

NATIONAL REPORT: PORTUGAL

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A. GENERAL

1. Having regard to the concept of parental responsibilities as defined by the Council of Europe (see above), explain the concept or concepts used in your national legal system.

Under Portuguese law, parental responsibility (literally, 'parental power') is seen both as a way to compensate for the incapacity of the non-emancipated minor to exercise his or her rights (Art. 122, 123, 124, and 129, Portuguese Civil Code) and as a collection of rights and duties that the legal system confers to or imposes upon both parents. Thus, parents are expected, in the interests of their child, to look after all aspects of the child; particularly the child's maintenance, health, safety, education, legal representation and administration of property (Art. 1878, No. 1, Portuguese Civil Code). Parental responsibility cannot be renounced (Art. 1882, Portuguese Civil Code), is non-transferable (*inter vivos* and *mortis causa*), and the exercise of it can be objectively controlled.¹

2. Explain whether your national concept or concepts encompass:

(a) Care and protection

As the concept of parental responsibility is understood to be a collection of powers and duties that the legal system confers upon parents so that they, in the interests of their children, will look after them, then the dimensions of care and protection can be understood as manifested in that concept.

(b) Maintenance of personal relationships

If 'looking after children' includes the parents' right and duty to keep their children close to them, then it must also include the maintenance of a close personal relationship with their child.

(c) Provision of education

The obligation of parents to ensure that their children receive an education is one of the mainstays of parental responsibility, expressly stipulated in the law (Art. 1878, No. 1, Portuguese Civil Code).

(d) Legal representation

In accordance with the notion of parental responsibility given above, the legal representation of children is one of the main aspects of parental responsibility (Art. 1878, No. 1, Portuguese Civil Code).

¹ F. PEREIRA COELHO and G. DE OLIVEIRA, *Curso de Direito da Família*, Vol. I, 3rd Ed., Coimbra: Coimbra Editora, 2003, p.173.

(e) Determination of residence

The right to establish the child's residence and the power to demand that she or he remains there (Art. 1887, No. 1 and 2, Portuguese Civil Code) are included in the concept of parental responsibility.

(f) Administration of property

The administration of their children's property is another of the rights and duties that parents hold as part of parental responsibility, expressly stipulated in the law (Art. 1878, No. 1, Portuguese Civil Code).

3. In what circumstances (e.g. child reaching majority or marrying) do parental responsibilities automatically come to an end?

Children are subject to parental responsibility until they reach majority or are emancipated (Art. 130, 132, 133 and 1877, Portuguese Civil Code). These are the normal ways in which parental responsibility will automatically come to an end.

There are, however, other ways that parental responsibility may end: the death of the parents or of the child, and full adoption (Art. 1979 *et seq*, especially Art. 1986, No. 1, Portuguese Civil Code) or simple adoption (Art. 1992 *et seq* and especially Art. 1997 and 1998, Portuguese Civil Code). Upon the death of one of the parents, parental responsibility falls to the surviving parent (Art. 1904 and 1911, No. 3, Portuguese Civil Code). With full adoption, "the adoptee acquires the status of son/daughter of the adopter and becomes part of his or her family alongside other descendants, while family ties between the adoptee and his or her natural ascendants and siblings are extinguished"; the biological parents' parental responsibility is therefore extinguished (Art. 1986, No. 1, Portuguese Civil Code). With simple adoption, parental responsibility falls exclusively to the adopter, although the natural bond of parentage is not extinguished (Art. 1997, Portuguese Civil Code).

4. What is the current source of law for parental responsibilities?

The Constitution of the Portuguese Republic and the Civil Code and Child Protection Law regulate parental responsibility. Thus, the Fundamental Law establishes various constitutional principles that directly affect parent-child relationships. These are: the principle of equality between spouses as regards the maintenance and education of their children (Art. 36, No. 3, Portuguese Constitution); the principle of awarding parents the right and duty to educate and maintain their children (Art. 36, No. 5, Portuguese Constitution); and the principle of the inseparability of children from their parents (Art. 36, No. 6, Portuguese Constitution).

The Portuguese Civil Code has a section on parental responsibility, divided into six subsections: general principles (Art. 1877 to 1884, Portuguese Civil Code); parental responsibility regarding their child (Art. 1885 to 1887A, Portuguese Civil Code); parental responsibility regarding their child's property (Art. 1888 to 1900, Portuguese Civil Code); the exercise of parental responsibility (Art. 1901 to 1912, Portuguese Civil Code); restrictions upon parental responsibility (Art. 1913 to

1920A, Portuguese Civil Code); and the recording of decisions relating to parental responsibility (Art. 1920B and 1920C, Portuguese Civil Code).

The Portuguese Child Protection Law lays down the rules for the regulation of the exercise of parental responsibility and its incidents (Art. 174 to 183, Portuguese Child Protection Law), and allows either parent the possibility of applying for court intervention when there is disagreement between them as to some matter of particular importance (Art. 184, Portuguese Child Protection Law).

5. Give a brief history of the main developments of the law concerning parental responsibilities.

The 1867 Portuguese Civil Code regulated the institution of parental responsibility in Title IX (On the Incapacity of Minority and Ways of Compensate it) of Part I (On Civil Capacity) and presented it as a collection of parental rights, designed to regulate the child and administer his or her property (Art. 137). This systematic insertion shows that parental responsibility was understood predominantly as a way to cure the child's incapacity to act while still a minor. This is perfectly attuned to the concept of the absolute power of parents (particularly the father) over their children until majority or emancipation. The legal regulation of this institution thus reflects an authoritarian and hierarchical vision of family relations.

As regards entitlement to parental responsibility, the rule was that both parents were entitled to hold parental responsibility (Art. 137 of the 1867 Seabra Code). However, owing to the relative incapacity of the married woman, the exercise of those powers was shared unequally between the father and mother. As head of the family, the father would direct, represent and defend his children, in and out of court (Art. 138 of the 1867 Seabra Code); the mother would participate and be heard on all matters concerning the child's interests, but had only a 'consultative function', as the mere collaborator of her husband (Art. 138 of the 1867 Seabra Code).

With regards to the personal aspect of parental responsibility, the rights of custody, education and representation were exercised by the father (Art. 137, 138, 143 and 148, No. 2 of the 1867 Seabra Code). The Code did not expressly establish a parental right to correct children. However, most authors agree that this right is included in the collection of rights that make up parental responsibility, considering that the right to correct is an instrumental right included in the rights of custody and education. Indeed, in accordance with Art. 143 of the 1867 Seabra Code, in the event of bad behaviour, serious indiscipline or disobedience from children, parents could apply to the courts to decree the appropriate corrective measures.

As regards the property of minors, the father held exclusive rights of administration (Art. 146 of the 1867 Seabra Code). However, both father and mother enjoyed (legal) use of the child's property (Art. 145 of the 1867 Seabra Code). Parents were not obliged to provide accounts of this administration (Art. 152 of the 1867 Seabra Code); however, they had to support the burden of maintaining and educating their children in a decent manner appropriate to their social status (Art. 148, No.1, *in fine*, and No. 2 of the 1867 Seabra Code). This right

to use could be renounced in favour of the children (Art. 149, No. 1 and only § of the 1867 Seabra Code).

Corresponding to these rights that the parents (especially the father) held over the children and their property was the duty of the children to respect and honour their parents (Art. 142 of the 1867 Seabra Code).

The essence of this system of parental responsibility was not altered by the Portuguese Civil Code of 1966. The new Code only changed the location of this information, with parental responsibility now appearing in Chapter 4 (Effects of parenthood) of Title III (On parenthood) of Book 4 (Family Law) of the Portuguese Civil Code. Parental responsibility was presented as one of the main effects of parenthood.

In 1976, the new Constitution of the Portuguese Republic dealt directly with matters concerning the parent-child relationship. The Fundamental Law established various principles that directly affected the regulation of the parent-child relationship. The first of these was the principle of equality of spouses as regards the maintenance and education of the children (Art. 36, No. 3, Portuguese Constitution); this meant that parental responsibility was now held and exercised by both parents (father and mother), with no special powers attributed to either of them (Art. 1901, Portuguese Civil Code). There was also the principle of awarding parents the right and duty to educate and maintain their children (Art. 36, No. 5, Portuguese Constitution), which was manifested as a right and duty to oversee the education of their children (Art. 1878, No. 1, Portuguese Civil Code), not in an authoritarian way, but rather by respecting the child and promoting her or his gradual autonomy (Art. 1874, No. 1 and 1878, No. 2, Portuguese Civil Code); this also translates into a right and duty of parents before the State, namely the right to educate their children in accordance with their own philosophical, ideological, political, aesthetic, moral and religious convictions. This role of the State is thus reduced to helping and collaborating with parents in the exercise of this main right (Art. 67, No. 2c and 68, No. 1, Portuguese Constitution). Finally, there is the principle of inseparability of children from parents (Art. 36, No. 6, Portuguese Constitution). This principle encodes the parent's subjective right not to be deprived of their children or to have their children removed from them, except in those circumstances laid down by law, such as situations when they have not fulfilled their basic duties towards their children, and only then upon judicial decision (Art. 1915 and 1918, Portuguese Civil Code).

Through the direct influence of the Portuguese Constitution of 1976, the Portuguese Civil Code also underwent alterations as regards the regulation of parental responsibility. Effectively, the 1977 Reform of the Civil Code established a new concept of the family and consequently of the parent-child relationship. This now included mutual rights and duties for parents and children, namely the duty to respect, help and support (Art. 1874, No. 1, Portuguese Civil Code). The interests of the child was now made into the guiding criterion for the exercise of parental responsibility (Art. 1878, No. 1, Portuguese Civil Code). Another innovation presented by the 1977 Reform led, in the teaching of PEREIRA COELHO and DE

OLIVEIRA, to the imposition of a positive duty upon parents to respect their child.² Thus, in accordance with the provisions of Art. 1878, No. 2, 2nd part, Portuguese Civil Code, parents should take their children's opinions into account (in accordance with the child's maturity and understanding) on important family matters, and recognise their autonomy in the organisation of their own lives. The duty of children to obey their parents nevertheless remains (Art. 1878, No. 2, 1st part, Portuguese Civil Code).

Today, the Portuguese Civil Code does not expressly establish the so-called power to correct. Indeed, the 1977 Reform did not include the wording of the former Art. 1884, Portuguese Civil Code from 1966, which recognised for both parents 'the power to correct their child, within moderation, when she or he was at fault'. Applying the constitutional principle of equality (Art. 13 and 36, No. 4, Portuguese Constitution), the Reform refused the two-part division of parental responsibility according to whether the children were 'legitimate' or 'illegitimate'. The only difference that now existed in the regulation of these two situations was in the way parental responsibility was exercised, because the effective difference in the situations demanded it. The regulation of the property dimension of parental responsibility was not untouched by the Reform. It effectively eliminated the right of parents to use their children's property and established the possibility of parents drawing revenue from their children's property, if that were necessary to cover the expenses of maintenance, safety, health and education of their children, and, within reasonable limits, the needs of the family (Art. 1896, Portuguese Civil Code).

6. Are there any recent proposals for reform in this area?

No.

B. THE CONTENTS OF PARENTAL RESPONSIBILITIES

7. Describe what the contents of parental responsibilities are according to your national law including case law.

In the terms of Art. 1878, No. 1, Portuguese Civil Code, 'it is the responsibility of the parents, in the interests of their children, to look after their health and safety, provide for them, oversee their education, legally represent them, even while still unborn, and administer their property'. Parental responsibility is made up of a collection of powers and duties, which, according to national legal literature and jurisprudence, includes: the power and duty of custody of children, the power and duty to protect the child's health, the power and duty to provide for them, the power and duty to oversee their education, the power and duty to represent them legally and the power and duty to administer their property. In addition to these functional powers listed in the article, other powers and duties may be considered as included in this one, namely: the power and duty to declare the birth of the child (Art. 97, No. 1a, Portuguese Code of Civil Registry) and the power and duty to name the child (Art. 1875 and 1876, Portuguese Civil Code and Art. 103, Portuguese Code of Civil Registry).

² Footnote?

8. What is the position taken in your national law with respect to:

(a) Care

The concept of care is contained in the legal notion of parental responsibility (Art. 1878, No. 1, Portuguese Civil Code). When the law refers to parents' duty to look after their children's safety, it is specifically referring to one of the powers and duties included in parental responsibility: the power and duty of custody. This functional power should not be understood merely in physical or material terms. The exercise of this power and duty also involves a series of acts carried out by parents with a view to satisfy the material and emotional needs of their children (i.e. feeding them, supplying them with clothing and accommodation, organising their lives, providing attention and affection) that correspond perfectly to the dimension of care. When parents do not act in this way and if their actions are damaging to the children or put their safety, health, moral training or education at risk, then they may be discharged of their parental responsibilities or have them restricted (Art. 1915 and 1918, Portuguese Civil Code).

(b) Education

The power and duty to educate minor children is expressly mentioned in the legal notion of parental responsibility (Art. 1878, No. 1, Portuguese Civil Code). It is therefore the responsibility of parents to promote the physical, intellectual and moral development of their children. Legal literature and jurisprudence have understood that this obligation includes not only the socialization of their children (that is, promoting the development of their physical and intellectual faculties) but also their moral, religious, civil and political training, and the acquisition of technical and professional skills (Art. 1885, Portuguese Civil Code). However, the level to which children are educated depends not only upon their parents' economic means (Art. 1885, No. 1, Portuguese Civil Code) but also upon the talents and inclinations of the child (Art. 1885, No 2, Portuguese Civil Code).

(c) Religious upbringing

As regards religious education, the decision whether to give the child a religious education lies with both parents: they choose the religion and decide how it should be taught and practised. This continues until the child reaches sixteen years of age, when the law recognises the child's freedom of self-determination in matters of religion (Art. 1886, Portuguese Civil Code).

(d) Disciplinary measures and corporal punishment

The Civil Code does not mention the "power to correct". De Oliveira claims that the 1977 Reform did not include this expression 'certainly out of deference and respect for minors'.³ Does this mean, therefore, that parental orders and advice cannot be enforced against the will of the child? Legal literature seems mostly to accept that parents still have this power, even though it is not explicit. Thus, parents have the right to correct their children, not as an autonomous right, but as one that is subordinate to the powers and duties of overseeing and educating them, and one which should be exercised in a non-punitive way. Physical or

³ See G. DE OLIVEIRA, 'Protecção de menores/ Protecção familiar', in: G. DE OLIVEIRA, *Temas de Direito da Família*, Coimbra: Coimbra Editora, 1999, p. 273.

psychological abuse of children is today punishable as a criminal offence in Portugal (Art. 152, Portuguese Criminal Code).

(e) Medical treatment

Parental responsibility also involves the power and duty to look after the child's health (Art. 1878, No. 1, Portuguese Civil Code). This involves ensuring that children receive essential medical care, particularly by attending regular check-ups, taking prescribed medicines and receiving care when ill. Consequently, parents may not prevent the performance of compulsory medical procedures ordered for reasons of public health, such as vaccinations and examinations for certain diseases, nor may they omit to follow a doctor's instructions for their child in particular.

The power and duty to look after their child's health also has other implications. It involves the right and duty to make decisions regarding surgery or medical treatment that medical experts recommend for their child. The need for parental permission for surgery or medical-surgical treatment results, therefore, from the general rules of parental responsibility. This principle has its limits, however. One such limit concerns the child's autonomy, proportional to his or her age and capacity for discernment. Art. 38, No. 3, Portuguese Criminal Code establishes that effective consent shall be provided by anyone over 14 years of age who possesses the necessary discernment to assess the significance and implications of their decisions at the moment the decisions are made. An interpretation of this article concludes that the law considers an adolescent of 14 who has the capacity to discern as capable of making decisions regarding medical surgery or treatment to his or her own body. Legal literature has stated that this recognises a 'special majority' rule in matters of healthcare.⁴

(f) Legal representation

It is the parents' responsibility to represent their children's interests even before the children are born (Art. 1878, No. 1, Portuguese Civil Code). The exercise of the power and duty of representation aims to cure the minor's incapacity to exercise rights. According to some legal literature, the power of representation covers not only the child but also the property aspects of parental responsibility. Thus, the power of representation includes the exercise of all the child's rights and the fulfilment of all his or her obligations, except those acts that are purely personal, which the minor has the right to perform personally and freely, and those acts regarding property of which the administration does not belong to his or her parents (Art. 1881, No. 1, Portuguese Civil Code).

9. What is the position taken in respect of the child's right to be heard with regard to the issues mentioned under Q 8 ((a)-(f)). What relevance is given to the age and maturity of the child?

In establishing the general principles of the regulation of parental responsibility, Portuguese law imposes upon parents a 'positive duty to respect their children', which translates into the duty to take account of their opinion in important family

⁴ See G. DE OLIVEIRA, 'O acesso dos menores aos cuidados de saúde', in: G. DE OLIVEIRA, *Temas de Direito da Medicina*, Coimbra: Coimbra Editora, 1999, p. 226.

matters, in accordance with their maturity, and the duty to gradually recognise their autonomy in leading their own lives (Art. 1878, No. 2, Portuguese Civil Code).

When there is disagreement between parents on important matters relating to the exercise of parental responsibility, an adolescent of fourteen or over may be heard by the judge (Art. 1901, No. 2, 2nd part, Portuguese Civil Code). The law also establishes that parents should take their child's wishes into consideration on matters regarding their academic and professional training (Art. 1885, No. 2, Portuguese Civil Code). As regards religious education, parental responsibility comes to an end when the child reaches the age of sixteen. Indeed, the law establishes a special majority in this respect, recognising that a child over sixteen has complete freedom to decide upon their religion (Art. 1886, Portuguese Civil Code). The law also establishes a special majority in regards to medical treatment; an adolescent may validly give their own consent on matters of medical treatment and surgical intervention at fourteen (Art. 38, No. 3, Portuguese Criminal Code).

10. Do(es) the holder(s) of parental responsibilities has(have) the right to administer the child's property?

Parents are the legal administrators of their children's property. Indeed, parents, as holders of parental responsibility, assume the power and duty to administer their children's property.

11. If yes, explain the content of this right.

Although the law does not expressly stipulate this, legal literature understands parents to hold the power of both ordinary and extraordinary administration. In administering their children's property, parents should use the same diligence they employ when administering their own (Art. 1897, Portuguese Civil Code), although they are not generally obliged to provide accounts of their administration (Art. 1899, Portuguese Civil Code), nor to provide a guarantee (Article 1898 of the Civil Code).

The power and duty of administration ceases when parental responsibility ends. Thus, when the child reaches majority or is emancipated, parents should hand over all the child's property (Art. 1900, No. 1, 1st part, Portuguese Civil Code). Parents should hand over moveable property to the child in the state in which they found it. If the property no longer exists, the parents should pay their children for the value of the property unless the child has participated in the consumption of this property, or unless it perished for a reason not imputable to the parents (Art. 1900, No. 2, Portuguese Civil Code).

12. Are there restrictions with respect to:

(a) Certain goods and/or values (inherited property, gifts etc)

Not all of the child's property is administered by the parents. Parents only administer property that is not excluded by law (Art. 1888, Portuguese Civil Code *a contrario*). The law specifies the categories of property that are not administered by parents. These are: property the child acquires through inheritance, if parental administration has been excluded for reasons of unworthiness or disinheritance

(Art. 1888, No. 1a, 2034 and 2166, Portuguese Civil Code); property the child acquires as a gift or inheritance against the will of his or her parents (Art. 1888, No. 1b, Portuguese Civil Code); property the child acquires through gift or inheritance if parental administration has been excluded, even if they are otherwise legitimately entitled to do so (Art. 1888, No. 1c and No. 2, Portuguese Civil Code).

(b) Salary of the child

Property acquired by a child over sixteen as product of his or her own work (Art. 1888, No. 1d and 127, No. 1a, Portuguese Civil Code).

(c) Certain transactions

Parents may not legally perform certain acts relating to the administration of a child's property without prior permission from the Public Prosecutor's Office (Art. 2, No. 1, Portuguese Law No. 272/2001 of 13 October 2001). Parents may not: sell or mortgage property unless it is subject to loss or deterioration (Art. 1889, No. 1(a), Portuguese Civil Code); vote at a company's general assembly on matters concerning the company's dissolution (Art. 1889, No. 1(b), Portuguese Civil Code); acquire a commercial or industrial establishment or continue to operate one that the child has acquired through inheritance or gift (Art. 1889, No. 1(c), Portuguese Civil Code); form a company in joint name, as a silent partner or through shares (Art. 1889, No. 1(d), Portuguese Civil Code); contract commercial debts resulting from any kind of bill transferable by endorsement (Art. 1889, No. 1(e), Portuguese Civil Code); guarantee or assume debts for others (Art. 1889, No. 1(f), Portuguese Civil Code); contract loans (Art. 1889, No. 1(g), Portuguese Civil Code); contract debts to be discharged after the age of majority (Art. 1889, No.1(h), Portuguese Civil Code); transfer credit rights (Art. 1889, No. 1(i), Portuguese Civil Code); repudiate an inheritance or legacy (Art. 1889, No. 1(j), Portuguese Civil Code); accept an inheritance, gift or legacy with charges, or agree to the extrajudicial sharing of it (Art. 1889, No. 1(l), Portuguese Civil Code); lease property for a period of longer than six years (Art. 1889, No. 1(m), Portuguese Civil Code); enter into agreements or apply for the court for the division of common property or the liquidation of the share in joint property (Art. 1889, No. 1(n), Portuguese Civil Code); accept compromises, or commit themselves in arbitration about above mentioned acts, or negotiate agreements with creditors (Art. 1889, No. 1(o), Portuguese Civil Code), upon penalty of such acts being declared annulable (Article 1893, Portuguese Civil Code).

If the minor inherits property or a legacy, or is given a gift that must be accepted, the parents should accept it, if they are legally entitled to do so, or apply to the Public Prosecutor's Office within thirty days to accept or refuse it (Art. 1890, Portuguese Civil Code and Art. 4, No. 1, Portuguese Law No. 272/200 of 13 October 2001).

Under the terms of Art. 1892, No. 1, Portuguese Civil Code, parents may not, in principle, rent or acquire, directly or through an intermediary, even in auction, property or rights belonging to a child that is subject to parental responsibility, nor may they become holders of credit or other rights against the child, upon risk of those acts being voidable (Art. 1893, Portuguese Civil Code).

13. Are there special rules protecting children from indebtedness caused by the holder(s) of parental responsibilities?

As regards the protection of a child against indebtedness caused by parents, the law only establishes the need to obtain permission from the Public Prosecutor's Office to assume liabilities that will be discharged after the age of majority (Art. 1889, No. 1(h), Portuguese Civil Code).

14. Do the contents of parental responsibilities differ according to the holder(s) of parental responsibilities (e.g. married, unmarried, parents not living together, stepparents, foster parents or other persons). If so, describe in some detail how it differs.

The content of parental responsibility varies only if the child has been entrusted to the care of a third person or to some child-care establishment. In this situation, they hold only those parental powers and rights necessary for the proper performance of their functions (Art. 1907, No. 1, Portuguese Civil Code).

C. ATTRIBUTION OF PARENTAL RESPONSIBILITIES

I. Married Parents

15. Who has parental responsibilities when the parents are

(a) Married at the time of the child's birth

If the parents are married when their child is born, both exercise parental responsibility (Art. 1901, No.1, Portuguese Civil Code).

(b) Not married at that time but marry later

If the parents are not married when their child is born but marry later, both parents exercise parental responsibility during the marriage (Art. 1901, No. 1 and 1911, No. 1, Portuguese Civil Code), provided the parenthood of both has been legally established.

16. How, if at all, is the attribution of parental responsibilities affected by

(a) Divorce

Divorce of the parents has consequences upon the parent-child relationship. These consequences include a new way of exercising parental responsibility (Art. 1905, Portuguese Civil Code).

(b) Legal separation

The same applies in the case of legal separation (Art. 1905, Portuguese Civil Code).

(c) Annulment of the marriage

The same applies when the marriage has been declared void (in the case of a Catholic marriage) or annulled (in the case of a civil marriage) (Art. 1905, Portuguese Civil Code).

(d) Factual separation

The system laid out in Art. 1905, Portuguese Civil Code as to the establishment of a new way of exercising parental responsibility in the event of divorce, legal

separation, nullity or annulment of the parents' marriage also applies to cases of factual separation of the parents, through Art. 1909, Portuguese Civil Code.

17. To what extent, if at all, are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage? If they are, are these agreements subject to scrutiny by a competent authority.

In situations of contentious divorce, contentious legal separation or the declaration of nullity or annulment of marriage, the new system for the exercise of parental responsibility may result from a system established by the parents through an agreement, subject to ratification by the judge (Art. 1905, No. 1, Portuguese Civil Code and Art. 174, Portuguese Child Protection Law), or from court intervention in those cases where there is little chance of agreement between the parents, or when the agreement presented by them is not in the interests of the children. The new system of parental responsibility is then regulated by judicial decision in keeping with the interests of the child (Art. 1905, No. 2, Portuguese Civil Code and Art. 180, Portuguese Child Protection Law).

In situations of divorce by mutual consent, or legal separation by mutual consent, the parents will agree upon the new system of exercising parental responsibility. Spouses that wish to divorce by mutual consent should present to the Civil Registry Office (Art. 12, No. 1(b), Portuguese Law No. 272/2001 of 13 October 2001), together with the divorce application, three agreements, one of which relates to the future of their children, if those children are minors. The agreement on the exercise of parental responsibility is sent to the Department of Justice, which will, within a period of thirty days, pronounce whether the agreement is in the interests of the children (Art. 14, No. 4, Portuguese Law No. 272/2001 of 13 October 2001). If the Public Prosecutor's Office does not consider the agreement sufficient to protect the interests of the children, the applicants may alter it or present a new agreement for the Public Prosecutor's Office consideration (Art. 14, No. 5, Portuguese Law No. 272/2001 of 13 October 2001). If the Public Prosecutor's Office decides the agreement is in accordance with the interests of the child, or if the parents have altered the agreement to bring it into line with the Public Prosecutor's Office recommendations, the process of divorce by mutual consent will proceed in the Civil Registry Office.

18. May the competent authority attribute joint parental responsibilities to the parents of the child even against the wish of both parents/one of the parents? To what extent, if at all, should the competent authority take account of a parent's violent behaviour towards the other parent?

No. The attribution of joint custody to both parents following a divorce, legal separation, declaration of nullity or annulment of marriage, or factual separation, is restricted to an agreement between the parents to exercise parental responsibility jointly as they did while they were living together (Art. 1906, No. 1, Portuguese Civil Code).

The law is silent as to whether the court should take into account the fact that one parent has been the victim of domestic violence. Legal literature, however, seems to consider that this fact should be taken into consideration when determining a new

exercise of parental responsibility, by not accepting a (presumed) agreement of the parents as to joint custody and in some cases even refusing the right of contact to the aggressor.⁵

19. Provide statistical information on the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage.

According to statistics provided by the Ministry of Justice Study and Planning Department in 2002, of the 19502 cases dealing with the regulation of parental responsibility, 14471 concerned children born within wedlock, 4685 concerned children born without wedlock, 346 regarded children of unknown parenthood, 806 decisions awarded custody to the father, 8856 decisions awarded custody to the mother, 253 decisions awarded custody to the same family, 291 decisions awarded custody to a third party and 64 decisions awarded custody to a welfare or educational institution. Joint custody was decreed in 276 of the decisions.

II. Unmarried Parents

20. Who has parental responsibilities when the parents are not married?

When parents are not married to each other and parenthood has only been legally established with one of them, parental responsibility belongs only to that parent (Art. 1910, Portuguese Civil Code). If parenthood has been established with both parents and they were not married when the child was born nor have they married since, then the exercise of parental responsibility falls to the parent who has custody of the child (Art. 1911, No. 1, Portuguese Civil Code). The law presumes that the mother has custody of the child (Art. 1911, No. 2, Portuguese Civil Code), although this presumption may be legally overturned (Art. 1911, No. 2, Portuguese Civil Code).

If the parents were not married but live together, and have declared before the official of the Registry Office that they wish to jointly exercise parental responsibility over their child, then parental responsibility belongs to both (Article 1911, No. 3 of the Civil Code).

21. Does it make a difference if the parents have formalised their mutual relationship in some way (registered partnership, civil union, pacte civil de solidarité...).

No.

22. Under what condition, if at all, can

(a) The unmarried mother obtain parental responsibilities

⁵ See C. SOTTOMAYOR, *Exercício do poder paternal relativamente à pessoa do filho após o divórcio ou separação de pessoas e bens*, Oporto: Publicações Universidade Católica, 2003, p. 486 et seq.

As was mentioned in Q 20, if the parents were not married when the child was born but parenthood has been established for both, then the parent that has custody of the child will exercise parental responsibility; the law presumes this to be the mother (Art. 1911, No. 1 and 2, Portuguese Civil Code).

(b) The unmarried father obtain parental responsibilities

An unmarried father may exercise parental responsibility if his paternity has been legally established, he has legal custody of the child and he manages to legally overturn the presumption in Art. 1911, No. 2, Portuguese Civil Code.

23. How, if at all, is the attribution of parental responsibilities affected by the ending of the unmarried parents' relationship?

The ending of the unmarried parents' relationship also has consequences for the exercise of parental responsibility. If parenthood has been established for both unmarried parents, the rules regulating the exercise of parental responsibility following divorce, legal separation, the declaration of nullity or annulment of marriage and factual separation of parents apply (Art. 1904 to 1907, and 1912, Portuguese Civil Code).

24. May the competent authority attribute joint parental responsibilities to the parents also against the wish of both parents/one of the parents? To what extent, if at all, may the competent authority take into account a parent's violent behaviour towards the other parent?

The judge may not award joint custody to unmarried parents unless they both agree (Art. 1906, No. 1 and 1912, Portuguese Civil Code). As to whether the existence of domestic violence influences the custody decision, see Q 18 above.

25. To what extent, if at all, are unmarried parents free to agree upon the attribution of parental responsibilities after the ending of their relationship?

When the parents' relationship ends, the need to regulate a new system of parental responsibility arises. This new system may result from an agreement between the parents subject to ratification by the judge (Art. 1905, No. 1, and 1912, Portuguese Civil Code and Art. 174 *ex vi* Art. 183, Portuguese Child Protection Law), or it may result from court intervention if the parents are unable to arrive at an agreement or if the agreement they have presented is not in the interests of the children. Parental responsibility will then be regulated by a legal decision made in accordance with the interests of the child (Art. 1905, No. 2, and 1912, Portuguese Civil Code and Art. 180, Portuguese Child Protection Law).

26. Provide statistical information available regarding the attribution of parental responsibilities for unmarried parents.

The statistics available reveal only the number of cases relating to the regulation of parental responsibility concerning children born out of wedlock. See the answer to Question 19 above.

III. Other Persons

27. Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when, he/she is:

(a) Married to that parent

Through full adoption of the spouse's child (Art. 1979 *et seq*, especially 1986, Portuguese Civil Code).

(b) Living with that parent in a formalised relationship (registered partnership, civil union, *pacte civil de solidarité*...)

Within the Portuguese legal system, there is no legal situation that may be subsumed into the concept of 'formalised relationship' such as 'registered partnership', 'civil union' and '*pacte civil de solidarité*'.

(c) Living with that parent in a non formalised relationship

In accordance with Art. 7 of Portuguese Law No. 7/2001 of 11 May 2001, the right of adoption is recognised for partners of different sexes that live together under the terms laid down in Art. 1979, Portuguese Civil Code. Thus, one of the cohabiting partners may adopt the child of the other (full adoption) if she or he is over 25 years of age and less than 60, and if the age difference between the adopter and adoptee is not more than 50 years (Art. 1979, No. 1 and 4, Portuguese Civil Code).

Legal literature does not consider it necessary to verify that the couple have cohabited for the minimum period;⁶ two years under the terms of Art. 1 of Portuguese Law No. 7/2001 of 11 May 2001.

28. Does it make any difference if the partner of the parent holding parental responsibilities is of the same sex?

Yes. According to Art. 7 of Portuguese Law No. 7/2001 of 11 May 2001, mentioned above, the right to adopt under conditions analogous to those of spouses (Art. 1979, Portuguese Civil Code) is only possible for people of differing sex who live together.

29. How, if at all, is the attribution of parental responsibilities in the partner affected by the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

The ending of a heterosexual relationship in which a natural parent and adopter live together with both holding and exercising parental responsibility over the child requires the regulation of parental responsibility similar to that described in Q 23 onwards.

⁶ F. PITÃO, *União de facto no Direito Português*, Coimbra: Almedina, ****, p.

30. To what extent, if at all, is the parent holding parental responsibilities and his or her partner free to agree upon the attribution of parental responsibilities after the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

See the answer to Q 25, concerning heterosexual cohabitation.

31. Under what conditions, if at all, can other persons not being a parent or a partner of a parent holding parental responsibilities, obtain parental responsibilities (e.g. members of the child's family, close friends, foster parent...)? Specify, where such other persons may obtain parental responsibilities, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

Only in exceptional circumstances. The child is only entrusted to a third person (Art. 1905, No. 2, Portuguese Civil Code) if the parents have been found guilty of infringing their duties towards their children, causing serious harm to them; or if, through inexperience, infirmity, absence or other reasons, they are unable to perform those duties (Art. 1915, Portuguese Civil Code and 194, Portuguese Child Protection Law), that is, when they have been discharged of parental responsibility by the court; or if the parents' behaviour puts the safety, health, moral training and education of the child at risk, and the court has formally ordered the restriction of parental responsibility (Art. 1918, Portuguese Civil Code).

When the child has been entrusted to a third person or to a child-care establishment, then that person or establishment will hold the parental powers and duties required for the performance of their functions (Art. 1907, No. 1, Portuguese Civil Code). As regards those powers and duties that are not considered necessary for the adequate performance of those functions, the court shall decide which parent shall exercise them (Art. 1907, No. 2, Portuguese Civil Code and Art. 180, No. 4, Portuguese Child Protection Law).

32. Under what conditions, if at all, can a public body obtain parental responsibilities? Specify, where it is so obtained, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

A child may be entrusted to a child-care establishment under the exceptional circumstances mentioned in the previous question. As for the powers held by those institutions and their implications, see the answer to the previous Q 2.

33. To whom are the parental responsibilities attributed in the case of:

(a) The death of a parent holding parental responsibilities

If the parents were married and one of them dies, parental responsibility passes to the surviving parent (Art. 1904, Portuguese Civil Code). If an unmarried parent dies who has cohabited and has declared their desire to jointly exercise parental responsibility before the official of the registry office, the situation is the same (Art. 1904 and 1911, No. 3, Portuguese Civil Code).

(b) The death of both parents of whom at least one was holding parental responsibilities at the time of the death

If both parents die, the child is subject to compulsory guardianship (Art. 1921, No. 1(a), Portuguese Civil Code). Guardianship is one of the ways to compensate for the lack of parental responsibility.

34. To what extent, if at all, may the holder(s) of parental responsibilities appoint a new holder(s) upon his/her/their death? If such an appointment is permitted, must it take place in a special form, e.g. will?

Yes. The parents may, in a will or other authentic or authenticated document, appoint a guardian (or guardians) for their child in the event of their death or disability (Art. 1928, Portuguese Civil Code). The guardian indicated by the parents must be confirmed by the juvenile court (Art. 1925, No. 2, Portuguese Civil Code) which will oversee the exercise of the guardianship (Art. 1925, No. 1, Portuguese Civil Code).

D. THE EXERCISE OF PARENTAL RESPONSIBILITIES

I. Interests of the Child

35. In exercising parental responsibilities, how are the interests of the child defined in your national legal system?

The exercise of parental responsibility is always subordinate to the interests of the child (Art. 1878, No. 1, Portuguese Civil Code). The law does not define the interests of the child, nor does it offer criteria for defining it. The child's interests are, therefore, a vague legal concept. Despite the extreme difficulty that legal literature has had in defining it, this concept is particularly expressive and acquires more defined contours when referring to the circumstances of a particular child, since there exist as many different interests as there are children. The child's interests is a cultural concept, profoundly dependent upon the system of values in force at any given moment and in each society, concerning the person of the child, his or her material and emotional needs, and the conditions necessary for his or her healthy development. Thus, the notion can only be specified in reference to those values and by means of a systematic interdisciplinary study of the child's real-life situation.

II. Joint Parental Responsibility

36. If parental responsibilities are held jointly by two or more persons, are they held equally?

With regards to a child born to married parents, parental responsibility belongs equally to the father and mother and is exercised by both (Art. 1901, No. 1 and 2, Portuguese Civil Code). The principle of equality between spouses imposes this solution (Art. 1671, Portuguese Civil Code). Art. 36, No. 3, Portuguese Constitution establishes that spouses have equal rights and duties regarding to the maintenance and education of their children.

In those exceptional circumstances in which parental responsibility is awarded to a third person or to a child-care establishment, the situation arises in which there is simultaneous exercise of parental responsibility by the parents, on the one hand, and by the third person or institution to which the child has been entrusted, on the other. Art. 1907, Portuguese Civil Code specifically stipulates that the third party or establishment concerned acquires the parental powers and duties necessary to properly perform his, her or its functions; and No. 2 of the same article establishes that the court will decide which parent will exercise those powers and duties not exercised by the third party or institution.

37. If parental responsibilities holders cannot agree on an issue, how is the dispute resolved? For example does the holder of parental responsibilities have the authority to act alone? In this respect is a distinction made between important decisions and decisions of a daily nature? Does it make any difference if the child is only living with one of the holders of the parental responsibilities?

Parental responsibility is exercised jointly by married parents while they are married (Art. 1901, No. 1, Portuguese Civil Code). The joint exercise of parental responsibility involves daily agreement regarding the child and the child's property. If the parents are unable to agree on matters of particular importance, either spouse may petition the court to settle the problem (Art. 1901, No. 2, Portuguese Civil Code).

In demanding the parents' agreement on the exercise of parental responsibility, the law does not necessarily require that both parents intervene in every act. Either parent may act alone; the law will presume they have the other's consent. However, this presumption does not apply to acts for which the law requires the express consent of both parents (*i.e.* to file lawsuits representing the minor (Art. 10, No. 2, Portuguese Code of Civil Procedure)) or for acts of particular importance (Art. 1902, No. 1, Portuguese Civil Code). With an act of normal importance, a non-consenting parent cannot oppose a third party acting in good faith that there is parental agreement (Art. 1902, No. 1, *in fine*, Portuguese Civil Code). The third party's good faith is removed by knowledge of the lack of agreement between the parents or if the act in question is considered an act of particular importance (Art. 1902, No. 2, Portuguese Civil Code).

If the child lives only with one parent, this might function as a way of removing the good faith of the parent that committed the act, to the extent that it is not reasonable to suppose they were both in agreement, given that they do not live together.

38. If holders of parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority's competence is limited to certain issues e.g. residence or contact.

As described in Q 37, if parents are unable to agree on issues of particular importance, the court will settle the matter (Art. 1901, No. 2, Portuguese Civil Code). The court will first and foremost try to persuade the parents to resolve their differences by fostering agreement between them. If this proves impossible, the

court will decide. Before doing so, however, the judge shall hear any child over fourteen years of age, unless there are circumstances that militate against this (Art. 1901, No. 2, *in fine*, Portuguese Civil Code).

39. To what extent, if at all, may a holder of parental responsibilities act alone if there is more than one holder of parental responsibilities?

It appears that, in practice, when a child has been entrusted to a child-care establishment, the director of that establishment may apply to the court for permission to perform those acts of particular importance for the life of the child.

40. Under what circumstances, if at all, may the competent authority permit the residence of the child to be changed within the same country and/or abroad (so called relocation) without the consent of one of the holders of parental responsibilities?

No answer.

41. Under what conditions, if at all, may the competent authority decree that the child should, on an alternating basis, reside with both holders of parental responsibilities (e.g. every other month with mother/father)?

Alternating custody is rarely applied by courts. The court may only ratify an agreement between parents relating to the future exercise of parental responsibility after divorce, legal separation, the declaration of nullity or annulment of a marriage, which establishes a system of alternating custody as a way of exercising joint parental responsibility if that is in the interests of the child (Art. 1905, No. 1 and 1906, No. 1, Portuguese Civil Code). The Public Prosecutor's Office shall operate in the same way (Art. 14, No. 4, Portuguese Decree-Law No. 272/2001 of 13 October 2001).

III. Sole Parental Responsibilities

42. Does a parent with sole parental responsibilities have full authority to act alone, or does he/she have a duty to consult:

(a) The other parent

The parent that does not exercise parental responsibility has the right to oversee the education and living conditions of the child (Art. 1906, No. 4, Portuguese Civil Code). The custodial parent does not have full freedom of action. His or her actions within the sphere of parental responsibility are subject to the control of the non-custodial parent. However, this does not mean that the custodial parent may only act with the prior agreement of the non-custodial parent. Rather, it means that the right of the non-custodial parent only operates indirectly, through court appeal. The control exercised by the non-custodial parent is thus the power to appeal to the court in order to impugn the actions of the custodial parent, when those actions endanger the child's interests.

(b) Other persons, bodies or competent authorities

For the performance of the acts stipulated in Art. 1889 and 1890, Portuguese Civil Code, the custodial parent requires the permission of the Department of Justice. See Q 12c).

E. CONTACT

43. Having regard to the definition by the Council of Europe (see above), explain the concepts of contact used in your national legal system.

Today, the right of contact in the context of a divorce or legal separation is understood very broadly. It consists of the right of the non-custodial parent to relate to and spend time with the child, not only through occasional contacts but also by providing accommodation for the child for short periods of time (such as weekends, holidays) and by corresponding with the child (by letter, e-mail, telephone, or through an intermediary).

44. To what extent, if at all, does the child have a right of contact with:

Portuguese law does not expressly consecrate any right for the child to relate with one of its parents or with other relatives. The right of contact is established as a right belonging to adults. However, more recent legal literature has understood that the institution of visiting rights is not only a right, but also contains an element of duty that corresponds to the rights of the child.

(a) A parent holding parental responsibilities but not living with the child

Thus, in a situation in which parental responsibility is exercised jointly but the child resides with only one parent, it appears that the other parent and correspondingly, the child, enjoy free right of contact with each other.

(b) A parent not holding parental responsibilities

In a situation of sole custody, the law only refers to the child's interest in maintaining a close relationship with the non-custodial parent (Art. 1905, No. 1, Portuguese Civil Code). In these cases, the non-custodial parent's right of contact is restricted to the terms of a system established by agreement, ratified by the judge, appreciated by the Public Prosecutor's Office and deemed to be in the interests of the child, or else it is decreed by the court. This right includes a duty to the child, and therefore constitutes a right of the child. The law appears to recognise this right of the child, although only indirectly. Indeed, in the event of failure to comply with the system of contacts established through the creation of obstacles by the custodial parent, the other may apply to the court, invoking non-compliance with the system of exercise of parental responsibility, for coercive measures to be taken and for the punishment of the parent that is at fault, by means of a fine and compensation to the child (Art. 181, No. 1, Portuguese Child Protection Law). If it is the non-custodial parent who has failed to comply, then the custodial parent may raise the matter of non-compliance.

(c) Persons other than parents (e.g. grandparents, stepparents, siblings etc...)

Portuguese Law No. 84/95 of 31 August 1995 expressly established a limit to parental responsibility in respect to control of the child's personal relationships.

Art. 1887-A, Portuguese Civil Code establishes that parents may not unreasonably deprive their children of contact with their siblings or ascendants. This rule appears to give rise to a right of contact with siblings, grandparents and other ascendants and consequently, a right of the child to relate to those relatives.

45. Is the right to have contact referred to in Q 43 also a right and/or a duty of the parent or the other persons concerned?

As regards the parents, yes. The non-custodial parent's right of contact also has the nature of a duty. As was mentioned in Q 44b, if the non-custodial parent does not comply with the system of visits, then that parent may be ordered to pay a fine and compensate the child (Art. 181, No. 1, Portuguese Child Protection Law).

46. To what extent, if at all, are the parents free to make contact arrangements? If they can, are these arrangements subject to scrutiny by a competent authority?

The contact system is one of the aspects affected by the regulation of the new way of exercising parental responsibility. Thus, parents may decide what specific system will apply in the agreement established between them about the regulation of parental responsibility, to be ratified by the judge or appreciated by the Department of Justice.

47. Can a competent authority exclude, limit or subject to conditions, the exercise of contact? If so, which criteria are decisive?

The court may modify, suspend or suppress the right of contact in the event of a change of circumstances (Art. 183, Portuguese Child Protection Law). The law does not determine in which cases the right of contact may be modified, suspended or suppressed; however, case law has provided some indications. In situations of serious illness, mental disorder of the non-custodial parent, lack of information about the residence of that parent, change of residence of the non-custodial or of the custodial parent, or lack of interest on the part of the child as a result of long periods without contact, etc., the court may decree an alteration or suspension of contact rights. Cases of suspension occur, specifically in cases where the non-custodial parent is an alcoholic or drug-addict, given that such addictions are very destabilising for the child, since the parent may take the child to places where the child's safety, health or moral education is at risk; this is not, however, true for contacts with a child that has greater maturity and discernment.

48. What if any, are the consequences on parental responsibilities, if a holder of parental responsibilities with whom the child is living, disregards the child's right to contact with:

(a) A parent

As has already been stated, Art. 181, Portuguese Child Protection Law regulates situations of failure to comply with the system of exercise of parental responsibility agreed by the parents or established by the court in point No. 1, which establishes that, if one of the parents does not comply with the agreement or decision, the other may apply to court for measures to be taken to enforce compliance and for the parent at fault to be sentenced to a fine and compensation to the child, to the

applicant or both. The judge will summon both parents to a meeting where the parents may agree to alter the system of parental responsibility in accordance with the interests of the child. (Art. 181, No. 2 and 3, Portuguese Child Protection Law). If the parents do not come to an agreement, the judge will decide (Article 181, No. 4 of the Child Protection Law. The judge may summon only the parent that is at fault and then make allegations that the judge sees fit. This will be followed by a summary inquiry and any other measures that are deemed necessary, and then the judge will decide (Art. 181, No. 2, 3 and 4, Portuguese Child Protection Law).

(b) Other persons

It appears that, if the custodial parent impedes the exercise of the right of contact with siblings, grandparents and other ascendants (Art. 1887-A, Portuguese Civil Code), then the system established for situations of non-compliance established in Art. 181, Portuguese Child Protection Law described in part (a) will apply.

F. DELEGATION OF PARENTAL RESPONSIBILITIES

49. To what extent, if at all, may the holder(s) of parental responsibilities delegate its exercise?

In accordance with Art. 1882, Portuguese Civil Code, parents may not renounce parental responsibility nor any of the rights that it specifically confers upon them, without prejudice to the provision on adoption. If we are to understand that the delegation of parental responsibility includes the renunciation of that responsibility, then it is prohibited under Portuguese law.

50. To what extent, if at all, may a person not holding parental responsibilities apply to a competent authority for a delegation of parental responsibilities?

No answer.

G. DISCHARGE OF PARENTAL RESPONSIBILITIES

51. Under what circumstances, if at all, should the competent authorities in your legal system discharge the holder(s) of his/her/their parental responsibilities for reasons such as maltreatment, negligence or abuse of the child, mental illness of the holder of parental responsibilities, etc.? To what extent, if at all, should the competent authority take into account a parent's violent behaviour towards the other parent?

When parents do not comply with their fundamental duties towards their children, they may be discharged of parental responsibility. In certain situations, the law stipulates that parents are automatically discharged of parental responsibility as a consequence of certain facts, presuming that in those circumstances, the parents are in no condition to fulfil their basic duties towards their children. The discharge of parental responsibility may take one of two forms: *ex lege* discharge of parental responsibility and judicial discharge of parental responsibility.

In cases of *ex lege* discharge, certain circumstances are involved that affect the parents and lead the law to presume that it is impossible for them to fulfil their

duties towards their children, irrespective of their actual behaviour towards them (*i.e.* definitive condemnation for a crime to which the law attributes this effect, Art. 1913, No. 1(a), Portuguese Civil Code; legal incapacity or disability due to mental disorder, Art. 1913, No. 1(b), Portuguese Civil Code; if the parent is a non-emancipated minor or is legally disabled or incapacitated for a reason other than mental disorder, Art. 1913, No. 2, Portuguese Civil Code).

In situations of judicial discharge, however, the law takes into account the relationship between parents and children and the behaviour of the parents towards their children, particularly the severity of the harm caused by the parents' actions to their children. Art. 1915, Portuguese Civil Code uses a general clause which covers not only behaviour with *mens rea* by parents that leads to serious harm to the child (Art. 1915, No. 1, 1st part, Portuguese Civil Code and Art. 192, Portuguese Child Protection Law) but also involuntary harmful behaviour, such as that resulting from inexperience, illness or absence (Art. 1915, No. 1, 2nd part, Portuguese Civil Code and Art. 192, Portuguese Child Protection Law).

As to the question of whether the mistreatment of a parent influences the decision to discharge the aggressor of parental responsibility, the law is silent. However, it appears that this fact should be taken into consideration when it is severe enough to harm the child.

52. Who, in the circumstances referred to in Q 51, has the right or the duty to request the discharge of parental responsibilities?

The Public Prosecutor's Office, any relative of the minor or any person who has custody of the child in fact and in law may petition the court for parental responsibility to be discharged (Art. 1915, No. 1, Portuguese Civil Code and Art. 194, Portuguese Child Protection Law).

53. To what extent, if at all, are rights of contact permitted between the child and the previous holder of parental responsibilities after the latter has been discharged of his/her parental responsibilities?

Rights of contact are not prohibited by law; in these cases the decision to allow contact is subjected to the criteria of the best interests of the child.

54. To what extent, if at all, can the previous holder(s) of parental responsibilities, who has been discharged of his/her parental responsibilities, regain them?

Full discharge ends when the inability or incapacity is lifted and by the ending of the period of guardianship (Art. 1914, Portuguese Civil Code). In cases of judicial discharge of parental responsibility, this will be lifted when the causes that gave rise to it cease (Art. 1916, No. 1, Portuguese Civil Code). Application for it to be lifted may be made by the Public Prosecutor's Office at any time, or by either parent a year after the transit of the discharge sentence or the sentence that has refused another application for discharge to be lifted (Art. 1916, No. 2, Portuguese Civil Code).

H. PROCEDURAL ISSUES

55. Who is the competent authority to decide disputes concerning parental responsibilities, questions of residence of the child or contact? Who is the competent authority to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact?

The competent authority to decide matters concerning the regulation of parental responsibility, the alteration of the respective system, rights of contact and custody is the court in the child's residence; this might be a special court, if the child resides within the area of jurisdiction of one of the family and juvenile courts, or the district court, if the child's residence is outside the jurisdiction of the family and juvenile courts (Art. 149, 154 and 155, Portuguese Child Protection Law).

The concept of the child's residence is not identical to the concept of legal domicile (Art. 85, Portuguese Civil Code). The child's residence is understood to be the place where the child has his life organised in a stable and permanent way. The investigation into the circumstances and needs of the child and the preparation of the respective report are the responsibility of the social services of the Institute for Social Rehabilitation.

56. Under what conditions, if any, may a legally effective decision or agreement on parental responsibilities, the child's residence or contact, be reviewed by a competent authority? Is it, e.g., required that the circumstances have changed after the decision or agreement was made and/or that a certain period of time has passed since the decision or agreement?

In the event of non-compliance with the parental agreement or with the court's decision on the system of parental responsibility, or when there are supervening circumstances justifying alterations to the established system, the court may review the matter upon the request of one of the parents or the Public Prosecutor's Office. (Art. 182, No. 1, Portuguese Child Protection Law).

57. What alternative disputes solving mechanisms, if any, e.g. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact?

In 1997, the project 'Family Mediation in Situations of Parental Conflict' was created by Order No. 12368/97. This aimed to set up family counselling on matters of parental responsibility on an experimental basis. The service is limited to the Lisbon district and operates alongside the courts. The work of family counselling is carried out by multidisciplinary teams.

58. To what extent, if at all, is an order or an agreement on parental responsibilities, the child's residence or contact enforceable and in practice enforced? Describe the system of enforcement followed in your national legal system. Under what conditions, if at all, may enforcement be refused?

See answer to Q 48a. Consideration of the child's interests may lead the court to abstain from decreeing coercive compliance with the established system.

59. To what extent, if at all, are children heard when a competent authority decides upon parental responsibilities, the child's residence or contact, e.g., upon a dispute, when scrutinizing an agreement, when appointing or discharging holder(s) of parental responsibilities, upon enforcement of a decision or agreement?

Under the terms of Art. 175, No. 1, Portuguese Child Protection Law, the judge may authorise the child to attend the meeting in which parental responsibility will be regulated, taking into account his or her age and maturity. The law does not establish an age at which a minor may or should be heard. As regards the other situations, although the law is silent it appears that the judge should hear the minor unless there are ponderous circumstances that militate against it.

60. How will the child be heard (e.g. directly by the competent authority, a specially appointed expert or social worker)?

The law says nothing about this (Art. 175, No. 1, Portuguese Child Protection Law). Jurisprudence has understood that the child may be heard either directly by the judge or indirectly through someone from the social services, and, in certain circumstances, by an expert.

61. How, if at all, is the child legally represented in disputes concerning:

(a) Parental responsibilities

The child does not take part in processes of regulation of parental responsibility and is therefore not represented by either his or her parents or by some special representative. The child's interests are considered to be protected by the Public Prosecutor's Office, which intervenes in these processes.

(b) The child's residence

See answer to Q 61a.

(c) Contact

See answer to Q 61a.

62. What relevance is given in your national legal system to the age and maturity of the child in respect of Q 59-61?

The law does not indicate at what age a child may be heard. However, Art. 1901, Portuguese Civil Code establishes that the judge should hear children over fourteen in cases of parental disagreement over the exercise of parental responsibility; and Art. 1981, No. 1(a), Portuguese Civil Code requires the consent

of a child older than 12 and the non-opposition of a child of 12 to adoption. As a presupposition of intervention of authorities with competence in matters concerning children and juveniles and of the protection committees demanded by Art. 10 of Portuguese Law No. 147/99 of 14 September (Portuguese Law Protecting Children and Young People at Risk), the age above which there are few doubts as regards whether a child should be heard is situated between 12 and 14. Below these ages, the hearing of a child should be seriously considered.