

THE CONSTRUCTION OF FATHERHOOD

This book tackles one of the most topical socio-legal issues of today: how the law – in particular, the European Court of Human Rights – is responding to shifting practices and ideas of fatherhood in a world that offers radical possibilities for the fragmentation of the conventional father figure and therefore urges decisions upon what kind of characteristics makes someone a legal father.

It explores the Court's reaction to changing family and, more specifically, fatherhood realities. In so doing, it engages in timely conversations about the rights and responsibilities of men as fathers. By tracing values and assumptions underpinning the Court's views on fatherhood, this book contributes to highlight the expressive powers of the ECtHR: more specifically, the latter's role in producing and legitimising ideas about parenting and, more generally, in influencing how family life is regulated and organised.

Alice Margaria is a Research Fellow in the Law and Anthropology Department of the Max Planck Institute for Social Anthropology. She holds a PhD in Law from the European University Institute. Her previous book *Nuove forme di filiazione e genitorialità: leggi e giudici di fronte alle nuove realtà* (2018) explores the role of national judges in bridging the gap between the social and the legal realities of families created via assisted reproduction, from a comparative perspective. She was invited as a visiting scholar at various institutions, such as Emory University and Lund University. She also worked with international organisations, including the UNICEF Office of Research.

Cambridge University Press
978-1-108-47509-9 — The Construction of Fatherhood
Alice Margaria
Frontmatter
[More Information](#)

The Construction of Fatherhood

THE JURISPRUDENCE OF THE EUROPEAN
COURT OF HUMAN RIGHTS

ALICE MARGARIA

Max Planck Institute for Social Anthropology
Department of Law and Anthropology



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-47509-9 — The Construction of Fatherhood
Alice Margaria
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of
education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108475099

DOI: 10.1017/9781108566193

© Alice Margaria 2019

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2019

Printed in the United Kingdom by TJ International Ltd. Padstow Cornwall

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-47509-9 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of
URLs for external or third-party internet websites referred to in this publication
and does not guarantee that any content on such websites is, or will remain,
accurate or appropriate.

Cambridge University Press
978-1-108-47509-9 — The Construction of Fatherhood
Alice Margaria
Frontmatter
[More Information](#)

To my children

Cambridge University Press
978-1-108-47509-9 — The Construction of Fatherhood
Alice Margaria
Frontmatter
[More Information](#)

Contents

| | |
|--|----------------|
| <i>Foreword</i> | <i>page xi</i> |
| <i>Acknowledgements</i> | <i>xiii</i> |
| Introduction | 1 |
| 1 Fatherhood and the Law in Europe | 4 |
| 1 Ideology versus Reality: Changing Families and Changing Fatherhood | 4 |
| 2 The Law’s Reaction: New and Old Ways of Connecting Fathers to Children | 9 |
| 3 Introducing the Key Concepts | 13 |
| ‘Conventional Fatherhood’ | 13 |
| ‘Fragmenting Fatherhood’ | 14 |
| ‘New Fatherhood’ | 15 |
| 4 The Aim and Structure of the Analysis | 17 |
| 2 The ECtHR and Fatherhood: Limits and Potential | 19 |
| Introduction | 19 |
| 1 Family Relationships: Between Restraint and Innovation | 20 |
| 2 Core Provisions | 24 |
| 2.1 Article 8 and Fatherhood | 25 |
| Two Stages of Review | 25 |
| Positive Obligations | 29 |
| 2.2 Article 14 and Fatherhood | 32 |
| 3 Doctrines and Decision Making | 35 |
| 3.1 The Doctrine of the Margin and Strictness of Review | 36 |
| 3.2 The Variable Use of Doctrines and the Court’s Moral Views | 40 |
| 4 Case-Law Selection | 45 |

| | | |
|----------|--|------------|
| 3 | Fatherhood and Assisted Reproduction | 48 |
| 1 | The Impact of ARTs on Conventional Fatherhood | 48 |
| 2 | The ECtHR and ARTs: An Ambivalent Reaction | 52 |
| 2.1 | Transsexuality and Fatherhood | 54 |
| 2.2 | Not-Yet Conceived Children and the Ideal Father | 58 |
| 2.3 | Surrogacy and Intended Fatherhood | 63 |
| 3 | Conclusions | 68 |
| 4 | Post-Separation and Unmarried Fatherhood | 72 |
| 1 | Fatherhood and the ‘Crisis’ of Marriage | 72 |
| 2 | The ECtHR, the ‘Crisis’ of Marriage and Fatherhood | 75 |
| 2.1 | Parental Rights after Family Breakdown | 78 |
| 2.2 | Non-Consensual Adoption | 85 |
| 2.3 | Paternity Proceedings | 91 |
| | Fathers Contesting Paternity | 93 |
| | Fathers Claiming Paternity | 98 |
| 3 | Conclusions | 106 |
| 5 | Fatherhood and Family–Work Reconciliation | 109 |
| 1 | Women in the Workplace and Conventional Fatherhood | 109 |
| 2 | Childcare-Related Entitlements for Fathers and the ECtHR: One Step at a Time | 114 |
| 2.1 | Restating Conventional Fatherhood | 116 |
| 2.2 | Contemplating ‘New Fatherhood’ | 119 |
| 2.3 | Pushing for ‘New Fatherhood’ | 121 |
| 3 | Conclusions | 125 |
| 6 | Fatherhood and Homosexuality | 128 |
| 1 | Homosexual Families and Conventional Parenthood: Points of Disjuncture | 128 |
| 2 | The ECtHR and Homosexual Relationships: A Two-Stage Development | 131 |
| 2.1 | Homosexual Fathers and Their Biological Children | 135 |
| 2.2 | Single-Parent Adoption: Gays versus Lesbians | 139 |
| 2.3 | Second-Parent Adoption and the ‘Special Status’ of Marriage | 144 |
| 3 | Conclusions | 151 |

Contents ix

| | | |
|---|--|-----|
| 7 | Fatherhood at the ECtHR | 155 |
| | Introduction | 155 |
| 1 | The Construction of Fatherhood in the ECtHR | |
| | Jurisprudence | 156 |
| | Towards ‘New Fatherhood’ | 156 |
| | The Relationship between Change and Continuity | 159 |
| 2 | The Role(s) of Doctrines | 161 |
| | European Consensus | 162 |
| | Positive Obligations | 164 |
| 3 | Final Thoughts | 166 |
| | <i>Bibliography</i> | 169 |
| | <i>Index</i> | 186 |

Cambridge University Press
978-1-108-47509-9 — The Construction of Fatherhood
Alice Margaria
Frontmatter
[More Information](#)

Foreword

It is an honour and a great pleasure to write the preface for this important, timely and fascinating book, a study that redraws the terrain of contemporary studies of fatherhood and law by turning the critical gaze to the construction of fatherhood in the context of the jurisprudence of the European Court of Human Rights (ECtHR). Alice Margaria has written a meticulously researched book, theoretically sophisticated in its approach yet written throughout in an engaging and accessible style. It is a work that I have no doubt will appeal to a wide readership across disciplines, making not only an important contribution to legal scholarship, and socio-legal studies in particular, but to interdisciplinary work on fatherhood generally and the growing body of international scholarship exploring the interconnections between gender, parenting and social change.

The scope and command of a diverse literature base in the work is formidable. The book encompasses, among other things, consideration of the complex relationship between law and the changing nature of families and fatherhood in a transnational frame; the core provisions, doctrines and decision-making of the ECtHR, blending detailed analysis of case-law with insights drawn from across diverse disciplinary perspectives. In her assessment of the limits and potential of the Court, the author carefully takes the reader through key areas of law that have, in the context of the ECtHR as well as other legal arenas, raised challenging and significant questions about social and legal understandings of fathering and fatherhood. These include the relationship between fatherhood and assisted reproduction (Chapter 3), the place of fatherhood in debates around family–work reconciliation (Chapter 5) and men’s parenting in laws relating to same-sex relationships, in particular with regard to adoption laws and the privilege of heterosexuality in the jurisprudence of the Court (Chapter 6). Central to the book is consideration of another

issue that has prompted extensive debate and dialogue across jurisdictions in Europe and beyond. In a discussion of the legal regulation of post-separation and unmarried fatherhood, the author charts how what is taking place in the law in these areas, on closer examination, reveals much about shifting understandings of marriage, divorce and, indeed, the politics of law and families.

What is truly original, and makes this work quite distinct from other studies of fatherhood, law and society, is the core focus on the jurisprudence of the ECtHR. It explores how, in this context, a closer examination of legal regulation can reveal much about the fragmentation of a traditional father figure and the nature of legal determinations of who, and by virtue of what kind of link, should be regarded as the legal father of a child. Exploring cases pertaining to family life and father–child relationships that have crossed national borders and reached Strasbourg, the book reveals a deep uncertainty across countries about social understandings of fatherhood and fathering; and how these constructions of fatherhood, as the book frames it, are enmeshed with an array of beliefs about social bonds, intentions, responsibilities and rights. Crucially, what emerges is not just the key role of the ECtHR in the production, reproduction and legitimisation, through its binding decisions, of an array of (by no means consistent) ideas of what it means to be a ‘father’ and, in particular, a ‘good father’. The book also considers the place of fatherhood at a conceptual level in a study of the power of law. More precisely, as the author puts it, it unpacks how the effects of the Court’s jurisprudence do not stop at telling parties how they must behave but also involve messages about what values, and ideas – about, for example, care, family, responsibility and rights – are more important than others within specific legal contexts. What emerges is a picture of both shifts and continuity in the extent to which the Court can be seen as either resistant or receptive to changing notions and practices of fatherhood in society.

As the author notes, whilst several scholars have sought to explore the contribution of the Strasbourg Court in relation to wider notions of parenthood, fatherhood has remained a relatively unexplored subject. This book is unique in the way it places the law’s ‘fatherhood question’ firmly on the agenda in the context of European jurisprudence. It is, in short, socio-legal scholarship at its best, most fascinating and most thought provoking – a book that deserves to be widely read far beyond the discipline of law and which will take its rightful place in the canon of work on fatherhood, law and gender and in socio-legal scholarship generally.

Richard Collier, Newcastle Upon Tyne, UK. March 2019

Acknowledgements

I owe a debt of gratitude to many people. I would like to start by thanking Ruth Rubio-Marin for bringing me to this interesting topic of research and for providing precious guidance during my PhD at the EUI. My thoughts on fatherhood have been greatly influenced by Richard Collier and Sally Sheldon, who – apart from producing wonderful scholarship – have been extremely generous and devoted time and efforts to read and discuss parts of my work. I am also grateful to Prof. Nancy Dowd, who has been a great source of inspiration and support especially during the initial phase of my PhD and to Prof. Martha Fineman for making my stay at Emory particularly fruitful. I am also thankful to Prof. Marie-Claire Foblets for encouraging me to bring this project to fruition whilst benefiting of the extraordinary resources provided by the Law and Anthropology Department of the Max Planck Institute for Social Anthropology (Halle). Special thanks go also to the library staff at the MPI, who always managed to satisfy my hunger for more and more sources and to retrieve copies of books and articles from different nooks and crannies all over the world. Many more colleagues have taken the time to read and offer comments on earlier versions of this work; I wish to thank all of them.

Each of my family members has played a crucial role in this journey. I wish to thank my father for making ‘nurturing fatherhood’ a reality in my daily life; my mother, for being an essential ally in my mission to juggle work and family obligations; my children, Aida and Ismail, for being patient and accompanying me throughout long and tiring working days; Skander, for being their engaged father and my supportive partner; and, my ‘social’ siblings, Noemi and Stefano, for their omnipresence despite our physical distance. I wish to thank also those who – by way of contrast – made some steps of my journey particularly arduous: they have helped me to realise the power of dreams and commitment.

Cambridge University Press
978-1-108-47509-9 — The Construction of Fatherhood
Alice Margaria
Frontmatter
[More Information](#)
