

grundsätzlichen – Positionen (siehe etwa Art. 3 Rn. 5 zur Staatsangehörigkeitsanknüpfung) sind immer deutlich, wenn sie auch nicht unumstritten sind. Es folgt die überzeugende Erläuterung der Unterhaltsverordnung durch *Marianne Andrae* und *dies.* / *Martin Schimrick*, die nun durch die Kommentierung des Haager Übereinkommens über die internationale Geltendmachung der Unterhaltsansprüche durch *Christoph A. Kern* flankiert wird. Den Band komplettieren ein Überblick über die Entwürfe zur Güterrechtsverordnung und zur Verordnung über eingetragene Lebenspartnerschaften aus dem Jahr 2011 (KOM(2011) 126 und 127) von *Kathrin Kroll-Ludwigs* sowie eine Erläuterung der Verordnung Nr. 606/2013 über die gegenseitige Anerkennung von Schutzmaßnahmen in Zivilsachen durch *Kathrin Binder*. Abgedruckt sind zudem das Internationale Familienrechtsverfahrensgesetz (IntFamRVG) und das Gesetz zur Geltendmachung von Unterhaltsansprüchen im Verkehr mit ausländischen Staaten (AUG). Während sich die Bearbeiter von Band I in der günstigen Situation einer Neukomentierung eines Rechtsaktes im Anschluss an eine grundlegende Reform befanden, trifft das Gegenteil für die Bearbeiter von Band IV zu: Hier steht nicht nur bald eine Reform der Brüssel IIa-Verordnung ins Haus (COM(2016) 411), auch die Entwürfe zu den beiden Güterrechtsverordnungen wurden im Gesetzgebungsverfahren noch grundlegend geändert.

Hannover

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Family Forms and Parenthood. Theory and Practice of Article 8 ECHR in Europe. Ed. by *Andrea Büchler* and *Helen Keller*. – Cambridge, Antwerp, Portland: Intersentia 2016. XXIII, 544 S. (European Family Law Series. 40.)

I. In recent years, we have witnessed an ever-growing increase in the pluralisation of family forms as well as in the options offered by reproductive medicine. These are just some, but likely major, reasons why family law in many European countries has been challenged both to adapt to changing values in society and, at the same time, to define new boundaries. None of the 47 Member States of the Council of Europe has remained untouched by these changing times – though they have been impacted, certainly, in different ways and to different extents. And all of them are bound in their legal frameworks by the rules of the European Convention on Human Rights.

It is against this backdrop that *Andrea Büchler* and *Helen Keller* set out to explore the theory and practice of Article 8 of the European Convention on Human Rights, which *inter alia* protects family and private life in Europe. In order to do so, they gathered rapporteurs from eleven different Member States of the Council of Europe, who then prepared country reports on the implementation of judgments by the European Court of Human Rights (ECtHR) on Article 8 concerning family forms and parenthood. The editors' aim was to study the impacts of the ECtHR's jurisdiction on the legal development in the Member States. They expressly included the effects not only on the domestic judiciary but also on other legal players – primarily the legislature – in the scope of their research.

II. *Andrea Büchler* and *Helen Keller*, the book's editors, are both professors at the Law Faculty of Zurich University; *Büchler* is a prominent family law scholar, and *Keller* is a scholar of public international and constitutional law and since 2011 a judge at the European Court of Human Rights. The seventeen country rapporteurs are researchers from various universities around Europe, most of them family law scholars with a private law perspective. Together they have written eleven reports on the following countries: Austria, Croatia, England and Wales, Germany, Greece, Hungary, the Netherlands, Poland, Spain, Sweden, and Switzerland. With the choice of countries, the editors have tried to include both "old" and "new" Member States of the Council of Europe as well as states with a civil and public law tradition, and to cover all European regions in geographical terms (p. 26). As an outside observer, of course, it is easy to criticise choices like these. For example, one cannot but notice a relative predominance of German-speaking countries in this selection. Also, one can always wish for a broader scope and ask whether it might not have been of particular interest to include more diverse religious backgrounds – for example, by researching developments in a predominantly Islamic state such as Turkey or Azerbaijan. Ultimately, though, there are always limits to feasibility which editors cannot escape. Here, as *Büchler* and *Keller* note, the limiting factor was the availability of researchers "who were willing to research the topic of family law in terms of the interaction between the European and national level" (p. 26). This in itself can be considered telling when it comes to the reception of European jurisprudence in domestic family law.

III. The editors set out the framework of research in two introductory chapters. First, *Keller* provides an overview of the context in which Article 8 and the analysis are embedded (pp. 3–28). She explains how the ECtHR applies the concept of margin of appreciation in its jurisprudence in general and in particular with regard to Article 8 (both by itself and in connection with the prohibition of discrimination enshrined in Article 14). After a brief description of the Court's recent tendency to draw a number of procedural rules from Article 8 rather than only substantive ones, she then addresses the relationship between the ECtHR's judgments and the national legal order. The background which *Keller* provides here is particularly enlightening and interesting for private law scholars who might not come into contact with the relevant concepts of public international law on a day-to-day basis. For one thing, she gives a short overview of the binding nature of the ECtHR's judgments and the methods for monitoring their implementation. Moreover, *Keller* presents a framework of classification with regard to the level of "ECtHR-awareness" that can be found in different countries. This framework enables us to look not only at how a state handles ECtHR judgments rendered with respect to this one state, but also, for example, at whether a state additionally strives to implement the judgments rendered regarding other Member States or even to anticipate future decisions of the ECtHR in its own court decisions or legislation (pp. 23–25).

Following *Keller's* introduction, the chapter authored by *Büchler* focuses on the content of the ECtHR's case law on Article 8 regarding parenthood and family forms. In a clear and concise manner, *Büchler* sets out the main issues decided by the ECtHR with regard to these two topics. Concerning parent-

hood, these are its formation and contestation, adoption, reproductive medicine and the right to knowledge of one's own origins; with respect to family forms, they are partnerships (both hetero- and homosexual), parental responsibility, contact and visitation rights as well as step and foster parenthood.

These are the material law issues which the rapporteurs subsequently address in their country reports. The authors were guided by a detailed questionnaire, which shows in the structure of the reports: even though they differ significantly in length (from approximately 20 to approximately 60 pages) and focus, based on the respective domestic discussions and development, a reader can conveniently look up the relevant points for a particular question and compare them across the reports. Easy access is also provided on the basis of the ECtHR's case law, as the approximately 250 decisions which the authors have evaluated are all listed in a case register.

IV. While each of the country reports would merit a review of its own, the focus here will be on the synthesis that *Büchler* and *Keller* derive from the eleven reports. All in all, they diagnose a very dynamic evolution of family law in the areas surveyed, on both the European and the domestic level. They see a movement towards a more flexible and open approach as a response to societal changes, despite all the arguments regarding the impossibility of harmonisation in family law based on its strong cultural roots (p. 520). At the same time, the analysis leaves them "disillusion[ed]" due to vast differences not only in the way the domestic actors deal with the ECtHR's jurisprudence, but also regarding the development of substantive legal questions themselves (p. 502).

1. While *Büchler* and *Keller* reach the conclusion that it is not the Convention's public international law status (monist vs. dualist system) which determines how much and in which way reference is made to the ECtHR on the domestic level (p. 504), they see a large number of factors as posing challenges to the implementation of the Court's decisions. Concerning the judgments rendered against the state itself, the primary hindrances lie in political and – perhaps less talked about in academia – economic circumstances (pp. 506–507).

No common ground seems to exist between the countries surveyed when it comes to the implementation of judgments rendered with regard to other Member States. Some states, such as Austria, are very open-minded in this respect and eagerly follow recent European developments, while others do not seem to notice much beyond what they are directly bound to implement. What the editors understandably lament is that in Poland the ECtHR's case law with respect to other countries has been used to lower the human rights standard regarding protection for legal change of gender (pp. 510–512). While this result is in conflict with Article 53 of the Convention (safeguard for existing human rights) and no doubt deplorable, it could nevertheless be seen as a logical consequence of the ECtHR's focus on consensus between the Member States and might thus challenge us to take a closer look at the risks posed by this concept.

On the positive side, however, the research has also shown that some states (such as the Netherlands) are pioneers of "preventive" implementation of ECtHR jurisprudence – that is, they take the line of judgments even further by anticipating future developments and aiming to bring their domestic law in accordance with these before they even happen. When the editors mark this type

of development as showing the great impact of the ECtHR's decisions (p. 509), some critical scepticism must be allowed: Can we really assume that these developments are attributable to the ECtHR's influence? Or would it not seem at least as likely that legislators and judges who favour progressive decisions could be tempted to attribute their own reasoning to the Court by way of a (possibly correct, possibly incorrect) prediction in order to make use of its authority for their own purposes? In any case, these observations are an expression of the dialectical relationship (formed by the concepts of European consensus and margin of appreciation) between the ECtHR and the Member States, which will not always be seen as easy and straightforward, but all in all can be regarded as a fruitful exchange and development (p. 522).

2. With regard to the domestic law on family forms and parenthood, the research has revealed some common trends and some differences in the developments within the states analysed. The editors observe that the convergences are based on a number of similar guidelines in all European countries (equal rights of both spouses, status equality for all children, no-fault divorce, freedom of marriage), many of which can be attributed to the European Convention on Human Rights (p. 521).

With regard to marriage, the editors note that it has become less important as an institution (p. 523). While there are significant differences when it comes to the legal protection of unmarried couples, *Büchler* and *Keller* nevertheless discern a general tendency towards more recognition and protection (particularly in the case of separation). Looking specifically at same-sex couples, though, the ECtHR has not required Member States to open up the institution of marriage to them (and the Member States indeed follow different routes in this regard), but rather only demands that they not be discriminated against relative to unmarried heterosexual couples. There does, at least, seem to be a new consensus to regard same-sex couples as a form of family life within Article 8. However, there remain significant differences concerning their access to parenthood and to reproductive medicine, even though the latter has been increasing (pp. 525–528).

Another highly contentious and challenging topic is legal fatherhood. Here questions arise regarding multiple (i.e. more than two) parents, the relevance of genetic versus social parenthood and the unmarried biological father's position. While many differences remain, the editors find a greater willingness to depart from earlier stereotypes and to strengthen the unmarried father's position. A tendency to shift towards the biological father can be seen, as well as an increased recognition of the child's interest in stable and undisturbed family relationships. More flexibility also seems to be on the rise with regard to granting parental responsibility to more than two persons. Recent and upcoming are a shift in the debate from parental responsibility towards custody, as well as the question of whether a man has a right to know about fatherhood (pp. 528–533).

The reconsideration and redefinition of legal parenthood are also taking place based on the possibilities now offered by reproductive medicine. In this respect, the ECtHR requires the Member States to keep up with scientific and societal developments and thus to allow more flexibility in this regard also (pp. 533–535).

Lastly, it is again more flexibility which is being demanded when it comes to

taking into account the best interests of the child. This concept is seen as having become a central issue in the ECtHR's jurisprudence; here again, it is the growing pluralisation of ways of life which has led the Court to demand that Member States provide for the examination of each individual case and each individual child's circumstances. It is no longer regarded as sufficient to work with legislative presumptions about the best interest of a child, because such presumptions are incapable of reflecting the reality of a pluralised society (pp. 535–538).

V. In sum, *Büchler* and *Keller*, together with the country rapporteurs, have gathered a wealth of information on questions of family forms and parenthood in Europe, on both the national and the supranational level. This book contains many insights – some surprising, others expected – with regard to current questions and developments of family law in these areas. As always when information is made accessible, it leads to more questions than answers. For someone looking at this research from a more external perspective, the accounts might give rise to considerations such as the following:

For one thing, it would be fascinating and possibly very helpful to study in more detail which factors determine the role which the jurisprudence of the ECtHR plays on a national level. The volume contains many hints and some – admittedly speculative (p. 502) – answers in this regard, such as a lack of education on the part of responsible persons (e.g. administrative personnel and social workers, as well as lawyers and judges), lack of resources, cultural hindrances and political opportunism. Yet, there is an abundance of room left for more research here.

Also, the observation of growing plurality and, accordingly, increasing flexibility and openness in family law legislation can make one wonder which role movements towards more conservative positions (as an example, see Hungary, p. 271) play as part of this plurality and which leverage they have. Thinking back to the Polish development on change of legal gender, and looking at the strong political tendencies currently evident in some other Member States of the Council of Europe, one may ask where the concept of European consensus will lead us in the future. Will it still be able to support a progressive interpretation of family law and if so, at what pace? In this respect, the editors of this volume have already posed a central question. In describing the uncertainty surrounding the development of Article 8 and the Court's jurisprudence, they identify two decisive factors (p. 539): "The first factor is whether, and if so how, national legislatures will define the tasks which family law is expected to perform in an increasingly plural society. The second – and critical – factor is what purposes and content the ECtHR will ascribe to Article 8 ECHR."

We will have to wait for the answers to these questions. In the meantime, we can derive many benefits from studying this book in order to understand where the developments of the Member States and the ECtHR have taken us so far.

