

“Post Separation Fathering. The contribution of the ECHR in the protection of children and non-resident parents’ right to mutual enjoyment of each other’s company”*

Joëlle Long ^{o1}

Summary. *Four recent judgments issued by the European Court of Human Rights raise the question of whether the right of children and non-resident fathers to mutual enjoyment of each other's company is effectively protected in Italy. A careful scrutiny of the Italian system seems to show that courts seldom use punitive measures to enforce contacts orders. Indeed, such measures are often deemed inappropriate. According to the Strasbourg Court, national authorities should ensure the implementation of the judicial order on access through a combination of both punitive and 'promotion' measures, such as family mediation and psycho-therapeutic interventions. Such an approach seems useful not only in the few stereotypical cases of a single implacably hostile parent, but also in the many cases involving high levels of parental conflict and/or allegations of child welfare or safety concerns.*

Key words: *Fathers' Rights, father-child relationships, contact, access, child custody, European Court of Human Rights, Family mediation*

Received: 27/07/2013 - Revision: 22/02/2014 – Accepted: 04/05/2014

^o Dipartimento di Giurisprudenza, Università degli Studi di Torino Lungo Dora Siena 100 A, 10153 Torino joelle.long@unito.it

¹ This article was developed within the project “Practices and Policies around Parenthood. Work-family balance and childcare in multicultural contexts”, coordinated by Prof. Manuela Naldini of the Department of Culture, Politics and Society and developed under the agreement between the University of Torino and the Foundation Compagnia di San Paolo (year 2011).

The right to mutual enjoyment of each other's company under the ECHR

The European Convention on Human Rights (ECHR) protects the mutual enjoyment by parent and child of each other's company. Indeed, the European Court of Human Rights considers this a fundamental element of the "family life" guaranteed by article 8(1) ECHR (see for instance *Eriksson v. Sweden*, 22 June 1989, para. 58). Under the Court's case law, although the breakdown of the relationship between spouses or former partners necessarily terminates the cohabitation of the child with both parents, a limitation or ban on the contacts between the offspring and the non-resident parent constitutes an "interference" in the latter's family life. And this intrusion can be justified only in exceptional circumstances, "in accordance with the law", when it pursues a legitimate aim and it is proportional to the aim pursued (see article 8(2) ECHR).

An analysis of the European Court's case law shows that the person most often claiming a violation of his right of access is the non-resident father. In fact, as it is well known, mothers are resident parents in the vast majority of cases (see *infra* para.2). Moreover, the procedural rules of the European Court render it virtually impossible for children to submit an application. Indeed, only the legal guardian can lodge a complaint (see Rules of Court n. 36 and n.47).

Several reasons make it important to analyse the Strasbourg's case law on fathers' right of contact. First of all, an adequate protection of the paternal right of access is instrumental to defend the concomitant right of children to family life and, more generally, the offspring's welfare. Indeed, an unjustified interruption of contacts with one of the parents can cause a range of serious and enduring problems in the child's social and cognitive development. Besides, understanding the obstacles men experience in their efforts to remain involved in their children's life after marital breakdown contributes to the promotion of gender equality. Lastly, an implementation of non-resident fathers' right of access also helps to recognize contact rights of the few, but steadily increasing, non-resident mothers.

According to the established case law of the European Court, a total ban on a non-resident parent's access rights should be proportionate to the legitimate aim of protecting the best interests of the child. A father's religious convictions, for instance, justify the denial of his access rights only if there is specific evidence that these convictions involve dangerous practices or expose a child to physical or psychological harm (*Vojnity v. Hungary*, 12 February 2013, paras. 38, 43). Even an allegation of sexual

harassment against the father does not always justify the total and permanent exclusion of the contacts between the child and her natural family, including the father². Indeed, national courts should consider whether any other less severe measure, such as supervised access, could be adequate. This is to protect the emotional balance of the child (*ibidem*). In addition, as far as procedural guarantees are concerned, excessively lengthy divorce proceedings infringe not only a father's right to a fair trial but also to family life: indeed, the passage of time could have irremediable consequences for the relations between the child and the parent not living with him or her (*Cengiz Kılıç v. Turkey*, 6 December 2011).

Four recent judgments of the European Court of Human Rights against Italy raise the question on whether the right of children and father to mutual enjoyment of each other's company is adequately protected in the Italian peninsula. In *Bove v. Italy*, *Piazzari v. Italy* (2 November 2010), *Lombardo v. Italy* (29 January 2013) and *Santilli v. Italy* (17 December 2013), Strasbourg judges held that the failure to protect non-custodial fathers' access to their child infringed the men's right to respect for family life under art. 8 ECHR. The facts in the abovementioned cases were similar. Mr Bove, Mr Piazzari, Mr Lombardo and Mr Santilli were all non-resident fathers with judicial orders granting them rights to access their respective child. They alleged that, despite the judicial order, the Italian authorities had been unable to contain the mothers' opposition and protect their right of access their respective children. In all three cases the mothers had custody and had been strongly opposing the father's visits.³ Social services had delayed to implement the court's orders, primarily because they shared the same opinion of the mothers, namely that contact may not be in the best interests of the child. Courts had not properly supervised social services' work. The respective children, after several years of suspension of the contacts due to the abovementioned delays, were also resisting visits. Considering the child's opposition to contacts, the Court castigated Italy not for failing to implement the judicial order, but for not being able to

² See, mutatis mutandis, *Clemeno and oth. v. Italy*, 21 October 2008. (The case concerned contacts between the child put in foster care and her natural family). The statement is important, mutatis mutandis, in separation and divorce proceedings because, as explained later on in the article, it is not uncommon for non-resident fathers to be accused by custodial mothers of sexually abusing the child (see *Bove v. Italy*; *Piazzari c. Italia*).

³ In *Bove v. Italy* the animosity of the mother against the father even led to an accusation of sexual abuse against the daughter. However, criminal proceedings against the applicant were discontinued.

promote contact, for example by organizing psychological support to the child (*Bove v. Italy*, paras. 46, 50).

A careful scrutiny of the Italian context appears to be particularly interesting. Indeed, in the Italian Peninsula the role of fathers in children's care has often been limited. The reason lies in the social and cultural stereotype of the central role of mothers in offspring rearing, fueled by the lack of adequate welfare for working parents (Naldini, 2003; Saraceno, 2011).

In the sections that follow, I analyze the Italian legal framework of visitation rights. I underline the gap between the principle of dual parenting embedded in the Civil Code and the practical difficulty which fathers encounter in the enforcement of child contact orders. This is especially the case when – as happened in the cases *Bove*, *Piazzini Lombardo* and *Santilli* – the mother opposes the father's contact and the child progressively becomes hostile to contact. I will then discuss the tools which could be used, *de iure condito*, to mend the gap between the law in the books and the law in action.

Law in the books...

In 2006, the Italian Parliament passed law n.54 concerning "[p]rovisions relating to parental separation and shared custody of their children". This was a consequence of intense lobbying by Separated Dads' Associations which had long been stressing the need for reform of custody rules to allow the non-resident parent to play a full role in the growth of the offspring⁴.

The 2006 reform brought about amendments to the Civil Code, which – in theory – made the Italian legal system consistent with the principle laid down by the Strasbourg Court according to which children have the right to maintain a legal and *de facto* relationship with each parent after their separation or divorce. Indeed, each parent continues to hold the "parental responsibility" (*potestà genitoriale*), unless his or her behavior can cause the child serious harm (articles 317, 330, 333. See also articles 8 and ff. Law n.184/1983 on Foster Care and Adoption). Besides, as far as contacts are concerned, the Civil Code states: "[e]ven in the event of a separation of

⁴ Men's Associations emerged fairly recently in Italy. Only at the end of the eighties did the first examples appear. In 1991, the Associazione Padri Separati (Association of Separated Fathers) was born in Rimini. In 1994 Papà separati Milano (Separated Dads) was created in Milan. In 1998, Papà separati was founded in Naples and was, the first to develop at national level. In 2009, an "Association of Associations": Adiantum (Associazione Di Associazioni Nazionali per la Tutela del Minore) was created to address excessive fragmentation of associations.

the parents, the child holds the right to preserve a balanced and continuous relationship with both parents and to receive care, education and instruction from both and to retain relations with his or her ascendants and relatives of each branch⁵.

To implement these rights, the Civil Code stipulates that courts should, where possible, arrange joint custody (*affidamento condiviso*: art. 337 ter para.2). Alternatively, sole custody is to be used as a subsidiary solution whenever joint custody is not in the best interests of the child (art. 337 quater). In the case of joint custody, both parents exercise parental responsibility. Thus, they make all decisions concerning their offspring, including, for instance, the choice of the child's place of residence, together (see art.337 ter para.3 and art.).

Parents whose rights of custody or access are infringed by the other parent can ask the court for a change of the custody order (e.g. from joint custody to sole custody). Besides, they can ask the court to admonish the defendant or condemn him or her to a fine or to damages in their favor and/or in favor of the son or daughter (article 709 ter Code of Civil Procedure). In addition, non-compliance with the orders of the court would result in criminal liability under article 388 Criminal Code (willful failure to comply with a court order).

However, there are exceptional cases when a parent can lawfully refuse to comply with a court order: where there is a clear and specific allegation of concrete harm to the child and in view of the urgency of the situation it has been absolute impossible to go to court to seek measures restricting the rights of access. An example could be the mother who, a few minutes before the arrival of non-custodial father, hears her daughter in tears telling of an alleged sexual abuse by the father. Another, less dramatic example, is the non-resident father who refuses to deliver the son to his mother that wants to take him away, according to the visitation schedule, and to leave together on holiday despite the offspring being ill with high fever.

When there is no urgency as above, the law involves social services and courts, these being the public authorities institutionally responsible for the protection of children.

⁵ Art. 155 para. 1. The article will become art. 337 ter para. 1 when the the Council of the Ministers approve the Legislative Decree on Filiation.

Law in action

Custody

Members of the fathers' right movement state that not much has changed, notwithstanding the 2006 law reform which sought to recognise the essential role that non-resident fathers play in the growth of their children. It is certainly true that in Italy joint custody is now widespread. In 2007, joint custody overtook sole custody to the mother (ISTAT, 2012)⁶. In 2010 it was chosen in 89.8% cases of separation and 73.8% of divorces (*ibidem*). However, regardless of the choice of custody, joint or sole, mothers are still preferred as resident parents in 93% of cases (analysis by *Osservatorio nazionale ADIANTUM* on 1020 judgments, cited in Cardinale, 2011). Besides, the analysis of joint custody decisions shows that courts, with an aim of ensuring a child's utmost stability, avoid recognizing equal parenting time and choose one parent, usually the mother, as "primary caretaker" (*ibidem*). The latter is in charge for the lodging and daily care. The other parent, in addition to the right and duty to participate in all decisions relating to the child (the so called "legal custody"), has an access right, i.e. the right of "tak[ing] the child to a place other than his or her habitual residence for a limited period of time" (art.2 n.10 EU Reg. n.2201/2003). Visitation patterns by a co-custodial non-resident parent are similar to that of a non-custodial parent (every other weekend, two weeks in the summer, and some holidays). Thus, in practice, the content of the right of the co-custodial parent is almost identical to the one held by non-custodial parents in sole custodies.

Moreover, members of the fathers' right movement also state that courts' gender bias is the reason of the primary choice of the mother as resident parent.

In legal terms this allegation calls into question the principle of non-discrimination on grounds of gender, and the father's right to respect for family life. In this light, Mr Bove, in the case *Bove v. Italy*, alleged that his right under article 8 had been infringed due to the Italian courts decision to grant sole custody to the mother. In this regard, however, the European Court merely noted that, in its opinion, the decisions of the national authorities were "taken in the best interests of the child" and were based

⁶ The data collected relates to judicial proceedings of separation before 165 civil courts in the year 2010. The reason for the difference between divorce and separation is probably that, because in Italy separation is the first step to divorce, in divorce cases much time has passed after the breakdown of the family hold and therefore the resident parent is more likely to be the one far more involved in the child's care.

"on relevant grounds." They therefore concluded, that there had been no violation of the Convention (*Bove v. Italy*, para. 54).

Contact

The recognition of children's and parents' right to mutual enjoyment of each other's company leads to the presumption in favour of contacts between non-resident parents and children after divorce, unless of course contact would be contrary to the offspring's welfare. Indeed, in the cases *Bove*, *Piazzini*, *Lombardo* and *Santilli*, the European Court found an infringement of the father's right to respect of family life due to the fact that national authorities omitted to adopt "measures that could reasonably be required on their part to enforce the decisions taken by the Juvenile Court of Naples" (*Bove vs. Italy*, para.47.). This breach, therefore, did not arise out of a failure to keep up with the visiting schedule against the wishes of the minor child. The violation came, rather, from the domestic authorities' failure to implement measures to overcome the mother's obstructive behavior as well as to promote and create the conditions for the father exercising his visitation rights, albeit respecting the child's will to refuse contacts (*Bove c. Italia*, paras. 46, 50). According to established European Court case law, the State must adopt legal instruments suitable to sanction a custodial parent who fails, refuses or neglects to cooperate in the exercise of rights of access by a non-custodial parent (*Maire v. Portugal*, 26.06.2003, para.76).

The 2006 reform, as explained above, has strengthened the sanctions against the violation of court orders concerning custody and access. However, the case law analysis seems to demonstrate that, in practice, the system designed in 2006 to ensure the compliance with court orders does not work. Indeed, courts appear reluctant to use punitive measures to enforce contact orders. In particular, so far, courts have hardly used judicial admonition, the condemnation to a fine and/or damages in favor of the non-resident parent and/or of the son or daughter (art. 709 ter of Code of Civil Procedure). Besides, in relation to modifying the type of custody, the fact that a child has long been living with the resident parent is a great prejudicial determinant. A change of custody is often perceived as likely to cause a greater prejudice than the alienation of a non-resident parent. (See *Lombardo v. Italy* where the child, as a consequence of the implacable hostility of the mother towards father's access, is formally put in care of social services, but in practice continues to be placed with the mother: *Lombardo*, para. 17). Furthermore, criminal law does not solve the problem. In *Lombardo* the mother was sentenced to one year and seven months in prison (with parole) and to a criminal fine, but still continued to oppose contacts.

In fact, courts seldom use punitive measures to enforce orders. Instead they focus on problem-solving, seeking to restore contact using further contact orders and seldom commenting explicitly on whether a breach had occurred. The approach is common both to the few stereotypical cases of a single implacably hostile parent (The cases *Bove*, *Piazzini*, *Lombardo* and *Santilli* are good examples) and to the many cases involving high levels of parental conflict and/or allegations of child welfare or safety. Indeed, in these latter situations courts usually choose measures that address the behavior of both parents, including provisions relating to how parents should behave with each other or referral to parent education, and/or counseling for the children.

Mending the gap... shared residence and bird nesting agreements

In order to best preserve the right of the child and of the non-resident parent to mutual enjoyment of each other's company, Separated Dads' Associations identify two types of custody that, in their opinion, courts should promote. These are: a) shared residence and b) bird nest agreements. The common element is that both these proposals aim to ensure the father not only a full role in the education of the child but also a community of life with the latter which tends to be equal in time to that of the mother.

a) Under "shared residence" (also known as "joint physical custody"), none of the parent is indicated as "resident" (or "primary caretaker") since the child reside(s) with each parent at different times. The time the offspring spends in each home is not necessarily equal, even if it tends to be so in order to preserve the relationship of the child with both parents. No legislative reform is needed to introduce this type of custody, since under the joint custody model the judge has the power to decide the operational details. There the judge may either choose one of the parents as "resident parent," or decide in favor of a shared residence. In practice, however, the latter is relatively uncommon because it is believed to severely disrupt children owing to the physical transfer of the child from one environment to another and therefore to the lack a stable educational reference⁷. To my knowledge, the only examples of shared residence date back to the very

⁷ In this regard I would merely point out that clinical studies demonstrating deleterious effects on the psyche of children under alternate custody usually pertains to high conflict families. Recent studies on non-high conflict families presents a rather positive picture. See Bjarnason, T. and Arnarsson, Á. (2011).

time of the entry into force of the 2006 reform⁸. This, in my opinion, shows that courts have been realizing the difficulties caused by this type of custody.

Formerly, the same fear of causing a child psychological harm contributed to the failure of another type of custody, which was very similar to shared residence: “alternate custody”, provided for by art. 6 para. 2 law n. 898/1970 on divorce⁹. The difference between shared residence and alternate custody is that, under the first model, both parents contemporaneously share parental responsibility, while, under the second, only the temporary resident parent holds it.

In contrast, the analysis of foreign legal systems shows a tendency to promote shared residence.

In the United Kingdom, there has been a lot of discussion about introducing a legal presumption of shared parenting. The Family Justice Review, commissioned by the Government to review the family justice system, opposed this proposal underlying it “might risk creating an impression of a parental ‘right’ to any particular amount of time with a child” (para 4.27). Following this opinion, the Children and Families Act 2014 only sets out a presumption of continued parental involvement, stating that “A court... is ... to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child’s welfare” (s 11 2(a)). As stressed in the preparatory works, the new law should not prompt the courts to be more willing to impose shared care

⁸ Tribunale di Chieti, 28.06.2006, in www.affidamentocondiviso.it ; Tribunale di Catania 12.07.2006, in www.papaseparatilombardia.org ; Tribunale La Spezia 14.03.2007, in *Famiglia e Diritto*, 2008, 4, 389. This, in my opinion, shows that courts have been realizing the difficulties caused by this type of custody.

⁹ The provision, which stated “[i]f the court deems it necessary in the interest of the children, also considering their age, it can order joint custody or alternate custody”, was superseded by the 2006 Reform. For a concrete example of alternate custody, see Trib. Roma, 12.05.1987, in *Giurisprudenza di merito*, 1988, 9. For arguments against the use of alternate custody see however Trib. Mantova, 11.04.1989, in *Il diritto di famiglia e delle persone*, 1989, 689 which rejected the father’s application of annual alternate custody stating this type of custody was not recommended because children need absolute stability, and, moreover, the parents resided in different cities. Similarly, Trib. Napoli, 22.12.1995, in *Gius.*, 1996, 1278.

The National Statistical Institute offers only aggregate data on alternate and joint custody. In 2000, for example, these type of custody together constituted only 8% of separations and 6.8% of divorces. In 2005, close to the entry into force of the reform, however, they had already doubled, reaching 15, 4% of separations and 11, 4% of divorces (ISTAT, *Separazioni e divorzi in Italia*, 2007, p.7).

arrangements even in case of safety concerns¹⁰. Besides, the new law overrides the linguistic duality between custody and access by introducing a "child arrangements order", which deals with the decision as to "with whom a child is to live, spend time or otherwise have contact" and "when a child is to live, spend time or otherwise have contact with any person" (s 12). This was meant to underline the moral and legal dignity of both parents after marital breakdown.

In France, in 2002 the *résidence alternée* was formally introduced as a possible choice for courts (see article 373-2-9 *Code civil*, as amended by *loi n. 2002-305 du 4 mars 2002*). In 2010, it had been used in 20% of custody decision (source: French Ministry of Justice). On 18 September 2013, the Senate unexpectedly passed an amendment to a government bill on equality between men and women, indicating "equal alternate custody" as the preferred option and placing the burden of proof on the parent who opposes this type of custody to demonstrate that it is not in the best interests of the children. The battle now moves to the *Assemblée Nationale*.

b) Both in the case of shared residence and in the case of habitual placement within one of the parents, cohabitation cannot take place in the adults' home but rather in the family home where parents spend their visitation time with the children following a visitation schedule. This solution works, however, only when the level of parental conflict is very low. Indeed parents, although their relationship as a couple ended, are requested to share not only the decisions concerning the education of the child, but also the same physical space, although at different times. It is important to observe that this choice is usually incompatible with a new partner and new children. Furthermore, it involves very high costs since three separate homes have to be maintained.

Mending the gap... mediation and collaborative law

Many social workers, children's rights associations and family law lawyers believe that litigating in court is not the best way to effectively implement children and fathers' right to family life. They believe other means of resolving family conflicts should be explored and encouraged. Their idea is that the custody order, regardless of its content, has a better chance to be successfully implemented if fully endorsed by the parties. Besides, parties themselves should take primary responsibility for ensuring

¹⁰ "Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny", London, 2013.

the protection of the best interests of their child. Two techniques identified are: a) mediation or b) collaborative law.

a) In *Bove v. Italy* and *Piazzzi v. Italy*, the European Court noted, in particular, that “to make the parties more collaborative” social services should have set up a mediation project involving the parents¹¹. In *Piazzzi*, in particular, social services left it to the mother to define and manage the psychotherapeutic process of her son and passively relied on the findings by the private practitioner the mother chose. According to the European judges, however, mediation by social services would have facilitated the creation of pro future conditions necessary for implementing the rights of the father, as well as safeguarding the impartial role of social services *vis-à-vis* the two parents¹².

Mediation, as it is well known, is a cooperative dispute resolution process where a neutral professional third party, the mediator, tries to help former partners to reach an agreement on the conditions of divorce, including child custody and visitation rights. The couple can either contact the mediator before going to court, or during the judicial process.

The UK was the first European country to carry out family mediation, under the name of ‘conciliation’. This was in the 1970’s, (see M. Roberts, 2008). At present, the new Children and Families Act 2014 makes sure that separating couples consider mediation as an alternative to a courtroom battle by stating that “Before making a relevant family application, a person must attend a family mediation information and assessment meeting” (Section 10(1)).

In the late 1980s, through Quebec’s influence, France first came in contact with family mediation. (For a history of family mediation in France, see Macfarlane D., 2004). However, only in 2002, the Civil Code was amended in order to promote family mediation, granting courts the power to enjoin parents to attend an information session on family mediation (art. 373-2-10 *Code civil*, as amended by *Loi n°2002-305 du 4 mars 2002* on parental responsibility). Following this provision, Decree No. 2010-1395 of 12 November 2010 on mediation and judicial activity in family law provides that, until the 31st of December 2013, the High Courts of Bordeaux and Arras will experiment a model of mandatory mediation. “Parties are informed of the judge's decision requiring them to meet a family mediator or by mail, or at the hearing. It is indicated to the parties the name of the family mediator or association and the place, date and time

¹¹ *Piazzzi v. Italy*, para. 61. See also *Cengiz Kılıç v. Turkey*, 6 December 2011, cit.

¹² *Piazzzi v. Italy*, para. 61.

of the meeting. When the decision is sent by mail, it is further recalled the date of the hearing at which the case will be heard. At that hearing, the judge ratifies the agreement, or, in the absence of an agreement, settles the dispute".

Just as the UK and France, Italy chose not to impose but only to propose and encourage the use of mediation among conflicting parents. Indeed, the 2006 reform gives the judge the power, after hearing the parties and obtaining their consent, to postpone the adoption of measures concerning custody in order to allow the parents to reach an agreement with the help of a trained mediator, specifically with reference to the protection of the moral and material support of the children (art.337octies para. 2 Civil Code). In practice, however, mediation seems to yield good results in cases in which the level of conflict between the parents is not high. Moreover, the absence of lawyers means that sometimes the agreements reached are not fit to be transposed into a court order. For example a parent may via mediation waive inalienable rights (e.g. the resident parent renounce the allowance for the offspring).

The importance of family mediation to ensure children's right to both parents is expressly emphasized in many international documents. According to the Recommendation No. R (98) 1 of the Committee of Ministers of the Council of Europe "on family mediation", mediation could "improve communication between family members, reduce conflict between parties in dispute, produce amicable settlements, provide continuity of personal contacts between parents and children, and lower the social and economic costs of separation and divorce for the parties themselves and states". Besides, under the European Convention on the Exercise of Children's Rights, "[i]n order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties" (art. 13). Lastly, EU Reg. n.2201/2003 states that in matters of parental responsibility the central authorities shall "facilitate agreement between holders of parental responsibility through mediation..." (art. 55 letter e). b)

b) A second technique that can be used to promote the participation of parents in decisions regarding the consequences of the couple's breakdown is the so-called "collaborative law". It is a voluntary legal process which starts with the parties signing an agreement binding each other to the process and disqualifying their respective lawyer's right to represent either one in any future separation or divorce proceeding (with specific reference to the United States pioneer experience, see Tesler P. H.,

2001). The aim is to enable couples who have decided to separate, to work with their lawyers in order to achieve a settlement that best meets the specific needs of both parties and their children. The advantages are to avoid judicial litigation, to have continued legal assistance and to reach a shared solution. Since lawyers are paid per hour, this approach could prove to be financially quite expensive.

However, for now, collaborative law is still little known in Italy since very few lawyers have been specifically trained to use it. The first case in Italy has recently been closed in Turin.

In contrast, collaborative law is already best known in the United Kingdom, where it was launched in 2003 and has so far been encouraged by both the judiciary and family lawyers organisations. In France, the interest began to grow at end of 2007 (Rivoire J. L., 2010).

Conclusion

The European Court of Human Rights' judgments in the cases *Bove*, *Piazzini, Lombardo and Santilli v. Italy* stimulate at least two reflections.

First of all, it is necessary to separate the issue of the custody from that of access.

As to custody, the choice of the mother as resident parent and, more generally, the evident disproportion between the number of placements of children with the mother as opposed to the father cannot be condemned in themselves. Indeed, they reflect the prevalent socio-cultural model under which women spend much more time than men caring for the children (see Istat, 2012, 110). This notwithstanding that in the majority of cases mums also work in the paid workforce. A closer proximity between mother and son facilitates the development of an enduring, emotional, and physical bond which tends to favor the mother as resident parent in the best interests of the child. Indeed, this, according to international and domestic law, is the sole criteria for custody decision. Thus, as stated by the Strasbourg Court in the *Bove* case, the placement of the child with his or her mother is legitimate, if justified by reference to the principle of the best interests of the child and based on relevant grounds (*Bove*, para.54).

On the contrary, however, as far as access is concerned, the nearly systematic limitation to contact between the non-resident parent and the child appears unacceptable. The presumption should be that contact with the non-resident parent is in the child's best interests. Thus, the limitation should be justified only if there is specific evidence suggesting that visits are harmful to the offspring.

Hence, comes a second consideration. National authorities should ensure the implementation of the judicial order on access through a combination of punitive and 'promotion' measures.

As the cases *Bove*, *Piazzini*, *Lombardo* and *Santilli* show, a remedial approach is not sufficient. Some punitive enforcement measures, namely the imprisonment of the defaulting parent and the transfer of the child's residence are often deemed inappropriate since they could harm the child, severing the ties with the primary caretaker. The analysis of other legal systems confirms the judicial trend of limiting the use of punitive measures. In the UK, for instance, the Children and Adoption Act 2006 introduced the new penalties of unpaid community work and financial compensation (see s.11j (2) Children Act 1989, as amended), which however have little been used so far (see L. Trinder, A. McLeod, J. Pearce and H. Woodward and J. Hunt, 2013).

If the child him or herself opposes contacts, punitive measures are impractical and other tools are needed. These tools should operate not to coercively enforce but to educate the parties involved about the potential benefit of continuing family relationships. A good example is family mediation.

A combination of punitive and 'promotion' measures, including family mediation and possibly collaborative law, seems to be the best choice not only in the few stereotypical cases of a single implacably hostile parent, but also in the many cases involving high levels of parental conflict and/or allegations of child welfare or safety concerns. Indeed, parents are encouraged to reach an agreement on their parenting pattern after separation or divorce, taking primary responsibility for their offspring's future and welfare. In fact, family relationships between the parties continue even after the judge's ruling. Therefore, in court a win-lose approach is likely to be counterproductive since the persistent conflict can hinder the implementation of the judge's decision on access and therefore the personal relationship between the child and the non-resident parent may deteriorate considerably. On the contrary, compromise solutions are more likely to be held in the medium and long term.

References

- Bjarnason, T. & Arnarsson, Á. (2011). Joint Physical Custody and Communication with Parents in 37 Western Societies, *Journal of Comparative Family Studies*, 42, 871-890
- Cardinale, A. (2011). Affidato condiviso dei figli. Una legge disapplicata [Shared custody of their children. A law disappplied]. In <http://www.imille.org/2011/04/affidamento-condiviso-dei-figli/>.
- Gaumont-Prat, H. (2012). La résidence alternée à l'épreuve du droit comparé. *Revue Droit de la famille*, 7, 13-18.
- Harris, P. & George R. (2010). Parental responsibility and shared residence orders: parliamentary intentions and judicial interpretations. *Child and family Law Quarterly*, 22, 151.
- Istat (2012), *Usa del tempo e ruoli di genere. Tra lavoro e famiglia nel ciclo di vita* [Use of time and gender roles. Between work and family life cycle]. Roma: Istat.
- Macfarlane, D. (2006). Family Mediation in France, in *Global Trends in Mediation* edited by Nadja Marie Alexander, The Hague: Kluwer Law International, pp.181-221.
- Naldini, M. (2003). *The Family in the Mediterranean Welfare States*, London: Frank Cass.
- Rivoire, J.L. (2010). La mise en place du droit collaboratif en France s'organise. *Actualité Juridique Famille*, p.255-256
- Roberts, M. (2008). *Mediation in Family Disputes*, Aldershot: Ashgates.
- Saraceno, C. (2011). Childcare needs and childcare policies: A multidimensional issue. *Current Sociology*, 59,1,78-96.
- Tesler, P. H. (2001). *Collaborative Law*. Chicago: ABA.
- Trinder, L. & McLeod, A. & Pearce, J. & Woodward, H. & Hunt, J. (2013). *The enforcement of court orders for child contact: interim research findings. Children and Families Bill Memorandum*. Public Bill Committee.