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Towards defining the 'right to a family' for the African child

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Summary

Most international instruments and national legislation dealing with children recognise the need for children to grow up in a family environment – in an atmosphere of love and understanding. In different regions around the world there are various family structures and patterns – traditional families with the heterosexual marriage form as the cornerstone; extended families with up to four generations in one household; and a mixture of family forms (cohabitation, homosexual ('lesbigay') unions, non-residential father households, single parented households, child-headed households, to mention a few). This article argues that every child has a right to a family which includes other familial rights, such as the right to family life and the right to a family environment. It begins with a brief overview of existing family forms, followed by an examination of the functions of the family. From that premise, it explains the need for understanding family from a functional rather than a structural viewpoint. It argues that, for the effective realisation of all familial rights enjoyable by the child, the concept 'family' must be defined. The definition must be based on its function, and tailor-made by each state to suit its societal circumstances. The article concludes that such a definition would provide clarity to the concept and aid in avoiding the legal limbo which sometimes affects children's familial status. Legal references in the article are mainly to international documents, regional documents and legislation from selected African countries.

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1 Introduction

The family may be described as the central unit of human society. Most international instruments and national legislation acknowledge the family as the 'fundamental group of society'.[1] The primary responsibility for the protection, upbringing and development of the child rests with the family.[2] The United Nations (UN) Convention on the Rights of the Child (CRC) states:[3]

> [T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

The African Charter on the Rights and Welfare of the Child (African Children's Charter) contains a similar acknowledgment in its Preamble and, like the African Charter on Human and Peoples' Rights (African Charter), describes the family as 'the natural unit and basis of society'.[4] The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (Hague Convention, 1993) recognises the importance of child development in a family environment.[5]

In humanitarian law, the 'principle of family unity' states that all children have a right to a family.[6] Also at national level, children's legislation in South Africa,[7] Kenya[8] and Nigeria[9] supports the

1 Including arts 12 & 16(1) of the Universal Declaration of Human Rights; Preamble & art 23 of the International Covenant on Civil and Political Rights; arts 1, 2 & 17 of the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, 1986; arts 9, 10, 20, 21 & 22 of the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, all through the document; art 10 of the International Covenant on Economic, Social and Cultural Rights; art 18 of the African Charter on Human and Peoples' Rights; art 16 of the European Social Charter; and Preamble of the African Charter on the Rights and Welfare of the Child.

2 Resolution of the UN General Assembly on the report of the *ad hoc* Committee of the Whole A/S-27/19/Rev 1 and Corr 1 and 2, 10 May 2002 – A world fit for children.

3 Preamble CRC.

4 Art 18 African Children's Charter; art 18 African Charter.

5 Preamble para 1, Hague Convention.

6 CRC, IRC, UNHCR, UNICEF Save the Children UK, WVI *Inter-agency guiding principles on unaccompanied and separated children* (2004) 16.

7 Preamble, Children's Act 38 of 2005, as amended.

8 Sec 6 Children Act 8 of 2001.

9 Sec 8 Child's Rights Act of 2003.

growth and development of the child in a family environment.[10] Even at grassroots level, few people will dispute the fact that the family is the backbone of the development of the child.

Certain familial rights have found definition in human rights law, including the right to (respect for) family life;[11] the right to found a family;[12] the right to family care;[13] and the right not to be arbitrarily separated from the family.[14] However, the exact contour of 'the right to a family' is not defined in human rights law. In fact, certain academics are of the view that there is no right to a family available to the child in international law.[15] Moreover, although the familial rights mentioned above are recognised, there is no universally-accepted definition for the term 'family'. Some academics and writers have commented on this.[16]

The article argues that efforts towards the recognition and realisation of familial rights available to the child may remain futile if the term 'family' is not fully understood. It attempts a definition of 'family' and promotes a functional (needs-based) approach to such a definition. Without making blanket rulings about the internal dynamics and functioning of family, the article highlights different forms in which family may be constituted *internally* and *externally,* after which the functions of family are described. It proceeds with arguments for the recognition of the right of the child to a family as a canopy for other familial rights *enjoyable* by the child. The article concludes on the note that, with clarity given by states to the concept 'family', the realisation of all familial rights would be more effective. This would also aid in avoiding the legal limbo which sometimes affects children's familial status.

10 These three countries have been selected because, in Africa, they have relatively new children's legislation which was enacted in the 21st century.

11 Art 8(1) European Convention on Human Rights; art 8 Human Rights Act (Act of Parliament of the United Kingdom); sec 8 Child's Rights Act of 2003.

12 Art 9 Charter of Fundamental Rights of the European Union.

13 Art 28 Constitution of the Republic of South Africa, 1996.

14 Art 9 CRC; arts 19 & 25 African Children's Charter.

15 For a detailed discussion on this, see J Sloth-Nielsen *et al* 'Inter-country adoption from a Southern and Eastern African perspective' (2010) *International Family Law* 86-96. A brief discussion of their views is presented in para 6 below.

16 A van der Linde *Grondwetlike erkenning van regte ten aansien van die gesin en gesinslewe met verwysing na aspekte van artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* unpublished LLD thesis, University of Pretoria, 2001 23, quoting D Hodgson 'The international legal recognition and protection of the family' (1994) 8 *Australian Journal of Family Law* 219.

2 Defining family

The term 'family'[17] is very complex. Almost two decades after celebrating the International Year of the Family,[18] there is still no universally-accepted definition of family.[19] A major challenge in attempting a definition for family is the diversity of family forms. The role and functions of family also vary immensely from era to era, region to region, state to state, and culture to culture. This diversity hinges on the variety in culture, religion, sociological order (including individual lifestyle preferences) and legal perspectives that exist around the globe. Moreover, modern-day understanding of family relationships has been fuelled by scholarship in diverse disciplines, including sociology, anthropology, psychology, history, family studies, child development studies, family therapy, education, medicine, economics, demography, social work and law.[20]

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17 This paper acknowledges the inevitability of changes in the family as people evolve and, ultimately, advocates for the development and establishment of criteria based on which the existence of *a family* can be identified and upon which the right to a family of children can be promoted.

18 The UN in its 78th plenary meeting on 8 December 1989 proclaimed 1994 to be the International Year of the Family.

19 DH Demo *et al* (eds) *Handbook of family diversity* (2000) 1. It is believed that the absence of a clear definition of the concept might even come into conflict with adoptive relationships. See also International Social Services (ISS)/International Reference Centre for the Rights of Children Deprived of their Family (IRC) 'How to strike a balance between the right to respect the private and family life and the protection of the child's best interest in adoption' (2009) *Monthly Review* 1.

20 JL Roopnarine & UP Gielen (eds) *Families in a global perspective* (2005) 7. GP Murdock *Social structure* (1949) 1 defines the family as '[a] social group characterised by *common residence*, economic co-operation and reproduction. It includes *both sexes*, at least two of whom maintain a *socially-approved* sexual relationship, and one or more children, own or adopted, of sexually-cohabiting adults'. This definition contains some elements which do not exist in some societies. Other definitions are 'two or more people who are in a relationship created by birth, marriage or choice' (LB Silverstein & CF Auerbach '(Post-) modern families' in Roopnarine & Gielen (above) 33) including adoption (Demo *et al* (n 19 above) 1). One common element in all societies is that the key function of family is nurturing and socialisation (IL Reiss *The family system in America* (1971) 26). A more contemporary and less restrictive definition is '[a] family is one or more adults related by blood, marriage or affiliation who co-operate economically, who *may* share a common dwelling place, and who *may* rear children' (B Strong *et al The marriage and family experience: Intimate relationships in a changing society* (1998) 14. Also see NV Benokraitis *Marriage and families – Changes, choices and constraints* (2005) 3). RF Winch defines family as a group of related persons in different positions within the family who fulfil functions necessary for the existence and survival of the family (reproduction, emotional care and child socialisation) (RF Winch 'Toward a model of familial organisation' in WR Burr *et al* (eds) *Contemporary theories about the family* (1979) 162-179). Popenoe argues that family is not necessarily based on heterosexual adult relationships, but that a single adult-household, with a dependent child or adult is also a family (D Popenoe 'American family decline 1960-1990: A review and appraisal' (1993) 55 *Journal of Marriage and Family* 529–535). According to Benokraitis, the distinguishing feature of family is that its members identify themselves with the

There remains an open definition of family because of the different perspectives which exist regarding what family structures and family relationships (blood-related or 'adoptive' households) should exist. Factors such as the increase in unmarried couples with children, the increase in divorce and re-marriage rates, the decline in legal marriage, and the emergence of child-headed households have also hindered the development of nomenclature to describe these different family compositions.[21] In a seminar on family by the Center for Families, Children and the Courts, moderated by CJ Ogletree, the topic 'What is family?' was tackled in an intriguing hypothetical.[22] When asked what, in their opinion, a family is, answers from panellists varied. According to Muncie and Langan, 'the diversity of contemporary society demands interdisciplinary forms of analysis' in order to capture the complex nature of the concept.[23] Freeman is of the view that 'it is difficult to define the "essence" of family' and that the diversity in perceptions of what a family is makes a 'core' definition unworkable.[24]

One of the major challenges in defining family is the fact that the nuclear family is widely perceived as the normal family.[25] A universal definition for family must be one that is capable of including families from different cultures and historical periods. This, however, is practically impossible. Therefore, it is important that in understanding family, the concept firstly is demythologised.[26] Two main questions are pertinent: (1) What is the appropriate subject matter for the concept[27] within the context of the society it aims at serving? (2) What is family for?[28] In the Center for Families, Children and the Courts seminar referred to above, the moderator ended the seminar by stating that

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group and are attached to the group (which also has its own identity) (Benokraitis (above) 3. Some other authors describe family as the 'haven of primary fulfilment and meaningful experience' (B Zinn & S Eitzen *Diversity in families* (1990) 14). In Gittins's view, family is a stereotype produced and maintained as a tool for social control (D Gittins *The family in question: Changing household and familiar ideologies* (1995) 15). Gubrium & Holstein suggest that individual experience rather than structure or form define a family (JF Gubrium & JA Holstein *What is family?* (1990) 1-10).

21 Silverstein & Auerbach (n 20 above) 34.

22 CJ Ogletree 'Parentage issues challenging California's judicial system: What is a family?' (2005) 6 *Journal of the Center for Families, Children and the Courts* 99-120.

23 J Muncie *et al* (eds) *Understanding the family* (1997) 1.

24 J Freeman 'Defining family in *Mossop v DSS*: The challenge of anti-essentialism and interactive discrimination for human rights litigation' (1994) 41 *University of Toronto Law Journal* 57.

25 See n 19 & n 20 above where various definitions are provided.

26 Zinn & Eitzen (n 20 above) 14.

27 Cheal advises that to obtain an answer to the question, an exploration of the roots of family variations in different ethnic, racial and cultural identities is necessary. See D Cheal *Family and the state of theory* (1991).

28 J Muncie & R Sapsford 'Issues in the study of the family' in Muncie *et al* (n 23 above) 8.

in the twenty-first century, there is an urgent need for every nation to confront the issue of what family is in 'a democratic, progressive society and answer it for *ourselves* in a way that would have meaning in the twenty-first century'. That is the exact attitude with which matters dealing with family should begin to be addressed.[29]

2.1 Forms of families

There are a myriad forms of families. This is because of the various functions and cultural patterns associated with the family and the variation in effectiveness with which family objectives are carried out.[30] As human beings evolve, so also do their perceptions of how things are and should be done – cultures, traditions, religious activities, community norms and beliefs modify. In Africa, in particular, factors such as poverty, career ambitions, (un)employment, sickness and the use and abuse of technology are additional challenges to the existence and stability of the traditional family form. In the process of change, accepted family forms are altered and disappear, giving way to new forms and resulting in various familial forms in different eras. When discussing family forms, three broad headings are used based on era, household and marriage.

2.1.1 Family forms based on era

In the pre-modern era, families typically consisted of the patriarchal father (husband and breadwinner) with his wives (mothers and caretakers) and concubines, and children. Children were highly valued for agricultural work and they were expected to be obedient.[31] With the Greeks, for instance, the adoption of children was common. Men

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29 Ogletree (n 22 above) 120. It is also important to note that there are different theories in family studies which inform the definition of family. These theories include the family systems theory; the human ecology theory; the family development theory; the individualism and interaction theories – symbolic interactionism theory, exchange and resource theory; the difference and diversity theories – phenomenology theory and feminist theory; the situational approach; and the institutional approach. Due to word restrictions, a detailed discussion of these theories cannot be accommodated in this article. For a crisp discussion, see E Okon *Protection of the right to a family in the context of separated and unaccompanied children in natural disasters* unpublished LLM dissertation, University of Pretoria, 2011. For a detailed study, see S Smith 'Family theory and multi-cultural family studies' in BB Ingoldsby & S Smith (eds) *Families in multicultural perspective* (1995) 8-35; CB Broderick *Understanding family process* (1993); N Kingsbury & J Scanzoni 'Structural functionalism' in PG Boss *et al* (eds) *Sourcebook of family theories and methods* (1993) 195-210; BB Ingoldsby & S Smith (eds) *Families in multi-cultural perspective* (1995) 15; FI Nye *The family: Its structure and interaction* (1973) 21-23; R LaRossa & DC Reitzes 'Symbolic interactionism and family studies' in Boss *et al* (above) 135-162; and JF Gubrium & JA Holstein 'Phenomenology, ethnomethodology and family discourse' in Boss *et al* (above) 654.

30 MC Elmer *The sociology of the family* (1945) 17.

31 BB Ingoldsby 'The family in Western history' in Ingoldsby & Smith (n 29 above) 39.

who had no sons adopted male children who could inherit their property.[32] During Roman times, the Roman family was the religious, economic, legal and educational centre of society.[33] Men had absolute powers as the *patria potestas or paterfamilias* who represented the community. In terms of Roman family law, these men were allowed to have only one wife.[34] Roman women controlled childrearing to a certain degree.[35] In medieval Europe, children were accorded special customary and legal protection as minors.[36]

The traditional family (household) in most African societies contained the husband with his wives and children, and blood or marriage relatives. In South Africa, in particular, during the pre-colonial era the basic family form was the traditional kinship structure.[37] In Zulu tradition, in pre-modern times, polygamy symbolised a man's 'social standing, wealth and virility';[38] wives were responsible for bringing up children.[39] In Kenya, the Kikuyu society is traditionally polygamous.[40] The father in pre-modern times usually had his own hut where he met with his children for lessons on family norms and traditions, and his wives for discussion of serious family issues. Mothers had their individual huts where they lived with their children – boys lived with their mothers until puberty, then they moved into the young men's hut.[41] In the traditional Yoruba[42] family, in Nigeria, the extended family is relevant in the establishment of family (which begins with marriage) and the survival of the family.[43] Polygamy also existed (and still exists), particularly with non-Christian members of this group.

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32 Ingoldsby (n 31 above) 41. Females were not allowed to inherit. Where a man had no sons and did not adopt, his daughter might have been forced to marry a close relative.

33 Ingoldsby (n 31 above) 42.

34 *The new encyclopaedia Britannica* (1978) Vol 7 157.

35 Ingoldsby (n 31 above) 42.

36 Ingoldsby (n 31 above) 48.

37 E Pretorius 'Family life in South Africa' in Roopnarine & Gielen (n 20 above) 368.

38 http://www.warthog.co.za/dedt/tourism/culture/family/polygamy.html (accessed 20 April 2011).

39 http://www.zulu-culture.co.za/zulu_family.php (accessed 20 April 2011). The wives are subservient to their husbands.

40 http://en.wikipedia.org/wiki/Kikuyu_people (accessed 20 April 2011). The Kikuyu are Kenya's most populous ethnic group.

41 As above.

42 http://en.wikipedia.org/wiki/Yoruba_people (accessed 20 April 2011). Yorubas are one of the largest ethnic groups in Nigeria. They make up about 21% of the Nigerian population.

43 M Ogundipe-Leslie *Re-creating ourselves: African women and critical transformations* (1994).

The effects of industrialisation and globalisation have changed the 'traditional' structure of families in most cultures, resulting in a preference for the nuclear family form. In South Africa, for instance, with the discovery of gold and diamonds, the establishment of mines and the commercialisation of agriculture, many able-bodied African men left their families for employment on the mines and farms. The consequence of this economically-influenced separation was the absence of the father from the family for long periods of time and, thus, the disruption of family life.[44]

Modern families are characterised by dual-earning partners or spouses in non-role-sharing families.[45] However, women still bear the responsibility of childcare and housekeeping. Post-modern families feature extended family members coming to the rescue of stressed nuclear family members. In African – and even American – societies, grandparents (usually grandmothers) live in the home of their child (with grand or great-grandchildren), either for short or long periods of time.[46] This made little difference to societies like those in India who have maintained the extended family structure with grandparents, uncles, aunts, nieces, nephews, sisters-in-law, parents and children in the same household.[47] According to some social constructionists, post-modern families are 'a deconstruction or transformation of at least one aspect of the traditional family'.[48] They list deconstructed and transformed families to include families constituted of lesbigay couples, single mothers, families conceiving children via reproductive technology, and transnational families.[49]

2.1.2 Household forms

Families may form households.[50] Some authors are of the view that the composition of a family is largely determined by the decision of a

44 Pretorius (n 37 above) 368.

45 Silverstein & Auerbach (n 20 above) 34.

46 Silverstein & Auerbach (n 20 above) 39.

47 P Laungani 'Changing patterns of family life in India' in Roopnarine & Gielen (n 20 above) 87-88. However, there are also nuclear families in Indian communities.

48 Silverstein & Auerbach (n 20 above) 34.

49 As above.

50 Muncie & Sapsford (n 28 above) 11.

newly-married family to set up a new household or to become members of an existing household where close kin of either of the new spouses live.[51] Two main forms of household have been identified, namely, the nuclear family[52] and the extended family.[53] With the 'deconstruction and transformation' characteristic of the post-modern era, various other household forms exist. These include the joint family;[54] one-parent

51 *The new encyclopaedia Britannica* (1978) Vol 10 478.

52 This 'universal' type of domestic family is found in all societies. (Murdock calls it 'a universal human social grouping'. See Murdock (n 20 above) 2.) It consists only of a heterosexually married couple (from different families) to the exclusion of any other person and their unwed children (biological or adoptive). As indicated by Muncie & Sapsford (n 28 above) 10, all other forms of family tend to be defined with reference to the nuclear family. Some other family scholars describe it as the nucleus of the corporate and the extended families – the first stage of both. Others are of the view that the nuclear family evolved from the extended family structure as a result of industrialisation and urbanisation. However, some anthropologists argue that 'the nuclear family is a 'social arrangement' rather than a universal form or 'biologically-determined family form'. See also Department of Social Development 2011 *Green paper on families 'Promoting family life and strengthening families in South Africa'* 24-40.

53 Also known as the non-nuclear family, the extended family may be made up of polygamous families, monogamous nuclear families or a combination of both. The typical structure of an extended family includes parents, unwed and married children with their spouses and offspring, and even grandparents. There may also be great-grandparents living in the same house with their children, and grandchildren and great-grandchildren. In industrial societies, the extended family takes the form of a domestic family plus close relatives living elsewhere, while in non-industrial settings, the extended family is a single household unit. As J Broodryk *Ubuntu: Life lessons from Africa* (2002) 29-31 points out, the extended family structure in African societies is such that a child has many fathers and mothers in his uncles and aunties. So, where the child's biological parents are not available to care for the child, his or her other parent(s) will assume such responsibility. An advantage of the extended family form is that children learn from a very early age to be tended by a variety of persons; they are not overly attached to any particular person (Laungani (n 47 above) 87). Also, this family form is more effective for maintenance and transfer of family traditions from one generation to another (Nye (n 29 above) 41).

54 Although often confused with the extended family structure, the joint family is a variant of the extended family (Nye (n 29 above) 42). This family form is common among the Hindu in India. It is a structure where all members of a family live together, including brothers and their wives and children, and have a communal kitchen, income, property and other resources with the patriarch as the head of the family and commander of the unit. Some, but not all, extended families are joint families.

family;[55] family with adoptive parent(s) and foster parents;[56] child-headed family (households);[57] same-sex parented family ('lesbigay family');[58]

55 This family form was found among the people of caste (coloureds) in the USA and exists today common in South African societies. In some societies, where women are so economically empowered that they have difficulty in finding men that can contribute to their economic security, marriage is rare. Such women sometimes choose single-parenthood through adoption, artificial insemination or surrogate motherhood. As a result, most single-parent families are those where the mother is responsible for provision and care for the house. Death of a spouse, through various causes, has also led to the increased number of single-parented families that exist today. For more on this see, Pretorius (n 37 above) 370 and Silverstein & Auerbach (n 20 above) 36. There are also absent parent(s) families (or non-resident father or mother households) where one or both parents are absent from the household for various reasons.

56 Adoption is a legislation-regulated practice which establishes a child's legal membership in an adoptive family. It may be carried out domestically or internationally. In most countries, adoption terminates all parental rights that existed between previous parents, biological or otherwise, or caregivers of the child; the new parents then become adoptive parents for all purposes (see the Children's Act 38 of 2005 sec 242 for effects of adoption). Foster care is a form of care for parentless children, children without families or those whose families cannot be identified. It is generally a form of interim care where a child is placed in state-managed and supervised care of a family to which the child may *not* be related (this applies in the United States, some European countries and South Africa). In Western Europe and Scandinavia, foster care is long-term care, like adoption. For more on this, see J Williamson & A Greenberg *Families, not orphanages* (2010) Better Care Network Working Paper September 2010 17, http://crin.org/BCN/ results.asp?keywords=family&offset=20 (accessed 21 October 2010). Since placement is intended to last until the child is reunited with his or her parents, attains adulthood or is permanently adopted, the state retains guardianship of the child for the period of foster care. Foster parents are compensated by the state for care of the child through foster child grants.

57 In some African countries – Ethiopia, South Africa and Zimbabwe – child-headed families (households) are a relatively new phenomenon which resulted from the high mortality rate of parents and caregivers as a result of the HIV/AIDS pandemic. For more on this, see S Tsegaye 'The lives of children heading household' http://www.crin.org/docs/The20Lives20of20Children20Heading20Families[1].pdf (accessed 20 April 2011); http://www.mida-international.org/index.php?option=com_content&view=article&id=53&Itemid=62 (accessed 20 April 2011). See also Save the Children *Field guide to separated children programmes in emergencies* (2004) 15 http://www.ecdgroup.com/docs/lib_005230015.pdf (accessed 19 April 2010). Best described in legal terms, a child-headed household is a household where, because 'the parent, guardian or caregiver is terminally ill or has died or has abandoned the children in the household', and there is no adult caring for the children, a child above the age of 16 years assumes the role of caregiver for the other (younger) children in the house (Children's Act sec 137(1)(a)). Where there is no extended family member or community-based care to turn to, the older children in these households fend for the younger children, sometimes at the cost of their own education.

58 The union of gay couples has been legalised in the Netherlands, France, South Africa (following the landmark decision of the Constitutional Court in *Minister of Home Affairs v Fourie & Bonthuys & Another* 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC), Denmark, the United Kingdom, Canada and some states within the USA. Child custody rights are also now accorded to these couples. As a result, same-sex families are becoming an accepted family form. These families also come in different forms. One combination that has been found is that of a family with a gay dad and lesbian mothers living in a duplex – the gay dad living downstairs and the lesbian mothers living upstairs. Children in this structure may be biological, adopted or surrogated.

corporate family;[59] experimental family;[60] and reorganised family.[61]

2.1.3 Marriage forms – Monogamous and polygamous

Monogamy is a marriage form where one husband has one wife. It is the simplest form of marriage common in many cultures. Nuclear families are monogamous in nature. More complex is the polygamous marriage which refers to any form of plural marriage such as one where a husband takes more than one wife (polygyny); a wife takes more than one husband (polyandry);[62] a group marriage (cenogamy); and several men and several women embrace a marital union (polygynandry).[63] Most countries where Islam is practised widely, for example Egypt and Nigeria, allow polygamy.[64] Murdock identified four societies that practise(d) polyandry: the Toda of Southern India; the Nayar of South-West India; the Tibetans of China; and the Marquesans.[65] In Nigeria, the Birom tribe in Jos Plateau, the Irigwe in Benue and the Abisi tribe have been noted for practising polygynandry.[66] The most common of all polygamous marriages is polygyny. Most African societies are traditionally polygynous – the Zulus of South Africa, the Kikuyis of Kenya, and the Yorubas and Hausa Moslems of Nigeria are typical examples of polygynous societies.

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59 The corporate family structure bases its existence on activities such as farming, hunting, trading in products, and rearing its children within its territory. This familial form is common to pre-industrial or pre-literate societies.

60 With the experimental family form, a large number of people with different backgrounds, education, and from different countries are brought together for work in groups. The tasks include clearing, irrigation and planting on land, washing and mending clothes, making meals and caring for children. The fabric of this household form is the formation of small groups and the mutual interaction between the people in these groups, thus creating a family group. An example of this household form is the *kibbutz* in Israel which is a collective agricultural community. This community has a unique method of child-rearing where all children in the community sleep in communal children's homes.

61 Remarried parents with their children from previous marriages are a common description of this family form. Also, where a previously nuclear family household becomes legally separated, the family structure is reorganised to, possibly, a single-parented family.

62 Some parts of the West allowed polyandry. Eg, the Dieri of Australia and the Chukchee of Siberia have been associated with this family form. However, there are views that these group marriages seldom exist. What is often found is an extension of sexual privileges, but not the economic benefits and responsibilities, to a group of men and women. See Murdock (n 20 above) 23-40.

63 *The new encyclopaedia Britannica* (1978) Vol 7 155. For more on polygamous marriages, see Murdock (n 20 above) 2 23-40 and Ingoldsby (n 31 above) 117-137.

64 RA Ahmed 'Egyptian families' in Roopnarine & Gielen (n 20 above) 161.

65 Ingoldsby (n 31 above) 124-126 quoting GP Murdock 'World ethnographic sample' (1957) *59 American Anthropologist* 664-687.

66 Ingoldsby (n 31 above) 128-131.

2.2 Functions of family

'The basic task of the family is to serve human needs. As the needs differ, the organisation and activities of the family will differ.'[67] In understanding the functions which the family serves in relation to children, the vital question is: What needs do families serve for individuals and society? This explains the shift in perceptions of what the family should be to what the family is. The following paragraph moves swiftly through the needs the family satisfies for today's children.

'A key function of family ... is the ability to provide a locus for emotional support and fulfilling relationships.'[68] The family performs seven major functions for individual members – 'production of economic goods and services, status giving, education of the young, religious training of the young, recreation, protection, and affection'.[69] Zaretsky is of the view that in a capitalist society, the family serves as a closed society which protects members from the 'impersonal, rational and anonymous' society.[70]

The satisfaction of emotional and psychological needs is the primary responsibility of a child's parent(s), legal guardians or persons responsible for the child.[71] The presence, or lack of, maternal warmth predicts 'later emotional adjustment, including feelings of insecurity, loneliness, depression, and perceived self-worth' while paternal warmth predicts 'later social and school adjustment' such as peer and teacher-assessed social competence.[72] What appears to be commonly accepted in most cultures is the fact that the most important sources of psychological needs within the family are companionship and parenthood.[73] Parents are seen as a shield from the harshness of the outside environment – school and playing field.[74]

Another need the family serves is the satisfaction of physical and material needs, including security. However, this is not to say that where, as a result of poverty or other social factors, parents cannot provide food, shelter and clothing for their children, a family does not exist. It is at this point that states have the duty to preserve the family by affording it the necessary protection and assistance[75] in the form

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67 Elmer (n 30 above) 9.

68 Muncie & Sapsford (n 28 above) 24.

69 Nye (n 29 above) 8. See also Kingsbury & Scanzoni (n 29 above) 195-210; Murdock (n 20 above) 10; and Elmer (n 30 above) 3.

70 E Zaretsky *Capitalism, the family and personal life* (1976).

71 Arts 18 & 27 CRC.

72 X Chen & Y He 'The family in mainland China: Structure, organisation and significance for child development' in Roopnarine & Gielen (n 20 above) 57-58.

73 *The new encyclopaedia Britannica* (1978) Vol 7 156.

74 As above.

75 Preamble para 5 CRC.

of 'material assistance and support programmes, particularly with regard to nutrition, clothing and housing'.[76]

The social functions for which the family's existence is essential depend, to a large extent, on the culture within which the family is founded. A major benefit of child socialisation in the family is that, when effectively carried out at all stages of a child's development, the child acquires life satisfaction and emotional and psychological well-being, which are important for adolescence.[77] This results in the satisfaction of mental and emotional needs required in the child for adjustment to his or her social environment and responsibilities.[78]

It is important that in defining the family, stereotypes should be avoided – a *functional* perspective of family appears expedient.[79] However, as Viljoen states, the fact that an institution performs a function does not mean that that function could not be performed if that institution does not exist or that the performance of the function creates the institution.[80] It is therefore suggested that, in defining the family, the functional perspective should be supported by the intention of parent(s) or caregivers to permanently perform those functions. Where parent(s) or care-givers intend to permanently uphold their responsibilities of providing emotional, psychological, socialisation, financial and educational care for a child, they create a unit (family) to which the child can belong and on which the child can depend. The family should be seen as that unit to which a child permanently identifies and can return to on a daily or regular basis until (and even after) adulthood is attained – a unit that is legally, morally and socially obligated to care for the child emotionally, socially, psychologically, materially, financially, educationally and spiritually (whether the child is biologically related to the unit or attached to it by choice).

2.3 An all-encompassing definition

In developing an all-encompassing definition of family, the contemporary family forms that exist should be accommodated. Also, certain criteria should be set to determine whether a group constitutes a family.[81] Furthermore, consideration should be given to factors which determine family membership – affinity, consanguinity, affection, cohabitation, adoption, a combination of one or more of

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76 Art 27 CRC.

77 DT Heath 'Parents' socialisation of children' in Ingoldsby & Smith (n 29 above) 161.

78 Elmer (n 30 above) 7 11.

79 The structural and functional theory to family studies has been employed by many social scientists in the field of family studies. This approach is used to organise and explain research study results.

80 F Viljoen 'Family structure and support networks' in AF Steyn *et al* (eds) *Marriage and family life in South Africa: Research priorities* (1987) 6.

81 Van der Linde (n 16 above) 24.

these factors, or from other methods.[82] It has been argued at national level that, because of the social nature and structural diversity of the family, the law should not define this fundamental institution.[83] However, in guaranteeing social rights, the law requires workable definitions which will ensure legal certainty. What follows below are some pointers to ingredients which should be included in the definition.

Firstly, people make up family. With respect to a child, there should be an adult responsible for the child in the family. (Child-headed households are an exception to this requirement.) It is submitted that a contemporary definition of family should include 'two or more persons, one of whom must be an adult'. In so doing, the definition accommodates single-parent families and other reconstructed families.

Secondly, blood relationship is an apposite indicator of family relationship. However, it is important to delineate, depending on the cultural and customary dictates of a particular society, what degrees of consanguinity should evoke legal responsibility for a child (and what should not). Biological parents (who maintain their parental rights and responsibilities over a child) are an apparent inclusion in this regard.

A third ingredient is parental rights and responsibilities. These may be legally acquired through adoption or through parental rights and responsibilities agreements. Grandparents, aunts, uncles and older siblings now often assume parental responsibilities over 'parentless' children. All persons with such rights and responsibilities should be included in the definition of a family.

Fourthly, a unit or persons to whom a child is emotionally and psychologically attached and from whom the child enjoys material and physical security should be viewed as family in respect of that child. However, the inclusion of these needs should not be seen in isolation of legally-acknowledged parental rights and responsibilities of adult(s) in the group or unit over the child. A child's siblings should also be considered in the definition of family because they partake in socialisation which is also an important need for the development of the child.[84]

Permanence or intended permanence of the relationship with the child is relevant in identifying family. Thus, this should be a vital ingredient for the definition of family. (This requirement excludes most foster families from recognition as family in relation to the child.

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82 As above.

83 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 10 BCLR 1253 (CC).

84 It is noteworthy that one of the factors in sec 7 of the South African Children's Act which must be considered when the best interest of the child standard is tested is 'the likely effect on the child of any separation from ... any brother or sister or other child ... with whom the child has been living' (sec 7(d)(ii)). This provision points to the need to maintain emotional and psychological attachments that may have developed in the child.

In countries where foster care is intended as permanent alternative care, this exclusion will not exist.)[85]

3 'Family' in terms of international instruments

CRC does not define family. However, the Committee on the Rights of the Child (CRC Committee) appears to favour a flexible definition of family. According to the Committee, while referring to the extended family and the community, CRC takes into account diverse family structures and cultural patterns which exist, and also emerging familial relationships.[86] The CRC Committee, and CRC, may be described as function-focused with regard to the family. According to the Committee, the family is the base for the development of human relations where a child acquires values and is socialised. Therefore, the family is important for the child's future.

A close attempt at defining the family is contained in the Resolution adopted by the UN General Assembly – A world fit for children.[87] This document acknowledges the existence of various forms of families,[88] and in article 44(19) refers to the responsibilities of 'family, parents, legal guardians and caregivers'. It creates the notion that there is family, other than parents, that may be responsible for the child. A much closer indication of the meaning of family is found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Convention on Migrant Workers) 1990 which defines 'members of the family' as[89]

> persons *married* to migrant workers or having with them a relationship that, *according to applicable law, produces effects equivalent to marriage*, as well as their dependent children and other *dependent persons* who are *recognised as members of the family by applicable legislation* or applicable bilateral or multilateral agreements between states concerned.

The interpretation of the latter part of this definition rests within the province of applicable national legislature (or agreements between states).

At the regional level, the African Charter emphasises the importance of the family as the natural unit and basis of society.[90] In terms of this provision, family is the foundation of African society. The African

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85 In Western Europe and Scandinavia, foster care is intended to be permanent.

86 CRC Committee (1994) Day of General Discussion 'Role of the Family in the Promotion of the Rights of the Child' para 2.1; CRC Committee (2005) Day of General Discussion 'Children without parental care' CRC/C/153 para 644.

87 UN Resolution adopted by the General Assembly (2002) (on the report of the *Ad Hoc* Committee of the Whole (A/S-27/19/Rev 1 and Corr 1 and 2)).

88 Art 15 UN Resolution (n 87 above).

89 Art 4 UN Convention on Migrant Workers (my emphasis).

90 Art 18(1) African Charter.

Charter places an obligation on the state to protect the physical and moral health of the family.[91] It further describes the family as the 'custodian of morals and traditional values' which are recognised in African communities.[92] The family, in terms of the African Charter, can therefore be defined as that unit which founds the existence of, firstly, an individual, and secondly, any society. Although the African Children's Charter[93] does not define the concept 'family', it refers to family,[94] family environment[95] and family life.[96] This Charter, like CRC, recognises that the child should grow up in a family environment for his or her full and harmonious development.[97] In so doing, it acknowledges the family as the ideal base for the existence and the holistic development of the African child.

4 'Family' in terms of national laws in selected African countries[98]

The Nigerian Child's Rights Act of 2003 (CRA) expressly guarantees the right of the child to family life.[99] It offers a broad definition of family 'in relation to a child' to include 'a person who has parental responsibility for a child and a person with whom the child is living or has been

91 As above.

92 Art 18(2) African Charter.

93 Art 18 African Children's Charter.

94 Art 10 African Children's Charter, in relation to the right of the child not to be subjected to interference of 'privacy, family, home or correspondence'.

95 Preamble para 4 African Children's Charter, '[r]ecognising that the child occupies a unique and privileged position in the African society and that for the full harmonious development of his [or her] personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding'; and art 23(3), with regard to the refugee child, '[t]he child shall be accorded the same protection as any other child permanently or temporarily deprived from his [or her] family environment for any reason'.

96 Art 14(2)(f) African Children's Charter, in relation to 'family life education'.

97 Preamble African Children's Charter.

98 The national laws considered are the laws of South Africa, Nigeria and Kenya, within the African region. It is pertinent to note that these three jurisdictions have children's legislation which was *recently* enacted and give effect to key provisions in CRC and the African Charter. It is for this reason that these countries are the focus here.

99 Sec 8. Sec 37 of the Constitution of the Federal Republic of Nigeria, 1999, is entitled 'Right to private and family life' but the provisions of sec 37 state: 'The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.' This formulation does not provide clarity to the meaning 'family life'. The CRA, however, gives more clarity as it does not equate family life to the home as the Constitution appears to have done.

living'.[100] The Kenyan Children Act 8 of 2001 (KCA)[101] does not define family; it guarantees the child's right to parental care.[102]

The South African Children's Act 38 of 2005 provides a more workable guide to a definition of family. In section 1 it defines a child's 'family member' to be[103]

(a) a *parent* of the child;
(b) *any other person* who has *parental responsibilities and rights* in respect of the child;
(c) a *grandparent, brother, sister, uncle, aunt or cousin* of the child; or
(d) *any other person* with whom the child has developed a *significant relationship*, based on *psychological or emotional attachment*, which *resembles a family relationship.*

This legislation points out key characteristics of persons who are family to a child: parenthood (natural or adoptive) and blood relationship; acquisition of parental responsibility in respect of the child; and significant relationship,[104] akin to a family relationship, resulting from psychological and emotional attachment. Subsection (d) purports flexibility in understanding the family, away from traditional consanguineous relations. This definition appears to extend family membership to persons (excluding blood relatives to the second degree) who may have cared for a child for a period of time, and thereby became psychologically and emotionally attached to the child without necessarily acquiring legal rights and responsibilities in respect of the child. It is submitted that clarity regarding the types of relationships which may fall within the definition in subsection (d) depends on the definition given to 'family relationship'. The inclusion of 'resembles a family relationship' to subsection (d) may be yet another means of avoiding delineation of who is (or is not) family to a child.[105]

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100 Sec 277 CRA.

101 Sec 45. The Constitution of Kenya, 2010, acknowledges family as the natural and fundamental unit of society and mandates the Kenyan Parliament to enact legislation which recognises 'any system of personal and family law under any tradition, or adhered to by persons professing a particular religion'. This legislative piece takes into account the importance of the family and the variety of family forms that must be considered when dealing with family rights.

102 However, the Act defines 'home' 'in relation to the child' as 'the place where the child's parent, guardian, relative or foster parent permanently resides, or if no parent, guardian or relative living and the child has no foster parent, the child's parent's or guardian's or relative's last permanent residence ...' This definition highlights persons who have responsibility over the child – biological or by operation of law.

103 My emphasis.

104 The meaning of 'significant' is subject to interpretation.

105 In its December 2002 Review of the Child Care Act Report, Project 110, the South African Law Reform Commission, acknowledging that the traditional nuclear family form is not the reality in South Africa, and noting the challenges that ensue, recommended a flexible relationship-based definition of family member to be included in the children's legislation thereby preventing children from becoming family-less.

5 Right to a family as a canopy for all other familial rights[106]

As highlighted in the introductory paragraph above, certain familial rights have found definition in international instruments and national legislation: the right to family care;[107] the right to family life;[108] the right to parental care;[109] the right not to be arbitrarily separated from parents;[110] and the right to grow up in a family environment.[111] Each of these rights depends on the existence of a 'family'. International agencies involved with child care acknowledge that 'all children have a right to a family'.[112] However, this exact formulation is not stated in international legal documents and national legislation pertaining to children. As a result, its existence depends on judicial interpretation.

The right of a child to a family exists as a right that may be interpreted in relation to (and in) other familial rights that have been expressed in treaties. It should be seen as the *sine qua non* for the realisation of other family rights pertaining to children.

The recognition of the right is important because it validates, firstly, the existence of a group to respect and protect,[113] and of a group from which duties (such as the duty to care for the child) are due. Secondly, it ensures legal certainty, thereby bringing to bay those arguments that challenge the existence of the right of the child to a family in international law. It is arguable that the explicit legal provision of the right of the child to a family will create unrealistic obligations on states to realise this right. Conversely, the acknowledgment of the right will promote the non-violation of this right by parents and other persons legally responsible for the child. Also, such acknowledgement will lend support to the CRC Committee's recommendations which require

106 It is important to stress that the best interests of the child remain the *primary consideration* when dealing with children's rights. Therefore, although a child has the right to a family, it will not be in the child's best interests to remain with a family where, eg, the child endures abuse and violence.

107 Sec 2 Children's Act.

108 Sec 8 CRA.

109 Sec 53(e) Constitution of Kenya; sec 2 Children's Act.

110 Art 9 CRC.

111 Para 6, arts 20(1) & 22(2) CRC; sec 2 Children's Act.

112 CRC, IRC, Save the Children, TdH, UNICEF, WVI, War Child UK and Plan International acknowledge this right in their document – Child Protection Working Group Guiding principles on accompanied and separated children following the Haiti earthquake January 2010 1.

113 K Jastram & K Newland 'Family unity and refugee protection' in E Feller *et al Refugee protection in international law: UNHCR's global consultation on international protection* (2003) 566.

that parties to CRC 'develop, adopt and implement' a comprehensive national policy on families and children.[114]

States must begin to consider parental or family care and protection of the child from the premise of the right of the child to a family. Each state should define 'family' for its purposes and within its cultural, economic and social circumstances, and explicitly acknowledge the child's right to a family and ensure the realisation of the right, thereby all other familial rights. It is proposed that the definition so developed should be revisited regularly and adapted to changing times and needs.

6 Right to a family within the African context

As highlighted in paragraph 3 above, the African Charter and the African Children's Charter do not contain an exact formulation of 'the right to a family'. However, it refers to family as the natural unit and basis of society. It is submitted that the child's 'right to a family' does not exist because 'family' has not been defined. (The right is often inferred from other familial rights.) This is because there is a disconnection between the idealisation of family and the perceptions of what family is and should be.[115]

Sloth-Nielsen, Mezmur and Van Heerden are of the view that 'a child does not have the right to a family in international law'. They explain that a child has the right to parental care or family care and to appropriate alternative care when removed from the family environment, but this is distinct from the child's right to a family.[116] In their view, the right to a family privileges inter-country adoption above other forms of alternative care. This argument appears unfounded. As noted by the CRC Committee:[117]

> Children's rights will gain autonomy, *but they will be especially meaningful in the context of the rights of parents and other members of the family* – to be recognised, to be respected, to be promoted. And this will be *the only way* to promote the status of, and the respect for, the family itself.

In South African case law,[118] the Constitutional Court in *In re: Certification of the Constitution of the Republic of South Africa, 1996,*[119]

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114 CRC Committee (2005) Day of General Discussion 'Children without parental care' CRC/C/153 para 645.

115 Department of Social Development 2011 'Green Paper on Families 'Promoting family life and strengthening families in South Africa' 16.

116 J Sloth-Nielsen *et al* 'Inter-country adoption from a Southern and Eastern African perspective' (2010) March *International Family Law* 86-96.

117 CRC Committee (1994) General Day of Discussion 'Role of the Family in the Promotion of the Rights of the Child' para 198.

118 Sec 28(1)(b) 1996 Constitution.

119 1996 10 BCLR 1253 (CC).

while addressing objections to the non-recognition of familial rights in the 1996 Constitution, held that there has been no 'universal acceptance' of the need to expressly recognise the right to family life as being fundamental and 'requiring constitutional protection'.[120] The Court explained that '[t]he absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies'.[121] According to the Court, because families are constituted in a variety of ways, there is 'uncertainty' as to the outcomes of constitutionalising family rights. As a result, constitution makers would rather not regard the right to family life as a fundamental right appropriate for definition in constitutional terms.[122] The Court argued that, by providing for the right of the child to family care, the Constitution 'directly' deals with the right to family life of the child. (The right is 'expressly guaranteed' therein.)[123]

Legislation in Kenya also does not explicitly provide for the right (of the child) to a family. In its findings, the High Court of Kenya in Nairobi in *Republic v Minster of Home Affairs and 2 Others Ex-parte Leonard Sitamze*[124] held that the family is of vital importance to Kenyan society and that the right to a family is informed by the fundamental right to human dignity which is constitutionally recognised in Kenya.[125] Nigeria's Child's Rights Act states that the child has 'a right to family life'.[126]

In its *Green Paper on Families*,[127] the South African government, while recognising the centrality of the family for human progress, notes that the mere inference of family in many countries' policies means that 'many countries do not focus on the family as the first point of entry, with regard to policy implementation'.[128] As a result, socio-economic benefits do not directly impact on the family; rather, they filter down to the family.[129] In the government's view, focusing on the family would produce more extensive positive societal results than when individuals are targeted.

120 *Certification* (n 119 above) para 98.

121 Para 99 *Certification*.

122 As above.

123 Para 102 *Certification*. It should be noted that this part of the judgment responds to the objection that the right to family life (and not the 'right to a family') is not expressly recognised in the Constitution. The 'right to family life' and the 'right to a family' are two distinct familial rights. This judgment has been cited as an example because it addresses the issues of familial rights generally.

124 *Republic v Minster of Home Affairs & 2 Others Ex-parte Leonard Sitamze* (2008) eKLR. judgment delivered by Judge JG Nyamu.

125 *Sitamze* (n 124 above) 20.

126 CRA s 8.

127 Green Paper (n 115 above).

128 Green Paper (n 115 above) 14.

129 As above.

Children's rights, particularly their familial rights, depend on the existence of family and the recognition, respect and promotion of the rights of its members. In simple terms, for a child to enjoy the right to family care, the child must belong to a family in the first place. Therefore, it is important that states define family in relation to the child, as a *sine qua non* for the realisation of familial rights pertaining to the child. This will ensure legal certainty and prevent the legal limbo in which children often find themselves.

7 Conclusion

The African Charter recognises the family as the basis of society. From time immemorial, the family structure has evolved and been adapted to suit changing times. Contemporary family forms have become removed from the 'usual' nuclear or extended family structure. As has been stated by Van der Linde,[130] the rise in the number of 'restructured' families suggests an adaptation to changes in modern society rather than a decline in the importance of the family. The essence of a family should therefore not lie in its structure or form, but rather in the functions of family members, one to another, and the intention to establish permanence in the execution of such functions. With this in mind, a definition of the concept should be developed by states, in context, within their particular jurisdictions. It is proposed that the definition so developed should be revisited regularly and adapted to changing times and needs. Once a definition has been developed, express recognition of the right of the child to a family should be ensured to create legal certainty and promote the non-violation of this right by persons most likely to deprive children of their families.

130 Van der Linde (n 16 above) 27.