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The Emerging Shape of Uniform European Family and Child Law

The Role of the European Convention on Human Rights

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I. Concepts of European Family Law

Family law has traditionally been considered relatively immune to attempts at legal standardisation when compared with other fields of private law. Supranational legal foundations in European family law with directly binding effect are currently limited to instruments on recognition and enforcement of certain maintenance law decisions, i.e. conflict-of-laws and civil procedure aspects. The law of the European Community (EC) admittedly contains a number of regulations with family policy content, such as in the field of mobility for migrant workers and their family members. However, this does not actually involve family law. So far, there are no uniform rules on substantive family law at supranational level. This is no coincidence: Supranational law does not provide for any explicit regulatory competence in family and child law matters. The Amsterdam Treaty to establish the European Union has not changed this. The European Parliament as well as working groups of the commission, admittedly deal on various occasions with family policy and family law. In October 1993, the Parliament recommended that possibilities for harmonising family law at European level be investigated. However, thus far there has largely been a lack of consensus on whether such harmonisation is even desirable and necessary.

Increasingly however, European and international conventions are having effects on substantive family and child law in the various Member States. There are admittedly only a few agreements directly harmonising family law or family law procedures. Agreements have primarily promoted international cooperation and the coordination of family law procedures in cases involving more than one country. But to some extent such treaty systems (primarily geared at dealing with conflicts of law) do contain some of “sporadic” harmonisation related to substantive law concepts. Thus the substantive law principle of the best interests of the child was explicitly incorporated in the Hague private international law Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Article 13(2)). The Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption of 29 May 1993 contains substantive law concepts for guaranteeing child rights with respect to certain effects of adoption (Articles 26 and 27) or to post-adoption services subsequent to a legally valid adoption carried out in a foreign country (Article 9 c).

A special role in harmonising family and child law in Europe has been attributed to the Council of Europe, founded in Strasbourg in 1949. This oldest intergovernmental organisation in Europe, currently with 43 members including all EU countries and numerous States in the former eastern bloc, is the only European organisation with an explicit mandate to contribute to the development of a common juridical area in Europe by means of international conventions. With conventions and recommendations, it also influences family law and family law practice in the Member States. However, the norms of the Council of Europe’s treaties are only binding on the States that have acceded to it. Furthermore, they are not model laws but rather framework guidelines that to some extent can be adopted selectively. Among the conventions especially dealing with protection of children are the European Adoption Convention of 24 April 1967, the Convention on...
the Legal Status of Children Born out of Wedlock of 15 October 1975\textsuperscript{11} and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 20 May 1980.\textsuperscript{12} This custody convention is the first to offer a multilateral international law basis for mutual enforcement of custody decisions and promotes international cooperation of public authorities and courts and thus of a legally-secured settlement of cross-border access rights.\textsuperscript{13} The European Custody Convention has been superseded amongst EU Member States by the prioritised EC Regulation No. 1374/2000.\textsuperscript{14} With the European Convention of 25 January 1996 on the Exercise of Children’s Rights,\textsuperscript{15} the Council of Europe has taken aim at improving implementation of children’s rights. For this purpose, hearing and representation of children in family law court proceedings are to be reinforced. These European conventions admittedly bring about some convergence of family law. But the effects of standardisation remain limited since these conventions have been implemented into national law, interpreted and applied differently in each particular State.

The Council of Europe has furthermore addressed numerous recommendations to Member States on family policy and family law matters.\textsuperscript{16} The protection of children’s rights is thus amongst the central fields for Council of Europe activities. In the “Programme for Children” child law has been explicitly addressed among the family policy issues, in particular contact of non-custodial parents with their children (visiting rights) and the legal status of children, i.e. the establishment and effects of kinship.

A further international organisation, the International Marital Status Commission (CIEC)\textsuperscript{17} deals with family law issues important for the practice of the law of personal status. However, this work altogether remains limited to a relatively narrow set of subjects.

Outside of the international conventions already mentioned on harmonisation of international and substantive family law, however, there exists a frequently overlooked possibility of standardising the development of substantive family law at the common European level. This refers to the influence exercised by international human rights conventions on the design of family law, in particular the UN Convention on the Rights of the Child (UNCRC) of 20 November 1989\textsuperscript{18} and the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950.\textsuperscript{19}

The UNCRC contains several provisions aimed at substantive family law. It not only stipulates the interests of the child principle as the guiding maxim in all proceedings relating to children (Article 12). It also promotes the establishment of specific values in the family law of the Contracting States including non-discrimination and the concept of joint parental responsibility (Article 18).\textsuperscript{20} Nonetheless, the effectiveness of this international protection system remains far below that of the ECHR since the UNCRC limits itself to the purely political protection system of periodic reporting by the Contracting States (Article 44 of UNCRC).

The Council of Europe’s ECHR does not contain any explicit norms of substantive family law but only the very general phrasing of Article 8(1) according to which everyone is entitled to respect for his private and family life, his home and his correspondence. Still the rulings of the Strasbourg control bodies provide an idea of the implicit recognition of certain common European principles for family law and child law.\textsuperscript{21} This case law has entailed numerous changes in substantive family law in Europe.\textsuperscript{22} In particular, the European Court of Human Rights’ judgment in the Marxk v Belgium case of 1979,\textsuperscript{23} a decision concerning discrimination of children born

\textsuperscript{11} Convention on the Rights of the Child, which entered into force for Germany on 5 April 1992, see BGBl. 1992, II at 121 et seq., reprinted in FamRZ 1992, at 253 et seq.
\textsuperscript{12} ETS No. 5, in force since 3 September 1953.
\textsuperscript{15} On the amendments to Belgian, Dutch and – to a very limited extent – French affiliation law cf. Protat, Kindschaftsrecht in Belgien und in den Niederlanden, in: Weyers (ed.), Menschenrechte und Zivilrechte, Baden-Baden (D), 1999, at 63 et seq. (69 et seq.); on equal treatment of legitimate and illegitimate children in inheritance law under Austrian law cf. Hinteregger, Menschenrechte und Privatrecht – dargestellt am Beispiel des Kindschaftsrechts – Landesbericht Österreich, in: Weyers (ed.), Menschenrechte und Privatrecht, 1999, at 79 et seq. (98); Ireland changed the legal status of children whose parents were unmarried (Status of Children Act, 1987), and the law on adoption (Adoption Act, 1998); the reform of child law in England and Wales also took into account the judgments of the Strasbourg control system (Children Act, 1989).
\textsuperscript{16} The reform of Belgian family law followed an almost eight-year period of delay: Law of 31 March 1987 on descent and the Law of 27 April 1987 on adoption.
out of wedlock\textsuperscript{24} has attracted considerable attention. In the Netherlands, the Mareck\textsuperscript{25} decision led to far-reaching modifications in illegitimacy law. They related to both the law on affiliation and to inheritance rights of children born out of wedlock. Dutch courts and particularly the Hoge Raad generated a whole code of judge-made law based on the ECHR going beyond the interpretations of the European Court of Human Rights.\textsuperscript{26}

The Strasbourg control bodies have in practice stretching back many years developed certain specifications for the framing of family law relations and family law proceedings. In what follows here, an attempt will be made to portray the framework of those principles of European family and child law that have emerged from the evolutive interpretation practice of the Strasbourg human rights bodies.\textsuperscript{27}

II. Family law and the ECHR

1. The Significance of the ECHR

The ratification of the ECHR with its internationally unique system of legal protection is a prerequisite for membership in the Council of Europe. The ECHR therefore does not just apply between all EC States but also for almost all members in the Council of Europe. The ECHR therefore does not just apply between all EC States but also for almost all States in the former eastern bloc and numerous successor States to the Soviet Union. This pan-European convention not only proclaims rights of the individual but also provides an international procedure in which the individual can exert such rights in relation to Contracting States.

All Contracting States are subject to the jurisprudential authority of the Strasbourg control bodies. For enforcement of the system of protection, the Convention originally had two main bodies: the European Commission of Human Rights and the European Court of Human Rights.\textsuperscript{28} Pursuant to the 11\textsuperscript{th} Protocol of 1994 the control system was significantly modified after 1 November 1998.\textsuperscript{29} After the one-year transitional period, the Commission has now lapsed, and a new single full-time Court of Human Rights has been created.\textsuperscript{30} Since then, the Court can also be seised directly by private parties by way of individual application. The Court decides by a majority vote whether there has been a violation of the Convention and determines compensation for damages and the amount of costs and expenses to be reimbursed.\textsuperscript{31} The State against which the judgment is rendered is obliged under international law to implement the judgment. Responsibility for supervising the execution of a final judgment continues to lie with the Committee of Ministers of the Council of Europe.

2. Effects of the ECHR in Domestic Law

The status of the ECHR in the domestic legal system of the Contracting States varies widely. It generally enjoys the quality of primary legislation, occasionally that of legislation taking precedence over conflicting (anterior and posterior) statutory law, in a few cases even a status equal to the constitution.\textsuperscript{32} In some countries in which it formally only has the character of primary legislation, it is de facto accorded a rank similar to a constitution. Thus in Italy and Germany the usual \textit{lex posterior} rule does not apply. According to the Italian constitutional court (Corte Costituzionale) and the court of cassation international conventions like the ECHR are an atypical source of law whose derogation by national law is not possible.\textsuperscript{33} The rights enshrined in the ECHR must be compared with the constitution or the Italian civil code (Codice Civile) in order to determine which law offers better protection. In Germany, priority in relation to subsequent legislated law stems de facto from the principle of favourable interpretation of international law. According to that principle, both the ECHR as well as the case law generated by the ECHR must be taken into account when interpreting the Basic Law and subsequent statutory laws.\textsuperscript{34} But there is some question whether this is always observed in practice.

\textsuperscript{24} Judgment of 13 June 1979, Series A, No. 31 = NJW 1979, at 2449 = EuGRZ 1979, at 454; (1979) 2 ECHR, at 332.


\textsuperscript{27} Previously, after the exhaustion of all national legal remedies, first the Commission had to deal with the application; it decided, whether the question was to be referred to the Committee of Ministers of the Council of Europe to the Court.

\textsuperscript{28} Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 11 May 1994,ETS No. 155, ratified by 40 Member States of the Council of Europe.

\textsuperscript{29} The newly-elected permanent European Court of Human Rights comprises 43 judges (one judge per Contracting State). The Court rules in Committees, Sections and the Grand Chamber. The Committees, which consider the admissibility of individual applications, are each composed of three judges. Their decisions are final. The Sections are each composed of seven judges and the Grand Chamber of seventeen judges. The Grand Chamber is then seised of a case, when the Sections wishes to overrule a previous judgment of the Court or when the matter is of fundamental importance. After a judgment has been rendered on important questions of general significance, the parties involved may apply to have the case transferred to the Grand Chamber.

\textsuperscript{30} The judgments of the European Court of Human Rights are published in English and French in an official series ("Reports of Judgments and Decisions"). Pre-1996 judgments have been published as "Série A"/"Series A" (with the full text of judgments and extracts of the European Commission’s decision on the merits) and "Série B"/"Series B" (with the pleadings, arguments and documentation). Most of the judgments of the Court are published also in the "European Human Rights Reports". Very recent judgments are available from the web-site of the Court: www.dhcour.coe.fr.

\textsuperscript{31} For instance, the quality of primary legislation, \textit{inter alia}, in the Federal Republic of Germany, Finland, Greece, Italy, Denmark; the quality of legislation superseding domestic legislation in Luxembourg, the Netherlands, France, Portugal and Spain; legal status equal to the constitution in Belgium and Austria. Cf. hereon Villinger, Handbuch der Europäischen Menschenrechtskonvention (EMRK), 2\textsuperscript{nd} ed., (Zürich, (CH), 1999, at 43, para. 57.


\textsuperscript{33} Bundesverfassungsgericht (D) 26 March 1987, in: BVerfGE 74, at 358 (370). Bleckmann wants to grant the Convention "the rank and quality of constitutional law". Cf. Bleckmann, Verfassungsrecht der Europäischen Menschenrechtskonvention, EuGRZ 1994, at 149 et seq.
In Sweden, the ECHR has been attributed special status: international conventions until very recently were not considered part of the domestic law but the ECHR was integrated into Swedish law by means of a special statute that came into effect on 1 January 1995.\(^3\) In the United Kingdom as well, the ECHR did not become a component of domestic law, despite being ratified.\(^3\) Only with the Human Acts Right of 1998 was the ECHR as of 2 October 2000 directly incorporated into English law.\(^3\)

Despite differences in application and the significance of the ECHR in each domestic hierarchy of legal norms, its influence on the development of family and child law in Europe cannot be underestimated. Many reforms in this legal field were directly or indirectly set off by decisions of the Strasbourg control machinery, partially as a response to a judgment. Final judgments rendered against a respondent State may also trigger reforms in other, not immediately affected States. In addition to that, the ECHR also influences the application of law, primarily as an interpretive standard for domestic law. The indirect application of human rights standards relevant to family law primarily has its importance in the indeterminate concept of the best interests of the child. Observance of this standard, however, is only possible if the legal practitioner has sufficient knowledge of the convention’s norms as well as of the settled case law issued by the of international control bodies.

3. The Human Right to Respect Family Life Under Article 8 of the ECHR

The Strasbourg system for the protection of human rights and fundamental freedoms contains a number of linkage points relevant to family law and child law. In practice, the focus has been on the right to respect of family life in Article 8(1) of the ECHR as well as Article 8 in conjunction with the ban on discrimination in Article 14.\(^3\)

Article 8 of the ECHR provides:38

> “Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Under Article 14 of the ECHR, enjoyment of rights and freedoms laid down in the Convention must be granted without distinction as to sex, race, skin colour, language, religion, political or other views, national or social origin, membership in a national minority, wealth, birth or any other status. This is an accessorius prohibition on discrimination related to the fundamental rights and freedoms enshrined in the ECHR.\(^3\)

The right to respect for family life in the sense of Article 8 of the ECHR is a conditionally-protected right. Interference by public authorities with this right are permissible if they are justified and proportional under Article 8(2) of the ECHR. In that sense, it involves a defensive right against unjustified government interference with family life. The control bodies investigate whether the governmental interference has a legal basis in domestic law and whether the restrictions cited in Article 8(2) of the ECHR have been observed, in which case they acknowledge a certain margin of appreciation for the State. The more intensive the interference, the narrower is the margin of appreciation. This must be observed in particular with State measures where there is a danger that family relations will be completely severed.

According to the case-law of the Commission and the Court, Article 8 of the ECHR furthermore establishes the positive obligation of national authorities to take appropriate measures so that “a normal family life” can develop. The extent of this positive obligation is somewhat vague. This applies especially to the margin of appreciation reserved for States in order to find an equitable compromise between the participants’ conflicting interests. It is investigated whether the public authorities have taken all necessary measures which “could reasonably be expected in the concrete case at hand.” Different views on the range of the margin of appreciation are frequently also reflected in dissenting opinions appended to the judgments of the European Court of Human Rights.\(^4\)

“Family life” in the sense of Article 8(1) of the ECHR is understood to be an autonomous concept of convention law and is interpreted independently of the national law of Member States. Strasbourg case law has developed a very broadly defined concept of family life.\(^\) Marriage almost inevitably

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35 Gearty, United Kingdom, in: Gearty (ed.), supra note 32, at 53 et seq., 65 et seq. The same is true for Ireland, cf. Flynn, Ireland, in: Gearty (ed.), op. cit., at 177 et seq., 183 (211).
38 Janis/Kay/Bradley, loc. cit.
39 The most recent additional protocol No. 12 of 4 November 2000 (ETS No. 177) provides in future for a general prohibition of discrimination on any ground by any public authority.
40 On the problem of conflicting interests among the individual family members cf. Laderitz, Menschenrechte und Privatrecht, in: Weyers, (ed.) (supra note 22), at 9 et seq.
gives rise to "family life", likewise a stable marriage-like de facto relationship with children. As a general rule, the relationship between an unmarried mother and her child, as well as between an unmarried father and his child, is considered to be "family life", even if the parents do not live together, or no longer live together. Family life may be involved even if there has hardly been any contact between the absent parent and the child because the other parent has prevented this. In this sense, not only an existing family relationship is protected, but even a potential relationship "in nuce" between an illegitimate father and his child. Apart from this special case, family life basically implies an existing family relationship, or in other words, the "real existence of close personal ties" of some permanence ("existent, effective and close links").

In its judgment in the Irish Keegan case, the Court recalled that the convention law concept of the family was not limited to relations based on marriage but also encompassed de facto relations. A child coming from such a relationship is consequently seen as "from birth onwards and simply on the basis of birth" to be ipso iure part of the family. A de facto family with stable relations between a couple and a child may constitute "family life" even when there is no biological tie to one of the parties. The court affirmed the existence of family life in the terms of Article 8 between X, a former female transsexual, his previous female partner Y and her child Z that had been conceived through heterologous insemination. The couple lived together for almost 20 years and the transsexual partner had since the child’s birth assumed the father’s role.

Regardless of the parent-child relationship, the relations between siblings are protected under Article 8 of ECHR. Basically as well, adopted families, step families and foster families also fall under the remit of Article 8. Under certain circumstances, lateral consanguineous relations can constitute family life as well.

4. Child Law Specifications of the ECHR

Besides affiliation, legal relations between parents and minors and the effects of parents’ separation on such relations, the Strasbourg bodies have primarily dealt with cases in which the children had been separated by their parents (or by the custodial parent) in connection with placement of the children in public or private foster care. In such separation cases, the procedural law aspects of Article 8 of the ECHR are of crucial importance.

a) Establishment and continuity of a parent-child relationship

According to the ECHR, the fact of birth in general constitutes the decisive bond between parent and child. In regard to maternal descent, the court in 1979 found that the birth and biological relationship between mother and child must automatically lead to legally recognised kinship. National regulations which make establishment of kinship dependent upon additional legal steps such as recognition or adoption violate the ECHR.

The relations between a father and a child born out of wedlock are likewise better protected by Strasbourg case law than under many national regulations. In fact, the Court has derived from Article 8 of the ECHR the right of the alleged illegitimate father to an effective and accessible remedy by which he can establish whether he is the biological, in particular to recognise the child, when such recognition is not contrary to the best interests of the child. Rules which prevent determination of paternal affiliation – to the detriment of the child’s interests – are likely to violate Article 8 of the ECHR. Thus in the judgment Kroon v The Netherlands, the Court expressed dissatisfaction that a father could not achieve determination of his biological paternity by contesting legitimate descent where the child was born into the mother’s formally still existing marriage and was therefore considered a legitimate child. In the concrete case, there was no contact with the mother’s husband who lived abroad and never assumed any parental responsibility. Limitations on contesting legitimacy and paternity are admittedly justified when they aim at safeguarding an unambiguous legal status of a child born in wedlock, in order to ensure legal certainty and to protect the interests of the child. But by way of exception, proceedings to contest paternity of a legitimate father should be available to rectify the affiliation status of a child when the biological father intends to act as a parent with respect to that child.

Rules to establish legitimate and illegitimate paternal affiliation may differ without constituting a violation of the ECHR.

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43 European Court of Human Rights, 13 June 1979 – Marevsk v Belgium, Series A No. 31, §§ 31, 45.
44 Keegan v Ireland, (supra note 42).
45 European Court of Human Rights, 22 April 1997 – X, Y and Z v United Kingdom, §§ 36-37; 47; at 91 et seq. The Court concluded that – in view of the broad margin of discretion of the legislator – the respondent State did not have a positive obligation to allow the de facto parental relationship between the child and the transsexual partner of the mother to be transformed into a legally recognised parent-child relationsh.

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On the procedural dimensions of Article 8 of the ECHR, see in detail, Brotzel, Die Defizite im deutschen Kindschaftsrecht, gemessen an der Europäischen Menschenrechtskonvention (EMRK), in: Kroepfel (ed.), Kinder- und Familienrecht im europäischen Kontext, Neuwied (D), 1996, at 49 et seq. (54).

48 Of fundamental importance hereon, see the case Marevsk v Belgium, European Court of Human Rights, 13 June 1979 (supra note 43) concerning the rights of the child born out of wedlock. Under Belgian law, the biological mother had to adopt her daughter in order to secure particular rights for her. Even in case of adoption, relatives on both the paternal and maternal side, would exclude inheritance rights of the child. This legal situation was in violation of the Convention, as it prevented the full development of family life. The jurisprudence was confirmed in the case Vermette v Belgium, cf. European Court of Human Rights, 29 November 1991, Series A No. 214-C.

49 European Court of Human Rights, 27 October 1994 – Kroon v The Netherlands, Series A No. 297-C, §§ 37 et seq.
per se. This applies in particular with respect to the paternity presumption according to the “pater est quem nuptiae demonstrant” principle. The Court in 1999 refused to recognise a biological father’s right to contest the paternity of a child considered the legitimate offspring of his previous partner who at the time of the birth was married to a third party.\(^52\) The denial of such a right was justified under the aspect of the best interests of the child since determination of paternity would have disturbing effects on the child and his “legal family”. Limitation of the right to contest paternity is thus allowed in order not to jeopardise the existing marriage and family peace and to protect the child’s interests in being integrated into a functioning marital family. Likewise, contesting legitimacy can be restricted in the child’s interests if the parental marriage is no longer functional. This applies to rules that link the “legitimate father’s” right to contest legitimacy of a child to certain deadlines.\(^53\)

The assessment of the interests of children who cannot invoke a presumption of legitimacy is different: in the judgment Keegan v Ireland (1994),\(^52\) the Court significantly upgraded the position of the unmarried father with respect to his offspring. The judgment dealt with the issue whether a child could be released for adoption by the mother without the biological father being informed or involved in the decision after he had separated from the mother even before the child’s birth. With this decision, the court acknowledged the role of the father “interested” in his illegitimate child, who wished to assume parental responsibility, independent of previous co-habituation between the father and the child. According to the judgment, the interest must not even take the form of contribution by the father to taking care of and bringing up the child. The affirmation of a parental bond between the father and the child, whose other parent was not married at the time of birth, depends according to this view essentially on the quality of the previous parental relationship, but not on the quality of the father-child relationship. It is questionable whether this focus on the rights of the unmarried father coincides with the best interests of the child. The father can invoke his parental rights without any previous social contacts to the child. This might prevent an early adoption although the father is not able to act as a parent.

In the absence of an adequate previous parental relationship, according to Strasbourg case-law, there is no protected family life in the relationship between the sperm donor and the child. The latter can consequently not invoke any parental rights, neither rights to consent, nor visitation rights.\(^55\)

There has still not been a decision on the legal exclusion of paternity determination after the death of the mother of an illegitimate child that had refused consent to paternity recognition during her lifetime. How are the child’s interests to be judged in relation to recognition of paternity and the concomitant right to access? Is exclusion of paternity recognition interference justified under the aspect of the best interests of the child in order to allow the child to remain with a grandmother or an uncle with whom the child stayed after the mother’s death? Particularly delicate is the assessment especially in cases where the “right to respect for family life” is being exerted against a background of law concerning aliens and the biological father can obtain the right to a residence permit in the country only via the right of access.\(^54\)

b) Custodial and access rights after the parents’ separation

The ECHR contains no special rules on parental custody after legal separation or divorce of the parents. In substance, family life as protected by Article 8 of the ECHR does not terminate upon separation of parents and children. For cases in which the parental marriage ends in divorce, this has long been recognised.\(^55\) But if one of the parents is granted sole custody, then Article 14 of the ECHR must be taken into account in the decision. In the case of Hoffmann v Austria,\(^54\) the court criticised a national custody rights decision that had justified attribution of parental custody to the father with the religious convictions of the mother (a member of the Jehovah’s Witnesses). Even the sexual orientation of a parent is not sufficient grounds to deny grant of parental custody.\(^57\)

Granting of sole custody to one parent as the result of divorce always constitutes significant interference in the parental rights of the other parent. The latter is entitled under Article 8 of the ECHR to appropriate personal access to the child. Limitations on access rights consequently require justification under Article 8(2) of the ECHR. They are permissible if there is an adequately determined legal basis for doing so, if at least one of the legitimate interference objectives mentioned in the convention is being pursued and if the principle of proportionality is observed. Among the criteria recognised for interference justified in an individual case are primarily the physical and spiritual welfare of the child, protection from serious psychological impairment, lack of care and guidance as well as dangers to the child’s health or further development. The principle of proportionality requires that the interference must be “necessary in a democratic society”. In this matter, the Contracting States have a margin of appreciation.

53 European Court of Human Rights, 28 November 1994 – Rasmussen v Denmark, Series A No. 87 = EuGRZ 1985, at 511 et seq.
59 European Court of Human Rights, 21 December 1999 – Salgueiro da Silva Monta v Portugal, Decision No. 33290/96.
authorities to support contact between children and the non-custodial parent after divorce with appropriate measures. This obligation, however, is not absolute. An obligation to mandatory enforcement of access rights is limited since the interests of all parties involved must be taken into account. The deciding factor is whether the public authorities have taken the necessary steps to make contact possible as “could reasonably be expected under the specific circumstances of the individual case.” The Court will also look for evidence whether procedural delays that can bring about a de facto decision in the matter have been prevented.

If the custodial parent denies the other parent visitation rights, the State meets its positive obligation under Article 8 ECHR if a coherent and effective mechanism for enforcement of visitation rights is available. However, the execution of enforcement measures may be limited when they constitute a danger for children, and visitation rights should not be enforced against the resistance and the declared will of the children involved. A violation of Article 8 of the ECHR depends in such situations basically on whether the authorities have undertaken all necessary steps to make contact possible without delay, including a familiarisation phase if necessary.  

These principles also apply to transborder execution of visitation rights and to the discretion of Contracting States when dealing with international child abduction cases. Between 1992 and 1996, six applications concerning international child abduction were lodged with the Commission. On 28 January 2000 the Court rendered its first final judgment in an international child abduction case. The Court found that the respondent State, Romania, had violated the right to respect for family life. Article 8 of the ECHR demands effective measures for reunification with the abducted child. Where, after a protracted separation, immediate reunification is not feasible, preparatory measures are in any case required. The type and scope of such measures depend on the circumstances in each individual case. In cases under the 1980 Hague Convention, the authorities are under an obligation to take all required measures that can reasonably be expected in order to facilitate execution of a return order. Inadequacy of measures arises, for instance, in the case of unexplained lack of action by national authorities for more than one year or in the absence of activities which can either be enforcement measures against the abducting parent or measures preparatory to returning the children. Lack of engagement of social services to prepare for contact and the lack of child psychology experts to determine the child’s real intentions can likewise entail a violation of Article 8 of the ECHR. It becomes obvious from the decision that even and precisely when the abducted child rejects contact to the parent claiming custody rights, the obligation to protect under Article 8(1) of the ECHR requires at least an attempt to determine the child’s real desires.

c) Custody and access rights of the illegitimate father

According to Strasbourg court practice, a regulation providing for the mother’s right to custody of illegitimate children is possible. Mandatory and invariably enforced attribution of custody to the mother is considered contrary to the convention. According to ECHR, it must be possible for parents living in a marriage-like partnership to be given joint custody rights on application. According to decision practice in out-of-wedlock law cases, there is a lack of objective justification for treating fathers of legitimate and illegitimate children differently in matters pertaining to access. In both cases, parental access rights can in any case be restricted for reasons of the best interests of the child. It is questionable, to what extent the requirement for equal treatment of unmarried mothers and fathers in relation to their illegitimate child can be derived from the Keegan case, at least in cases where the father is interested and ready to assume custody.

As in decisions on access rights of the non-custodial parent after a divorce, in the case of the illegitimate father as well, the judges in Strasbourg pay particular attention to the procedural dimensions of Article 8 of the ECHR. Even when barring the illegitimate father from access can be considered necessary in the child’s best interests, the corresponding proceedings must make it clear that the father was sufficiently involved in the decision-making process. In its judgment Elsholz v Germany (2000), the Court reiterated that the margin of appreciation to be accorded to the national authorities is subject to stricter scrutiny by the Court when a father is barred from any access to his child since such restrictions entail the danger that the family relations between the parent and a young child would be effectively curtailed. The Court found that such margin of appreciation had been exceeded since the German district court had refused to order an independent psychological report to determine the child’s true feelings and because the regional court had decided the case without a hearing relying only on the file and the written appeal submissions.  

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58 European Court of Human Rights, 19 September 2000 – Glaser v United Kingdom (Application No. 32346/96). In conclusion, the Court held the national efforts to be sufficient.


Article 8 of the ECHR requires fair and comprehensive balancing of the child’s interest in remaining in public foster care and the parents’ interest in family reunification. In case of a conflict, the interests of the child take precedence.

In the decision in *K. and T. v. Finland*, the Court confirmed these criteria when assessing the necessity of foster care measures. They apply both to the taking into public care, as well as to the refusal to terminate the care. In doing so, the Court has underscored the different attitudes and perceptions in Member States as to the appropriateness of intervention, depending on such factors as traditions relating to the role of the family and the role of the State, the basically wide discretion of national authorities in foster placement as well as the fact that national authorities have direct contact with the persons involved. When restricting access rights, however, the margin of discretion is narrower and a stricter scrutiny is called for because there is the danger that family relations de facto might become completely severed. If, however, by taking such measures and upholding them, irreversible *faits accomplis* can be brought about, then the procedural requirements on involvement of the parents in the foster care proceedings are all the greater. Foster placement measures must in principle be oriented towards potential reunification of the family where such is compatible with the best interests of the child.

The requirement of a fair balance between the various interests involved and appropriate procedural involvement applies all the more in case of complete and irreversible deprivation of parental rights in connection with adoption clearance. To declare a child available for adoption against the will of the parents is only permissible in exceptional cases under the ECHR if such a far-reaching measure is absolutely necessary in the interests of the child. In decisions on placement with foster families with an eye to adoption, the parents’ right to prior information and a prior hearing must be respected.

III. Concluding Remarks

Family and child law is a typical example of the influence of human rights positions on the framing and application of private law in an ever closer Europe. In it, the ECHR with its specific legal protection system is playing a prominent role. In their evolutive and dynamic interpretation practice, the Stras...
bourg control bodies have endeavoured to adapt the convention to changing social and economic conditions in Europe. The ECHR’s influence has not entailed comprehensive codification of uniform family law but has developed by way of decisions in individual cases. However, general principles can be derived from such individual case decisions which reflect a common opinio iuris within Europe. Not only the national legislator but also national legal practice should therefore bear in mind the jurisprudence of the Strasbourg control bodies in family and child law. In particular, the procedural law dimensions of Article 8 of the ECHR must be observed.

Current Supreme Court Jurisprudence on International Child Law

Compiled by Dr Eva Kaster-Müller

The Editors have compiled a list of national judgments concerning child law, particularly in the area of child abduction, which has been printed in the following. The growing importance of the problem of child abduction in jurisprudence (though this in no way reflect the actual legal situation) is not least based upon the fact that, in the short period of its existence, the European Court of Human Rights has also dealt with this issue on several occasions. Finally, the former US-President Clinton also addressed this issue on the occasion of one of his last visits to Germany, in that he reproached the host country for not having sufficiently fulfilled her obligations laid down in the Hague Convention on the Civil Aspects of International Child Abduction. No less significant are the questions of custody, maintenance and the enforcement of measures for the protection of children in an international context, which are considered in the judgments below.


The Luxembourg Convention of 20 May 1980 and the Hague Convention on International Child Abduction of 25 October 1980 both protect minors from the negative effects of child abduction, however they have different scopes of regulation and application as well as different application prerequisites. From this it follows that the judge must investigate whether the child has been moved illegally or is being detained illegally under Article 3 of the Hague Convention if the petitioner invokes that convention. Moving or detaining is illegal if the right of custody which the petitioner possesses under the laws of the State of the child’s previous residence and de facto exercises, has been violated. (Editor’s summary)

Extract from the decision: “(...) La ricorrente deduce la violazione dell’art. 3 della Convenzione de L’Aja del 25 ottobre 1980, resa esecutiva con legge 15 gennaio 1994 n. 64, sostenendo che nella specie detta Convenzione non potrebbe applicarsi perché la disposizione citata considera illecito solo il trasferimento o il mancato rientro di un minore quando avviene in violazione dei diritti di custodia assegnati congiuntamente o disgiuntamente in base alla legislazione dello Stato nel quale il minore aveva la sua residenza abituale immediatamente prima del detto trasferimento o mancato rientro, mentre l’affidamento congiunto e il colloca- mento presso la madre era avvenuto sulla base di un accordo omologato dal giudice statunitense.

Né potrebbe darsi esecuzione al più recente provvedimento straniero che aveva affidato la custodia in via esclusiva al padre, perché adottato da un giudice diverso da quello della residenza abituale del minore. In proposito dovrebbe, invece, tenersi presente che, con decreto dell’8 ottobre 1998, il Tribunale per i mino- renni di Genova aveva affidato il figlio alla madre. Osserva, infine, la ricorrente che, quando la procedura di modifica delle condizioni di affidamento del minore prevista in sede di divorzio tuttora pendente negli USA si fosse conclusa con un provvedimento defi- nitivo, il padre avrebbe potuto ricorrere allo strumento di esecu- zione di tale provvedimento. Il ricorso è fondato.

Come in altra occasione è stato rilevato, il fenomeno dell’illecita sottrazione internazionale di minori ha formato oggetto di due Convenzioni, quella del Lussemburgo, del 20 maggio 1980, e quella de L’Aja, del 25 ottobre 1980, entrambe rese esecutive con la legge n. 64 del 1994. Ma le due Convenzioni, pur avendo la me- desima finalità di tutela dell’interesse del minore dal pregiudizio derivante dai trasferimenti indebiti, hanno contenuto, funzione e condizioni di applicazione del tutto diversi, presupposto della prima essendo che, anteriormente al trasferimento di un minore attraverso una frontiera internazionale, sia stata adottata, in uno Stato contraente, una decisione esecutiva sull’affidamento, ovvero, successivamente al trasferimento, sia stato pronunciato un provvedimento sull’affidamento dichiarativo della illecitività del trasferimento stesso; caratteristica della seconda risultando, per contro, la totale irrilevanza di un titolo giuridico di affidamento (e, a più

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