Kosovo, Albania,



Japan and some other countries primarily follow a sole custody model.

- **Best Interests of the Child:** This standard is universally recognized, but its application can vary significantly. In the U.S. and UK, it often leads to joint custody arrangements, whereas in Japan, Kosovo etc., it typically results in sole custody.

### **Conclusions and recommendations**

Parenting after divorce requires careful consideration, so many states attach considerable importance, as family matters hold a significant place in their legislation due to their complexity and sensitivity. This sensitivity continuously grows since the child is the primary subject in this field. The rights of European states tend to be treated as uniformly as possible. The Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, has played a significant role in this regard. The Family Law of Kosovo has transposed provisions of the Convention on the Rights of the Child, which has its advantages as it provides the law with standards from the Convention. We can say that co-parenting after divorce can present various challenges, but above all, it's essential to prioritise the child's well-being throughout this process. The aim of this paper is to give some helpful recommendations, through which we will find solutions for the problems that can appear related to parental responsibilities. Here are some recommendations for improving and effectively implementing parental responsibility after divorce in Kosovo. From the analysis of Law No. 2004/32 on the Family in Kosovo, we can draw the following conclusions:

**Firstly:** By amending the Family Law of Kosovo, we consider that the possibility for parents to exercise joint physical custody after divorce should be reviewed because in Kosovo the sole physical custody dominates in most cases, as well as in some countries. It is exercised only by one parent, while personal contact with the child is designated to the other parent. Sole physical custody of a child has been traditionally granted to the mother, and visitation rights – to the father. However, shared residence is more beneficial for children. The importance of shared residence is that the child lives with each parent for an equal amount of time. Laws and practices should encourage joint custody, where both parents share responsibility for major decisions in the child's life and also children spends substantial time with both parents, typically splitting time between their homes.

**Secondly:** When parenting after divorce gets difficult getting a mediator involved can be very helpful in promoting productive communication and resolving conflicts.

**Thirdly:** Through amendments, the Family Law considers the opinion of children over 10 years old regarding custody as determinant rather than supplementary circumstances.

**Fourth:** The need for training judges in the field of parental responsibility after divorce is crucial for several reasons. These reasons are need to ensure that judicial decisions are made in the best interests of the child, that they reflect current legal standards, and improve the efficiency and fairness of the family justice system.

**Fifth:** Involving various stakeholders, such as legal professionals, social workers, and children's advocacy groups, is crucial in reforming parental responsibilities after the divorce process to ensure a holistic approach. Each of these stakeholders brings unique expertise and perspectives that can contribute to creating a more comprehensive and effective system for addressing the needs of families undergoing divorce.

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