

BOOK REVIEWS

ALICE MARGARIA, *THE CONSTRUCTION OF FATHERHOOD*
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Alice Margaria's *The Construction of Fatherhood* is an excellent and valuable contribution to human rights literature and law and gender research.¹ Her book is a thorough look into both how the European Court of Human Rights (ECtHR or the Court) constructs fatherhood in particular and how the Court develops and applies doctrine and adopts moral positions in general. This book will be of interest to those interested in gendered aspects of the Court's case-law, but also to those seeking to better understand the Court's use of its doctrines of interpretation and the inconsistencies in their application.

I. FATHERHOOD IN THE ECtHR

The ECtHR is constantly engaged in the difficulties of applying a convention drafted in 1948 to modern day realities, traversing the task of interpreting the Convention without veering too much into criticism-drawing judicial activism² or entrenching restraint.³ This is where the Court's doctrines of

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¹ Alice Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (Cambridge University Press 2019), ISBN: 9781108475099, 85 €. Margaria's book is built on the foundation of her PhD thesis, written under the supervision of Ruth Rubio-Marin and successfully defended in 2015 at the Department of Law, European University Institute.

² See e.g. Tom Zwart, 'More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How it Can Be Done' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar Publishing 2013) 72-78.

³ See e.g. Alastair Mowbray, 'Between the will of the Contracting Parties and the needs of today' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of*

interpretation come into play. They allow the Court to read the Convention as a 'living instrument', interpreted in light of present day-conditions, with the purpose of maintaining an effective and meaningful system for human rights protection.⁴ It is exactly into this difficult act of navigation and balancing that Margaria's meticulous study looks. Her focus is on fatherhood, which in addition to being an interesting subject in its own right, provides Margaria with a distinctive window into the Court's use and development of the margin of appreciation doctrine and the consensus test.

Family life is one of the areas of society that is seeing the most rapid evolution. This is reflected in both societal and technological advancements, resulting in numerous human rights cases dealing with issues which were unforeseeable during the drafting of the Convention. The previously prevalent understanding of fatherhood in the European context has been based on the default family model of a heterosexual married couple with children, where the husband is the breadwinner and mother is the carer of home and offspring.⁵ The commonness of divorce and separation and the weakening of the role of marriage in child-bearing has led to a certain 'fragmentation' of fatherhood, where fathers are often parenting from a distance or cohabiting with their children part-time, making fatherhood a concept increasingly more difficult to define.⁶ Margaria utilizes the concept of "fragmented" or "fragmenting fatherhood" throughout the book to illustrate the evolving legal recognition of diversity in parenting practices.

The author explores the Strasbourg Court's construction of fatherhood through four principal developments in the realities of European families and the Court's corresponding reactions to these developments. The judgements

Human Rights (Cambridge University Press 2013) and Eva Brems (ed) *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2013).

⁴ See e.g. George Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 108-122.

⁵ See e.g. Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006) 81-82.

⁶ Sally Sheldon, 'Fragmenting Fatherhood: The Regulation of Reproductive Technologies' (2005) 68 *The Modern Law Review* 523, 527-531.

analysed have been selected and grouped based on these four sociological categories, the structure of the book mirroring these. The first development examined is the introduction of assisted reproductive technologies (ARTs) and the types of fatherhood enabled through these technologies, including trans-fatherhood and the legal difficulties of intended fatherhood.⁷ The second grouping of cases involves post-separation and unmarried fatherhood, tied to the diminishing significance of marriage, evident in a continuing increase in unmarried cohabitation and childbearing, and also the increased availability of DNA testing.⁸ The third development is in women's growing participation in the labour force also after childbirth and the consequent redistribution of child-care. This development has given rise to cases involving child-care related financial and social entitlements.⁹ The fourth and final stream of cases is that of fatherhood and homosexuality, relating to the on-going process of increasing social acceptance and legal recognition of same-sex partnerships and same-sex parenthood.¹⁰

The book examines the construction of fatherhood through the interpretation of Article 8, which provides for the right to respect for private and family life, and Article 14, which enshrines the prohibition of discrimination, and is often referred to in conjunction with Article 8.

II. THE BOOK'S MAIN CONTRIBUTIONS

Previous works that comprehensively delve into the Court's jurisprudential evolution on specific social questions of gendered character include those on homosexuality¹¹ and equality and non-discrimination.¹² Fatherhood in the ECtHR has also been discussed through the commentary of individual pivotal cases.¹³ Margaria's book, however, represents the first endeavour to

⁷ Margaria (n 1) 48-71.

⁸ Ibid 72-108.

⁹ Ibid 109-127.

¹⁰ Ibid 128-154.

¹¹ E.g. Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013).

¹² Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, vol 74 (Martinus Nijhoff Publishers 2003).

¹³ Some examples include the following interventions on *Gas and Dubois v France* and *Konstantin Markin v Russia*: Paul Johnson, 'Adoption, Homosexuality and the

systematically address the Court's construction of fatherhood through its case-law. As such it is a much needed and appreciated contribution to the literature.

The main arguments put forth by the book are twofold. First, even though the Court has come to increasingly emphasise paternal care in its case-law,¹⁴ it has not departed from a 'conventional' conception of fatherhood.¹⁵ Second, the materialisation of the Court's understanding of a new kind of fatherhood is not only a matter of (moral) choice, but rather the consequence of the combined workings of the Court's moral and doctrinal decision making.

III. 'CONVENTIONAL' AND 'NEW' FATHERHOOD

Margaria highlights the strides that the Court has taken in its jurisprudence in advancing an understanding of what she characterizes as 'new fatherhood', incorporating the element of 'care' which encompasses nurturing intentions, interest, commitment, and establishment of close personal ties with the child. Conversely, 'conventional fatherhood' relies on a biological (genetic) link with the child, a marital relationship¹⁶ with the child's mother, breadwinning, heterosexuality and heteronormativity.¹⁷

Despite supporting this new emphasis on care, and successfully eschewing stereotypes, the Court still relies on a 'conventional' understanding of fatherhood. Margaria makes the persuasive argument that instead of departing from a conventional definition of fatherhood, based on the special status of marriage, the bread-winner model, and heteronormativity,¹⁸ the

European Convention on Human Rights: *Gas and Dubois v France*' 75 *The Modern Law Review* 1136 and Alexandra Timmer, 'From inclusion to transformation: rewriting Konstantin Markin v. Russia' in Eva Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2013).

¹⁴ In the form of what Margaria refers to as 'new fatherhood'.

¹⁵ Margaria's understanding of 'conventional fatherhood' draws from McGlynn's dominant ideologies of fatherhood: McGlynn (n 5) 81-82.

¹⁶ Or equivalent marriage-like relationship, such as opposite-sex cohabitation or sexual relationship between opposite-sex partners.

¹⁷ McGlynn (n 5) 81-82.

¹⁸ The Court has taken on the task of dismantling gender stereotypes, of which Margaria has identified three present in case-law concerning fatherhood: 1) the

Court rather builds its conception of 'new fatherhood' as a layer on top of the old, conventional, characterisation of fatherhood. This causes the court to be caught in a mutually reinforcing model of change and continuity in its understanding of fatherhood.¹⁹

Biology still plays a crucial role in how the Court understands fatherhood. Even when elements of 'care' are present, the biological link between father and child is a decisive factor, as is evidenced by the opposite outcomes in *Mennesson v. France* on the one hand, and *Paradiso and Campanelli v. Italy* on the other.²⁰ Likewise, biology determined the outcome in *Z, Y and Z v. the UK* to the disadvantage of the applicant, a transsexual father, even though evidence of 'care' was undisputed.²¹ Furthermore, the Court continues to award special status to marriage, and has used this special status to justify the exclusion of certain parental rights from same-sex couples and gender minorities.²²

The author also builds on her previous work while positing that the strides that the Court has taken in rejecting the gender stereotype of men as primary breadwinners and women as primary caretakers in the landmark judgement of *Konstantin Markin*²³ are limited. Fathers are awarded financial entitlements related to parenting only through their role as wage-earners and, as such, the

'man-breadwinner/woman-homemaker' trope, 2) unmarried fathers as irresponsible and uninterested in their children and 3) gay as unfit to be a parent.

¹⁹ Margaria (n 1) e.g. 156, 159-160.

²⁰ *Mennesson v. France*, no 65192/11, § 100 ECHR 2014 (extracts) and *Paradiso and Campanelli v. Italy [GC]*, no 25358/12, § 207-208, 24 January 2017. Both cases involve surrogacy, but in *Mennesson*, unlike in *Paradiso and Campanelli*, the child resulting from the surrogacy arrangement was genetically related to the applicant. In *Mennesson*, the biological link secured a violation of the child's article 8 rights, whereas in *Paradiso and Campanelli* the absence of a genetic link led to Court not finding even the presence of family life under article 8 and the removal of the child from the intended parents did not constitute a violation of the Convention.

²¹ *X, Y and Z v. the United Kingdom*, 22 April 1997, Reports of Judgments and Decisions 1997-II.

²² See e.g. *Gas and Dubois v. France*, no 25951/07, § 68 ECHR 2012 and Loveday Hodson, 'A Marriage by Any Other Name? *Schalk and Kopf v Austria*' 11 Human Rights Law Review 170-179.

²³ *Konstantin Markin v. Russia [GC]*, no 30078/06 ECHR 2012 (extracts).

extension of entitlement schemes to fathers serves to reinforce a breadwinner model.²⁴

The dissonance in the Court's navigation between change and continuity is markedly displayed in the case of *Salgueiro da Silva Mouta v. Portugal*.²⁵ As Margaria points out, the case looks to represent the Court's departure from a conventional, heterosexual understanding of fatherhood and was undeniably significant, especially considering the year of its decision. The applicant is a homosexual man who had become a father in the context of a marriage with a woman and had been denied parental access after the divorce because of his homosexuality. However, ultimately the applicant in this case is a conventional father in most ways: the child was born in wedlock and is genetically related to the applicant, and the father appears to be gainfully employed. The only unconventional characteristic would appear to be that of homosexuality. The Court is thus able to depart from convention while not straying too far from it.

IV. THE ROLE OF DOCTRINES IN THE CONSTRUCTION OF FATHERHOOD

The way doctrines are employed varies depending on the doctrine and case in question. In line with the principle of subsidiarity, the Court will defer to states in how they secure Convention rights through the application of the margin of appreciation, which can vary from wide, where the scrutiny applied by the Court is less stringent, to narrow, where the Court will be more strict in its supervisory role.²⁶ The Court does not have a systematic way of granting states a margin of appreciation, and sometimes will reference the margin in

²⁴ Alice Margaria, "'New Fathers' and the Right to Parental Leave: Is the European Court of Human Rights Satisfied with Just Breadwinning?' in Rosie Harding, Ruth Fletcher and Chris Beasley (eds), *Revaluing Care in Theory, Law and Policy: Cycles and Connections* (Routledge 2016).

²⁵ *Salgueiro da Silva Mouta v. Portugal*, no 33290/96 ECHR 1999-IX. The Court found that the applicant had been discriminated against because of his sexual orientation and found a violation of article 14 in conjunction with article 8 (privacy). The Court explicitly departed from the state's assertions that the applicant's sexuality was 'abnormal' and possibly detrimental to the wellbeing of the child.

²⁶ See e.g. Andreas Føllesdal, 'Appreciating the Margin of Appreciation' in Adam Etinson (ed), *Human Rights: Moral Or Political?* (Oxford University Press 2018).

the conclusions of the judgement for the first time with no further elaboration on how the margin applies. The same is true of the consensus test utilised in theory by the Court to evaluate the limits in the scope of its evolutive interpretation. Often times the analysis of consensus will be absent completely and the existence or non-existence of a consensus will only be referred to in passing.²⁷

What emerges from Margaria's detailed analysis of fatherhood case-law is a refined critique of the Court's inconsistent use of its doctrines of interpretation. It would appear that where the Court has been more inclined to methodological rigour, the Court's understanding of fatherhood has developed more or less systematically towards the direction of 'new fatherhood'. Margaria's examination of case-law shows that this tendency is mostly true in cases involving the rearrangement of care responsibilities and child-care related entitlements. In other case categories, however, the use of doctrines would appear more irregular. Margaria argues that this variable use of doctrines implies the Court's primary reliance on its own moral standpoints on fatherhood as determining the doctrinal choices in any given case. This finding is in keeping with previous criticism specifically aimed at the Court's application of the margin of appreciation and the consensus test.²⁸ In the cases Margaria analyses in her study, the consensus test would mostly seem to operate as a matter of choice on the part of the Court. Not implying that consensus is out-right fabricated by the Court, rather her analysis supports the suggestion that the Court might be utilizing consensus to add persuasiveness to its adopted moral position, in this case, that of 'new fatherhood' with 'conventional' foundations.

V. CONCLUDING THOUGHTS

The Court seems in the habit of avoiding politically difficult issues it labels 'morally and ethically delicate', such as same-sex marriage²⁹ and recognition of children born through surrogacy, with the almost automatic application of a wide margin of appreciation, often referring to the (lack of) European

²⁷ Ibid 286-288.

²⁸ See Lawrence R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights' 26 *Cornell International Law Journal* 133 154.

²⁹ *Schalk and Kopf v. Austria*, no 30141/04 ECHR 2010.

consensus. The Court does not have a consistent approach to evaluating consensus, in some cases relying on a simple statement on the existence of consensus as fact, or in others displaying different levels and methods of consensus review. Margaria rightly homes in on the inconsistencies and vagaries of the Court's sometimes in-existent consensus analysis, but in the end devotes less page space to flesh out the Court's evident habit of hiding behind the margin of appreciation. The same methodological inconsistencies evident in the Court's application of the consensus test are also apparent in the application of the margin of appreciation. This tendency of the Court merits more attention. With the signatory states' mounting calls for further subsidiarity and more emphasis on the margin of appreciation, the Court is under pressure to defer to states on issues where the margin doctrine applies.³⁰

This brings me to discuss other possible limitations of Margaria's book, of which there are very few. If there is something the book is missing it would be a critical discussion on the concept of fatherhood as "male parenthood".³¹ The Court has so far been committed to a binary approach to gender, and this is reflected in analysis of its case-law. As societal and legal conceptions of gender evolve, will the concepts of "fatherhood" and "motherhood" evolve as well, possibly focusing the discussion on "parenthood" involving parents of all genders, separate or encompassing of fatherhood and motherhood? In international law there is a tendency for 'gender identity' to be used only in reference to transgender, which leaves other gender identities obscured.³² Margaria's focus on fatherhood specifically as male parenthood provides a valuable and profound contribution and is undoubtedly an appropriate

³⁰ Protocol 15 of the ECHR will amend the phrasing of the preamble of the Convention to include explicit mentions of both the subsidiarity principle and the margin of appreciation. Some scholars have argued that the Court has already reacted by increasingly referencing the margin doctrine, see firstly Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9(2) *Journal of International Dispute Settlement* 199.

³¹ This definition is relied on broadly, see e.g. Richard Collier and Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Bloomsbury Publishing 2008).

³² Dianne Otto, 'Queering Gender [Identity] in International Law' (2015) 33 *Nordic Journal of Human Rights* 299, 314.

choice for the focus of this book. However, this book could have benefited from a critical reflection on how centering analysis on motherhood or fatherhood can leave some aspects of parenthood hidden. Are all fathers necessarily men, and all mothers women, and how should parents who do not fit this binary be discussed by Courts and in literature? These discussions will hopefully gain more substance as legal and social recognition of non-binary genders and trans identities continues to evolve.

In conclusion, Alice Margaria has written a truly valuable contribution to human rights law, family law, and law and gender literature. This book offers a deeper understanding of the ECtHR and its doctrines besides a rich discussion on fatherhood in its evolving forms. Moreover, this book is an enjoyable read, the arguments and analysis unfolding with apparent ease and a clear progression. Not only does Margaria engage in nuanced and in-depth analysis of the Court's discussion of fatherhood and masculinity, she succeeds in thoughtfully analysing the Court's use of doctrine and the significant role this plays in the construction of fatherhood.