

The Content of the International Obligations to Protect the Family Life for Children in South Africa

by

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Summary

This research intends to investigate the content of the international obligations to protect the right to family life for children in South Africa (RSA). Most international instruments and domestic legislations dealing with children recognise the need for children to grow up in a family environment in an atmosphere of love and understanding. In different parts of 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. The definition of a family and family life have gradually evolved over the past years. States have in some instances refused to embrace different types of families like (LGBTQI) citing moral concerns while others have enacted laws that greatly hinder family life such as immigration laws despite being a party to several international legal instruments, which impose an obligation on States to promote, protect and preserve the right to family life particularly for children. The problem faced in international/human rights law is how best to balance the rights of children and the ability to State sovereignty. The Study reveals that generally all States including RSA understand and have embraced the right to family life for children. However, when it comes to implementation of the right to family life, it is often this right is overlooked by States to prioritise other State interests. The study demonstrates how States by becoming a party to these international instruments accepted the legal obligations to protect the right to family life and further assesses how these obligations have been translated into legislative and policy frameworks. A comparison with Zimbabwe and Canada is also undertaken to compare how the RSA is performing in comparison to the other two States. Despite all the challenges children face in families such as abuse, poverty, neglect and exploitation. Families provide children with love care and protection with the end goal being to ensure that the children grow up to become adults who care assume parental obligations/rights. The study is influenced by the need for care and protection by children.

Key Words: children, family life, South Africa, international law, human rights.

Declaration

I, Arthur Shirichena, hereby declare that all the work contained herein is my own original work; that all ideas that are not mine have been duly acknowledged and referenced according to the referencing guide of the University of Fort Hare; and that this dissertation has not been previously submitted in its entirety or in part to any other university towards any other degree.

Candidate: Arthur Shirichena

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Date: 15 April 2018.



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Dedication

To my mother Ellis Shirichena.



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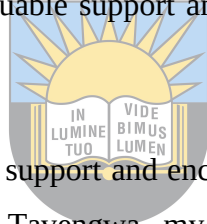
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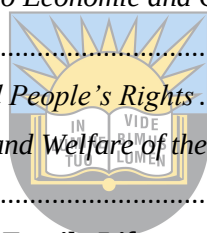
I have also benefited greatly from the support and encouragement of my friends and fellow colleagues most notably: Rumbidzai Tavengwa, my late friend Romeo Gumede, Melisa Malambile, Eleanor Feni, Night Rwodzi, Nasholan Chetty and Spencer Mugezi.



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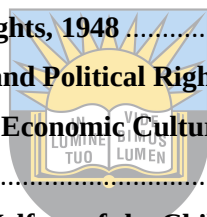
TABLE OF CONTENTS

Summary	2
Declaration	3
Dedication	4
Acknowledgments	5
Abbreviations	9
CHAPTER 1	10
1 1 Background of the study	10
1.2 Research aims/Objectives	11
1 3 Research problem and Questions	11
1 4 Significance of the Research	12
1 5 Outline of Chapters	12
1 6 Literature Review	13
1.6.1 <i>The Universal Declaration of Human Rights</i>	14
1 6 2 <i>International Covenant on Civil and Political Rights</i>	15
1 6 3 <i>International Covenant on Socio Economic and Cultural Rights</i>	15
1 6 4 <i>Convention on Rights of Child</i>	15
1 6 5 <i>African Charter on Human and People's Rights</i>	16
1 6 6 <i>African Charter on the Rights and Welfare of the Child</i>	16
1 6 7 <i>African Youth Charter 2006</i>	17
1 7 Customary International Law on Family Life	17
1 8 Journal Articles, Dissertations/Thesis	18
1 9 Domestic laws	22
1 10 Case law	22
1 11 Research Methodology	24
1 12 Delimitations of the Research	25
1 13 Referencing Style	25
1 14 Ethical Implications of the Research	25
Chapter 2	26
2 The Meaning and Historical Development of Right to Family Life	26
2 1 Introduction	26
2 2 Sociological Understanding of a Family and Family life	27
2 3 Historians	29
2 4 Feminist Understanding of Family Life	31
2 5 Marxist Approach to Family Life	33
2 6 Evolution of Homosexual Families	33
2 6 1 <i>Development of LGBTQI Families in the United States of America</i>	34
2 6 2 <i>Development in Europe</i>	36



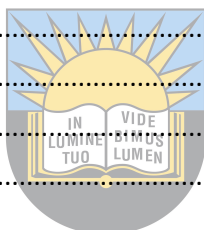
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2 7 Development of family life in Europe and Africa	36
2 7 1 Europe.....	36
2 7 2 Development in Africa	37
2 8 Religion/culture.....	38
2 8 1 Cultural Understanding of Right to Family Life.....	38
2 9 Religious Understanding of Right to Family Life	40
2 9 1 Islamic.....	40
2 9 2 Christianity	40
2 10 Family and Marriage	41
2 11 International Law Development & Recognition of Family Life	41
2 12 Development of Family Life in RSA.....	48
2 13 Summary.....	53
Chapter 3	54
3 INTERNATIONAL AND REGIONAL SOURCES ON THE RIGHT TO FAMILY LIFE	54
3 1 Introduction.....	54
3 2 Universal Declaration Human Rights, 1948	54
3 3 International Covenant on Civil and Political Rights 1966.....	58
3 4 International Covenant for Socio Economic Cultural Rights 1966.....	61
3 5 Convention on Rights of Child.....	62
3 6 African Charter on Rights and Welfare of the Child	64
3 7 Summary.....	68
Chapter 4	69
4 SOUTH AFRICA AND INTERNATIONAL LAW	69
4 1 Introduction.....	69
4 2 RSA and the CRC	70
4 3 The Children's Act.....	71
4 4 Best interests of the child.....	72
4 5 Adoption.....	75
4 6 Divorce	77
4 7 Inheritance and Succession laws.....	80
4 8 Marriage	82
4 9 Social Security	85
4 10 Labour law.....	86
410 1 Family responsibility leave	86
4 10 2 Maternity leave	87
4 11 Education	88
4 12 Refugees	89



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4 13 Immigration.....	91
4 14 Criminal Law	95
4 15 Summary.....	97
Chapter 5.....	99
5 COMPARISON OF SOUTH AFRICA WITH OTHER STATES: ZIMBABWE AND CANADA	99
5 1 Introduction.....	99
5 2 Zimbabwean Legal System	99
5 3 Canadian Legal System	101
5 4 Children's Acts in RSA, Zimbabwe and Canada.....	102
5 5 Best Interests of the Child Standard	103
5 6 Immigration &Citizenship	104
5 7 Criminal Law	107
5 8 Labour Laws.....	108
5 9Adoption.....	110
5 10 Marriage laws.....	112
5 11 Divorce Action.....	113
5 12 Succession.	114
5 13 Refugees	115
5 14 Social welfare.....	117
5 16 Summary.....	119
6. CONCLUSION.....	120
BIBLIOGRAPHY	125
International Instruments	125
Regional Instruments	125
Constitutions	126
Legislation	126
South Africa.....	126
Zimbabwe Legislation	126
Canada Legislation.	127
Case Law	127
Journals	129
Textbooks	131
Dissertation/Thesis	131
Reports By International Organisations Or States	132
Internet Sources	132
Other Sources	134



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Abbreviations

UDHR Universal Declaration of Human Rights.

ICCPR International Covenant for Civil and Political Rights

ICCSCR International Covenant for Social Cultural Rights

UN United Nations

RSA Republic of South Africa

CRC Convention on Rights of Child

ACHPR African Charter on Human and Peoples Rights

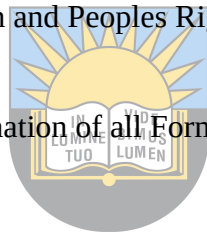
CEDAWU Convention on the Elimination of all Forms of Discrimination against Women

AYC African Youth Charter.

ACHR American Convention on Human Rights

ECPHR European Convention of Human Rights and Fundamental Freedoms

ACRWC African Charter on Rights and Welfare of a Child.



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CHAPTER 1

1 1 Background of the study

A family is of paramount importance and remains a safety net for children.¹ Children need / love, care and affection from their families. In the 19th century, many States began to recognise the right to a family life as a basic human right. In 1948 the Universal Declaration of Human Rights (UDHR)², although not a treaty, was adopted which, set out the basic human rights of all people within the jurisdiction of a State.³ Since then more international and regional instruments have been formulated.⁴ The UDHR has become accepted in international law as a declaration and has possibly crystallised as a custom or parts thereof.⁵

The international and regional instruments that followed sought to cater for the legal interests of women and children particularly within their family environment. The instruments include the International Covenant for Civil, Political Rights (ICCPR)⁶, ICSECR, Convention on the Rights of a Child (CRC)⁷, Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)⁸ and the African Charter on Human and People's Rights (ACHPR), ACRWC.⁹ By being, a party to these legal instruments relevant to family or which refers to the importance of family, States voluntarily accept the legal responsibility to promote and protect the family lives of their citizens and those who live in their States.

This study seeks to evaluate what the obligations to promote and protect that States have towards family life for children. The study will seek to examine whether RSA is protecting or promoting its international law obligations measures on protection of family life. RSA is a party to several international instruments mentioned above that obliges states to ensure that

¹ UN Children's Fund "A situational Analysis on the Status of Women's and Children's rights in Zimbabwe 2005-2010, a call for reducing disparities and improving equity" 2011.

² *Ibid.*

³ Universal Declaration of Human Rights (UDHR) 1948 adopted by UN General Assembly Resolution 217A (III) of 10 December 1948.

⁴ International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999 Entered into force 23 March 1976.

⁵ Dugard J *International Law: A South African Perspective* (4th ed) (2011) 39.

⁶ See preamble of the ICCPR.

⁷ United Nations Convention on the Rights of the Child (CRC) 1989 adopted by UN General Assembly, Resolution 44/25 of 20 November 1989, entered into force 2 September 1990.

⁸ UN General Assembly Convention on the Elimination of all forms of discrimination against women, 1979.

⁹ African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 available at: <http://refworld.org/docid/html> (last accessed 23 March 2016).

family life is promoted, protected and preserved. A comparison will be undertaken to determine how other Zimbabwe and Canada are attempting to fulfil their obligations. Zimbabwe and Canada have been selected for this study because they are a party to some of the international legal instruments that South Africa is a party to and they share similar constitutional principles.

This research is conducted from a legal perspective in order to understand what the international instruments expect of their State to provide for children them in terms of family life. It is important to note that ultimately the intention should be that all children grow up and become autonomous adults. It is submitted South Africa, however, on a legislative and policy basis viewpoint perspective is not fully complying with some of the provisions of the international instruments. This is what this study aims to highlight and explore.

1.2 Research aims/Objectives

The study also seeks to understand the nature of the family, the historical development of the right to family life in general and in particular what it entails for State. This study will look at the various issues including the international instruments relating to children's family life. The study will also analyse the measures RSA has taken to fulfil the obligations assumed by it by international law. The study assesses whether these measures are adequate to fulfil the spirit of both the domestic and international law. On a comparative level, this study will seek to compare how Zimbabwe and Canada are performing concerning the fulfilment of their comparable international obligations. Zimbabwe and Canada have been selected for this study because their share similar laws such as common law and are party to most relevant legal instruments to be examined in this study. The study will at the end, provide some recommendations and conclusions on possible measures that may enhance the States advancement of children's rights to family life.

1 3 Research problem and Questions

The main research question to be evaluated is whether RSA is fulfilling its international Obligations to protect, promote and respect the right to family life for children.

The primary research question and problem to be addressed:

- Is South Africa fulfilling its international obligations in promoting the children's right to family life?

The secondary research questions are as follows:

- to assess the nature and content of the international legal instruments that South Africa is a party to and others relevant instruments with specific reference to Children's right to family life;
- How is RSA and other States fulfilling these obligations;
- The study investigates the shortcomings of the RSA fulfilment of its international obligations on family life;
- The impact of the RSA government policies and legislation on children and other stakeholders.

1 4 Significance of the Research

Partial or full Implementation of the domestic and international legal obligations relating to children's right to family life is required by international law and will be beneficial in creating an improved childhood environment. The participation of the State and other stakeholders, such as communities, non-governmental organisations, are key to achieving this protection.



The State must put in place measures to ensure the children's right to family life is respected, promoted and protected. This study is significant because it seeks to examine whether current measures implemented by RSA adequately promotes, protects and fulfil children's right to family life. If not, then why is it not capable or failing to do so? It is crucial that measures be put in place to ensure that children's rights are recognised and protected on a national level.

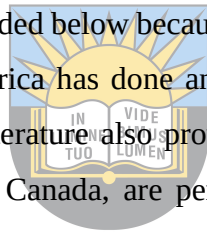
1 5 Outline of Chapters

- Chapter one deals with the general overview of the study. It outlines the aims, objectives, problem statement, rationale and limitations of the research methodology;
- Chapter two analyses the meaning of family and historical development of the right to family life;
- Chapter three outlines the content of the international obligations towards children's right to family life and the implications thereof;

- Chapter four provides a critical analysis on whether RSA, as a dualist State, has domesticated adequate measures to fulfil its international obligations outlined in chapter three;
- Chapter five provides a comparative study between RSA, Zimbabwe and Canada on what Canada and Zimbabwe have done to fulfil their obligations toward family life and how they differ from the situation in RSA;
- Chapter six provides the conclusion and findings of the research and recommendations.

1 6 Literature Review

A considerable amount of literature has been produced about South Africa's obligations in international law regarding children's rights to family life. The content of the literature identifies the obligations and challenges faced by South Africa in implementing and fulfilling its obligations considering the existing socio-economic environment and other political concerns. The literature has been included below because they provide insight into the extent of obligations on SA, what South Africa has done and areas of possible improvements to children's right to family life. The literature also provides a comparative analysis on how other States, such as Zimbabwe and Canada, are performing in so far as fulfilling these obligations is concerned.



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Shagufta Omar notes that International conventions and treaties are amongst the most important formal sources of modern international law, also termed as conventional sources.¹⁰ Though formally the most widely applicable and emanating source of international law (creating force of application), they are neither the only source nor the most authoritative one, for creating rights and obligations under international law. Abdul Ghafur Hamid asserts that for any study of the sources of international law Article 38 of the Statute of the International Court of Justice¹ is always the starting point.¹¹

However, Dugard notes that the Statute of the International Court of Justice (ICJ) “no longer accurately reflects all the materials and forms of state practise that comprises today's sources

¹⁰ See Omar “Sources of International law in light of Article 38 of International Court of Justice” available at <http://ssrn.com/abstract=1877123> (last accessed 20 August 2017).

¹¹ *Ibid.*

of international law.”¹² Soft law, United Nations Security and General Assembly resolutions and *Jus cogens* are now also recognised as sources of international law.¹³ Thus, efforts are being made to bring developments in respect of sources of law in line with the categories of Article 38 of the Statute of International Court of Justice.¹⁴

1.6.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR), which was adopted in 1948, is a milestone document in the history of human rights.¹⁵ The Declaration sets out the human rights standard to be observed by all States. The UDHR is a declaration but some part of this declaration has crystallised into custom. The UDHR forms the basis of all international instruments that followed including the ICCPR and ICESCR

Article 16 of the UDHR states that:

- (1) “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution, (2) Marriage shall be entered into only with the free and full consent of the intending spouses, (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.¹⁶

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The article provides the basis in international law for the recognition of the right to family life as the family was accepted as an important aspect in human life. Human Rights Watch notes that the UDHR is not a treaty to which States can become parties, but it is a statement by the international community of the minimum standards of State practice. The declaration is also regarded as an articulation of States' human rights obligations as parties to the Charter of the UN United Nations.¹⁷ The UDHR is considered by some to have become part of customary international law, by which South Africa is bound simply as a member of the community of States.¹⁸ RSA constitution recognizes the importance of adhering to

¹² Dugard 22.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ UN “Universal Declaration of Human Rights” <http://www.un.org/en/universal-declaration-human-rights/> (accessed 5 March 2016).

¹⁶ *Ibid.*

¹⁷ Human Rights Watch “South Africa, Obligations under International and Domestic law” https://www.hrw.org/legacy/reports98/sareport/App1a.htm#N_7_ (last accessed 28 March 2017)

¹⁸ *Ibid.*

principles of international law, stating, "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."¹⁹

1 6 2 International Covenant on Civil and Political Rights

The ICCPR²⁰ constitutes another attempt by the international community to ensure that family life is protected. South Africa became a signatory to the Covenant in 1994, ratified it in 1998 and signed its additional optional protocols.²¹ Article 23(1) of the Covenant states that the family is the “natural” and fundamental group unit of society. Children are therefore entitled to protection by society and the State. Section 23(3) requires that State Parties to the Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses in a marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.²² This provides an attempt to cater for the children’s right to family life.

1 6 3 International Covenant on Socio Economic and Cultural Rights

In 1966, the international community took further steps to entrench the right to family life as part of socio-economic rights through the introduction of the ICSECR.²³ Article 10 states “that the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children”²⁴ This Covenant binds State Parties to ensure that enough measures are done to advance the socio economic rights of their citizen with the family being at the core of the social life of the citizens. Zimbabwe ratified the Covenant in 1991.²⁵

1 6 4 Convention on Rights of Child

The Convention on Rights of a child,²⁶ seeks to provide international legal protection to the rights of a child. South Africa signed the treaty in 1993 and ratified it in 1995, while

¹⁹ Section 232 of Constitution of Republic of South Africa 1996.

²⁰ See preamble of ICCPR.

²¹ Article 23(1) of ICCPR.

²² Section 23(3) of ICCPR.

²³ See preamble of ICESCR.

²⁴ *Ibid.*

²⁵ Claiming Human Rights “Guide to International Procedures Available in Cases of Human Rights Violations in Africa” <http://www.claiminghumanrights.org/iccesc.html?&L=0> (last accessed 5 March 2016).

²⁶ See preamble of CRC.

Zimbabwe signed in 1990 and ratified it in 1991.²⁷ The Preamble of this Convention states that:

“The States Parties to the Convention are convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”.²⁸

Similarly, Declaration 14 of the Convention, states that:

“Half a million mothers die each year from causes related to childbirth. Safe motherhood must be promoted in all possible ways. Emphasis must be placed on responsible planning of family size and on child spacing. The family, as a fundamental group and natural environment for the growth and well-being of children, should be given all necessary protection and assistance”.²⁹

1 6 5 African Charter on Human and People's Rights

The ACHPR, also known as the Banjul Charter, is a regional human rights instrument intended to promote and protect human rights and basic freedoms on the African continent.³⁰ RSA signed the Charter in 9 July 1996, ratified on 9 July 1996 whereas Zimbabwe signed it on 20 February 1986, and ratified it 30 May 1986.³¹ Article 18 (1) and (2) states that the family shall be “the natural unit and basis of society.” It shall be protected by the State, which shall take care of its physical health and moral wellbeing. The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community.³² The ACHPR is one of the first regional instruments, which recognises the right to family life and recognises families as an important fabric to morals of society.

1 6 6 African Charter on the Rights and Welfare of the Child

The ACRWC³³ constitutes a regional approach on how to provide for the rights and welfare of children. South Africa signed the treaty on 10 October 1997 and ratified it on 7 January

²⁷ *Ibid.*

²⁸ See preamble of the CRC.

²⁹ Department of Social Development in South Africa *White paper on families in South Africa*, 2012 8.

³⁰ African Commission on Human and Peoples' Rights “Ratification Table: African Charter on Human and Peoples' Rights” <http://www.achpr.org/instruments/achpr/ratification/> (last accessed 28 March 2016).

³¹ *Ibid.*

³² *Ibid.*

³³ African Charter on the Rights and Welfare of the Child (ACRWC) 1990 African Union (AU) 11 July 1990 entered into force 29 November 1999 <http://www.refworld.org/docid/3ae6b38c18.html> (last accessed 5 March 2016).

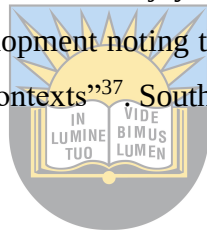
2000. Zimbabwe has ratified the ACRWC on 19 January 1995.³⁴ Article 18 provides for protection of the family and states that:

- (1) The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development, (2) States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child, (3) No child shall be deprived of maintenance by reference to the parents' marital status.”³⁵

The article outlines a definition for the family, state obligations towards for families and children.

1 6 7 African Youth Charter 2006

The African Youth Charter (AYC)³⁶ reasserts the right to family life. Article 8 states that “the family, as the most basic social institution, shall enjoy the full protection and support of States Parties for its establishment and development noting that the structure and form of families varies in different social and cultural contexts”³⁷ South Africa ratified the Charter on 28 May 2009.³⁸



1 7 Customary International Law on Family Life

Customary law refers to that law that has general become accepted by community or States as binding even though it does not exist in written form or expressly opted into by States.³⁹ Article 38(1) (b) of the Statute of the International Court of Justice lists international custom as one of the sources of international law. It defines custom as evidence of a general practise accepted as law.⁴⁰ Dugard notes that consent of States to customary rule is inferred by conduct.⁴¹ Some scholars believe the UDHR has now acquired the status of customary international law.

³⁴ African Charter on Rights and Welfare of child “Ratification table” <http://pages.au.int/acerwc/pages/acerwc-ratifications-table/>(last accessed 20 March 2017).

³⁵ Article 18 of ACRWC.

³⁶ African Union African Youth Charter 2 July 2006 available at: <http://www.refworld.org/docid/493fe0b72.html> (last accessed 5 March 2016).

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Dugard 20.

⁴⁰ Statute of the International Court of Justice (1945) 39 AJIL Supp 215.

⁴¹ Dugard 39.

IHL Rule 105 of customary international law states, concerning humanitarian law, that “family life must be respected as far as possible.”⁴² Humanitarian law despite dealing with war and conduct of hostilities serves to highlight the significance of family life. Thus, “State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.”⁴³ The Fourth Geneva Convention, which provides for families to be given “facilities for leading a proper family life.”⁴⁴

South Africa has adopted a monist approach to customary international law in its Constitution in section 231 and 232.⁴⁵ This means that customary international law to which RSA is a party automatically become domestic law and RSA and therefore do not need to be domesticated like treaties. Section 326 of the Constitution of Zimbabwe states that ‘[C]ustomary International Law is part of the Law of Zimbabwe, unless it is inconsistent with the Constitution or an Act of Parliament’.⁴⁶ Dorothy Pasipanodya notes that:

“The effect of these Constitutional provisions is that International treaties are only binding on Zimbabwe once they have been ratified into law by Parliament, with the President’s authority and that any accepted Interpretation of Customary International law will not apply where a version, no matter how absurd, of it has been incorporated into a Statute.”⁴⁷

This therefore presents a slightly different approach on how customary international law is interpreted in Zimbabwe. This suggests that customary international law will be invalid if in contradiction with a local law.

1 8 Journal Articles, Dissertations/Thesis

Ekanem Okon⁴⁸ a renowned scholar on children’s rights 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

⁴² Henckaerts and Beck “Customary International Humanitarian law” available at https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule105#Fn_73_2 (last accessed 2 March 2016).

⁴³ *Ibid.*

⁴⁴ ICRC “Treaties, States Parties and Commentaries, Fourth Geneva Convention, Article 82, available at <https://ihldatabases.icrc.org/ihl/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5> (Last accessed 3 March 2016).

⁴⁵ Dugard 40.

⁴⁶ Section 326 of Constitution of Zimbabwe Amendment (No, 20) Act 2013 Zimbabwe.

⁴⁷ Pasipanodya *The Application of International law in Zimbabwe in light of the New Constitution and the Doctrine of National Sovereignty* (LLM University of Zimbabwe 2013) 34 available at http://www.academia.edu/4690926/The_Application_of_International_Law_in_Zimbabwe_in_light_of_the_New_Constitution_and_the_Doctrine_of_National_Sovereignty (last accessed 5 March 2016).

⁴⁸ Okon E “Towards defining the right to a family for the African child” (2012) 12 *African Human Rights Law Journal* 373.

a family environment. The author begins with a brief overview of existing family forms, followed by an examination of the functions of the family. From that premise, he explains the need for understanding family from a functional rather than a structural viewpoint. He argues that, for the effective realisation of all familial rights enjoyable by the child, the concept 'family' must be defined.⁴⁹ The definition must be based on its function and tailor-made by each State to suit its societal circumstances. The author concludes that such a definition would provide clarity to the concept and aid in avoiding the legal limbo, which sometimes affects children's family status.⁵⁰

Wilson Adrian⁵¹ a sociologist who studies family life discusses the theoretical approaches to family life and from a sociological perspective. The author discusses the functionalist approach separately from the theoretical approaches, which looks at whether family is good for society. The author gives a historical background of the role of family in the ancient times and investigates the roles of family played in the day-to-day societal activities. The author also discusses the feminist approach, which assesses whether family is good for women. The author provides a historical background of the role of women in ancient Europe; the duties expected of women in families and questions some of the roles.⁵² Finally, the author discusses the Marxist approach, which argues that feminism is a tool for suppressing workers. The author concludes that it would be wrong to draw a sharp conclusion on these approaches, as there are links and shared perspectives between these approaches. This article is important because it gives a historical understanding to family life.

Angelo Pantazis and Tshepo Mosikatsana,⁵³ child law experts in RSA look at the sources of child law in South Africa. They note that the provisions of section 30 of SA Interim Constitution⁵⁴ are derived from international instruments namely the UDHR, the European Convention on Human Rights 1950 (ECHR), etc. In common law, the key determinant of judicial decisions affecting children's is the child's best interest. The authors discuss various children's rights such as right to parental care, security, basic nutrition, and basic health and social services, neglect and abuse, labour and criminal justice system. They conclude by

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Adrian *Theoretical approaches to family life, Family* (1985) 15.

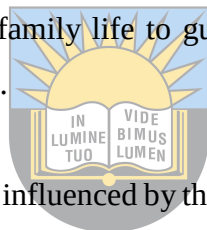
⁵² *Ibid.*

⁵³ Pantazis and Mosikatsana *Children's Rights*, Revision service (1999) 5.

⁵⁴ Section 30 of the Constitution of South Africa Act 200 of 1993.

assessing whether the best interests are of prominent importance in any matter involving the child and when the standard is best applicable. They noted that while the courts have not explicitly discussed the issue, there must be some limit to the applicability of the standard. Nevertheless, on matters involving children, the best interest's principle has been applied to legal issues beyond the substantive determination of the welfare of a child. The article is important because it provides a critical analysis of the best interest of the child principle.

Karin Guilick⁵⁵ gives a general overview on what a family is and defines a family according to international legal instruments. She pays attention to families, particularly internally displaced persons. She addresses the guiding principles dealing with internally displaced people who have been displaced due to war or conflicts. Karin further discusses the content of respect for family life and reunification in international law. She concludes by providing recommendations on how families, State and its organs should assist families internally displaced. She highlights the need to adopt a flexible definition of families by States, the best interests of the child and respect for family life to guide administrative and implementing partners in their policies and programs.



Maria Nonyana Mokobane's⁵⁶ study is influenced by the circumstances of children in the need of care and protection. The study is conducted from the family life perspective considering section 28(1) (b) of the RSA Constitution⁵⁷, which provides for the right to family care, parental and alternative care to a child who is removed from family life. The study demonstrates how family care, parental care are provided in the RSA Children's Act⁵⁸, reinforced by the judiciary and have evolved in practise. She notes that the Children's Act does not explicitly provide for families, family care and responsibilities of the State to assist families such as government and stakeholders lack guidance in dealing with child care. She notes that RSA ratified the CRC, and is bound to develop its policies in line with the CRC.

Furthermore, she assesses whether the Children's Act does enough in meeting the CRC standards and complies with the RSA constitution on protecting the right to family. The author provides a comparative study, which includes international and foreign standards and foreign

⁵⁵ Guilick "Protection of family, incorporating the guiding Principles" (1999) 5.

⁵⁶ Mokobane "*Children In Need Of Care And Protection And Their Right To Family Life*" (LLD University of Pretoria 2012) 35.

⁵⁷ Section 28 (1) (b) of the Constitution of Republic of South Africa 1996.

⁵⁸ Children's Act 38 of 2005.

jurisdiction in the view of suggesting improvements of RSA child legislation. This article is important because it provides a comparative study with other foreign jurisdictions but also provides a critical analysis on how far RSA has gone in promoting family life as far as children's rights are concerned.

The white paper on families in RSA⁵⁹ provides objectives, vision, and mission statement of the State. It provides a definition of family and provides analysis about families in SA. The paper further investigates legislative and policy frameworks from a global perspective to national legislation and domestic policies. The white paper further provides responses, strategies on families by providing approach, strategic priorities, recommended strategies and envisaged action to family life. The paper concludes by providing coordination, implementation and monitoring structures. This paper is significant because it provides an insight to the measures the State currently has in place and hopes to implement.

Lilian Mutambara⁶⁰, analyses the custody laws in Zimbabwe on whether they comply with the international instruments on children's rights. She notes that customary law and Local Courts Act⁶¹ requires that courts consider the best interests of the child and the law does not discriminate on whether the child is born of wedlock or not. This complies with Article 3(1) of the CRC.⁶² She further noted that the State has conflicting legislations as the Matrimonial Causes Act,⁶³ does not refer to best interests of the child and the Children and Guardianship of Minors Act⁶⁴ discriminates against children not of married parents. This is in violation of Article 16(1) (d) of Convention on Elimination of all Forms of Discrimination on Women (CEDW)⁶⁵ and Section 23(1) (a) of the Constitution of Zimbabwe.⁶⁶ She concludes by providing evidence of case law and societal attitudes, which are still patriarchal and therefore not catering for the interests of child and mothers.

⁵⁹ Department of Social Development "White paper on families in South Africa 2012" available at, http://www.dsd.gov.za/index.php?option=com_docman&task=cat_view&gid=33&Itemid=39 (last accessed 15 March 2016).

⁶⁰ Mutambara "Do custody laws protect the best interests of children in Zimbabwe in light of international instruments?" University of Zimbabwe 17.

⁶¹ Customary Law and Local Courts Act Chapter 7:05 of 1992 Zimbabwe.

⁶² Article 3(1) of the CRC.

⁶³ Matrimonial Causes Chapter 5:13 Act 33 of 1985 of Zimbabwe.

⁶⁴ Guardianship of Minors Act Chapter 5:08 of 1961 Zimbabwe.

⁶⁵ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women 18 December 1979, United Nations, Treaty Series, vol. 1249, 13. Article 16(1)(d).

⁶⁶ Section 23(1) (a) of Constitution of Zimbabwe 2013 Zimbabwe.

1 9 Domestic laws

RSA has taken steps to ensure that some of the international obligations accepted through treaties towards everyone who resides in it are met. Section 232 of the Constitution of RSA states that in interpreting legislation, the courts must prefer any reasonable interpretation that is in line with international law over the interpretation that is inconsistent with international law.⁶⁷ This serves to indicate the value that RSA law places international law. Section 231 of the constitution also states customary international law is law in the republic unless it is inconsistent with the Constitution.⁶⁸ A similar sentiment is also echoed in Section 39 on the constitution on the bill of rights that when interpreting the bill of rights International law must be considered.⁶⁹

Furthermore, section 28(1) (b) of the Constitution of RSA states that every child has a right to family care or parental care or to appropriate care when removed from family environment.⁷⁰ This shows how the State values family life and particularly family life for children. The constitution does not expressly provide for the right to family life.⁷¹ This is the only section that deals with family life and particularly for children. Section 28(2) states that “a child’s best interests are of paramount importance in every matter concerning a child.”⁷² This is a similar position adopted by other States such as Zimbabwe, which are also a party to several instruments that RSA has signed regarding the welfare of children. The Children’s Act of RSA provides detailed rights and obligations adopted by the State to protect children’s interests.

1 10 Case law

In the case of *Hugo vs President of RSA*⁷³, where the president, acting in terms of his constitutional powers to pardon and reprieve offenders had granted release to prisoners in certain categories. One of the categories to be pardoned was of ‘mothers in prison on 10 May

⁶⁷ Section 232 of the Constitution of Republic of South Africa 1996.

⁶⁸ Section 231 of the Constitution of Republic of South Africa 1996.

⁶⁹ Section 39 of the Constitution of Republic of South Africa 1996.

⁷⁰ Section 28(1)(b) of the Constitution of Republic of South Africa 1996.

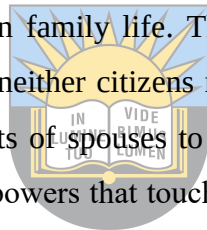
⁷¹ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837.

⁷² Section 28(2) of the Constitution of Republic of South Africa 1996.

⁷³ *President of the Republic of South Africa v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1).

1994, with minor children under the age of twelve (12) years. The respondent, a single father of a child under twelve at the relevant date, challenged the constitutionality of the pardon in the court a quo, saying that it unfairly discriminated against him and his son on the ground of sex or gender in violation of section 8 of the interim Constitution. The court a quo (the Durban and Coastal Local Division) held the act unconstitutional and ordered its correction by the President within six months of the date of judgment. The president and the Minister of Correctional Services appealed against the judgment. The reason given by the president for the special remission of sentence of mothers with small children is that it will serve the interests of children.⁷⁴ This case highlights how the State has sought to advance the best interests of the child. This case however brings about an important definition of what constitutes a family in RSA.

In *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi a v Minister of Home Affairs*; *Thomas and Another v Minister of Home Affairs*, the case brought into question immigration laws and their impact on family life. The applicants in this case were RSA citizens and their spouses, who were neither citizens nor permanent residents of RSA. The case examined the constitutional rights of spouses to cohabit and the need for Parliament, when granting government official's powers that touch on constitutional rights, to lay down proper guidelines.



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In the United Kingdom, *Beoku-Betts* case referred to 'the central point about family life, which is that the whole is greater than the sum of its individual parts'.⁷⁵ In this case, the applicant was a Sierra Leone citizen who had been living in the UK after escaping a civil war in Sierra Leone. On 1 June 2001 (shortly after discovering that his leave had expired) the appellant claimed asylum and the right to remain under articles 3 and 8 of ECHR.⁷⁶ On 27 February 2002, the Secretary of State refused both claims.⁷⁷ On appeal, the Lords in determining an appeal under section 65 of the Immigration and Asylum Act 1999 (the 1999 Act) (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) against the Secretary of State's refusal of leave to remain on the ground that to remove the appellant would interfere disproportionately with his article 8 right to respect for his family

⁷⁴ *Ibid.*

⁷⁵ *Beoku-Betts (FC) v Secretary of State for the Home Department* (2008) UKHL 39 (2009) 1 AC 115 para 16.

⁷⁶ *Ibid.*

⁷⁷ House of Lords, Judgments *Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department*, Session 2007 2008(2008) UKHL39.

life. Should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally.⁷⁸ This case shall provide an insight on how other jurisdictions have dealt with family life issues and immigration.

In the case of *Chikwamba V Secretary of State for the Home Department*⁷⁹ in which the appellant had fled Zimbabwe, though her asylum application was refused, she was not returned for the temporary suspension of such orders to Zimbabwe. In the meantime, she married and had a child. The applicant appealed an order for her removal citing human rights grounds.⁸⁰ The respondent had a policy that the applicant must return to their home country and make her application from there. The appeal succeeded with the judges noting that particularly in cases involving the human rights of children caution must be exercised before requiring out of country applications.⁸¹ The research will examine RSA case law relating to the right to family life for children and how courts have addressed the issue and provide a comparison on how other jurisdictions addressed this issue.



1 11 Research Methodology

The research methodology is mainly based on a study of literature. This includes library research and internet sources. The international Instruments and domestic legislation will be the primary source of regulatory information. Primary sources will consist of International instruments and domestic legislations. Owing to the need for empirical evidence to provide a situational background for this research, this study will make use of international law sources.

The secondary sources will consist of research papers, reports, journals articles and books from which additional arguments and references will be established. The research papers and journals that explore the relevant provisions for this study will be examined. The research will employ scholarly works, which scrutinize the possible gaps in the recognition, promotion and protection of the right to family life for the children. To enrich the analysis, academic work which assess the extent of the fulfilment of the obligations.

⁷⁸ *Ibid.*

⁷⁹ *Chikwamba v Secretary of State for The Home Department*: Hl 25 Jun 2008.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

1 12 Delimitations of the Research

The major limitation in this research is that it does not focus on the international instruments that RSA is not a party, which do not address the right to family life. The study focuses on the implementation of the already ratified international legal instruments relating to children's right to family life and assesses whether RSA is fulfilling its obligations as set out in the domesticated law and international legal instruments. This research will assess whether RSA is fulfilling these international obligations under the International law. This research however will only look at families with children, as the focus of the study is to understand what children need in family life.

1 13 Referencing Style

The referencing style employed is that of the *Speculum Juris*, an accredited journal by the Department of Higher Education and Training (DHET), which is published by the Nelson R Mandela School of Law, University of Fort Hare.



1 14 Ethical Implications of the Research

The research at hand does not foresee any ethical implications, as questionnaires or interviews will not form part of this research.

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Chapter 2

2 The Meaning and Historical Development of Right to Family Life

2 1 Introduction

There is no definition provided for a family in any of the international legal instruments that deal with family life. The legal instruments however, provide a context on which one can understand what the drafters understood a family to be. The meaning and understanding of a family life has evolved from the nineteenth century to the twentieth century and has been influenced by the international legal instruments that have contributed to this evolvement. The State, religion and other factors contributed towards this change in perception of family life through policies and actions which were meant to foster social cohesion. Religious bodies and the State endorsed marriage as a fundamental step to supporting a family. To grasp the concept of family life, an adequate historical understanding of family is necessary. The State must acknowledge its central role in social, political as well as personal relationships. This chapter will analyse the changing and development of family life from various factors affecting family life.



Confusion about family function /dysfunction is increased by the common failure to specify what the family means.⁸² This is caused by a general lack of understanding of what obligations and rights arise from the term family. Although regularly classified as a natural or biological unit, the family is also very much a social construction.⁸³ Children have the right to family life and by extension, that includes family environment.⁸⁴ Human rights law provides an understanding to certain familial rights and States were left to interpret what these right could be , for example the right to found a family⁸⁵, the right to family life⁸⁶ and the right not to be arbitrarily separated from the family.⁸⁷

⁸² Schwab, Helen and Prentice, Florence “Family Functioning” 2000 *Hingham, Kluwer*, 16.

⁸³ Ariès “Centuries of Childhood: A Social History of Family Life” 1962 *Knopf*, 6.

⁸⁴ Okon 2012 *AHRJ* 375.

⁸⁵ Article 9 Charter of European Union, *Charter of Fundamental Rights of the European Union* 26 October 2012, 2012/C 326/02 available at: <http://www.refworld.org/docid/3ae6b3b70.html> (last accessed 22 May 2016).

⁸⁶ Article 8 European Convention on Human Rights Council of Europe, “European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14”, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> (last accessed 5 March 2016).

⁸⁷ Article 19 & 25 African Children’s Charter see also Article 9 United Nations Convention on the Rights of the Child 1989.

Nevertheless, human rights law does not define the exact meaning of a family. The realization and recognition of children's familial rights depends in part on the clear definition of the term 'family' because a definition provides a scope of what the familial rights are. There are also theories that have been suggested by sociologists who study human social behaviour to assess the role and definition of a family. This chapter will also discuss the religious influence of marriage to family life. The chapter will also evaluate the international law recognition and advancement of the right to family life since 1948. The discussion of both human rights and sociologists will provide an understanding on how the law and social life, together influenced the development of family life.

2.2 Sociological Understanding of a Family and Family life.

The study of family has evolved significantly over the past decades. Tamara Hareven notes;

“Over the past decade, research in the history of the family has moved from a narrow study of the family as a household unit at one point in time to a consideration of it as a process over the entire lives of its members; from a study of discrete domestic family or household structures to one of the nuclear family's interaction with the wider kinship group; and from a study of the family as a separate domestic unit to an examination of its interaction with the worlds of work, education, correctional and welfare institutions, and such processes as migration”.⁸⁸

Families are no longer viewed from a narrow perspective but have been interpreted broadly to also consider the changing social and economic environment people live in.

A major initial impetus for the historical study of the family came from Phillipe Aries's in 1960⁸⁹, which opened a new direction by focusing attention both on the concept of childhood and on the changing experience of children in preindustrial French and British societies. Aries argued that childhood as a distinct experience and stage of life was discovered only in the eighteenth century and that its discovery was closely linked to the emergence of the “modern family”.⁹⁰ However, as already indicated in this research the focus will be on families, which incorporate children as the study concerns, children's right to family life.

⁸⁸ Hareven “Family Time and Industrial Time: The Relationship between the Family and Work in a New England Industrial Community” (1982) 8.

⁸⁹ *Ibid.*

⁹⁰ Hareven 1982 9.

Sociologists, like Haneven, who study the development, structure and functioning of the human society, further define family more in terms of the manner in which members relate to one another than on a strict configuration of status roles.⁹¹ Sociologists identify different types of families based on how one enters into them.⁹² Symbolic interactionist theories indicate that families are groups in which participants view themselves as family members and act accordingly, in other words, families are groups in which people come together to form a strong primary group connection, maintaining emotional ties to one another over a long period of time.⁹³ Today because of norms of sexual equality, and gender, employment, the different forms of family composition should be legally and socially accepted.⁹⁴ This shows the change in human forms of socialization has changed the way families are viewed.

Sociologically, the family is defined as a group of interacting persons who recognise a relationship with each other, based on a common parentage, marriage and/or adoption.⁹⁵ The functions of families vary between different societies and there is no central function that all societies grant to the family.⁹⁶ Families display four general systematic features, namely: intimate interdependence, selective boundary maintenance, ability to adapt to change and maintain their identity over time and performance of family tasks.⁹⁷ Family tasks include physical maintenance, socialisation and education, control of social and sexual behaviour, maintenance of family morale and motivation to perform roles inside and outside the family, the acquisition of mature family members by the formation of sexual partnerships, the acquisition of new family members through procreation or adoption, and the launching of young members from the family when mature.⁹⁸

Families are essentially care institutions that vary across cultures and change over time.⁹⁹ Their essential function, historically, has been to contribute to the basic economic survival of family members; thus, the structure of families often adapts to the economy, cultural

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Little *Introduction to Sociology* available <https://opentextbc.ca/introductiontosociology/chapter/chapter14-marriage-and-family/> (last accessed 7 May 2016).

⁹⁵ *Ibid.*

⁹⁶ Turner "Classical Sociology" (1999) 8.

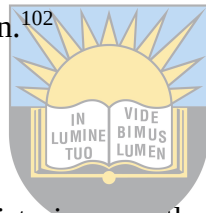
⁹⁷ Mattessich and Hill "Life Cycle and Family Development " In Sussman and Steinmetz, (Eds). *Handbook of Marriage and the Family* (1987) 440.

⁹⁸ *Ibid*

⁹⁹ *Ibid.*

ideologies and laws are created to reinforce that adaptation.¹⁰⁰ Over time, societies grow and become more complex and stratified, and the nature and quality of life among families becomes differentiated based on varying economies and the particular position of the family within the economic system.

Despite different theories, sociologists understand families to be social institutions that perform vital functions to their members and societies. They produce, nurture and socialise children, care for the frail and elderly family members and meet the emotional needs of their family members. The family has a role (providing and caring for the child) to play in the life of a child. To describe families as social entities recognises the fact that they are socially created, defined and vary across cultures Sociologists note that the two traditional family functions have been to rear children to become autonomous members of society and to meet the adult's sexual and emotional needs, financial security companionship etc.¹⁰¹ Thus from a sociology perspective, a family is a social group characterized by common residence, economic corporation and reproduction.¹⁰²



2 3 Historians

Borrowing from the social sciences, historians use the term family to describe a kinship and legal unit based on relationships of marriage or biology (parent-child-linkages).¹⁰³ The nuclear or conjugal family is composed of a heterosexual marital couple and their dependent children, living in an independent household whilst extended families are usually multigenerational, and include kin related by blood as well as by marriage.¹⁰⁴ Even in using such definitions, historians are mindful that most people define family subjectively, according to their own experiences and the historical forces that have shaped them.¹⁰⁵

Social groups also vary in their understanding family. Some trace descent through the paternal or maternal line, others give more weight to horizontal ties of kinship, as acquired through

¹⁰⁰Hill "Evolution of Family and Marriages"

www.sagepub.com/sites/default/files/upm-binaries/41374_1.pdf (last accessed 21 May 2016).

¹⁰¹ Schwab 2000 KAP 19.

¹⁰² "The Universality of Family life" <http://vcampus.uom.ac.mu/soci1101/532theuniversalityofthefamilyhtml> (last accessed 9May 2016).

¹⁰³ J Rank Articles "History of Family Gender, Theory, Development, Social, and Press "available at <http://family.jrank.org/pages/493/Family-History.html> (last accessed 12 September 2016).

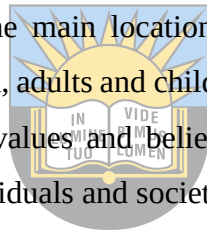
¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

marriage, than to these vertical ones. If we tend to refer frequently and without reflection to the family, history shows that there are many identifiable forms of family in any culture, in any historical moment.¹⁰⁶

A group of family historians developed a more dynamic, relational approach by studying the life course of families.¹⁰⁷ Life course historians are concerned with the relationship between the life stages of individual family members and the larger family cycle.¹⁰⁸ Family decisions and actions are viewed as adaptations to the changing ages and roles of members, and to external social, economic, and political pressures.¹⁰⁹ The community studies of the U.S. historians, which examine the intersections of family time and industrial time, identified the family as an active agent of change, and the continued importance of kinship ties as adaptive strategies.¹¹⁰

Social reproduction and State formation are related issues that have recently interested family historians. The family is not only the main location of biologically and legally defined relationships between men and women, adults and children, but also where private and public spheres intersect. Families replicate values and belief systems, forging the links between personal identity and social role, individuals and society, home and nation.¹¹¹



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According to the functionalist theory, the family was one of the core elements of the social system providing the crucial link between the individual and wider social group.¹¹² Thus, any change or decline in family will affect the social structure. Wilson notes that the family had two distinct functions that were socialization of the young and the stabilization of the adult personality.¹¹³ The isolated nuclear family was seen to be good and ideal for post war American Society. The family had been left free to rear children with more professional parents alongside teachers and child experts. The family was able to concentrate on the demanding relationship between the husband and wife. Therefore, in this Post War America the American society valued nuclear families.¹¹⁴

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Hareven 18.

¹¹² Adrian 45.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

The family still provided for both the child and adults with the physical and emotional support needed for their roles in society. This society emphasised on duties to function well. Thus, everyone had their own duty within society and family was the supporting instrument. The family provided the motivation to be successful in an industrial world, which laid interests on achievements by industrial effort. This is in direct contrast to African family life, which focuses on *Ubuntu* or living together. Child centred families were progress and women could find purpose in family life, in the expressive role of mother.

Furthermore, man's physiological needs were met in his instrumental role of a 'breadwinner.'¹¹⁵ Thus, this society was patriarchal in nature as it emphasised on men taking care of their families and women being housewives. The modern family was good and fit for modern society serving both individual needs and requirements of broader social system. However, this approach gives an oversimplified view of relationship within family especially the role of women. The approach fails to allow the greater variety of family forms that exist in various societies.¹¹⁶ Thus, this oversimplified view plays down the influence of the social differences that exist based on religion, ethnic class and status.¹¹⁷

Examinations of the social construction of gender have demonstrated how motherhood developed as a self-conscious vocation within the context of changing feminine roles and prescribed ideals, while work on masculinity has led to critical reappraisals of how masculine roles fit with larger patriarchal structures and the public status ascribed to "breadwinning." "Race" as a social construct is also increasingly significant to studies of the historic relations of family, State, and society.¹¹⁸

2 4 Feminist Understanding of Family Life

The feminist approach to the theoretical approaches of family life, studies the role of women in the family and family life.¹¹⁹ The feminist approach is important to this study because it highlights the views of women who form an integral part of the family. Feminism was in part,

¹¹⁵*Ibid.*

¹¹⁶ *Ibid.*

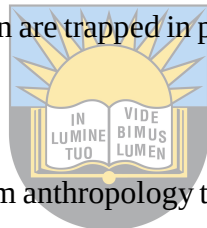
¹¹⁷ *Ibid.*

¹¹⁸ Bederman "Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880–1917" (1995) 67.

¹¹⁹ *Ibid.*

a reaction against the cult of domesticity, which had been so powerful in Post War America and Europe.¹²⁰ Feminism spread to Europe in the late 1960s, helping to raise the self-awareness of many women of their own sexual liberation and the development of the gay movement were also attempts to reconsider some of the basic social attitudes of society.¹²¹ Feminists examine the place of women in history and in society with great consideration being put on the domestic role of women. This has created practical and political problems in obtaining the equal treatment with men.¹²²

Furthermore, a major area of interest for feminists is the allocation of roles in the family.¹²³ Historical evidence shows that women's role both within and outside the family changes overtime, feminists sociologists have also been interested in the role of women and varies from culture to culture and also within any society.¹²⁴ For most women, marriage and motherhood will be the dominant events of their lives, housework and childcare continues to be predominantly the sphere of women. The family socializes young girls and boys into traditional gender roles and thus women are trapped in patriarchal roles. Patriarchy manifested itself in families during the 1960s.



Friedrich Engels borrows evidence from anthropology to show that there was a series of stages in the evolution of humankind, social institutions such as family, changed in form alongside the changes in the nature of economic subsistence.¹²⁵ The earliest family forms were communistic households where women were seen as equal to men and there was certainly a sexual division of labour.¹²⁶ Domestication of animals and the cultivation of plants marked a major economic development and men took control of this new source of wealth.¹²⁷ Power and status went to the man while property was passed from father to son. Men's work was the most important while that of women was not regarded as socially significant.¹²⁸

¹²⁰ Wilson 24.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Wilson 26.

¹²⁵ Engels "The Origin of the Family, private property and the state" 1884 academia.edu (last accessed 21 March 2016).

¹²⁶ Wilson, 26.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

Thus, patriarchy was entrenched in the social system of society and families. Engels was able to show that the family was not a fixed institution and it changed overtime.¹²⁹ Changes in the social relations of relations of production changed the family. Engels also showed that women often had inferior place in the home, arguing that they were domesticated slaves.¹³⁰

For many years, Marxists who offer a different view to the feminists largely ignored the family as a political and social issue as it was believed that any faults in the family would be corrected by the creation of a socialist society. Alongside functionalist, sociologists, Marxists recognised the family as the main agent for socialization, but they do not see it as beneficial. Instead, to them, the family transmits the dominant bourgeois culture of capitalist society, preventing the people from seeing the world as it really is.¹³¹

2 5 Marxist Approach to Family Life

The Marxists saw the working-class family socialized into a state of false consciousness.¹³² The small family encourages its members to think in individual terms, to try to obtain what is good for the family. In doing this, it weakens the bond between the man and his working-class brothers.¹³³ At the same time, comfortable and welcoming home is a distraction to the worker, it helps the breadwinner who in the past was a man to relax and forget his problems of his position at work. The family becomes the physiological haven that weakens the workers determination to stand and fight capitalism. The family was regarded as an obstacle to the revolution.¹³⁴

2 6 Evolution of Homosexual Families

The 20th century also saw same sex relationships and marriages being recognized by some States and being granted equal rights before law. This positive development however, was a gradual process as Richman notes that after being rejected by their families of origin upon revelation of their sexual identity, gay men and lesbians were forced to find and construct new families composed mostly of other gays, lesbians and sometimes-straight supporters in their

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

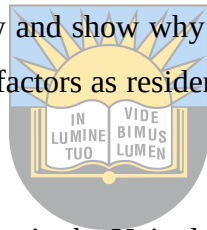
¹³⁴ *Ibid.*

new communities.¹³⁵ These “families of choice” often composed of friends and their families or partners, filled the support gap left by the abandonment of individuals biological families , and in doing so eventually rose above the level of friendship circles to status of kinship network.¹³⁶ These gay and lesbian families of choice provided a framework in the LGBTI community for families formed based on something other than genetics.¹³⁷

The rise soon followed in planned families headed by gay male and female couples, through either adoption or surrogacy. Gay and lesbian families exist in several forms:

“children born during a heterosexual marriage and raised post-divorce by a gay and lesbian parent (and possibly his or her partner, single or dual adoptive gay or lesbian parents with no genetic relation to the children they adopt; planned lesbian families in which children were conceived through donor insemination and raised by either single lesbian mother or two lesbian mothers ;and gay male families in which a child was conceived by surrogacy and was related to at least one father genetically.”¹³⁸

These multiple examples of family structure then allude to the complexity of “family” in both common social understanding and law and show why family structure should be defined to include both biological ties, and such factors as residence, marriage or partnership, financial support and emotional ties.¹³⁹



2 6 1 Development of LGBTQI Families in the United States of America

In US, the Lawrence decision¹⁴⁰ is hailed as one of the most important gay rights developments in the US history.¹⁴¹ The court ruled that gay men and lesbians were deserving of dignity and equality in their personal lives that had denied them by the existence of sodomy laws. The ruling however did not specifically address family law or the heterosexist assumptions that made for marginalized existence for gay and lesbian headed families.¹⁴²

However, the evolution of gay marriages has faced some challenges in USA opposition tapped into fear based on beliefs. The first fear was that homosexuals, more than just aberrations

¹³⁵ Richman “Courting Change: Queer Parents, Judges, and the Transformation of American Family Law” (2008) 20.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Richman, 21.

¹³⁹ *Ibid.*

¹⁴⁰ *Lawrence v. Texas*, 539 U.S. 558.

¹⁴¹ Richman (2008), *University Press (NYU Press)*, 24.

¹⁴² *Ibid.*

from the norm are overly sexualized and promiscuous to the point of depravity.¹⁴³ This belief encouraged the fear that the presence of gay men and lesbians would corrupt family as an institution. The second was the widespread disbelief that LGBTQI individuals would not be interested in or capable of nurturing children and having a family.¹⁴⁴ Such views had a negative effect when it came to adoption and custody for children as it was assumed that an LGBTQI parent's life style was not conducive to having children. These parents were said to be more promiscuous or deviant, that lesbian mothers would be less "maternal" by nature than their heterosexual counterparts, and that LGBTQI parents would be more interested in sex than parenting.¹⁴⁵

Furthermore, another concern was that children would have a greater chance of being molested or otherwise sexually harmed because of their parent's sexual propensities and associations.¹⁴⁶ These concerns were fueled in part by the historical framing of homosexuality as a physiological disorder. In its original version of the Diagnostic and Statistical Manual (DSM) of psychiatric disorders, the American Psychiatric Association (APA) included homosexuality as a sexual disorder.¹⁴⁷

Thirdly, it was assumed that children would be harmed by contact and residence with a LGBTQI parent because of the stigma associated with the community's disapproval of their parent's sexuality, or others perception of it. Finally, it was feared that the child would become homosexual or develop a non-normative gender identity because of contact with homosexual parent.¹⁴⁸

In the USA, the best interest of the child standard is used in legal matters relating to children.¹⁴⁹ The best interests of the child principle are used to determine what best measures can be put for a child to be well taken care of. In adoption or divorce cases it is used to determine, which parent will have primary residential or physical, custody? The Uniforms Marriage and Divorce Act lists a number of considerations including the wishes of the child and parents, the child's adjustments to the home, community and school, mental and physical

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

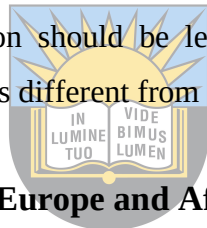
¹⁴⁸ *Ibid.*

¹⁴⁹ ULA Marr & Divorce s 307 Marr.

health of parties etc.¹⁵⁰ In *Bah v Bah* in Tennessee the court stated that the judge must also consider the parents character and propensities as evidenced by past conduct.¹⁵¹ The best interest's principle still applies to adoption whether by single parent or couple.¹⁵²

2 6 2 Development in Europe

In Europe LGBTQI rights were protected under private life, however, in the case of *Schalk and Kopf v Austria* it was held that homosexual relationships exceeded the scope of private life and was recognized as a family.¹⁵³ While Sociologists, define family more in terms of the manner in which members relate to one another than on a strict configuration of status roles. Sociologists identify different types of families based on how one enters them. Symbolic interactionist theories indicate that families are groups in which participants view themselves as family members and act accordingly. In other words, families are groups in which people come together to form a strong primary group connection, maintaining ties to one another over a long period. Today because of norms of sexual equality, and gender, employment; the different forms of family composition should be legally and socially accepted the old, extended family of the 100 years ago is different from the nuclear" family.¹⁵⁴



2 7 Development of family life in Europe and Africa.

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2 7 1 Europe

Family life is important in the study of history of man and is a fundamental unit of human society.¹⁵⁵ Aries understands the rise of family to be a result of society moving from sociability to one based on privacy.¹⁵⁶ In Europe around the 17th century, childhood and family took shape around this time noted by Aries. Before the 18th century, most families lived in houses shared with servants, slaves and masters. This emphasized more value on collective than the individual did.¹⁵⁷ Thus, a family involves many different people hence it was an extended family of non-biologically related people. Gradually in the 19th century the child's

¹⁵⁰ *Ibid.*

¹⁵¹ *Bah v Bah* 668 SW 2d 663 1983.

¹⁵² Richman 31.

¹⁵³ *Schalk and Kopf v. Austria* 30141/04 24.06.2010.

¹⁵⁴ William "Introduction to Sociology" – 1st Canadian Edition "

<https://opentextbc.ca/introductiontosociology/chapter/chapter14-marriage-and-family/> (last accessed 7 May 2016).

¹⁵⁵ Clement "Sociology for Nurses 2010" 127.

¹⁵⁶ Aries 1962 "Centuries of Childhood: A Social History of Family Life" 32.

¹⁵⁷ Aries 1962 34.

status changed within the family and society and a smaller family group was kept and children's rights were further given better acknowledgement.

The existence of slave trade marked the emergence of the use of servants. Therefore, slaves, servants, clients all lived under one unit and were headed by the husband, who was the man of the house. In Ancient Roman culture and society family included all the people who were part of the household including the workers, slaves, servants and everyone in that household.¹⁵⁸ Thus that during those days the term family was widely used to encompass different members of the household. One should note that during this era children were increasingly seen as economic assets.

2.7.2 Development in Africa

In Africa, societies contained the husband with his wives, children, and blood or marriage relatives.¹⁵⁹ Africans give more focus on the group than individual and lived as a large community. Most African communities were hunters, gatherers, and a man would sometimes go to different faraway places to fend for the family, thus the extended family would look out/after each other. To understand the description/definition of family from an African society, the period of slave trade and colonialism should be understood. Enslaved people were treated as property; thus, family separation was continuous because slaves were sold and exchanged. In a situation where a father was sold to slave trade, the mother was left to nurture the family, hence the single parent household developed.¹⁶⁰ Most slaves later organized themselves into family structures of nuclear family, but parents did not exercise complete control over their children's lives as they were viewed as property to be owned by the master.¹⁶¹

When missionaries came to Africa during this period they, were inclined to monogamous marriages.¹⁶² This also led to the development of the nuclear family, as the Christian missionaries encouraged their converts to develop property around the nuclear family as

¹⁵⁸ See "Ancient Rome Family Life" available at www.ducksters.com/history/ancient-rome/family-life.php (last accessed 12 March 2016).

¹⁵⁹ Okon 2012 *AHRJ* 5.

¹⁵⁹ Wilson 29.

¹⁶⁰ J Rank files "African-American Families Historical Cultural Influences on African-American Family Life" available at <http://family.jrank.org/pages58/African-American-Family-Life.html> (last accessed 12 May 2016).

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

opposed to the African situation in which inheritance rights were vested in the lineage.¹⁶³ In Zulu, culture polygamy symbolized a man's social standing and wealth.¹⁶⁴

The Kikuyu in Kenya are also an example of the society that is traditionally polygamous.¹⁶⁵ Nevertheless, the missionaries changed this, and a man married one wife.¹⁶⁶ Edward notes that the nuclear family was the most accepted family form as evidenced by those only monogamous marriages. This highlights the development on family life during the colonial times particularly how the colonies and colonial masters viewed a family.

2 8 Religion/culture.

2 8 1 Cultural Understanding of Right to Family Life

D Brown argues that the family is the 'crucible for the transmission of religious and cultural beliefs.'¹⁶⁷ It is through the family that moral or cultural values are transmitted from one generation to the other. In international and domestic law, this basic unit on which human society is founded provides the natural framework for the financial, emotional and material support for the growth and development of its members, particularly children.¹⁶⁸ The Human Rights Committee (HRC), responsible for monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), has noted that a treaty definition of the concept of family at the international level would be ineffectual given the different conceptions of family that exist throughout the world and even within a single given state.¹⁶⁹ The family is still a concept in transition.¹⁷⁰

¹⁶³Stanton Ramsamy Selybolt Carolyn "Culture Sociology of the Middle East, Asia and Africa" *An Encyclopaedia* 2012 140.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ Brown "Freedom From or Freedom For: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 *U.B.C. L. Rev* 551 -579.

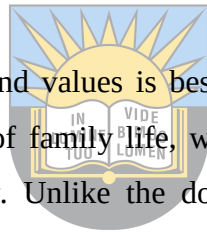
¹⁶⁸ Patterson, Andrews "Protecting the child against separation from the family environment: Articles 9 and 25 of the UN Convention on the Rights of the Child" 1996, *Child. Legal Rts. J* 2.

¹⁶⁹ General Comment No. 19: "Protection of the family, the right to marriage and equality of the spouses" (Art. 23) [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6f97648603f69bc12563ed004c3881?](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bc12563ed004c3881?) (Last accessed 15 May 2016).

¹⁷⁰ Van Bueren "The International Protection of Family Members' Rights as the 21st Century Approaches" 1995 *Hum. Rts* 732-733.

Around the world, social, economic, political and scientific changes have resulted in an in-depth re-evaluation of the scope and meaning of family.¹⁷¹ The traditional definition of family, which revolved around the marital union and blood relationships between husband and wife, parent and child, has been expanded to recognise the once unconventional familial ties. The importance of religious and cultural values must not be overlooked. Noteworthy is the fact that, there are different understanding of family for example between western and non-western countries and these differences play an important role in how we understand children's rights.

Similarly, conservative understandings of family life are often in contrast with liberal views of family life. Research indicates that more traditional cultures and religions have a strong belief in the structure of an authoritarian and patriarchal society therefore restricting conceptions of family that either challenge or fail to conform to the dominant family structure.¹⁷²



The influence of cultural traditions and values is best exemplified through an analysis of African communitarian conceptions of family life, which often sit uneasy with 'western' individualistic conceptions of family. Unlike the dominant conception of family in the Europe, African society is communitarian and revolves around the extended family.¹⁷³ Within the extended family, each individual member is assigned specific roles, rights and duties that make that person a part of the social and economic unit. These rights and duties are identifiable through naming. Cobbah notes that the naming of individuals within kinship structures defines and institutionalises the family member's social role.¹⁷⁴

Cobbah further argues that while these roles may appear to be of only morally persuasive value to the western observer, they are 'essentially rights which each kinship member has towards his kin.'¹⁷⁵ He states that:

“When it comes to naming and roles, under the African family, conceptions like aunt, uncle and cousin do not necessarily exist. A mother's sister is a younger or older result of this childcare is very much a communal affair and children are referred to as 'our

¹⁷¹ Dolgin “Defining the family: Law, technology and Reproduction in an Uneasy Age” (1997) 17.

¹⁷² Peens and Louw ‘Children's rights: A review of children and adult perceptions’ (2000) *Med & L* 283.

¹⁷³ Cobbah ‘African values and the Human rights Debate: An African Perspective’ (1987) *Hum. Rts* 315.

¹⁷⁴ Cobbah 1987, *Hum Rts* 316.

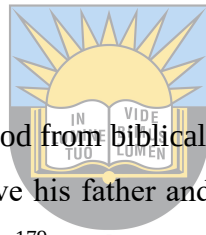
¹⁷⁵ Cobbah 1987, *Hum Rts* 318.

children' i.e. belong to the lineage or kinship group rather than to two individuals. It is from this conception of family that the commonly cited adage that 'it takes a village to raise a child' emanates. In addition to this, the harmonization of duties and rights within such a community becomes more acceptable than it is in western law".¹⁷⁶

2 9 Religious Understanding of Right to Family Life

2 9 1 Islamic

A Muslim family consists of a legally married couple (husband and wife) and their children. The family can also include their parents, siblings and other relatives. A Muslim family comes into existence through either: blood relationship and marriage.¹⁷⁷ The basic family unit of husband and wife (man and woman) is established solely through marriage. Family members include blood relatives of both husband and wife, whether they live under single roof or not.¹⁷⁸ Muslim families seem to blend between nuclear and extended families.



2 9 2 Christianity

In Christianity, the context is understood from biblical verses such as Ephesians 5:31, which states "For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh."¹⁷⁹ Without a man and a woman coming together in marriage, there is no family.¹⁸⁰ Christianity thus offers a narrow definition of a family and seems to focus more on the nuclear family. It excludes homosexual families. God's desire for the family is that it produce and multiply.¹⁸¹ This excludes homosexual families who may naturally be unable to procreate or have no intention to pro create.

Religious scholars hold the same view, as Kostenberger writes that the Bible defines family as the union of one man and woman in matrimony, which is blessed with children, natural or

¹⁷⁶ Cobbah 1987, *Hum Rts.* 320.

¹⁷⁷ Furqaan Institute of Quranic Learning "An ideal Muslim Family" <http://www.fiqh.org/resources/an-ideal-muslim-family/> (last accessed 21 May 2016).

¹⁷⁸ Fiqh "An ideal Muslim Family" <http://www.fiqh.org/resources/an-ideal-muslim-family/> (last accessed 21 May 2016).

¹⁷⁹ Peach "How does God define family?" <http://www.whatchristianswanttoknow.com/how-does-god-define-family/> (last accessed 21 May 2016).

¹⁸⁰ *Ibid.*

¹⁸¹ Genesis 1:27, "So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." Revised Standard Version 1989.

biological.¹⁸² This is in line with Genesis 2 verse 24, which sets out how the Bible defines a family, as a man being joined to one woman (wife).¹⁸³ Homosexual relationships are excluded in the Christian definition of family because they fall short of procreation, since they are by their nature unable to fulfill God's mandate for starting a family.¹⁸⁴ However, some scholars who extend the definition of family to encompass people who are in a polygamous marriage. This can be noted from the Holy Bible, which gives an example of King Solomon who had multiple wives and concubines. This entails that there are converging views on the exact content or definition of family/marriage.

2 10 Family and Marriage

In many societies, marriage is important for family stability. Social science research demonstrates two almost incontestable conclusions: stable, marital structures provide profound benefits for men, women and children, while, on the other hand, the breakdown of stable, marital structures poses significant social costs upon individuals and society. Marriage is more than the union of two persons; it is a social institution that is culturally patterned and integrated into basic social institutions.¹⁸⁵ In RSA, one out of every two marriages ends in divorce.¹⁸⁶ Divorce affects not only the adults who make this choice, but the children as well. Children's emotional and psychological responses to divorce depend on their age. In most cases, children are often confused by the divorce and they are mostly traumatised by the event. Furthermore, stable marriages have a positive effect on the quality of family life. However, certain cultural and religious practices lead to marriage being an oppressive institution.

2 11 International Law Development & Recognition of Family Life

The perception of children has changed over time since the end of World War II up to present day. This sentiment was shared in the case of *Villanatos* where it was noted that the court must take into account developments in society and changes in perception of social and civil-status.¹⁸⁷ Puppinck writes that this decision marks a new stage in the accelerated dissolution

¹⁸² Kostenberger "The Bible's Teaching on Marriage and Family" *Family Research Council* available at <http://www.frc.org/brochure/thebibles-teaching-on-marriage-and-family> (last accessed 09 May 2016).

¹⁸³ Genesis 2 verse 24 of the Holy Bible, Revised Standard Version, 1989.

¹⁸⁴ *Ibid.*

¹⁸⁵ See online article entitled "YoungTheSocialRoleoftheFamily" www.worldfamilypolicy.org/policyfamily-4-23.pdf (last accessed, 24 April 2016).

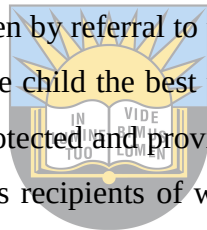
¹⁸⁶ *Ibid.*

¹⁸⁷ *Villanatos and others v Greece* 29381/09 Para 56.

of the legal definition of the family, which has become a concept, which is flexible to the point of inconsistency.¹⁸⁸ Furthermore in *Velcea and Mazare v Romania* the court noted that family life is not limited to social, moral or cultural relations but also encompasses interests of a material kind such as the obligations.¹⁸⁹

In 1924, the League of Nations adopted the Geneva Declaration of the Rights of the Child (herein referred to as the Geneva Declaration).¹⁹⁰ This historic declaration recognized and affirmed for the first time the existence of rights specific to children and the responsibility of adults towards them.¹⁹¹ The League of Nations was formed after World War I with an aim of protecting basic human rights standards. Thus, it adopted the five principles to protect children generally, but this discussion, will pay attention to is principle 2 of the Geneva Declaration. This principle points that the orphan and wife must be sheltered and succored.¹⁹²

This suggests that the forefathers of this document guaranteed the right of the child to belong found a family. This can further be seen by referral to the preamble of this instrument where it is stated that humankind owes to the child the best that it must give, thus everyone has a duty to make sure that children are protected and provided with their needs. This instrument is soft law. Children were regarded as recipients of welfare rather than holders of specific rights.¹⁹³



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The United Nations was founded after World War two in 1945.¹⁹⁴ Thus, there was need to officially confirm and accept the Geneva Declaration in order to avoid the gross human rights violations that had occurred during the two world wars. The research to highlight principle 6, which provides that a child should grow under the responsibility of his parents and the State, should provide care for children without families.¹⁹⁵ The period was one of strengthening of

¹⁸⁸ Gregor "The dilution of the family in human rights: Comments on Vallianatos and other ECHR cases on family life." 2014, *European Journal of International Law*, 16.

¹⁸⁹ *Velcea and Mazare v Romania*, 64301/01.

¹⁹⁰ Geneva Declaration of the Rights of the Child of 1924 adopted Sept 26 1924 League of Nations OJ Spec Supp 21, at 43 (1924).

¹⁹¹ Humanium "Declaration of the Rights of the Child 1959" available at www.humanium.org/en/childrens-rights-history/references-on-child-rights/geneva.declaration/ (last accessed 14 May 16).

¹⁹² Principle 2 of the Geneva Declaration of the Rights of the Child 1924.

¹⁹³ Kaime "The African Charter on the Rights and Welfare of the African Child: A Socio-Legal Perspective" 2009 *Pretoria University Law Press* Pretoria.

¹⁹⁴ UN "United Nations" available at www.un.org (last accessed 12 July 2016).

¹⁹⁵ Principle 6 of the Declaration of the Rights of the Child 1959.

the parent-child bond over all relationships external to the nuclear family and an emphasis on what parents must do for children.¹⁹⁶

The end of the World War II saw the world coming into face with gross human rights violations therefore, it was important to avoid a repeat of this by reconfirming human rights and put monitoring bodies to protect them, thus the ICCPR and ICESCR came to life. International human rights law comprises of the International Bill of Rights, which consist of the UDHR, International Covenant on Civil and Political rights (ICCPR) and the ICESCR among other sources.¹⁹⁷ Both Covenants recognize the importance of family as a foundation of society. Article 23 of the ICCPR provides that a man and woman have a right to marry and found family.¹⁹⁸

The year 1979 saw the celebrations of the International Year of the Child, which was a follow-up on the successes and challenges of the implementation of the 1959 Declaration on the Rights of a Child. This saw the adoption of the Convention on the Rights of the Child (CRC). Jerry argues that the 1924 and 1959 Declarations paved way for the negotiation of the CRC.¹⁹⁹ The two Declarations are non-binding soft law as articulated in Article 38 (1) (c) of the ICJ.²⁰⁰ The end of World War II marked the beginning of a new chapter in the history and development of human rights. The UDHR was signed in 1948 is a milestone document in the history of human rights.²⁰¹

The Declaration signed by States sets out the human rights standard to be observed by all States. Article 16 of the UDHR states that

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family, They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage and family according to the declaration are inherently linked. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. Marriage is also seen as an important force to families.”²⁰²

¹⁹⁶ “Social change and the family” available at archive.unu.edu/unupress/unupbooks/uu13se02ht (last accessed 16 May 16).

¹⁹⁷ “Human Rights for All: International Covenant on Economic, Social and Cultural Rights,” 2015 *A Handbook* 5.

¹⁹⁸ Article 23 of the ICCPR.

¹⁹⁹ Kuper *International Law Concerning Child Civilians in Armed Conflict* 1997 43.

²⁰⁰ Article 38 (1) (c) of the ICJ Statute.

²⁰¹ See UDHR Article 16.

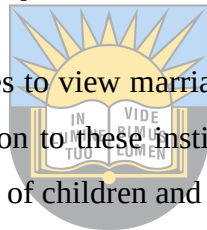
²⁰² Article 16 UDHR.

Furthermore, Article 16(3) of the UDHR states that the family is the natural and fundamental group unit of society. The international Community entrenched the family as of fundamental importance in society and at the core of the human rights. The declaration did not attempt to provide a definition of what a family is. Even though the western dominated nuclear family was in the minds of the drafters, the beginning of decolonisation probably was a factor, which allowed them drafter to allow for a widest interpretation as family structures differed from one country to another as former colonies now had a chance to contribute to the narrative.

In 1966, through the ICCPR, the international community took a further of promote and protect family life.

Article 23(1) of the ICCPR states that the family is the 'natural' and fundamental group unit of society. Children are entitled to protection by society and the State. Section 23(3) requires that State Parties to the Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.²⁰³

The international community continues to view marriage and a family as being intertwined. States are obliged to provide protection to these institutions. This treaty is of significance because it seeks to address the welfare of children and families in marriage.



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In 1966 again, the international community took further steps to promote the right to family life as part of socio economic rights through the introduction of the ICSECR.²⁰⁴ The treaty provides an international legal framework, which sought to codifying and make binding the human rights indicated in the UDHR. It was drafted and adopted in 1966 and came into force on 23 March 1976.²⁰⁵ Article 10 states “that the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children”.²⁰⁶ This covenant binds States to ensure that enough measures are done to advance the socio economic rights of their citizen. With the family being at the core of the social life of the citizens. This treaty reaffirmed the family as being the fundamental group

²⁰³Article 23 of ICCPR.

²⁰⁴ See preamble of the ICESCR.

²⁰⁵ *Ibid.*

²⁰⁶ Article 10 of the ICCPR.

unit of society and the need for states to protect it. One would argue that since this treaty was signed during the cold war era, war and conflict was in the mind of the drafters.

In the case of *Hopu and Bessert v France*, the Human Rights Committee, reiterated its view that the concept of family in article 17 of the ICCPR must be given a broad interpretation to include “all those comprising the family as understood in the society of the State party concerned”.²⁰⁷

Some major human rights instruments contain provisions that directly and indirectly recognise and protect the family.²⁰⁸ Professor Van Bueren notes that there are three overlapping notions relating to the family in international human rights law; firstly, the ‘family’, which occurs in most instruments such as the ICCPR and the ICESCR²⁰⁹. Secondly, the concept of ‘family life’, referred to in the (ECHR)²¹⁰ and thirdly, the concept of ‘family environment’ which is found in the CRC and the African Children’s Charter (ACC).²¹¹

The CRC and the ACC refer to both the ‘family environment’ and ‘family’ in the same instrument. All three notions seem to cover common ground and, from an analysis of the jurisprudence seem to protect the similar interests. Even though the rights of children were included in the Geneva Declaration and the UDHR, it was argued that the special needs of children justified an additional, separate document hence in 1959 the United Nations adopted the Declaration of the Rights of the Child.²¹² This can be noted in that the 1959 Declaration expanded the Geneva Declaration principles albeit further adding more emphasis on the vulnerability of the child and need for special safeguards for him. Kuper argues that the 1959 Declaration point of departure is the principle that the child is weak and therefore requires

²⁰⁷ *Francis Hopu and Tepoaitu Bessert v France* 549/1993 U.N. Doc. CCPR/C/60/D/549/1993/Rev1 (1997).

²⁰⁸ Universal Declaration on Human Rights (1948) articles 12, 16, 18, 25 and 26; International Covenant on Economic, Social and Cultural Rights (1966) articles 10, 13.3 ; International Covenant on Civil and Political Rights (1966) art 23 & 17; American Convention on Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedoms articles 8 and 12, African Charter on Human and Peoples’ Rights (1986) articles 18, 27 & 29; Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) .

²⁰⁹ See ICSCR.

²¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

²¹¹ CRC and the ACRWC use both terms family and family environment. See preamble of both and article 20 of CRC.

²¹² Children Rights in Wales History of children’s human right available at www.childrenswales.org.uk/history-of-children-rights.aspx (last accessed 16 May 16).

special care and safeguards and childhood is the only privileged class, which transcends societies and epochs.²¹³ This resulted in the adoption of the CRC1990.

The CRC is only treaty that provides in detail the rights of a child. While other treaties do provide for these rights, they cover certain aspects and not as broad as the CRC. The CRC seeks to provide international legal protection to the rights of a child. The Preamble of this Convention states that:

“The States Parties to the Convention are “convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”.²¹⁴

A preamble of a treaty or legislation outlines what the treaty or legislation is about and what influenced the treaty or legislation to be drafted. Thus, for State parties in preamble of the convention to accept the duty to protect family life and respect family as a fundamental unit of society provides international legal protection of children s rights. Article 8 of the (ECHR) contains inter alia the right to respect for family life. This right is violated if a child is separated from her/his parents.²¹⁵



Having concluded the international treaties several States through their regional bodies sought to conclude treaties that would fit within their continental context. For Africa, while all the treaties addressed the right to family life it was crucial for African States to come up with their own treaty that related to African family life. Whereas Western Europe and American understanding of a family was a nuclear family, in Africa an extended family is at the core of the African society. Extended families have been around in Africa for a long time dating back as far as the Stone Age. While European and American family life - centred around being productive and successful in the industrial world in Africa Ubuntu was at the core of family and social life.

The ACHPR (also known as the Banjul Charter) is a regional human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent.²¹⁶

²¹³ J Kuper 1997 42.

²¹⁴ UNHR “CRC” <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. (Last accessed 21 May 2016).

²¹⁵ Doek “Commentary on the United Nations Convention on the Rights of the Child, Articles 8-9: The Right to Preservation of Identity and the Right Not to Be Separated from His or Her Parents” (2006) 15.

²¹⁶ See Preamble of ACHPR.

Article 18(1) and (2) states that the family shall be “the natural unit and basis of society”. The family shall be protected by the State, which shall take care of its physical health and moral. This clause is based on the treaties from other international treaties like the CRC, ICCPR AND ICSECR, by including this clause in its treaties the African States sought to reiterate and guarantee the protection of family and family life. The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community.²¹⁷ This is one of the first regional instruments, which recognises the right to family life and recognises families as an important fabric to morals of society.

The ACRWC provides a regional approach on how to provide for the rights and welfare of children. Article 18 provides for protection of the family and states that:

- (1) The family shall be the “natural unit and basis of society”. It shall enjoy the protection and support of the State for its establishment and development, (2) States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child, (3) No child shall be deprived of maintenance by reference to the parents’ marital status.²¹⁸

The charter outlines a definition for the family, State obligations towards for families and children. The charter is a regional treaty mirrors the CRC in attempting to cater for children’s rights. The charter borrows much of its clauses from section 23(1) to 23(3) of the ICCPR.

African Youth Charter (AYC) reasserts the right to family life. The AYC is a political and legal framework, which provides strategy and direction for youth empowerment and development activities at the continental, regional and national levels across Africa.²¹⁹ Article 8 states that “the family, as the most basic social institution, shall enjoy the full protection and support of States parties for its establishment and development noting that the structure and form of families varies in different social and cultural contexts”.

The Charter not only reemphasise the role of family in society and need for State protection, but it further recognises the various types of families that exist within the African society and

²¹⁷ *Ibid.*

²¹⁸ UN Article 18 of ACRWC.

²¹⁹ Carmma “African Youth Charter” available at <http://www.carmma.org/resource/african-youth-charter> (last accessed 21 May 2016).

requires States to protect all types of families that exist within their jurisdictions. All these legal instruments seek to highlight the importance of family life, the various understandings of what a family is in different States and the development that a family has undergone in the recent years. However, some of these instruments are yet to reflect the changing nature of families especially in Africa especially with recognition of same sex families. Nevertheless, the family continues play an important role in the livelihood of all persons.

2 12 Development of Family Life in RSA.

The concept of the nuclear family has never accurately captured the norm of all RSA families. RSA law contains no specific definition of the family. However, in the case of *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others*, the court stated that:

“Families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.”²²⁰

Thus in the RSA context, the concept of family includes when we speak of RSA families, we talk not only of the nuclear family, but also of extended families, as well as caregivers or guardians.²²¹ The development of family policy by government in RSA can be traced back to the institutional segregation of population groups that prevailed during the apartheid era²²² The apartheid system essentially gave rise to a dualistic family policy whereby a strong differentiation was made between white families and those of Africans, colored’s, and Indians.²²³ The core of the Western family was adopted as the model of family life in the country.²²⁴

Following the establishment of a new democratic dispensation in 1994, the post-apartheid Government instituted various policy and legislative reforms aimed at, among other things,

²²⁰ *Dawood v Minister of Home Affairs and Others* para 37.

²²¹ Holborn and Eddy “First Steps to Healing the South African Family” 2011 *South African Institute of Race Relations* 7.

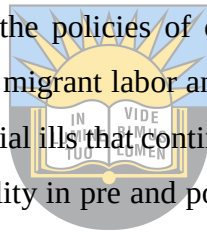
²²² Amoateng & Richter “Social and Economic Context of Families and Households in South Africa” In Amoateng and Heaton (Eds.) “Families and Households in Post-Apartheid South Africa” 2007, Cape Town: HSRC 31.

²²³ Harvey “Social change and family policy in South Africa, 1930 to 1986” 1994 *Pretoria; Human Sciences Research Council* journal 43.

²²⁴ *Ibid.*

the realignment of the country's institutions, to transform the RSA society.²²⁵ However, the family is not explicitly addressed in many of these policies. Rather it is usually inferred, and in consequence, most socio-economic benefits indirectly filter down to the family. For example, the five major social assistance policies in the country focus only on specific individuals, namely: older persons (The State Old Age Pension), people with disabilities (the Disability Grant), and children (the Child Support Grant, the Foster Care Grant, and the Care Dependency Grant).²²⁶ However, the needs of such individuals may not necessary be congruent with those of the family unit. Past and present poverty analyses and strategies of intervention have also primarily concentrated on households, as opposed to families, thereby causing policies to overlook intra-family dynamics in the country.²²⁷

In light of this background that the absence of an explicit policy framework on the family in RSA has, over the years, been identified by policymakers, academics, civil society, and concerned citizens as a critical shortcoming that needed to be urgently addressed. In particular, the detrimental effects of the policies of colonial apartheid on the family (for example, land disposessions, and the migrant labor and homeland systems) are viewed to a connection with the multiplicity of social ills that continue to confront contemporary RSA.²²⁸ Apartheid, unemployment and inequality in pre and post-apartheid RSA negatively affected family life for the poor ²²⁹



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Thus there is no clear guidance on the content of family life, as there is no definition of the term family in its domestic law. In RSA, the exercise of guardianship, custody and access usually takes place within a family relationship of some sort.²³⁰ Heaton notes that in RSA family can be used in a wide or narrow sense to an extent that it includes child headed households ,and persons living together who are not biologically related.²³¹ In this regard, one

²²⁵ Department of Social Development in South Africa "White paper on families"
http://www.dsd.gov.za/index.php?option=com_docman&task=cat_view&gid=33&Itemid=39
(last accessed 24 March 2016).

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ Ratele, Sheferand and Clowes "Talking South Africa fathers: a critical examination of men's constructions and experiences of fatherhood and fatherlessness" 2012 *South African Journal of Psychology* 2012 33.

²³⁰ Boniface "Do Children in South Africa have a right to family life? An Exploration of the Development of the concept "a Right to a family" in South African Law" *Scientific Cooperation's International Journal of Law and Politics* 4.

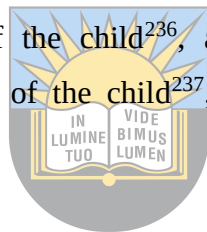
²³¹ Heaton *South African Family Law* (2011) 3-11.

must then consider different domestic laws of RSA in a bid to understand the content of children's right to family life.

Section 28 (1) (b) of the Constitution guarantees the children the right to family and parental care.²³² Section 28 is given effect to when one examines the Children's Act. Section 12 of the Constitution further protects the privacy of the family and its members.²³³ The preamble of the RSA Children's Act provides that a child should grow in a family.²³⁴ However, a description of what constitutes a family is not provided. This Act only defines a concept that relates to family that is a family member in Section 1 of the Act states that:

"A family member in relation to a child means (a) a parent of the child, (b) any other person who has parental rights and responsibilities in respect of the child (c) a grandparent, brother, sister, uncle, aunt or cousin of the child, (d) any other person with whom the child has developed a significant relationship based on physiological and emotional attachment which resembles a family relationship." ²³⁵

The Children's Act defines a family member in relation to the connection the member has with the child such as a parent of the child²³⁶, any other person who has parental responsibilities and rights in respect of the child²³⁷, the child's siblings, aunt, uncle or cousin.²³⁸



Furthermore, the Children's Act states that a family member includes categories of people who have a significant relationship with the child, based on psychological and emotional attachment, which resembles a family relationship.²³⁹ The Children's Act offers a wider description of family as evidenced by its description of a family member. Some of the objectives of the Act are to promote and strengthen families and to give effect to the constitutional right that children must family and parental care or alternative care when removed from family environment. Section 18 of the Act stipulates that the term parental responsibilities and rights include the right to maintain contact with the child and contribute to the maintenance of the child.²⁴⁰

²³² Section 28(1) (b) of the Constitution of Republic of South Africa 1996.

²³³ Section 12 of the Constitution of Republic of South Africa 1996.

²³⁴ Preamble of Children's Act.

²³⁵ Section 1 Children's Act.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

RSA case law is of importance if one wants to understand how the right is defined/applied. In *Re: Certification of the Constitution of the Republic of RSA*, 1996 the Constitutional Court stated that there is no universal acceptance of the need to recognize the rights to marriage and family life as being fundamental in the sense that they require express constitutional protection.²⁴¹ The Court also stated that the possible outcomes of constitutionalizing family rights is uncertain because families are constituted and dissolved in a variety of ways.

Human rights are universal and inalienable; indivisible; interdependent and interrelated.²⁴² In *Dawood; Thomas* case it was held that the infringement of family life of aliens was an infringement of human right to dignity and equality.²⁴³ The case highlighted the link between right to family life and right to movement (migration). Thus, the promotion and protection of the right to family life also promotes the Constitutional right to dignity²⁴⁴, equality²⁴⁵, adequate standard of living²⁴⁶, privacy²⁴⁷. In the case *Centre for Child Law*, it was held that Section 28(1) (b) should be interpreted in such a way, which permits adoption, by stepparents as this promotes the right to family life.²⁴⁸ In this case the applicant sought and was granted an order that section 230(3) of the Children's Act, does not preclude a child from being adoptable where the child has a guardian and person seeking to adopt the child is the spouse or life- partner of guardian. Section 242 of the Children's Act does not automatically terminate all parental responsibilities and rights of guardian where such adoption order is granted.²⁴⁹

The Green Paper on Families main aim is to promote family life and strengthen families in RSA. The paper views the family as a key development imperative and calls for a new approach towards the family in RSA. The paper seeks to mainstream family issues into government-wide, policy-making initiatives to foster family well-being in the country.²⁵⁰

²⁴¹ *Re: Certification of the Constitution of the Republic of South Africa 1996(10) BCLR 1253 (CC)* para 65.

²⁴² UNFPA, "Human Rights Principles" 2005 available at <http://www.unfpa.org/resources/human-rights-principles> (last accessed 20 May 2016).

²⁴³ *Dawood; Shalabi; Thomas v the Minister of Home Affairs* 25.

²⁴⁴ Section 10 of the Constitution of Republic of South Africa 1996.

²⁴⁵ Section 9 of the Constitution of Republic of South Africa 1996.

²⁴⁶ Section 22 of the Constitution of Republic of South Africa 1996.

²⁴⁷ Section 13 of the Constitution of Republic of South Africa 1996.

²⁴⁸ *Centre for Child Law v the Minister of Social Development* 2014 (1) SA 577 (GSJ).

²⁴⁹ *Ibid.*

²⁵⁰ Department of Social Welfare "Green Paper on Families South Africa" <http://www.sabinetlaw.co.za/justice-and-constitution/articles/green-paper-families-published-gazette> (last accessed 28 October 2017).

Race and economic relations are also important factors that have shaped family life in RSA as it reconfigured social relations among them.²⁵¹

This duality was further reinforced by the underdevelopment of African economies and reduced their functions to that of migrant labour workers. Furthermore, as part of its principles, it acknowledges the diversity of families and the need to promote the children's right to family life. This entails that the Green paper accepts and gives legal recognition to different family structures and therefore aims to ensure that family life is promoted, and families are strengthened specifically through Government initiatives/policies.

Colonialism and missionaries changed the traditional African family setup, which included the extended family. However, today because the constitution governs all conduct and law²⁵², Section 39 of the Constitution²⁵³ obliges the courts to interpret and develop the common law to be in line with the constitution. This was affirmed in the *Fourie* case²⁵⁴, where the common law definition found in the Marriages Act, which excluded same-sex marriages, was declared invalid, and this was echoing the sentiment of the legal reasoning in *Dawood* where it was held that marriage is the basis of society and should be promoted in different spheres.²⁵⁵ Section 9(3) of the constitution states that

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”²⁵⁶

Cameron J in the judgment of the case of *Fourie* vs Minister of Home Affairs and others noted that:

“family as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constitutes family life should change as social practices and traditions change; permanent same-sex partners are entitled to found their relationships in a manner that accords with their sexual orientation and such relationships should not be subject to unfair discrimination. Same-sex life partners are “as capable as heterosexual spouses of expressing and sharing love in its manifold form.”²⁵⁷

²⁵¹ *Ibid.*

²⁵² Section 2 of the Constitution of Republic of South Africa 1996.

²⁵³ Section 39 of the Constitution of Republic of South Africa 1996.

²⁵⁴ Court accepted that same sex marriages/union should be legalised in South Africa.

²⁵⁵ *Dawood v Minister of Home Affairs* 38.

²⁵⁶ Section 9(3) of the Constitution of Republic of South Africa 1996.

²⁵⁷ *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) 19.

The above-mentioned ground-breaking decision has had a great impact on the development of family life by recognising LGBTQI marriages and families as well. The new democratic era and constitution have changed the way the government, the people view human rights, and the bill of rights, which is the corner stone of democracy, seeks to promote, protect and develop these rights in line with international law. Thus, RSA complied with its international law obligations.

2 13 Summary

The chapter started of tracing the historical meaning of family life. The chapter evaluated different schools of thoughts such as the sociologists and historians who trace the origins of family life from pre-industrial French and British societies. The emergence of mordent families was also traced. All schools of thought concur on the need for a definition of a family however; they seem not to provide that definition due to various factors but instead choose to provide an understanding of the role of a family to a person. Sociologists define the family more in terms of the way members relate to one another than on a strict configuration of status roles.

The chapter went on the examine the view of family and family life from a feminist and Marxist perspective. The schools of thought played a dominant role in the social and academic discourse in the nineteenth century. Marxists view the family as a hindrance to the workers goals to defeating the rich while the feminists viewed the role of a woman in a family and how they argue it disempowered women. The tracing of the origins on the LGBTQI families was an important aspect of the chapter as it evaluated the origins of a modern family trend that is developing across the world. An analysis of how various countries such as United States of America, European countries have adopted and embraced this modern was crucial in understanding what lessons can be drawn for RSA. The cultural and religious views were also weighed into the discussion as they form part of the human societal living.

The chapter then concluded by evaluating the international law development of the right to family life and its development in RSA. It was observed that much of the recognition of family life began with the UDHR, which laid the groundwork for my future treaties to work on. The CRC provided a comprehensive detail on the rights of a child. The status of international law in RSA legal system was noted. The next chapter will discuss the various international and regional instruments that deal with the right to family life to evaluate what the content of their obligation is and entails.

Chapter 3

3 INTERNATIONAL AND REGIONAL SOURCES ON THE RIGHT TO FAMILY LIFE

3 1 Introduction

When States become parties to a treaty, they assume rights, duties and obligations towards their citizens and other States. By becoming a party to these covenants and charters, RSA pledges to fulfil the spirit, purport and objects of the instruments to ensure the lives of its people are improved. These instruments lay out the duties and obligations that States must undertake. This chapter will examine the content of these instruments in relation to children's rights to family life. Secondly, to understand what the obligation is of States towards children.

3 2 Universal Declaration Human Rights, 1948

The UDHR, which was adopted in 1948, is a milestone document in the history of human rights. The UDHR adopted just after the end of the Second World War and it sought to provide for international human rights for all citizens of the world. While the UDHR is not a binding source of international law, it conveys the spirit of the world's expectations regarding human rights. The UDHR, is the single most important statement of ethics, its authority is unparalleled. Many legal experts estimate that it has acquired the status of international customary law.²⁵⁸ The international-level commitment to upholding human rights that exists today would be unthinkable without the UDHR.²⁵⁹ Whilst the UDHR was drafted more than six decades ago, it continues to be relevant because it touches on many socio-economic issues such as education, poverty and standard of living.

However, the declaration has not escaped criticism; some scholars argue that uncertainty as to how and by whom the declaration is to be implemented. "To what extent is it to lead to world government? What, if any, are the principled limitations on that tendency?"²⁶⁰ The declaration lacks enforcement mechanisms, which are essential in every treaty or law, and fails to prioritise real pressing human rights issues like prevention of torture and genocides

²⁵⁸ Baets "The Impact of The Universal Declaration Of Human Rights On The Study Of History, History and Theory" 2009 *Wesleyan University*, 48.

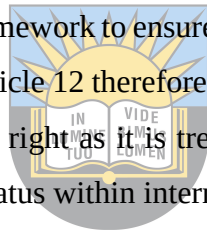
²⁵⁹ "Commentary the Eternal UN Declaration of Human Rights" <http://standardtimespress.org/?p=6769> (last accessed 22 May 2016).

²⁶⁰ Kalb "Commentary on the UDHR " available at <http://antitechnocrat.net/node/37> (last accessed 22 May 2016).

considering that it was written at a time when the world had just witnessed serious human rights violations during the Second World War.²⁶¹ Nevertheless, it continues to have the binding effect on States on human rights issues.

The preamble of the UDHR states that whereas inherent dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, the drafters and the international community recognised a family as foundation of humanity and attribute it to be linked to a person's dignity. Article 12 states that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.²⁶²

In article 12 States sought to ensure a family and home are strictly protected as they form the foundation of a human life and are linked to a dignity. Thus, all States are expected to take measures from legislative to policy framework to ensure that families and homes of its citizens and those living in it are protected. Article 12 therefore, brings it question whether family life should be treated as a first generation right as it is treated with great status in international law. Nevertheless, it holds a special status within international law.



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The Declaration sets out the human rights standard to be observed by all States. Article 16 of the UDHR states that

- (1) "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family, They are entitled to equal rights as to marriage, during marriage and at its dissolution, (2) Marriage shall be entered into only with the free and full consent of the intending spouses, (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".²⁶³

In Article 16 for the first time, the international community recognises women and man as equal. This has had an effect and made changes to how families have transformed since 1948 up to present. The article recognises marriage, family as inherently linked, and religion alongside having influence on how a family and marriage are founded. Article 2 recognises the need for freedom and one's dignity in entering into marriage and largely being part of a

²⁶¹ *Ibid.*

²⁶² Article 12 of UDHR.

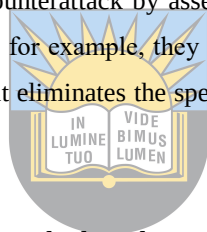
²⁶³ Article 16 of UDHR.

family.²⁶⁴ Article 3 provides an express and fundamental understanding of the role of family in society and how States view family. The Oxford dictionary defines something natural as existing in or derived from nature; not made or caused by humankind.²⁶⁵ Thus, because a family is something that is not created by humankind, but it is of fundamental significance to society's foundations and worth to be protected. This places an obligation on States to protect a family and family life as it is the fabric of society.

James Klaib however argues, "As a natural functional unit the family involves sex-role differentiation, so the relation between the family as the natural and fundamental group unit of society and the demand for sexual egalitarianism is unclear."²⁶⁶

He further asserts that,

"The abolition of the family as a social institution, through suppressing customs and attitudes that support it, turning its functions over to the government, and eliminating distinctions between the family and other groups of individuals living together. Pro-family forces could legitimately counterattack by asserting that the Declaration makes family values a human right. Thus, for example, they could define "gay marriage" as a violation of human rights because it eliminates the special position to which the natural family is entitled by this article."²⁶⁷



Article 23(3) states that everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.²⁶⁸ James Kalid argues that Paragraph 2 said that pay must be based on productivity.²⁶⁹ Now it turns out it must be based on need. The two principles are inconsistent.²⁷⁰ The institution continues to be given due recognition and protection even in welfare and labour law. Since the declaration recognises a family as part of human dignity it is essential that workers are remunerated in such a manner that does not infringe on their dignity by being unable to provide for their families. Thus, States are now obliged to ensure that their labour laws and their standard of living in the countries are of such

²⁶⁴ Article 12 of UDHR.

²⁶⁵ Oxford dictionary <http://www.oxforddictionaries.com/definition/english/natural> 9 (last accessed 22 May 2016).

²⁶⁶ Kalb "Commentary on the UDHR", available at <http://antitechnocrat.net/node/37> (last accessed 22 May 2016).

²⁶⁷ *Ibid.*

²⁶⁸ Article 23(3) of UDHR.

²⁶⁹ Kalb "Commentary on the UDHR," available at <http://antitechnocrat.net/node/37> (last accessed 22 May 2016).

²⁷⁰ *Ibid.*

a standard that they do not infringe on the human dignity but continue to support the institution of family and family life as it is of fundamental importance to society.

Furthermore, Article 25 states that,

(1) “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”²⁷¹

Article 25(1) assumes the natural family and the sole (male) breadwinner, and to that extent is helpful to anyone who wants to change accepted understandings of human rights in a more conservative direction.²⁷² Article 25(2) the provision points in opposing directions.²⁷³ A requirement of special care and assistance for motherhood sounds like approval of traditional sex roles. Such a provision assumes that the interests of mothers are not simply identical with those of fathers or of other people suffering from a temporary reduction in their availability for work. The UDHR therefore lends support to reinterpreting human rights in a direction at odds with the radical feminist sense now generally accepted. On the other hand, to the extent, “social protection” includes protection supplied by such social institutions as the family; the provision suggests that the family is a bad thing because it is intrinsically unequal. The very existence of the family as an institution means that the social protection of children varies depending on whether they are born in wedlock or not.²⁷⁴

The UDHR further provides for protection of family life under socio –economic rights. In addition to Article 23(3), which requires labour laws to be aligned, and remuneration to be sufficient, enough to ensure people live a decent life worth of their dignity. This remuneration must ensure that these citizens are able provide for shelter food etc.²⁷⁵ These are some of the measures that States must take to ensure that they provide social assistance for their citizens.

²⁷¹ Article 25(1) of the UDHR.

²⁷² *Ibid.*

²⁷³ Article 25(2) of the UDHR.

²⁷⁴ Kalb “Commentary on the UDHR ” available at <http://antitechnocrat.net/node/37> (last accessed 22May 2016).

²⁷⁵ Article 25(3) of the UDHR.

States such as RSA through the RSA Social Security Agency seek to advance Social security for its citizen's.²⁷⁶

3 3 International Covenant on Civil and Political Rights 1966

The ICCPR provides another step by States to ensure that family life is protected. RSA became a signatory to the covenant in 1994, ratified it in 1998 and signed additional optional protocols to the ICCPR.²⁷⁷ Zimbabwe ratified the covenant in 1991.²⁷⁸ Article 23(1) of the Covenant states that the family is the “natural” and fundamental group unit of society. Children are entitled to protection by society and the State. Section 23(3) requires that State parties to the Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.²⁷⁹ This provides an attempt to cater for the children's right to family life.

The United Nations Human Rights committee in its thirty fifth session noted that Article 24 of the ICCPR recognizes the right of every child, without any discrimination, to receive from his family, society and the State the protection required by his status as a minor.²⁸⁰ As a result, the implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant.

There is also a need for States to ensure that in all other rights to its citizens there is a separation between adults and children in so far as limitation of rights is concerned. The covenant expressly indicate to States measures to be adopted with a view to affording minors greater protection than adults.²⁸¹ One could therefore suggest that death penalty may not be imposed on persons below the age of 18, while juveniles during criminal proceedings must be separated from adults in order to ensure that they receive adequate care and protection.

²⁷⁶ South African Social Security Agency Act No 9 of 2004, sets up the agency in charge of distributing welfare services in the country through welfare grants.

²⁷⁷ Claiming human rights “South Africa” <http://www.claiminghumanrights.org/southafrica.html?L=0>. (last accessed 5 March 2016).

²⁷⁸ Claiming Human Rights “Zimbabwe” <http://www.claiminghumanrights.org/zimbabwe.html?&L=0> (last accessed 5 March 2016).

²⁷⁹ Article 23(3) of the ICCPR.

²⁸⁰ Human Rights Committee General Comment Number 17 Article 24 Rights of a child HRI/GEN/1/Rev9 (Vol 1).

²⁸¹ *Ibid.*

The covenant thus provides guidelines on the type of treatment that the State should provide towards the children in relation to other citizens in so far as children's civil and political rights are concerned. Like any other international instrument, the UDHR allows for a margin of appreciation. The Human Rights Committee notes that the measures to be adopted are not specified in the Covenant and it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction.²⁸²

The right to special measures of protection belongs to every child because of his status as a minor. Nevertheless, the Covenant does not indicate the age at which he/she attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions. In this respect, States should indicate in their reports the age at which the child attains his majority in civil matters and assumes criminal responsibility. States should also indicate the age at which a child is legally entitled to work and the age at which he is treated as an adult under labour law. States should further indicate the age at which a child is considered adult for the purposes of article 10, paragraphs 2 and 3.²⁸³

The committee in conclusion noted that, the responsibility for guaranteeing children the necessary protection lies with the family, society and the State.²⁸⁴ Although the Covenant does not indicate how such responsibility is to be apportioned, it is primarily incumbent on the family, which is interpreted broadly to include all persons composing it in the society of the State party concerned, and particularly on the parents, to create conditions to promote the harmonious development of the child's personality and his enjoyment of the rights recognized in the covenant.

States are required to indicate how society social institutions and the State are discharging their responsibility to assist the family in ensuring the protection of the child. Committee considers it useful that reports by States parties should provide information on the special measures of protection adopted to protect children who are abandoned or deprived of their

²⁸² *Ibid.*

²⁸³ *Ibid.*

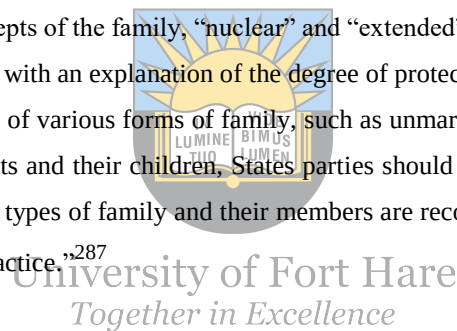
²⁸⁴ *Ibid.*

family environment to enable them to develop in conditions that most closely resemble those characterizing the family environment.²⁸⁵

The Human Rights committee asserts in their reports, States parties often fail to give enough information on how the State and society are discharging their obligation to provide protection to the family and the persons composing it.²⁸⁶ They further notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system.

It further postulates that,

“... where diverse concepts of the family, “nuclear” and “extended”, exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.”²⁸⁷



Article 23 paragraph 2, of the covenant reaffirms the right of men and women of marriageable age to marry and to start a family. Paragraph 3 of the same article provides that no marriage shall be entered into without the free and full consent of the intending spouses. States party’s reports should indicate whether there are restrictions or impediments to the exercise of the right to marry based on special factors such as degree of kinship or mental incapacity. The Covenant neither does not establish a specific marriageable age for men nor for women, but that age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law.²⁸⁸

²⁸⁵ Human Rights Committee, General Comment Number 17 Article 24 Rights of a child HRI/GEN/1/Rev9 (Vol 2).

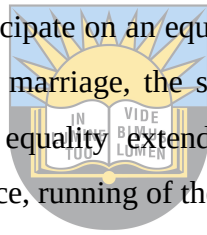
²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ Article 23 of ICCPR.

Furthermore, in this connection, the Committee notes that such legal provisions must be compatible with the full exercise of the other rights guaranteed by the Covenant; thus, for instance, the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages.²⁸⁹ In the Committee's view, however, for a State to require that a marriage, which is celebrated in accordance with religious rites, be conducted, affirmed or registered also under civil law is not incompatible with the Covenant. States are also requested to include information on this subject in their reports.²⁹⁰

Article 23, paragraph 4, of the Covenant provides that State parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at dissolution. With regard to equality as to marriage, the Committee wishes to note in particular that no sex-based discrimination should occur in respect of the acquisition or loss of nationality because of marriage. Likewise, the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name should be safeguarded. During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets. Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.



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3 4 International Covenant for Socio Economic Cultural Rights 1966

Article 2(1) of the ICESR states that each State party to the covenant shall undertake individually and through international assistance and co-operation, especially economic and technical, to full realization of the rights recognized in the present Covenant by all means, including particularly the adoption of legislative measures.²⁹¹ The text of this subsection of article two is the primary source of the obligations of State parties towards the realization of all the rights espoused in the Covenant.²⁹² By virtue of being, a party to this covenant RSA

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ Article 2(1) of ICESR.

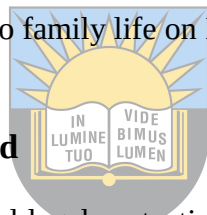
²⁹² Jackson *The International Covenant on Economic Social and Cultural Rights: A Critical Examination of the Relative Importance of Resource Constraints on Benchmarks and Benchmarking Processes in The African Context* (LLD-thesis, UCT, 2007)16.

thus accepts the obligation to ensure that reasonable steps are taken through legislative or policy measures to achieve the rights enshrined in the covenant.

The Human Rights Committee notes in this regard that such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the covenant, may also be economic, social and cultural. Every possible economic and social measure should be taken to reduce infant mortality and to eradicate malnutrition among children. To prevent them from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by any other means.

In the cultural field, every possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression.²⁹³ The inclusion of Right to family life on ICCPR and ICSECR of 1966.

3 5 Convention on Rights of Child



The CRC seeks to provide international legal protection to the rights of a child. RSA signed the treaty in 1993 and ratified in 1995 while Zimbabwe signed in 1990 and ratified in 1991.²⁹⁴ The adoption of CRC represents an acceptance on the part of the world community that the rights of certain categories of people are best protected in a single instrument designed for that purpose.²⁹⁵ The convention further points to the growing support by the world community to protect children's rights.²⁹⁶ The CRC is the principal normative framework relied on in most analyses relating to the rights of the child in Africa.²⁹⁷

The Preamble of this Convention states that;

“The States Parties to the Convention are “convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its

²⁹³ Human Rights Committee, 2012, HRI/GEN/1/Rev 9 8.

²⁹⁴ Claiming Human Rights “Zimbabwe” <http://www.claiminghumanrights.org/zimbabwe.html?&L=0> (last accessed 6 March 2016).

²⁹⁵ Kaime 2009 *Pretoria law University Press* 12.

²⁹⁶ Rwezaura “Law culture and children's rights in Eastern and Southern Africa” in W Ncube (ed) *Law culture tradition and children's rights in Eastern and Southern Africa* (1998) 289.

²⁹⁷ Kaime 2009 *Pretoria law University Press* 15.

members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”.²⁹⁸

In this case, States accept the responsibility to protect the dignity of future of society, children should be given protection and assistance in order to self-actualize and become valuable members of society. In that same spirit, paragraph 6 of the preamble of CRC State parties’ note that a 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.²⁹⁹ The importance of a family unit is emphasised as it provides love care and support, which sociologists have already identified as, provided by families and essential for the growth and wellbeing of the child. Thus, it is the responsibility of States to ensure that this social unit is protected.

Article 9 of the CRC states that:

“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately, and a decision must be made as to the child's place of residence.”³⁰⁰

Non-separation of parents and children is the starting point of Article 9 and a principle that State parties should have to uphold.³⁰¹ States are therefore, obliged to ensure that legislative framework prevents the separation of families either during divorces, criminal proceeding or wartime situation. Article 8 of the (ECHR), provides for the right to family life.³⁰² The right is violated if a child is separated from his /her family.³⁰³

However, this right can only be limited if it is in a democratic society in the interests of national security, public safety or the economic wellbeing 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.³⁰⁴ Whilst in some instances it is necessary, States must take

²⁹⁸ Preamble of CRC.

²⁹⁹ *Ibid.*

³⁰⁰ Article 9 of the CRC.

³⁰¹ Jaap 2009 *NLD* 62.

³⁰² Article 8 of the ECHR.

³⁰³ Jaap 2006 *NLD* 65.

³⁰⁴ Article 12 of the ECHR.

reasonable measures to ensure the welfare of the child is not greatly affected by this separation.

Article 18 provides a vivid image of what the drafters had in mind as far as the States Obligations towards children are concerned states that:

“States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.”³⁰⁵

The article places the burden on primary responsibility of children on parents. The article further introduces a key concept which is in the best interests of the child. This principle has become the backbone in many countries including RSA.³⁰⁶ The State parties’ obligation “shall ensure” implies that they must take positive measures to prevent a separation of child from his or her parents against their will.³⁰⁷ States are thus required to ensure that adequate provisions and services are provided for parents to best fulfil their duties.

3.6 African Charter on Rights and Welfare of the Child

The ACRWC was adopted in 1990. The charter is intended to take into account the economic, social, political, cultural and historical experience of African children.³⁰⁸ Muthoga notes that the idea to adopt an instrument on the rights of the African child ‘originated from a desire to address certain peculiarly African problems’ which had not been addressed by CRC.³⁰⁹ Some of the concerns included the among other concerns; the peculiarities of the African situation omitted from CRC were identified as the situation of children living under apartheid, disadvantages facing the African girl child.³¹⁰ The African conception of the community’s responsibilities and duties, the role of the extended family in the upbringing of children, the

³⁰⁵ Article 18 CRC.

³⁰⁶ Section 7 of Children’s Act.

³⁰⁷ Detrick, “A Commentary on the United Nations Convention of the Rights of a Child” (1999) 170.

³⁰⁸ Muthoga “Analysis of international instruments for the protection of the rights of the child” in *Community Law Centre International conference on the rights of the child: Papers and reports of a conference convened by the Community Law Centre* (1992) 123.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

use of children as soldiers, and problems of internal displacement arising from civil wars and internal insurrections.³¹¹

Thus, even though the CRC gave a direction as to how States should deal with children's rights it however, fell short of providing detailed direction on how individual countries or continents could address some challenges that are closer to home. The charter therefore forms part of a long line of international and regional instruments aimed at the promotion and protection human rights.³¹²

Thus, an effective implementation strategy for the rights and welfare of the child needs the collaborated efforts of both the State and the individual. The African Children's Charter considers this dichotomy by emphasising State obligations, on the one hand, and positing African cultural heritage as underlying the whole philosophy of the rights and welfare of the African child.

In addition to the above, in this regard, article 1 of the ACC calls upon all state parties to recognise the rights, freedoms and duties enshrined in the Children's Charter and to undertake all necessary steps to adopt measures that will give effect to the Charter.³¹³ At the same time, paragraph 6 of the Preamble states that the concept of the rights and welfare of the child should be characterised by the virtues of African cultural heritage and inspired by African civilisation. By positing African culture and civilisation as the inspiration for the protection and promotion of the rights and welfare of the child, the African Children's Charter considers the need for cultural legitimacy in implementing children's rights standards and of the need for enhancing it where cultural support is weak.³¹⁴

Article 30 of the ACRWC provides for the children not to be separated from their parents undergoing the criminal proceedings. Article 1 state that "States parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law."³¹⁵ Article 30 of the ACC is explicitly focused on children of incarcerated mothers.

³¹¹ *Ibid.*

³¹² Kaime 2009 *Pretoria law University Press* 16.

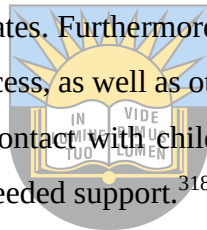
³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ Article 30 of the ACRWC.

However, the African Committee takes the view that Article 30 can be extended to apply to children affected by the incarceration of their sole or primary caregiver; this may be another family member such as a grandparent or a foster parent. This is because large numbers of children in Africa are orphaned or living separated from their parents but may still require the protections guaranteed in Article 30 when their sole or primary caregiver is deprived of their liberty.³¹⁶

Furthermore, States parties should take an individualized, qualitative approach that is nuanced and based on actual information about incarcerated parents/caregivers and children, rather than a quantitative, categorical approach based on generalized and simplistic assumptions. An individualized approach is required when reading Article 30 with Article 4 (the best interest of the child) of the ACC.³¹⁷ In order to encourage such an approach, statistics about children of incarcerated parents should be routinely and consistently gathered by relevant agencies to help develop policy and practice in States. Furthermore, professionals working with children at all stages of the criminal justice process, as well as other professionals such as teachers and social workers who may come into contact with children of incarcerated parents, must be trained to appropriately provide any needed support.³¹⁸



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There are four main principles governing the best interest of the child namely, a) Non-discrimination of children (Article 3 of the Charter); (b) The best interest of the child (Article 4(1) of the Charter); (c) The right to survival, protection and development of each child (Article 5 of the Charter); and 9 (d) The right to participation (Article 4(2) of the Charter).³¹⁹ Article 3 of the ACC provides that “every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/ her parents” or legal guardians” race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”³²⁰

³¹⁶ African Committee of Experts on the Rights and Welfare of the Child (Acerwc) General Comment No 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) On “Children of Incarcerated and Imprisoned Parents and Primary Caregivers” 2013 34.

³¹⁷ *Ibid.*

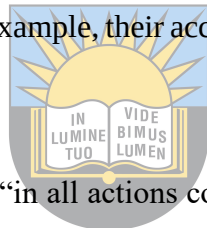
³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

In addition, to the above, the principle of non-discrimination is fundamentally rooted in several international human rights instruments. Articles 2 of the CRC, the ICCPR and ICESCR. Article 2(2) of the CRC obliges States parties to ensure that no child is discriminated against based on the actions of his or her parents.³²¹ In this regard, a child cannot be treated as a mere extension of his or her parents, umbilical destined to sink or swim with them the sins and traumas of fathers and mothers should not be visited on their children.³²²

To prevent discrimination, States parties should put measures in place to provide children imprisoned with their parents/primary caregivers with the equivalent services that children who are not imprisoned would receive. Therefore, access to services such as education and health care cannot be restricted for children who are imprisoned with their parents/ primary caregivers just because they find themselves incarcerated since this would amount to a form of discrimination against such children. Furthermore, measures should be in place to ensure that children are not discriminated against in accessing their rights because of their parents/ primary caregivers' incarceration; for example, their access to education and healthcare should not be disrupted.³²³



Article 4(1) of the ACC provides that “in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.” There are three important aspects of this principle that should be upheld. Firstly, it states that in all actions concerning the child. This is not limited to certain actions only.³²⁴ Therefore, States parties are to respect, protect and fulfil the best interest of children in all actions concerning children. Secondly, it states that any person or authority should fulfil the best interests of children.

This places a requirement on all officials or persons that might meet a child or deal with a matter in which a child is involved. Therefore, prison officials, police officials and justice officials would fall within the ambit of this provision.³²⁵ Lastly, Article 4(1) of the Charter requires that the best interests of the child be the primary consideration in matters involving

³²¹ *Ibid.*

³²² Justice Sachs in *S v M* (CCT 53/06) [2007] ZACC para 18.

³²³ African Committee Of Experts On The Rights And Welfare Of The Child (ACERWC) General Comment No. 1 (Article 30 Of The African Charter On The Rights And Welfare Of The Child) On “Children Of Incarcerated And Imprisoned Parents And Primary Caregivers” 2013 37.

³²⁴ *Ibid.*

³²⁵ *Ibid.*

children. Therefore, persons dealing with matters involving children, within the ambit of the ACC, should ensure the best interest of the child as the outcome.³²⁶

The best interests of the child must be the primary consideration in relation to all actions that may affect children whose parent's conflict with the law, whether directly or indirectly, in accordance with Article 4. States should create and implement laws/policies to ensure this at all stage of judicial and administrative decision-making during the criminal justice process, including arrest, pre-trial measures, trial and sentencing, imprisonment, release and reintegration into the family and community. To meet this obligation, Article 4 demands that States parties have in place procedural guarantees. States parties are urged to put in place policy, legislative, administrative and judicial measures to ensure that the best interests of the children whose mothers are in institutions are safeguarded.³²⁷

3 7 Summary

The chapter started by examining the status of international law and why it is important to this study. The content and the obligations of this right to family life emanate from the international and regional legal treaties that RSA is party to. The chapter also discussed the content of various international instruments regarding family life. These legal instruments include UDHR, ICCPR, ICSECR, and CRC and on a regional level, the ACRWC was discussed.

The study noted that most of these instruments reaffirmed the position of a family in society and underscored the need for States to promote, protect and preserve the family life in particular for children. However, none of these instruments attempted to provide a definition of a family. Perhaps due to the margin of appreciation the interpretation was left to individual member States to come up with definitions that suit their own circumstances and societies. The next chapter shall address RSA has managed to fulfil the obligations discussed in chapter three in its various legislative and policies affecting family life.

³²⁶ *Ibid.*

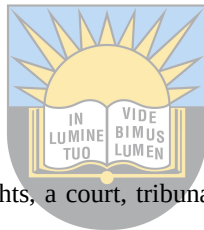
³²⁷ *Ibid.*

Chapter 4

4 SOUTH AFRICA AND INTERNATIONAL LAW

4 1 Introduction

As a member of the international community, RSA applies international law in its domestic legal system. SA has a hybrid system in its application of international law, monist in custom and dualist in treaties.³²⁸ Monism means the State applies customary international law directly to its domestic legal system as stated in section 232 of the constitution “customary international law is law in the Republic unless it is inconsistent with the constitution or an Act of Parliament”.³²⁹ Whereas, under dualist all international treaties must be domesticated through a local legislation being passed by the National Assembly that mirrors the treaty. As stated in section 231(1) an international agreement binds the republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.³³⁰



Section 39(1) (b) and (c) states that:

“When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”³³¹

This peremptory provision on the application of international law emphasises the value the RSA legal system places on international law. This arguably is based on the influence of RSA on international law as evidenced by the conventions against apartheid, which were adopted because of apartheid policies in RSA.³³² In terms of the application of international law section 233 states, “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”³³³

Thus, international law reigns supreme in terms of application and status. It is essential for one to understand the content of the international instruments regarding children’s rights

³²⁸ Dugard 49.

³²⁹ Section 232 of the Constitution of Republic of South Africa 1996.

³³⁰ Section 231 of the Constitution of Republic of South Africa 1996.

³³¹ Section 39(1) (b) of the Constitution of Republic of South Africa 1996.

³³² Dugard 51.

³³³ Section 233 of the Constitution of Republic of South Africa 1996.

particularly for family life in order understand how courts/ governments are expected to apply and interpret these treaties and customs. This chapter examines the domestic policies, legislations and other local measures the State has taken to ensure that the right to family life for children is protected. We will examine if these measures are adequate and what improvements can be made on to ensure they reach the goals set in the domestic and international instruments.

4 2 RSA and the CRC

The CRC is perhaps the best instrument in which to assess with, because the CRC contains comprehensive details on what is expected from States regarding children's rights and welfare. The CRC recognises the family as an important player in a child's life by recognizing that the 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.³³⁴ RSA is a signatory to the CRC and has ratified the treaty. The fact that this Convention has been ratified by RSA places the RSA government under an international obligation to comply with the duties placed on member States. As one of the duties, the State is expected to report regularly to the supervising body under CRC on the compliance with the duties bestowed on RSA as a member state.³³⁵ On 25 and 26 January 2000, the Committee considered RSA's first report and adopted concluding observations on RSA's compliance with the indicated Convention.³³⁶

In the first place the Committee noted that RSA had not yet ratified ICESCR, which it only ratified in 2015. The ratification of ICESCR would strengthen the efforts of the State party (i.e. RSA) to meet its obligations in guaranteeing the rights of all children under its jurisdiction and encouraged RSA to reinforce its efforts to finalise the ratification of this instrument.³³⁷ The Committee also expressed concern regarding socio-economic rights of children and the failures in the current system.³³⁸ The government was criticized for the lack of co-ordination between institutions implementing CRC, the lack of prioritisation in budgetary allocations

³³⁴ Preamble of the CRC, 1989.

³³⁵ Van Rensburg "Rights to Social Security and Assistance," available at http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/pdf/HeynsxBrand_Socio-Economic_Rights_Social_Security__PRINT_.pdf (last accessed 10 October 2016)

³³⁶ *Ibid.*

³³⁷ Committee on the Rights of the Child *Concluding observations* 2000 CRC/C/15/Add122 11.

³³⁸ *Ibid.*

and distributions to ensure implementation of the economic, social and cultural rights of children; inadequacies in data collection regarding children's rights.³³⁹ Nevertheless, the State in 2005 enacted the Children's Act³⁴⁰ to provide proper guidance and address some of the deficiencies outlined by the Committee. We will in this chapter examine into detail the Act to assess whether it reaches up to the standard of the CRC.

4.3 The Children's Act

The Children's Act was enacted to give effect to the international obligations that RSA had assumed by being a party to several treaties relating to children's rights. Since RSA uses a dualist system in implementation of treaties, several treaties had to be domesticated through this Act to become law. In the preamble of the Act, it highlights the need to extend particular care to the child as stated in the Geneva Declaration on the Rights of the Child, in the CRC, ACRWC and recognised in the UDHR and in other statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children.³⁴¹ While the Children's Act provides detailed outline of the State's obligations on children matters, this Act cannot be interpreted in isolation, but it must be read in line with all other legislations where children's interests are at stake. The Children's Act does not define what a family is but gives a description of a family member.

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In the preamble, the children's Act describes a family member in relation to the child as

“a) a parent of the child, (b) any other person who has parental responsibilities and rights towards the child, (c) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship.”³⁴²

Essentially, it is important to understand what the law regards as a family as it provides an understanding of who has an obligation in promoting and protecting the family life of the child. The Act gives a widest definition possible of what or who constitutes a family member and provides the characteristics of what a family looks like or provides to a child and to family

³³⁹ South African Human Rights Commission (SAHRC) *4th Annual Economic and Social Rights Report: 2000-2002* 29-30.

³⁴⁰ See Children's Act of South Africa.

³⁴¹ Preamble of Children's Act.

³⁴² *Ibid.*

members. Section 2(a) describes the objectives of the Act to be to promote the preservation and strengthening of families.³⁴³

Furthermore, in section 7 and 9 the Children's Act outlines the best interests of the child principle.³⁴⁴ The principle will be discussed in detail later. Section 15 of the Act outlines the enforcement of rights of the child.³⁴⁵ The Act outlines the list of persons who may approach a court to seek enforcement against the State.³⁴⁶ However, the State is not empowered to do so in cases where the State seeks to protect a child against abuse or infringement of its rights from non- State actors. The section assumes the State cannot act towards a positive implementation of the children's rights. The section further does not provide for enforcement of child's right against organs of the State. This is important because it provides immediate assistance whereas the judiciary process takes longer and may be inaccessible to poor members of community.

Unmarried fathers had for a long time been unrecognised as unable to assume parental rights and responsibilities, but the Act empowers them. Section 31 provides detailed considerations the state and parents must make before making decisions involving a child.³⁴⁷ This decision can also include the child's access to family life in relation to divorce or remarriage of the other parent.³⁴⁸ Broadly the Act gives an overview of who has obligations and what are the obligations, considerations to be made on addressing children's issues and how to resolve disputes arising out of children's matters. Section 18 to 23 outlines the parental rights and responsibilities. The Act however falls short of providing detailed enforcement measures on an administrative level and this negatively affects the implementation of their rights and particularly family rights.

4 4 Best interests of the child

“The right in question in children's maintenance matters is contained in section 28 of the Constitution. Section 28(2) provides “A child's best interests are of paramount importance in every matter concerning the child.”³⁴⁹ Children have a right to proper

³⁴³ Section 2(a) of the Children's Act.

³⁴⁴ Section 7 and 9 of the children's Act.

³⁴⁵ Section 15 of the Children's Act.

³⁴⁶ *Ibid.*

³⁴⁷ Section 31 of the Children's Act.

³⁴⁸ *Ibid.*

³⁴⁹ Section 28(2) of the Constitution of Republic of South Africa.

parental care. It is universally recognised in the context of family law that the best interests of the child are of paramount importance. While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents. There is an obligation on the State to create the necessary environment for parents to do so.”³⁵⁰

This above paragraph best summarises this study. In it, the court argued that family provides the best interests of the child and what the parents and State obligations are. The concept of the best interests of child is an international one, which was adopted in 1989 through the CRC. Article 3 states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.³⁵¹ The article did not further elaborate what exactly the best interests of the child are and the criteria to determine this. The interpretation of the convention was left to State parties to decide in relation to prevailing conditions within their countries.

In addition to the above, in RSA this was further reinforced in section 9 of the Children’s Act which states that in all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.³⁵² The State in this instance applied this domestic principle, which had been adopted through the CRC. The Children’s Act however, went further and attempted to provide clarity and context to what the standard through section 7 which outlines the factors that must be taken into account when such a decision has to be made.³⁵³ This is further echoed in section 2(a) (IV) which states that that the best interests of a child are of paramount importance in every matter concerning the child.³⁵⁴

The best interests of the child standard is further entrenched in other legislations that relate to children such the Juvenile Justice Act that in its preamble states that the Constitution, while envisaging the limitation of fundamental rights in certain circumstances, emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards, among others, the right.³⁵⁵ This principle has become a core

³⁵⁰ *Bannatyne v Bannatyne* (CCT18/02) [2002] ZACC 31; 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) (20 December 2002).

³⁵¹ Article 3 of the CRC.

³⁵² Section 9 of the Children’s Act.

³⁵³ Section 7 of the Children’s Act.

³⁵⁴ Section 2 of the Children’s Act.

³⁵⁵ Preamble of the Juvenile Justice Act 75 of 2008.

foundation for the courts and the State to adjudicate on child related matters. However, despite attempts to provide as much clarity as possible the extent of application of principle continues to be debatable within the courts.

The question of determining what exactly a child's best interests are is a question of fact that stands to be determined by the circumstances of each case.³⁵⁶ In *Van Deijl v Van Deijl* the court emphasised economic, social, moral and religious considerations. The court also emphasised emotional needs and ties of affection.³⁵⁷ In *French v French* the court emphasised the child's sense of security; the suitability of the custodian parent; material considerations and the wishes of the child.³⁵⁸ In *Fletcher v Fletcher* the court noted that it had to take into account the best interests of the child with regards to the parent who is better able to promote and ensure the physical, moral, emotional and spiritual welfare of the minor children.³⁵⁹

In the *Hugo case* according to the affidavits filed, the president intended by the special remission of the prison sentences of mothers to further the best interests of children.³⁶⁰ In *Re Ndala* the court allowed an adoption to proceed despite the fact that a letter from the commissioner was not available because it was in the best interests of the child to conclude the adoption as soon as possible.³⁶¹ In *S v M* the best interests of the child may be of paramount importance but is not the only consideration.³⁶² All these cases indicate that the law allows courts to advance the children's best interest to the extent that it allows to subvert others laws if it has deemed to be in the best interests of the child.

Yvonne Duasab argues that the best interest of the child means considering the child before a decision affecting his/her life is made.³⁶³ This is a principle that has established itself through all matters and legislation affecting the well-being of the child. It is an overarching common-law principle that has been used to assist primarily courts and other institutions in the decision-

³⁵⁶ Barrie "The best interests of the child: lessons from the first decade of the new millennium: aantekeninge, Tydskrif vir die Suid-Afrikaanse Reg," 2011 *Sabinet online* 16.

³⁵⁷ *Van Deijl v Van Deijl* (1966 4 SA 206 (R).

³⁵⁸ *French v French* 1971 4 SA 298 (W).

³⁵⁹ *Fletcher v Fletcher* 1948(1) SA 130 (A).

³⁶⁰ *President of the Republic of South Africa and Another v Hugo* 43.

³⁶¹ *In re Ndala* 14/1/2/-19/2010 para 16.

³⁶² *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC).

³⁶³ Duasab "The best interests of the Child," available at

http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_h.pdf (last accessed 10 November 2016).

making process.³⁶⁴ It should be borne in mind that courts are the upper guardians of minor children and, if the need arises, have a final say in determining the overall welfare of the child. This they do through a relatively delicate balancing of interests. These interests themselves are particularly sensitive as they often relate to family status matters in terms of divorce, maintenance, and custody and control.³⁶⁵

4 5 Adoption.

To provide alternative care, RSA like many States allows adoption. In RSA, adoption is governed by section 230 of the Children's Act³⁶⁶ in line with Article 21 of the CRC and 20, which requires States to provide alternative care for the child.³⁶⁷ Section 230(3) outlines which child can be adopted and 231 states who qualifies to adopt the child. The State has undertaken on a policy and practical level to ensure that the adoption is successful, and children are protected. The National Department regulates and monitors the implementation of adoption services by ensuring that more children are placed within the country through the implementation of the Register on Adoptable Children and Prospective Adoptive Parents (RACAP) before considering inter-country adoption. Furthermore, adoption service providers are accredited to render adoption services.³⁶⁸ The Children's Act also contains many features that were not part of the Child Care Act, like post-adoption agreements and freeing orders.³⁶⁹

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However, the adoption has not been without challenges, some parents after divorce seek to escape the obligation of maintenance of the adopted child. In the case of *Maneli vs, Maneli* where a parent sought escape paying maintenance and grounds that the child was not adopted based on the applicable Children's Act but rather customary law.³⁷⁰ The Court held that he held the responsibility to pay maintenance. In reaching this decision, the court was influenced by the best interests of the child. In *Kewana v Santam Insurance Co. LTD*³⁷¹ it was held that a child adopted according to customary law in Transkei is entitled to compensation for loss of support resulting from the negligent killing of such child's adoptive parent.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ Section 230 of the Children's Act.

³⁶⁷ Article 20&21 of CRC 1989.

³⁶⁸ SAs Adoption Assistance centre "what does the Children's Act say about adoption" available at http://www.adoption.org.za/index.php?option=com_content&view=article&id=23&Itemid=23 (last accessed 10 October 2016).

³⁶⁹ *Ibid.*

³⁷⁰ *Maneli v Maneli* 14/3/2-234/05.

³⁷¹ *Kewana v Santam Insurance Co. LTD* 1993 (4) SA 771.

Such an action can be maintained under the Compulsory Motor Vehicle Insurance Act 25 of 1977 (Tk) and that the previous Children's Act 33 of 1960, did not affect customary law. In *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) Bartelsman J held;

“Act of adoption possibly incomplete - Offer to adopt children a binding offer which can and should be enforced on behalf of children. Recognition of such duty to maintain enforceable in terms of customary law and reconcilable with boni mores - Insofar as such duty not recognised by common law, it is logical extension thereof - Acceptance of validity of duty to maintain minor children which arises from promise made in context of (possibly) incomplete customary adoption merely a logical further step in development of common law.”³⁷²

The Learned Judge further held in *Metiso v Padongelukfonds*, that the deceased had a legal duty to maintain the minor children, because he had adopted them according to customary law. The learned judge found that it was in the children's best interests to give effect to the deceased's duty, and accordingly refused to declare the customary adoption invalid for failure to comply with all the statutory requirements.³⁷³ In *T v T* the court allowed an application for recession of adoption order because the biological parents had the capacity to maintain the children.³⁷⁴ In *Ndala, In re: Ndala* the Child Commissioner sought guidance on what must be done in the absence of a letter from the Provincial head of Social Department recommending whether an adoption is permissible or not in line with 239(1)(d) of Children's Act.³⁷⁵ The court allowed it because it was in the best interests of the child.

In light of the above cases on recession of adoption, the Department of Social Development has noted that the cases highlighted the need for government to review the child adoption process.³⁷⁶ This is why the Department of Social Development has proposed amendments to the Children's Act in order to allow social workers employed by the Department or Provincial Department of Social Development to process child adoption applications as opposed to these being done only by adoption agencies.³⁷⁷ The Department argues social workers employed by the Department work directly with communities, households or families as well as individuals

³⁷² *Metiso v Padongelukfonds* 2001 (3) SA 1142.

³⁷³ *Ibid.*

³⁷⁴ *T v T* (13040/2013) [2015] ZAGPJHC 131; [2015] 3 All SA 631 (GJ).

³⁷⁵ *Ndala, In re: Ndala* 45.

³⁷⁶ Government of South Africa “Social Development on protection of children during adoption” available at <http://www.gov.za/speeches/social-development-protection-children-during-adoption-2-jun-2015-0000>(last accessed 10 October 2016).

³⁷⁷ *Ibid.*

or children and, as such, have an intimate understanding of the circumstances of the children they work with.³⁷⁸

The Department is of the view, that social workers must play a role in the adoption process to reduce the risk of failed adoptions. While this may be an attempt to ensure that failed adoptions do not increase the State should address such problems with prospective adoptive parents to ensure that they understand the role they are about to play and make it difficult for these parents to opt out of adoption as a way of showing future adopting parents that once this obligation has been assumed one cannot escape it.

4 6 Divorce

Whilst the State envisages that marriages will last, and the spouses be separated by death, divorces have become an everyday occurrence in our society and the legal system has had to make provisions for such broken marriages. Marriages end for various reasons that include, irretrievable breakdown; one of them becomes a habitual criminal etc. To dissolve the marriage, the aggrieved party institutes a divorce action. Since a divorce action also marks the end of a family, the future of the children also must be decided on and the best interests of the child are always in most divorce cases at the centre of dispute between the divorcing parties. Divorce and separation are very traumatic experiences for all the parties but more especially for children.³⁷⁹ Section 1 (a) of the Divorce Act describes a divorce action as an action by which a decree of divorce or other relief is sought on an application *pendent lite* for an interdict or for the interim custody or access to minor child of the marriage.³⁸⁰

Section 6 of the Act further provides context of how divorce law should deal with the issues relating to children's welfare to try to ensure that the family life a child continues to be provided for despite the circumstances. Section 6 (a) provides that a divorce decree must not be granted until the court is satisfied that sufficient provisions have been made or contemplated regarding the welfare of the minor or children born of the marriage are satisfactory and to the best of the circumstances. In *Stock vs Stock* the court held that the court may use expert evidence, such as that of psychologists or psychiatrists, or the evidence of

³⁷⁸*Ibid.*

³⁷⁹ Burman, Derman and Swanepoel "Only for the wealthy? Assessing the future for Children of divorce" 2000 *SAJHR* 535.

³⁸⁰ Divorce Act 70 of 1979.

other persons such as school teachers, family members, other care givers, etc. who are familiar with the circumstances and cognizant of the needs of the parents and children.³⁸¹

Section 6(4) further provides for a legal practitioner to be appointed to represent the child during the proceedings, a sentiment also echoed in Section 2(10) of the Children Act, which states that every child has a right to participate and to have a voice.³⁸² This means every child may take part in any matter that concerns the care and wellbeing of child depending on maturity.³⁸³ Since adults are the ones making the decision to divorce, they have some sense of justification for their decision and a sense of confidence that things will work out eventually. Often, children have a support network of family and friends to help them emotionally and practically during the difficult period of adjustment. Finally, adults have direct access to lawyers to help them argue in favour of the arrangement they believe is best for the children. However, children are often surprised by their parents' decision to divorce.³⁸⁴

Considering the above argument, children are thus shut out from the proceedings and have a very limited say in the proceedings. Children feel they have no say in the decision (to get divorced), and they are left unsure about what to expect in the future.³⁸⁵ This could be improved by following the recommendation of the Commission which recommended that section 6 of the Divorce Act 70 of 1979 be amended to give a court the authority to appoint an interested third party, such as a member of the child's (extended) family, to support a child experiencing difficulties during parental separation or divorce in a manner determined by the court. Such support can involve a person being allocated temporary parental rights and responsibilities in respect of the child concerned.³⁸⁶

Divorce and separation are very traumatic experiences for all the parties but more especially for children.³⁸⁷ In deciding to grant custody, the courts in most instances tend to grant custody

³⁸¹ *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E-J.

³⁸² Section 2(10) of the Children's Act.

³⁸³ Department of Social Development "The Children's Act Explained"

http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=109&Itemid=3
(last accessed 4 October 2016).

³⁸⁴ *The Protection of Children Caught up in the Divorce / Separation of Their Parents* available at http://www.ci.org.za/depts/ci/plr/pdf/salrc_dis/17-dp103-ch14.pdf (last accessed 4 October 2016).

³⁸⁵ For the Sake of the Children, report of the Special Joint Committee on Child Custody and Access, December 1998 12.

³⁸⁶ *Ibid.*

³⁸⁷ Burman Derman Swanepoel 2000 SAJHR 535.

to the mother of the child/children unless she is deemed unfit by the court. Some scholars argue that the “maternal preference” and “tender years” principle may be a violation of the equality clause in the constitution.³⁸⁸ However, in the case of *Madiehe (born Ratlhogo) v Madiehe*, in response to this concern the court noted that the test is simply the best interests of the child. Therefore, it follows that if the father can provide what is in the best interests of the child, he is the proper person to be awarded the custody of the child. Similarly, if the mother is better equipped to provide what the child needs, then she has the better claim.³⁸⁹ Thus through the best interest test, the court seeks to provide the best family environment that a child will need.

However, there are several challenges that affect the children in divorce matters. That is not unusual to find that the custodial parent is using the child as a weapon in the matrimonial warfare and is sabotaging the access visits of the non-custodial parent.³⁹⁰ This is particularly prone to happen in high-conflict divorce cases where a parent might even go so far as to abduct the children to a foreign country.³⁹¹ The law needs to be strengthened enough to punish lawyers who collude with clients to falsify claims in the divorce proceedings and to punish fully the party which falsifies information in these proceedings.

Section 6(3) of the Divorce Act³⁹² empowers the court to granting a decree of divorce to make ‘any order which it may deem fit’ thus any parent seeking a divorce participate in an education program to help him or her become aware of the post-separation reaction of parents and children, children's developmental needs at different ages, the benefits of co-operative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution, provided such programs are available.³⁹³ The Divorce Act will ensure parents to take into account the impact of the divorce on the children and how they can deal with them before and after divorce, such programs should be compulsory, and the state must introduce them as currently on the family advocates provides such roles but are very limited in their scope of their work. The State can do more to improve the welfare of the children in divorced families by ensuring that their family life is protected

³⁸⁸ *Ibid.*

³⁸⁹ *Madiehe (born Ratlhogo) v Madiehe* [1997] 2 All SA 153 (B) at 157.

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² Section 6(3) of the Divorce Act.

³⁹³ *Ibid.*

as much as possible and that any divorce action between the two parties ceases to be about their broken relationship but an attempt to provide the best family life possible for the child.

4 7 Inheritance and Succession laws

A child needs love affection, support from a family. This support also includes material support in the form of provision of shelter, food, education and any other material resources that will enable the child to grow up in a happy and healthy environment. Unfortunately, death is part of every human journey and families are not spared of this unfortunate curse either and as result children are left in the care of one parent or none in the event of a tragic loss of one parent. The Interstate Succession Act³⁹⁴ governs how the distributions of the assets of the deceased are taken care of.³⁹⁵ This Act governs the material aspect of the family life by ensuring that even after the other parent or both parents are deceased, the surviving spouse and children can continue to have the material support to enable them to live a happy life.

It is generally believed that most couples now have wills and a will includes a codicil and any other testamentary writing, which expresses the interest and wishes of the deceased spouse on how their estate should be distributed.³⁹⁶ Thus, a will influences a marriage, which ultimately has to be broken. Section 2D of the wills Act states that;

“if any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court and that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse had died before the date of the dissolution concerned, unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage.”³⁹⁷

This clause would apply particularly in instances where the spouses had been married in community of property with/without accrual as defined the Marriage Act.³⁹⁸ This section read together with section 2(C) (1) and (2) which address the benefits for surviving spouse and children in cases where a renunciation of the ability to inherit or who would obtain their share of the estate in the event of preceding the death of the spouse or being a minor etc.³⁹⁹ All these provisions only allow the spouse and children to benefit to the extent that the Will allows

³⁹⁴ Interstate Succession Act 81 of 1987.

³⁹⁵ *Ibid.*

³⁹⁶ Wills Act 7 of 1953.

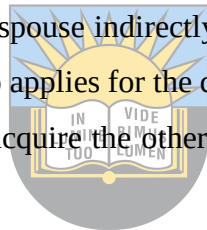
³⁹⁷ Section 2D of wills Act.

³⁹⁸ Matrimonial Property Act 88 of 1984.

³⁹⁹ Section 2(1) (c) and (2) Wills Act.

them to. Thus, if the deceased had made no provision for them to benefit from the estate they have no claim, which can deprive the children of ability to get material support from their deceased parent. The Wills Act must then be amended to ensure that the surviving spouse and children do not claim from the deceased person's estate, but they acquire their claim by operation of law. This will incentivise couples to write wills to avoid post death disagreements within families.

In the unfortunate event where a spouse dies and does not leave a will behind. The distribution of his/her estate is governed the Interstate Succession Act.⁴⁰⁰ Section 1(a) to (c) provides for the estate to be distributed between the surviving spouse and children. This provision ensures that the children are the first beneficiaries of this estate. Whilst this a welcome move by the state is, possess a great challenge especially if the spouses had not formally divorced but had separated as it may go against the wishes of the deceased. The Act must thus be amended to ensure that the primary beneficiary of the estate are children whom in turn will be taken care of by the surviving spouse. Thus, the spouse indirectly benefits by being a caretaker for the children as in the case of the same also applies for the child share provided for in section 1(c) (ii) which provides that the children acquire the other half of the estate and is split equally amongst them.⁴⁰¹



University of Fort Hare

These children must acquire the greater percentage and the surviving spouse acquiring the residue, that way it ensures that despite the loss of one parent they continue to be provided for materially. Furthermore, a former spouse will not have to claim for his children but all children of the deceased irrespective of the which parent they are born to acquire their share by operation of law and not claiming from the estate through surviving parent In *Bhe and Others v Khayelitsha Magistrate and Others* the applicant sought an order from the court securing the property of her deceased partner for her daughters, whom he had fathered.

Since the applicant had never married the father of her children, the deceased's estate stood to be inherited by the eldest male relative who was the deceased's father to the exclusion of his extra-marital children in application of the customary law rule of male primogeniture.⁴⁰² The court found that the customary law rule of male primogeniture discriminated against

⁴⁰⁰ Interstate Succession Act.

⁴⁰¹ *Ibid.*

⁴⁰² *Bhe v Magistrate Khayelitsha*. 2005 (1) BCLR 1 (CC) 15 Oct. 2004 165.

women and extra-marital children and declared the rule was unconstitutional. Had this decision not been taken, thousands of children would have continued to suffer the injustice of being treated as second-class citizens in terms of their position in their family and in society.

403

In *RSA Human Rights Commission and Another v President of the Republic of RSA and Another* the Commission and the Women's Legal Trust, acting in their own interest and in the public interest sought a declaration that section 23 of the Black Administration Act was unconstitutional, because of its inconsistency with the Constitution's equality provisions.⁴⁰⁴

This legislature must now transform these decisions into legislation in order provide more clarity to the law. Section 4(e) provides for adopted children to also benefit from the estate. This provision allows children to be fully integrated as members of the family as well as Section 2, which allows illegitimate children to benefit.⁴⁰⁵

4 8 Marriage

When two people fall in love with one another, they usually decide to take the next step and officiate their relationship to be recognised by law through marriage. Until 2006, marriages in RSA were governed by the Marriages Act⁴⁰⁶, Matrimonial Property Act⁴⁰⁷ and the Recognition of Customary Marriages Act.⁴⁰⁸ In *Gumede vs the President of RSA and others* the Recognition Act was assented to and took effect well within our new constitutional dispensation.⁴⁰⁹ The recognition represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages, which were entered in accordance with the law and culture of the indigenous African people of this country.⁴¹⁰

⁴⁰³ Mokobi "Lingering Inequality in Inheritance Law: The Child Born out Of Wedlock in Botswana" <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/15.pdf> (last accessed 10 October 2016).

⁴⁰⁴ *South African Human Rights Commission and v President of the Republic of South Africa Case CCT 50/03*

⁴⁰⁵ Section 2 of the Interstate Succession Act.

⁴⁰⁶ Marriage Act 25 of 1961.

⁴⁰⁷ Matrimonial Property Act 88 of 1984.

⁴⁰⁸ Recognition of Customary Marriages Act 120 of 1998.

⁴⁰⁹ *Gumede vs the President of South Africa*, 2009(3) SA 152 (CC) 16- 23.

⁴¹⁰ *Ibid.*

However, in the *Fourie*⁴¹¹ case where the common law definition of marriage, which only recognised marriage as a union between a man and a woman, was challenged, also in the Equality Project case, which challenged section 30(1) of the Marriages Act.⁴¹² The common law and section 30(1) of the Marriage Act were accordingly inconsistent with sections 9(1) and 9(3) equality and 10 dignity of the Constitution to the extent that they make no provision for same-sex couples to enjoy the status, entitlements and responsibilities they accord to heterosexual couples.⁴¹³ This led to the legislature passing the Civil Union Act, which allows non-heterosexual couples to be able to marry and acquire the same rights and responsibilities as their heterosexual counterparts.⁴¹⁴ The Act defines a civil union as the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others.⁴¹⁵ This Act thus fits into the discussion on marriage and family life.

Section 10 of the Marriage Act allows for marriages between a citizen and non-citizen.⁴¹⁶ This provision at least allows for children to be able to be united with their parents irrespective of their different parents' nationality. However, as will be discussed later the immigration laws tend to hinder the ability for such marriages to occur despite being allowed in the Marriage Act. The Act in its entirety is focused on the technical details of a marriage but does not focus on the core issues that result from a marriage such as family and children.

This Act must thus be amended to address these vital issues to allow couples before marriage to understand the rights and responsibilities that they will now bear under the law. Since it does not address the issues of children, their voice is also not provided during the marriage formation process as a result children be forced into this new environment in the case of a parent remarrying. The Act should be amended to also allow children's voice to be heard in this process also.

⁴¹¹ *Minister of Home Affairs v Fourie, with Doctors for Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae)*. CCT 60/04

⁴¹² *Lesbian and Gay Equality Project and Eighteen rs v Minister of Home Affairs and s* CCT 10/05.

⁴¹³ Constitutional Court, Media Summary of *Minister of Home Affairs v Fourie, with Doctors For Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae)*. CCT 60/04 and *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others* CCT 10/05.

⁴¹⁴ Civil Union Act 17 of 2006.

⁴¹⁵ Section 1 of the Civil Union Act.

⁴¹⁶ Section 10 of the Marriages Act 25.

The Matrimonial Property Act⁴¹⁷ governs the acquirement and ownership of material property during a marriage. RSA has three marital regimes and they are marriage in community of property governed by chapter 3 of the Act, marriage in community out of property and marriage in community out of community of property with accrual system governed by chapter 1 of the Act.⁴¹⁸

All these three regimes do not in any way cater for the children, but instead children are left to benefit from the property through parental rights and responsibilities. This poses a great challenge when it comes to inheritance matters as the children are left at the mercy of the surviving parents or relatives to provide for them. The Act must thus be amended to ensure the property of both spouses belongs to children during and after the course of a marriage/until they become adults and this property is managed on their behalf by parents. Through this mechanism, the children are then able to have a say when it comes to divorce matters or inheritance as it is where in most cases currently their welfare is at stake.

Furthermore, The Recognition of Customary Marriages Act and Civil Union Act also follow similar patterns with the Marriage Act by addressing technical issues on marriage rather than core issues such as family life, or children. These Acts must as well be amended to address these issues to adequately cater for children born out of such marriage. In *Nhlapo v Mahlangu and Others* an application was brought in which two women claimed to be married to the deceased, the other by customary marriage while the other by civil union. The court declared the civil union marriage null and void.⁴¹⁹ However, in this instance the court looked into the technicalities of what constitutes a valid marriage under civil union but did not consider the other factors of a marriage such as children.

If these factors been considered this case would have a different outcome and this echoes an earlier sentiment that children must be the owners of their parent's property that way these children were going to benefit irrespective of their parents' marriage legality. Secondly, the marriage laws should be developed to cater for children so that in future disputes courts do not look at the technical aspects of the marriage but the marriage in its entirety. In *Mayelane v*

⁴¹⁷ Chapter 3 of the Matrimonial Property Act.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Nhlapo v Mahlangu* (59900/14) [2015] ZAGPPHC 142.

Ngwenyama and Another the case centred on the consent of the existing wife regarding him marrying a second wife in terms of Tsonga customary law.⁴²⁰ The court ruled that this marriage can only happen with the consent of the existing/first wife. Such powers should be granted to children as well. The children's voice must also be heard when their parents decide to make such a decision that will have far reaching effects on their lives.

In the case of *DE vs HE* the court noted that the law seeks to protect family life and not marriage. The case concerned the continued existence of a spouse is right to claim damages for adultery against a third party.⁴²¹ The court noted that marriages are founded on love and respect, which are not legal rules, and are the responsibility of the spouses themselves. In the present case, the breakdown of the marriage was because of a failure by the spouses themselves to sustain their marriage and thus it would be inappropriate for the courts to intervene.⁴²²

In as much as the courts recognised the role of a marriage in the foundation of a family and family life, the State cannot intervene in seeking to protect marriages as that is a relationship between two individuals. However, in as much as the case concerned a delictual claim the case brought into fore an interesting question on what the State role is in terms of marriages and how far it can intervene to protect and promote marriages in so far as family life is concerned and particularly where children's best interest are at stake.

4 9 Social Security

The State recognises that not all its citizens can afford to lead a life above the poverty datum line and to uplift many out of poverty many States such as RSA, Zimbabwe and Canada have social security law, which seeks to provide for social grants and welfare for its citizens in order to be able to live a healthy and happy life. In RSA, the Social Assistance Act governs the social security law.⁴²³ The preamble of the Act states that since the Constitution⁴²⁴, provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance, and obliges

⁴²⁰ *Mayelane v Ngwenyama* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC)

⁴²¹ *DE v RH* (CCT 182/14) [2015] ZACC 18; 2015 (5) SA 83 (CC); 2015 (9) BCLR 1003.

⁴²² *Ibid.*

⁴²³ Social Assistance Act.

⁴²⁴ Preamble of the Constitution of Republic of South Africa 1996.

the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.⁴²⁵

Section 28(1) (c) further grants every child the right to basic social services.⁴²⁶ In this case, we will infer the dependents to include children. The State provides grants specifically for children namely the Child support grant, Care dependency grant that is granted to someone if he or she is a parent, primary care giver or foster parent of a child who requires and receives permanent care or support services due to his or her physical or mental disability. This Act goes a long way in also providing for disabled children by ensuring that their parents are supported financially to cover for their special needs. The Foster child grant is a grant for a child given for as long as that child needs such care. This ensures that there is continued financial support for foster children irrespective of them reaching the age of majority for as long as there is a demonstrated need.

The State however, in line with the current inflation rates must increase the child related grants as children have more need such as food education etc. As much, more funds need to be provided for their welfare. Section 19(3) (a) provides for the suspension of giving the child related grants if there is evidence of abuse. The State must find an alternative care provider for the children be consulted to hear their views on these care providers.

An increase in accountability on the use of these funds on children with children's cooperation to the investigation will help avoid abuse. In the *Khosa vs, Minister of Social Development* the case related to the eligibility of non-citizens from receiving grants. The court ruled this to be a violation of the equality as the constitution provides for social security for all.⁴²⁷ In general, the State has made great strides to provide social assistance to the needy families; however, more need to be done to ensure accountability and proper use of the funds towards to welfare of the children.

4 10 Labour law

410 1 Family responsibility leave

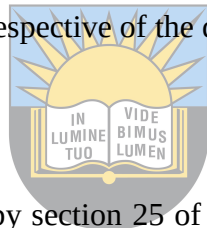
⁴²⁵ *Ibid.*

⁴²⁶ Section 28(1) (c) of the Constitution of Republic of South Africa 1996.

⁴²⁷ *Khosa v Minister of Social Development* (CCT 13/03 CCT 12/03) [2004] ZACC 11.

In the quest to provide for the best of their children, parents acquire employment to sustain the family life by providing food, shelter, clothes education and medication. While parents are working it is fortunate or unfortunate that certain family events may occur that require their attention. Section 27 of the Basic Conditions of Employment Act states that full time workers may take 3 days of paid family responsibility leave during each annual leave cycle (12-month periods from date of employment).⁴²⁸ The reasons for a family leave include when your child is born when your child is sick in the event of the death of your spouse or life partner parent or adoptive parent grandparent child or adopted child, grandchild, sibling.⁴²⁹

The Act however, excludes the following workers from benefitting from the family Responsibility leave, 4 months for their employer, 4 days a week for one employer. This is however, discriminatory against other workers as some of the reasons provided in the Act may occur while the worker is currently at work and as a result, he/she is deprived of fulfilling their family responsibility especially towards children. The Act should thus be amended to allow all workers to benefit from it irrespective of the duration of one's employment.



4 10 2 Maternity leave

Maternity leave in RSA is governed by section 25 of the Basic Conditions of Employment Act.⁴³⁰ Pregnant women may take 4 months of maternity leave, starting 1 month before their due date.⁴³¹ The legislation thus discriminates on the male colleagues by not allowing them the ability to take part in the raising of the child in the first three months or so after birth and this continues the narrative that males are not fit to be primary caregivers, a narrative that is false. Furthermore, the 4 months of leave are not sufficient for a mother to be able to nature the child.

The parent is thus forced to leave the child in the care the of maid or other relative, a situation which has resulted in mistreatment of children and depriving a child the right to family life especially at his/her infancy stage. Whilst RSA abides by the ILO Convention 183, which states that a woman is entitled to maternity leave of no less than 14 weeks, the ILO Convention is not able to promote the family life for children as such there is need to develop this

⁴²⁸ Section 27 Basic conditions of Employment Amendment Act.

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

international law.⁴³² Congress of South Africa trade Unions, Cosatu gender forum chair Sharone Daniels notes that, "The current legislation appears to have been written without consideration of women in the workplace. The women were expected to be pregnant and chained to the stove, and Pick n Pay allows 11 months of maternity leave, nine of which are paid. The retailer gives fathers eight days' paternity leave, even though labour legislation does not make specific allowance for leave for new fathers."⁴³³ The State must thus introduce an 11-month maternity leave for both parents of the newborn child.

4 11 Education

Family life is not limited to the provisions of the home set up where immediate parents exist but also extends to the broader community. It thus also includes the type of community environment a child lives in and the education the child receives. Section 28(1) (d) provides that every child to be protected from maltreatment, neglect, abuse or degradation.⁴³⁴ *In the Christian Education case*, in which religious schools challenged the legislation will outlawed corporal punishment, the State argued that corporal punishment is inherently violent, and involves a degrading assault upon the physical, emotional and psychological integrity of the person to whom it is administered. RSA has suffered, and continue to suffer, a surfeit of violence. The State has an obligation to ensure that the learner's constitutional rights are protected.

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The State has an interest in ensuring that education in all schools is conducted in accordance with the spirit, content and values of the Constitution. While the applicants argued that, this violated their right to religion and deprived them of the ability to control the child. The court held that the parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land and following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfil what they regard as their conscientious and biblically-ordained

⁴³² Maternity Protection Convention, 2000 (No 183).

⁴³³ Nair "Call for 11 months of maternity leave" *Timeslive*, 29 July 2014
<http://www.timeslive.co.za/thetimes/2014/07/29/call-for-11-months-of-maternity-leave> (last accessed 10 October 2016).

⁴³⁴ Section 28(1) (d) of the Constitution of Republic of South Africa 1996.

responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos.⁴³⁵

The court noted that the children concerned were from a highly conscientised community and many would have been in their late teens and capable of articulate expression as there was no assistance of a *curator ad litem* to represent the interests of the children.⁴³⁶ This highlights the need for children's voice to be heard but more importantly the case highlighted the distinction between primary parents of the child and secondary parents (teachers) role in the children's upbringing.

With a school being a secondary home for many children, particularly in boarding schools, the State and primary parents must ensure that a child is afforded the best home and family environment as much as possible and no child is arbitrarily deprived of being part of this crucial community. Thus in the case of *Head of Department, Department of Education, Free State Province v Welkom High School and Another*; *Head of Department, Department of Education, Free State Province v Harmony High School and Another* where certain schools sought to exclude students due to their pregnancy was held to be unconstitutional and schools' pregnancy policies at face-value infringe upon the constitutional rights of pregnant learners, including the rights to human dignity, to freedom from unfair discrimination and to receive a basic education.⁴³⁷ Thus on an education level, there is need for the State to ensure that the children's environment in the wider community is protected and promoted in line with the family life values in order to enable them to grow up in a safe and productive environment.

4 12 Refugees

The Refugees Act governs refugee law in RSA.⁴³⁸ The Act seeks to give effect within the RSA to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into RSA of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such

⁴³⁵ *Christian Education South Africa v Minister of Education*, [2000] ZACC 11, 2000 (4) SA 757 (CC) 2000 (10) BCLR 1051 (CC) 46.

⁴³⁶ *Ibid.*

⁴³⁷ *Head of Department, Department of Education, Free State Province v Welkom High School* *Head of Department, Department of Education, Free State Province v Harmony High School* (CCT 103/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) (10 July 2013) .

⁴³⁸ See Chapter 5 Refugees Act.

status; and to provide for matters connected therewith.⁴³⁹ Chapter 5 of the Act provides a detail of the rights and obligations of the refugees when in the republic in particular section 27(1) (b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution⁴⁴⁰ and the right to remain in the Republic in accordance with the provisions of this Act.⁴⁴¹ This therefore means all refugees have rights to social security, education etc., and the same rights that accrue to citizens. Refugee children thus have a right to family life.

The Act has a more extensive definition of a refugee and provides for dependents of refugees as refugees themselves. RSA provides affords a derivative status to dependants who automatically include immediate family members and this shows that respect for family, as a unit is evident in this section.⁴⁴² Moreover section 3 (e) of the Act states that the family must not be in the republic at the time of application and it can therefore be argued the drafters anticipated the reunion of refugee families in RSA.⁴⁴³ One can argue on a legislative level RSA has so far taken reasonable steps to meet these international obligations.

Section 32 of the Children Act provides for assistance for unaccompanied minors and mentally disabled persons.⁴⁴⁴ However, most of these children upon arrival language barriers, insecurity, inadequate housing and problems with integration into schools, as they are perceived to be "different" from the local population. They might also be denied access to social services and legal documentation.⁴⁴⁵ Access to social work services remains a challenge. Unaccompanied minor-refugees often have trouble in obtaining the necessary legal documentation in order to access services. "Legal documentation" refers to documents that unaccompanied minor-refugees require to obtain asylum status in RSA.⁴⁴⁶ Many children are

⁴³⁹ See Preamble of the Refugees Act.

⁴⁴⁰ Section 28(1) (b) of the Constitution of Republic of South Africa 1996.

⁴⁴¹ Section 3 of the Refugees Act.

⁴⁴² Khan, *Refugee Law in South Africa*, 2014 *Tal Schreier* 16.

⁴⁴³ *Ibid.*

⁴⁴⁴ Section 32 of the Children's Act.

⁴⁴⁵ Magqibelo Londt and September; Roman "Challenges faced by unaccompanied minor-refugees in South Africa, social work" 2016 *Stellenbosch Online* 7

⁴⁴⁶ Van Der Burg "An examination of the extent to which South Africa is meeting its legal obligations with regard to the protection of undocumented foreign migrant children" http://www.scielo.org.za/scielo.php?script=sci_nlinks&ref=1979552&pid=S0037-8054201600010000500038&lng=en (last accessed 10 October 2016).

turned away from schools and clinics daily some due to a lack of documentation, and others for no apparent reason at all.⁴⁴⁷

Furthermore, the Refugee Act and legislation in RSA prohibits the implementation of refugee camps because they are said to separate people from society and restrict freedom of movement.⁴⁴⁸ However, this fails to account for migrants' lack of a central place of safety, which leaves them in desperate need of an environment where they are safe, where they can be legitimately assisted and guided in their integration into society, where their skills can be used, and where they can find jobs. Refugee camps do not need to be a means to an end, but they may be imperative as grounding centres for assisting migrants to adjust and develop a belonging in a country that otherwise leaves them to survive on the outskirts of its communities.⁴⁴⁹

In the *Bolanga* case where the State sought to deny refugee status to the applicant on grounds that is the applicant was of no threat to the political establishment in Democratic Republic of Congo despite the fact that the country is currently undergoing a civil war at the time .The court set aside the state decision.⁴⁵⁰ In the case of *Minister of Home Affairs and Others v Watchenuka and Others*, the applicant sought relief from the respondent rule, which did not allow refugee applications currently under consideration to study and work. The court held that this was in violation their dignity and deprives them of their ability to enjoy the rights in chapter 2 of the constitution.⁴⁵¹ The State thus needs to do more of a practical level to document and provide for these children and refugee families. A partnership with the private sector and other non-governmental organisations on caring for these refugees and particularly children will go a long way. Thus, legislatively the State has done enough measures but more needs to be done on a practical level.

4 13 Immigration

⁴⁴⁷ Magnes "A bleak reality of migrants and their children in South Africa" Daily Maverick, 20 June 2016 http://www.dailymaverick.co.za/opinionista/2016-06-20-a-bleak-reality-of-migrants-and-their-children-in-south-africa/#.V_pa2PI97IV (last accessed 10 October 2016).

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Bolanga v Refugee Status Determination Officer* (5027/2012) [2015] ZAKZDHC 13.

⁴⁵¹ *Minister of Home Affairs v Watchenuka* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA).

Globalisation has brought with it a massive wave of immigration. People all over the world are moving around in search for greener pastures. In the course of search for greener pastures, some people have met someone and decided to marry and start a family together. In RSA, the Immigration Act regulates immigration. In the preamble of the Act, it seeks to ensure the international obligations of the Republic are complied with.⁴⁵² The purpose of the Immigration Act is to provide for the regulation of admission of persons to, their residence in, and their departure from the Republic. Strict measures pertain to illegal foreigners.⁴⁵³

The Act generally seeks to promote the economic growth of the State and security issues.⁴⁵⁴ Section 18(1) states that a 'Relative visa' is granted to a foreigner who is a member of the immediate family of a citizen or a permanent resident, provided that such citizen or permanent resident provides the prescribed financial assurance and section 18(2) does not permit the said visitor from working. This poses a challenge to family reunion/life because it can only be allowed provided the financial stability is proven and the State denies access to financial stability to the family by depriving the foreigner of ability to work. This section must thus be amended to allow families/relatives to reunite for a period irrespective of financial implications.



Section 27 of the Act allows to a permanent residence status to be granted to a foreigner provided the applicant has good offer of employment in the republic while (ii) states that the permit may be extend to the spouse and children of younger than 18 years.⁴⁵⁵ The use of the word “may” means that it is a peremptory provision and the State can do this out of its discretion. This poses a challenge to the status of families in RSA if the State can be given discretion on whether to prioritise them or not.

Furthermore, this possess a big challenge because it means the State in granting the residence status may deprive the applicant of his right to family life and the children whom even though may be 18 years and above but are not yet independent to take care of themselves. This Act must thus be amended to make it an obligation for the State to allow the family of the applicant to obtain the residence status and the children as well irrespective of their age to allow the

⁴⁵² Immigration Act 13 of 2002.

⁴⁵³ Van Der Linde “Immigration and the right to respect for family life in the European context: A reflection on the states' positive obligations and possible lessons for South Africa” 2015 *De Jure* 65.

⁴⁵⁴ Preamble, section d, g, h, I of the immigration Act.

⁴⁵⁵ Section 27 of the Immigration Act.

continuation of the family life. Section 27(g) of the Immigration Act entitles a foreigner to permanent residence in SA if he or she has a relative within the first step of kinship (including children and parents) who is a RSA permanent resident or citizen. Regardless, home affairs continue to withhold that right from foreign parents and their children.⁴⁵⁶

Section 26 requires that the foreigner must have been the 'spouse' of the citizen or permanent resident for five years and a good faith spousal relationship should have existed. If the State, however, tolerates an illegal foreigner in its territory, not deporting him/her and enabling him/her to form relationships, to get married, to have children, *et cetera*, the situation becomes more complicated.⁴⁵⁷ If special and exceptional circumstances prevail, in their cumulative effect, as well as the importance attached and the protection afforded to marriage or other 'spousal relationships' in terms of *Dawood, Shalabi and Thomas*,⁴⁵⁸ could lead to such an illegal spouse being afforded a right to permanent residence in view of international trends and developments. In this regard, the best interests of children can be a persuading factor.⁴⁵⁹

The protection of family life under such special and exceptional circumstances seems to outweigh the interest of the State in pursuing a restrictive immigration policy and is recommended. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. The right of families to be together must be protected and respected. To prevent such legal issues arising and the occurrence of similar situations, authorities should discourage illegal entry and/or over-staying in the State in line with the aims of the Act, by effectively employing deportation measures as provided for in the Act.⁴⁶⁰ A spousal visa application enables the applicant to join a RSA Citizen or permanent residence holder in RSA on a temporary visa, normally valid for 2 or 3 years.⁴⁶¹

This only allows spouses to be joined for a limited period and possess a great challenge to continuation of family life once the visa expires. It however, does not enable the spouse to

⁴⁵⁶Eisenberg "Home affairs disrupts home lives" BDLive, available at <http://www.bdlive.co.za/opinion/2016/02/03/home-affairs-disrupts-home-lives> (last accessed 10 October 2016).

⁴⁵⁷ Van Der Linde 2015 *De Jure* 67.

⁴⁵⁸ *Dawood v Minister of Home Affairs* para 46.

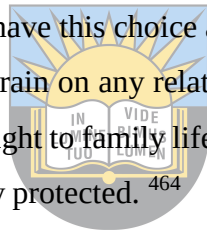
⁴⁵⁹ Van Der Linde 2015 *De Jure* 68.

⁴⁶⁰ *Ibid.*

⁴⁶¹ Integrate Immigration "South African Spousal Visa Requirements – Applying for a Spousal Visa" <https://www.integrate-immigration.com/south-african-spousal-visa-requirements.php> (last accessed 10 October 2016).

work or study during this course of stay and only after five years can the spouse apply for permanent residency in the RSA. Such measures impede on the ability of families to reunite and stay together for long since it imposes such strict requirements. The State needs to balance up the need for financial stability of the applicants and the need to promote family life.

The case of *Dawood and another vs Minister of Home Affairs* and others provides a glimpse at the impediments that the immigration law has on family life. The case concerns RSA citizens and their spouses, who are neither citizens nor permanent residents of RSA. The case examines the constitutional right of spouses to cohabit and the need for Parliament, when granting government officials powers that touch on constitutional rights, to lay down proper guidelines.⁴⁶² Justice Kate O'Regan, noted that there is no automatic entitlement to such temporary permits. Each application is considered on its merits and the grant or extension of a temporary residence permit to a foreign spouse may be refused.⁴⁶³ The RSA spouse is then forced to go abroad with the foreign spouse or remain behind alone pending the outcome of the application. Many are too poor to have this choice and must remain in RSA without their spouses. Enforced separation places strain on any relationship and may destroy the marriage relationship altogether. Although the right to family life is not expressly mentioned in the Bill of Rights, such right is constitutionally protected.⁴⁶⁴



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The right to family life is recognised in international treaties and receives protection in a variety of ways, while marriage and the family are of vital importance to society. In addition, human dignity entrenched in section 10 of the Bill of Rights is of fundamental importance to our society and our constitutional interpretation, especially because of our past where it was routinely and cruelly denied. Human dignity is a foundational value, which informs the interpretation of many, perhaps all, other rights.⁴⁶⁵

He went further on to note that, the right to enter and sustain permanent intimate relationships is part of the right to dignity. Entering and sustaining a marriage relationship are of defining significance for many people. Not only legislation that prohibits the right to form a marriage relationship infringes the right to dignity; any legislation that significantly impairs the ability

⁴⁶² *Dawood v Minister of Home Affairs* 67.

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

of spouses to honour their obligations to one another would also limit such a right. A central aspect of marriage is cohabitation, right and duty to live together. Legislation that significantly impairs the ability to honour this obligation constitutes a limitation of the right to dignity.⁴⁶⁶ In this case, the court for the first time linked the right to family life to dignity and dignity, which is at the core of the democratic values of the country. One would argue the State needs to be flexible in its requirements to obtain the visa or permits that allow families to ensure such requirements do not impair on family life thereby affecting the dignity of its citizens.

4 14 Criminal Law

In everyday society, children become exposed of the criminal justice system. The Child Justice Act⁴⁶⁷ seeks to provide a framework on how children who find themselves in such circumstances can live and lead a normal life and protected from the harsh justice system. In the preamble, the Act seeks to protect the children's best interest by providing to family, parental or appropriate alternative care.⁴⁶⁸

The best interests of the child continue to be a dominant narrative on which even the justice system seeks to balance between the justice and best interests of the child. Chapter 4 section 21 to 29 govern the detention and placement of a child.⁴⁶⁹ The Act, seeks to ensure that a child is provided the best the care by being released into parent or guardians care. Thus, irrespective of the outcome of the case against the child, the state must take all measures possible to ensure the child enjoys family life and provided alternative care where possible.

In the case of *Hugo vs President of RSA* in which the applicant sought to challenge the amnesty granted by the president to mothers in prison on grounds that it violated the equality clause as he as a father was no eligible to the relief.⁴⁷⁰ The president in his founding affidavit argued that he

“Was motivated predominantly by a concern for children who had been deprived of the nurturing and care which their mothers would ordinarily have provided. Having spent many years in prison myself, I am well aware of the hardship, which flows from

⁴⁶⁶ *Ibid.*

⁴⁶⁷ Child Justice Act 75 of 2008.

⁴⁶⁸ Preamble of Child Justice Act.

⁴⁶⁹ Chapter 4 of Child Justice Act.

⁴⁷⁰ *President of the Republic of South Africa v Hugo* 34.

incarceration. I am also well aware that imprisonment inevitably has harsh consequences for the family of the prisoner”⁴⁷¹

One would question why with such experience and understanding of how lack of family life in prison harsh consequences for the prisoner and family has, why did the president not grant it to all forms of families. Nevertheless, this shows that at that time the State seemed to view mothers as the backbone of the family and thus it sought to preserve the relationship between a mother and child more importantly than with the father.

In addition, to the above, the president was further motivated to do this in the best interests of the child. However, in this case the child’s best interest was violated. The court concluded that regarding the impact upon fathers of young children who were not released the majority of the Court held that, although the pardon may have denied men an opportunity it afforded women and could not be said that it fundamentally impaired their sense of dignity and equal worth.

Moreover, the pardon merely deprived them of an early release to which they in any event had no legal entitlement since the grant of a pardon is a matter purely within the discretion of the president. The court held that the pardon did not preclude fathers from applying directly to the President for remission of sentence on an individual basis in the light of their special circumstances. Therefore, the pardon was not unfairly discriminatory.⁴⁷²

In *S v M* where a single mother of three was convicted of fraud, the court had to decide on impact of the constitutional injunction that the best interests of a child are paramount in all matters concerning the child on sentencing of primary caregivers of young children.⁴⁷³ Sachs J noted that focused and informed attention needed to be given to the interests of children at appropriate moments in the sentencing process. The objective was to ensure that the sentencing court was in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts fell short in this respect, proper regard for constitutional requirements necessitated a degree of change in judicial mind-set.⁴⁷⁴

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*

⁴⁷³ *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).

⁴⁷⁴ *Ibid.*

The court concluded that that in the light of all the circumstances of this case M, her children, the community and the victims who will be repaid from her earnings, stand to benefit more from her being placed under correctional supervision than from her being sent back to prison and a lighter sentence was imposed. In a separate judgment concurred in by Navsa AJ and Nkabinde J, Madala J agreed with the reasoning of Sachs J insofar as it related to the best interests of the children in terms of section 28(2) of the Constitution.⁴⁷⁵ He held that the interests of the children cannot be viewed in isolation and that a nuanced approach should be adopted when balancing the best interests of the children and the interests of society about deterrence, punishment and retribution.⁴⁷⁶

In 2010, the court followed a similar approach in the case of *S vs Mudziwa Ntikedzeni* the accused was found guilty of culpable homicide.⁴⁷⁷ In evaluating for mitigating circumstances the court found that the accused had a family life and was at the core of it by providing for his family and has a good relationship with his children and current wife. The court went on to further consider the best interests of the children in the matter to decide whether imprisoning the accused was in the best interests of the children. In the event the court gave the accused, a lighter sentence based on the account that arresting him would prove very detrimental to his children's family life and support, as he was the sole breadwinner. Thus, in as much as attempts have been made by legislation and through case law the State still has a long way to ensure that the way police treat the arrest of minor children is in line with the objects of the Juvenile Justice Act.

4 15 Summary

RSA has made significant strides in its attempt to provide for children's right to family life as part of its international and constitutional obligations. Notably the wider definition of a family and attempt to contextualise what the best interest of the child entails. Other branches of law such as family law, labour law etc. have all been structured in such a manner that ensures that the interests of families and children are catered for and where a conflict of laws exist the best interests of the child standard is of paramount importance. However, in as much as legislative

⁴⁷⁵ Section 28(2) of the Constitution of Republic of South Africa 1996.

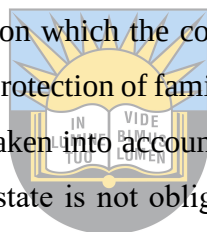
⁴⁷⁶ *S v M* para 43.

⁴⁷⁷ *S vs Mudziwa Tikedzeni* CC26/2010.

and policies have been drafted that advance family life, the implementation of these policies through the administrative bodies continues to be a challenge.

On immigration and refugees, the Department of Home Affairs continues to tighten policies making it difficult for families to reunite and the slow pace at which legal documents are provided to unaccompanied minors possess a great challenge in terms of their placement and livelihood because it denies them access to necessities. While the children can have a voice regarding their parents' marriage, divorce and inheritance, in practise children have very little say and as a result, their views and interests are not catered for. The State needs to ensure that before approving a marriage or divorce the children's voice is heard and considered in the decision-making process. All these and other reasons discussed above show why the state needs to strengthen in legislative and administrative processes to full realise the best interests of the child in family life.

RSA has a long way to go in full recognising and implementing various instruments and realising the constitutional principles on which the country is founded on regarding family life. The failure to provide an explicit protection of family through constitutional or legislative provision has made the family to be taken into account as a secondary factor in deciding of children's issues simply because the state is not obliged to do so or it recognises that that doing will result in it assuming more burden in providing adequate resources to fully recognise this right.



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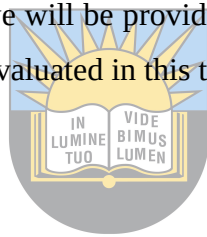
The State has made great strides in some respects by providing a contextualised understanding on the best interests of the child standard, seeking to protect unaccompanied minors, allowing children to claim from their deceased parents will etc. Such measure goes a long way to improving the family life for children even though more rigorous legislative and administrative measures need to be put to strengthen the promotion and protection of children's right to family life. The next chapter will compare how RSA has performed in terms of fulfilling its obligation with Zimbabwe and Canada.

Chapter 5

5 COMPARISON OF SOUTH AFRICA WITH OTHER STATES: ZIMBABWE AND CANADA

5 1 Introduction

In the previous chapter, we examined the legislative and administrative provisions in RSA, which address various aspects of day today human living and have an impact on family life. As a member of the international community, it is imperative to understand and compare how other jurisdictions are performing in so far as promoting the right to family life. In this chapter, we will compare how Zimbabwe, Canada and RSA promote and protect the right to family life through various legislative and policy frameworks, which affect families. At the end of the chapter, this will give us a better understanding of where the country is doing well and where it is lacking in terms of promoting family life for children. An account of the legal systems of both Canada and Zimbabwe will be provided, and a detailed comparison of each aspect discussed in chapter 4 will be evaluated in this chapter.



5 2 Zimbabwean Legal System

In 2013, Zimbabwe adopted a new Constitution⁴⁷⁸, which replaced the Lancaster House Constitution of 1979.⁴⁷⁹ The current Constitution of Zimbabwe is a home-grown Constitution whose adoption process took close to three years. The constitution was ushered through Constitution of Zimbabwe Amendment (No. 20) Act, 2013.⁴⁸⁰ The Constitution of Zimbabwe is the Supreme Law of the country and it is the parent Act for any other legislation.⁴⁸¹ The Constitution provides for rights of the citizens. Part 1 of Chapter 4 provides for application and interpretation of these rights. About its application, section 45 provides for both horizontal and vertical application of the constitutional rights.⁴⁸² In particular, it affords these rights to both natural and juristic persons and importantly obliges the same and the State to respect, protect, promote and fulfil the rights and freedoms set out in the constitution.

⁴⁷⁸ Constitution of Republic of Zimbabwe, 2013.

⁴⁷⁹ Constitution of Republic of Zimbabwe, 1979.

⁴⁸⁰ Saki and Chiware "Update: The Law in Zimbabwe" April 2014, available at http://www.nyulawglobal.org/globalex/Zimbabwe1.html#_edn2 (last accessed 17 October 2016).

⁴⁸¹ Section 2 of the Constitution of Republic of Zimbabwe, 2013.

⁴⁸² Section 45 of the Constitution of Republic of Zimbabwe 2013.

The interpretation of the bill of rights is provided for in section 45 and it obliges the courts, tribunals, forums and bodies to give full effect of the rights and freedoms; to promote the values and principles that underlies a democratic society and the values set out in the constitution. Most importantly, this section gives the courts the power to take into account international law and all treaties and conventions to which Zimbabwe is a party and to consider relevant foreign law.⁴⁸³ Chapter 2(34) outlines the domestication process of international instruments by requiring the State to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.⁴⁸⁴ One can conclude that like RSA, Zimbabwe is a dualist in treaties and monist in customary international law.

Unlike RSA, the right to family life is expressly provided in the Constitution and can be inferred from other rights of a similar nature. Chapter 2 of the Constitution outlines primary national objectives in section 19 (1) requires the State to adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount.⁴⁸⁵ The best interest standard was adopted through the CRC and all States that are a member of the instrument now apply it in their domestic legislative and policy framework. Furthermore, section 19(2) (a) states that the State must adopt reasonable policies and measures, within the limits of the resources available to it, to ensure that children enjoy family or parental care, or appropriate care when removed from the family environment.⁴⁸⁶ The State recognises the role of a family in a child's life and requires the State to place paramount importance in promoting and protecting it. Section 25 states that

(a) The State and all institutions and agencies of government at every level must protect and foster the institution of the family and in particular must endeavour, within the limits of the resources available to them, to adopt measures for a the provision of care and assistance to mothers, fathers and other family members who have charge of children.⁴⁸⁷

This is a milestone achievement because the State recognises the family as a basic unit of greater society and seeks to provide necessary protection to it. The fact that the Constitution amongst its national objectives recognises children's rights as of primary importance is a great

⁴⁸³ Saki and Chiware "Update: The Law in Zimbabwe" April 2014, available at http://www.nyulawglobal.org/globalex/Zimbabwe1.html#_edn2 (last accessed 17 October 2016).

⁴⁸⁴ Chapter 2(34) of the Constitution of Zimbabwe, 2013.

⁴⁸⁵ Chapter 2 of the Constitution of Zimbabwe, 2013.

⁴⁸⁶ Chapter 2 Section 19 of the Constitution of Zimbabwe 2013.

⁴⁸⁷ Chapter 2 Section 25 of the Constitution of Zimbabwe 2013.

achievement towards the advance of children rights and for family life. In Zimbabwe, children's rights are governed by the Children's Act.⁴⁸⁸ This Act will be discussed in detail in this chapter. Since Zimbabwe and RSA both share a similar legal system and constitution, it provides a suitable example on which to make a comparison on the strides made to advance children's right to family life.

5 3 Canadian Legal System

Canada is a constitutional monarchy, which has a Parliament, composed of a Senate and House of Representatives, and ten provinces, which have legislative assemblies. Since Canada's various Constitution Acts do not assign the subject of children to either level of government, it is essentially split, with each level-covering children as part of the jurisdictions conferred upon them and there is no one age of majority for all purposes of Canadian law.⁴⁸⁹ Canada has ratified the CRC⁴⁹⁰

Canadian constitutional law does not permit the federal government to legislate over matters that fall under provincial jurisdiction even for implementing an international agreement; Canada makes reservations to this effect if implementation would require provincial cooperation. The federal government has had to work with the provinces in implementing aspects of the original convention dealing with such matters as education and health care. On the other hand, the conduct of war and criminal law are matters under federal jurisdiction. Thus, the federal government has been able to implement the Optional Protocols by amending its statutes that regulate national defence and create a national criminal code.⁴⁹¹

Children and Family Services Act govern children's rights and laws.⁴⁹² The Act seeks to promote services to children and their families, the protection of children and adoption. The Act recognises that the family exists as the basic unit of society, and its well-being is inseparable from the common well-being and the rights of children are enjoyed either personally or with their family.⁴⁹³ In Canada, children and family are not mutually exclusive.

⁴⁸⁸Zimbabwe: Children's Act Chapter 5:06.

⁴⁸⁹Library of Congress "Children's Rights Canada" <https://www.loc.gov/law/help/child-rights/canada.php> (last accessed 17 October 2016).

⁴⁹⁰ See ratification table for CRC.

⁴⁹¹Library of Congress "Children's Rights Canada" <https://www.loc.gov/law/help/child-rights/canada.php> (last accessed 17 October 2016).

⁴⁹² Children and Family Services Act Chapter 5 of the Acts of 1990 Canada.

⁴⁹³ *Ibid.*

The welfare and best interests of children are best provided for under the family. Since the Canadian legal system does not allow a universal application of a federal law on all provinces, this piece of federal legislation enables the federal state to require the provincial governments to not separate children and family in their legislative and policy framework. Canada provides a suitable jurisdiction for comparison for this study because some of the provisions in RSA's legal were borrowed from Canadian legal system and the State has a renowned welfare policy.

5 4 Children's Acts in RSA, Zimbabwe and Canada

In RSA, the Children's Act governs children's rights. Among other important features of the legislation is the best interest's standard section 7⁴⁹⁴. This standard domesticated from the Convention on the Rights of the child is applied in judicial and administrative processes in adjudicating children's matters. Parental rights and responsibilities, in chapter 3 section 18 up to 35 of the Act details the rights and responsibilities of parents on children and these include providing love care and support which a child needs from a family. Children in need of protection seeks to provide for alternate care in line with international obligations. Adoption and surrogate mothers some of the common forms of providing alternative care but also familial units that provide a family life to children.⁴⁹⁵ These sections are important in understanding the context of children's right to family life.

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In Zimbabwe like in RSA, the Children's Act governs children's rights.⁴⁹⁶ Among other features of the Act, establishes a child Welfare Council (part 1A), Part IV which seeks to prevent neglect and abuse. Part VIIA and VII, which deal with foreign and domestic adoption. Part VIIB that establishes the Child welfare fund. In Canada, the Children and Families Services Act govern the Children's welfare.⁴⁹⁷ Section two of the Act states that the primary purpose of the Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.⁴⁹⁸

⁴⁹⁴ Section 7 of Children Act of South Africa.

⁴⁹⁵ Chapter 9, 15, 19 of Children's Act of South Africa.

⁴⁹⁶ Zimbabwe: Children's Act (5:06).

⁴⁹⁷ Children and Family Services Act Chapter 5 of the Acts of 1990 Canada.

⁴⁹⁸ *Ibid.*

Section 13(1) and (2) provides for promotion of family integrity and section 14 requires a duty to provide services to the child.⁴⁹⁹ Section 68 governs adoption.⁵⁰⁰ The Act in detail seeks to promote and protect family life and the role of children in a family and from abuse. The establishment of a Child Welfare Fund is a welcome move in addressing welfare matters but it is not particularly clear how this will help in promoting family life for children. RSA and Zimbabwe can emulate the combination of family life into Children's Act. That way the State is obliged to provide children with their rights supported by their family. RSA must include the right to family life in its constitutional provisions. This will ensure the State entities do not treat family life as a secondary need but a primary need to human life in issues relating to immigration and labour laws.

5.5 Best Interests of the Child Standard

By ratifying the CRC, RSA, Zimbabwe and Canada also adopted the best interests of the child standard as a principle to adjudicate and decide on all matters relating to children. In Canada Section of the Children and Family Services Act, which governs children's, matters states that in all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.⁵⁰¹ Unlike Canada and RSA in Zimbabwe the best interests of the child standard is not contained in the legislation but rather is entrenched in the Constitution through section 19(1) which states that the State must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount.⁵⁰² Zimbabwe unlike RSA and Canada does not through legislation contextualise the best interest of the child standard and this possess a challenge for judiciary and administrative bodies in dealing with children's rights. The lack of articulated parental rights and responsibilities also presents a challenge.

In RSA section 9 of the Children's Act states that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.⁵⁰³ Section 7 of the Act provides a context to what the standard means in RSA. The Act does not define the standard but provides several factors to be considered in applying the standard. RSA thus goes a step further by contextualising the standard to enable

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² Section 19(1) of the Constitution of Republic of Zimbabwe 2013.

⁵⁰³ Section 9 of the Children's Act of South Africa.

the judiciary and administrative organs of the state to have clarity into content on this matter. One can therefore conclude that on this matter RSA has taken a leading role on the matter. RSA must be commended for interpreting the best interests of the child standard.

5 6 Immigration & Citizenship

Migration laws are essential for families because they determine whether the family will be able to enjoy family life or not. The denial of a visa or stripping of citizenship to a parent/s may result in the loss of family life for children. As such, these laws must be closely monitored to ensure they are just and are in the best interests of children and family life. Citizenship has been a heated debate in Zimbabwe, the Constitution in entire chapter 3 address the acquisition and loss of citizenship.⁵⁰⁴ Citizenship can only be acquired by birth, descent or registration. The new constitution gives provision for the establishment of a board responsible for granting and revocation of citizenships by registration and granting of permits to non-citizens who intends to reside and work in Zimbabwe. The board shall consist of a chairperson and at least two other members, appointed by the President.⁵⁰⁵ However, Otto Saki and Tatenda Chiware note that:

“Regardless of these provisions being clear and progressive, in practice, where a person have a Zimbabwean identity document and Zimbabwean birth Certificate depicting that the holder is a Zimbabwean, that person cannot be issued with a Zimbabwean passport on the basis that he/she should renounce their citizenship first. This has made persons like farm workers, who are originally from Malawi but have regarded Zimbabwe as their permanent home, without passport. Their position is further worsened by the fact that most of them have since lost contact with their descents and they do not appear in the records of their country of origin. The Courts have tried without success to compel the Registrar’s Offices to issue passports to such persons.”⁵⁰⁶

By not recognising these individuals as citizens, this poses a challenge to their family life as they are unable to travel back home to visit their families nor to be able to enable their families to join them, thereby hindering family life. Section 3A of the Immigration Act addresses marriages for convenience in which if the marriage officer is satisfied that two persons getting

⁵⁰⁴ Chapter 3 of the Constitution of Zimbabwe 2013.

⁵⁰⁵ Section 41 of the Constitution of Zimbabwe 2013.

⁵⁰⁶ Saki and Chiware “Update: The Law in Zimbabwe” April 2014, available at http://www.nyulawglobal.org/globalex/Zimbabwe1.html#_edn2 (last accessed 17 October 2016).

married are doing it for purposes of acquiring right to entry or have no intention of living together the marriage will be declared void.⁵⁰⁷

Such a policy can be very arbitrary to the extent that it leaves the fate of the proposed family on the hands of a single immigration officer and no appeal process is provided by the legislation. The citizenship Act in section 3 grants citizenship to a child born to two citizens provided this child is not yet an adult and in section 4, it allows citizenship to be granted provided to an adopted child.⁵⁰⁸ The immigration Act is generally flexible in terms of its requirements of who can be allowed entry and residence into the country.

However, the Immigration Act of RSA has very stringent requirements for person seeking to move into the State for short term or permanent basis. Section 18(1) only allows the granting of a Relative visa, which enables a relative or spouse to a citizen /permanent resident of the Republic to visit provided the applicant of the citizen/permanent residency holder could demonstrate financial capability to host.⁵⁰⁹ This is discriminatory based on financial standing whereas section 25 of the Act only allows the granting of permanent residence to someone who has acquired a permanent job however the family of the applicant is not entitled to receive this status too.⁵¹⁰ This allows the immigration department to be able to separate families, which is not in the best interests of children.

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In Canada, permanent residence can be obtained through family reunification provided in section 12(1) of the Immigration and Refugee Act which states that a foreign national may be selected as a member of the family class based on their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.⁵¹¹

The law is however, vague in section 27 to the extent of the rights and obligations of permanent residents and temporary residents their rights are limited but not clear to what extent. This lack of clarity in the law can pose a challenge especially for families since it is unclear to what extent the family members are able to enjoy fulfilling their parent rights and

⁵⁰⁷ Section 3A of the Immigration Act Chapter 4:02 as amended up to Act 22/2001 of Zimbabwe.

⁵⁰⁸ Citizenship of Zimbabwe Act Chapter 4:01 Act No. 23 of 1984 as amended by Act No. 7 of 1990.

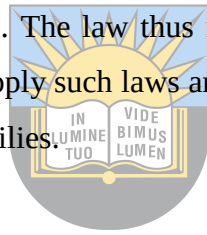
⁵⁰⁹ Section 18(1) of the Immigration Act of South Africa.

⁵¹⁰ *Ibid.*

⁵¹¹ Immigration and Refugee Protection Act S C 2001 c 27 Canada.

responsibilities towards children. One can safely say Zimbabwe has flexible immigration rules that allow the free movement and promotion of immigrant families unlike RSA and Canada.

In RSA, unlike Zimbabwe citizenship is only provided for in terms of legislation. Section 2 of the Constitution requires that national legislation be promulgated to govern how legislation shall be acquired, loss and restoration.⁵¹² The RSA Citizenship Act governs the citizenship. In both RSA and Zimbabwe, loss of marriage does not affect citizenship.⁵¹³ Citizenship can be acquired through birth, descent and naturalisation. Citizens can lose their citizenship if they marry another foreign citizen in another country, if the minister deems it to be of public interest to do so, or such citizen has at any time been sentenced in any country to a period of imprisonment of not less than 12 months for any offence which, if it was committed outside the Republic, would also have constituted an offence in the Republic.⁵¹⁴ Such stringent methods can have far detrimental effects to a family life and the children if either/both parents are to be stripped of their citizenship. The law thus needs stricter requirements to revoke citizenship so that the state may not apply such laws arbitrarily to people without due regard to effect on their personal life and families.



In Zimbabwe section 15 of the citizenship Act Citizenship of women not affected by marriage, it states that

“A married woman shall, subject to this Act and Chapter II of the Constitution, be capable of acquiring, losing, divesting herself of and being deprived of, citizenship of Zimbabwe in all respects as if she were an unmarried woman of full age.”⁵¹⁵

However, in Zimbabwe it seems to deprive men of this right to retain their citizenship irrespective of marriage and this may have a negative effect when it comes to their family life if after divorce they lose their citizenship it therefore suggests the children will be left fatherless if the father is deported, an outcome which is very detrimental for the children. In Canada citizenship can be acquired by birth or grant.⁵¹⁶ Section 5 allows granting of citizenship to minors and adults through adoption.

⁵¹² Section 3 of the Constitution of the Republic of South Africa 1996.

⁵¹³ Chapter 6(14) of citizenship Act of South Africa.

⁵¹⁴ Section 2(a) of citizenship Act of South Africa.

⁵¹⁵ Section 15 of Citizenship Act of Zimbabwe.

⁵¹⁶ Citizenship Act R S C 1985 c 29 Canada.

The law is also unclear on how citizenship is lost. A situation which causes great discomfort to immigrant families if they do not know what steps they need to fulfil in order not to lose their citizenship. Generally, all the three countries seek to empower the citizens to enjoy the rights and responsibilities provided for by the State however, in Canada more clarity is needed in terms of how citizenship is lost, effect of marriage on citizenship. While in Zimbabwe, the law needs to be gender neutral in order not to discriminate against gender when it comes to loss or acquisition of citizenship.

5.7 Criminal Law

Juvenile justice refers to legislative, institutional, and procedural mechanisms that specifically deal with juvenile offenders or children in conflict with the law.⁵¹⁷ In RSA, the Juvenile Justice Act governs the criminal proceedings against children.⁵¹⁸ It outlines the process on how children who find themselves in such circumstances can live and lead a normal life and protected from the harsh justice system. In the preamble, the Act seeks to protect the children's best interest by providing to family, parental or appropriate alternative care. Chapter 4 section 21 to 29 governs the detention and placement of a child.⁵¹⁹

In Canada, the Youth Criminal Justice Act governs the proceedings against children.⁵²⁰ Section 26 requires the State to notify the parents/guardians of the accused, section 38 governs the sentencing and it is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.⁵²¹ The Act generally seeks to ensure the criminal proceedings happen in a safe environment and the offender is held accountable whilst preserving his/her livelihood such as family life, which is in the best interests of society.

Zimbabwe unlike RSA has a codified criminal law system.⁵²² This means criminal law has been into statute and common law no longer apply unless otherwise provided in the Act.

⁵¹⁷ Njungwe "International standards on juvenile justice: Implications of the new criminal procedure code on the administration of juvenile justice in Cameroon" 2008 *Journal on Democracy and Human Rights* 10.

⁵¹⁸ Child Justice Act of South Africa.

⁵¹⁹ Chapter 4 of the Child Justice Act of South Africa.

⁵²⁰ Youth Criminal Justice Act S.C. 2002 c 1 of Canada.

⁵²¹ *Ibid.*

⁵²² *Ibid.*

Section 84 of the Children's Act addresses detention of children and requires that a child or young person who is charged with an offence shall not before conviction be detained in a prison or police cell or lock-up unless his detention is necessary and no suitable remand home is conveniently available for his detention.⁵²³ Thus, the State seeks to limit detention of children as much as possible.

Section 6 of the Criminal law codification Act states that children between ages zero to seven have no criminal capacity, while those between seven to 14 years is presumed to lack capacity and while those above fourteen have mental capacity to commit crimes.⁵²⁴ The Children's Act uses the terms 'juvenile offenders' and 'children in conflict with the law' refer to persons below the age of 16.⁵²⁵ This therefore means any child who has been convicted faces the full wrath of the law even though they have special prisons for children, the law seeks to make the child account not does it seem to allow for family life for the convicted parents and child.

5 8 Labour Laws

In RSA, labour laws concerning family life are governed by the Basic Conditions of Employment Act.⁵²⁶ Section 27 of the Act states that full time workers may take 3 days of paid family responsibility leave during each annual leave cycle (12-month periods from date of employment).⁵²⁷ The reasons for a family leave include when your child is born when your child is sick in the event of the death of your spouse or life partner parent or adoptive parent grandparent child or adopted child, grandchild, sibling.⁵²⁸ Maternity leave in RSA is governed by section 25 of the Basic Conditions of Employment Act.⁵²⁹ Pregnant women may take 4 months of maternity leave, starting 1 month before their due date.⁵³⁰ The maternity leave however does not extend to men.

In Zimbabwe, the Labour Act does not provide for family responsibility leave. However, special leave entitlements as identified under section 14B may be used.⁵³¹ Employees may

⁵²³ Section 84 of Children's Act of Zimbabwe.

⁵²⁴ Section 6 of the Criminal Law (Codification and Reform) Act Chapter 9:23 Act 23/2004 6/2005 (S. 11), 9/2006 (S. 31), 3/2009. Si 30a/2007 134/2007, 51a/2008 109/2008.

⁵²⁵ Children's Act Chapter 5:06 Zimbabwe.

⁵²⁶ Basic conditions of Employment Amendment Act of South Africa Act 75 of 1997.

⁵²⁷ *Ibid.*

⁵²⁸ Section 27 of Basic conditions of Employment Amendment Act of South Africa.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

⁵³¹ Section 14B Labour Act 1985, Chapter 28:01 Acts 16/1985, 12/1992, 20/1994 (s. 19), 22/2001, 17/2002, Zimbabwe.

request for up to 12-calendar days special leave for personal reasons that affect their immediate family (death of a spouse, parent, child, legal dependent or on any other justifiable compassionate ground.⁵³² The law does not support work-life balance for parents or workers with family responsibilities. Section 18 of the Labour Act provides maternity leave upon production of a medical certificate. Female employees are granted maternity leave for a period of 98 days on full pay. A female employee may proceed on maternity leave not earlier than the forty-fifth day and not later than the twenty-first day prior to the expected date of delivery.⁵³³

In Canada, the labour code governs labour laws in the country.⁵³⁴ Section 206 states that:

“206.1 (1) Subject to subsections (2) and (3), every employee who has completed six consecutive months of continuous employment with an employer is entitled to and shall be granted a leave of absence from employment of up to thirty-seven weeks to care for a new-born child of the employee or a child who is in the care of the employee for the purpose of adoption under the laws governing adoption in the province in which the employee resides.”⁵³⁵

Section 2 further provides for an extension of this leave and section 26(2) (2) allows for an extension for the total number of weeks the child is in hospital. The law is very generous as far as allowing working parents to have family life. It further allows for an aggregate leave, which combines both maternity and parental leave that may be taken by one, or two employees under sections 206 and 206.1 in respect of the same birth shall not exceed fifty-two weeks.⁵³⁶ It appears the law is gender neutral on the granting of aggregate leave.

Section 206(3) provides for a compassionate care leave every employee is entitled to and shall be granted a leave of absence from employment of up to 28 weeks to provide care or support to a family member of the employee if a qualified medical practitioner issues a certificate stating that the family member has a serious medical condition with a significant risk of death within 26 weeks.⁵³⁷ Female employees are entitled to maternity leave, are entitled to, and shall be granted a leave of absence from employment of up to seventeen weeks, which leave

⁵³² *Ibid.*

⁵³³ S18 of the Labour Act 1985, Chapter 28:01 Acts 16/1985, 12/1992, 20/1994 (s. 19), 22/2001, 17/2002 Zimbabwe.

⁵³⁴ Canada Labour Code (R.S.C., 1985, c. L-2).

⁵³⁵ Section 206 of the Canada labour code.

⁵³⁶ Section 206(2) of the Canada Labour code.

⁵³⁷ Section 206(3) of the Canada Labour code.

may begin not earlier than eleven weeks prior to the estimated date of her confinement and end not later than seventeen weeks following the actual date of her confinement.⁵³⁸

Zimbabwe must adopt legislative provisions, which recognise family responsibility leave. RSA like Canada needs to adopt flexible family responsibility leave like Canada, which extend more time and introduce the compassionate care leave, which will allow for working family members to spend time with their loved ones who are sick. Maternity leave must be granted to both parents of the child to allow a child to grow up with his or her parents. If such measures are implemented this will go a long way in promoting family life especially in families where both parents work.

5.9 Adoption

In Canada, section 68 to 87 of the Children's Act governs adoption of children. The Act outlines the process that includes the placement requirements and procedures (section 69 and 70).⁵³⁹ Section 70(2) requires all adoptions to be carried out with consent from the parents. Section 78A (1) allows for the Openness agreement which requires the purpose of facilitating communication with or maintaining a relationship with a child between an adopting parent and an adoptive parent.⁵⁴⁰



Section 78(3)(a) twelve years of age or older, the child's views must be considered before an agreement is made while s78(3)(b) states that less than twelve years of age, the child's views must, where it is appropriate, be taken into account before an agreement is made.⁵⁴¹ This initiative allows children's views to be listened to and have a say regarding their family life. Section 83(1) allows for aggrieved parties to make an appeal against the decision and Section 84 where one year has elapsed from the date of an order for adoption, the order shall not thereafter, in any direct or collateral proceeding, be subject to attack or to be set aside. This gives adequate protection to the adoption process and the adopted child.⁵⁴²

⁵³⁸ Section 206(1) of Canada Labour code.

⁵³⁹ Section 69 & 70 of the Children and Family Services Act Canada

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*

In Zimbabwe, child adoption is governed by the Children's Act. Key features of this Act include section 75, which allows for foreign adoption. Section 59(2) an adoption order shall not be made in any case where the sole applicant is a male and the minor in respect of whom the application is made is a female, unless the court is satisfied that there are special circumstances, which justify as an exceptional measure the making of an adoption order.⁵⁴³ This is discriminatory on males. Section 59(4) only requires the consent of the two parents and no views of the child are considered in the process.

A recession of adoption order can be made where the applicant is the parent of the minor, that he did not consent to the adoption and that the adoption order should not have been made without his consent or where the applicant is an adopter, that his adoption of the minor was induced by fraud, misrepresentation or *Justus error*. If the minor was suffering from a serious physical defect or that the minor is a mentally disordered or defective person in terms of physical defect or mental disorder or defect existed at the time of the making of the adoption order.⁵⁴⁴ No application shall be made more than six months after the date upon which the applicant became aware of the fact that an order for the adoption of his minor child had been made, or more than five years after the date upon which that order was made. However, unlike RSA and Canada, Zimbabwe lacks behind in not having a child protection register.

The children's Act governs adoption of minors in RSA. Chapter 16 also allows foreign adoption. Section 231(2) (c) allows for adoption if the adopter is above 18 years old while section 231(4) states that one may not be disqualified from adoption based on their financial status. This possess a challenge in attempting to provide for children's family life where love care and material support exists however no financial support is possible.⁵⁴⁵ Poverty contributes amongst some of the reasons why many children are street kids.⁵⁴⁶ Section 233(c) (ii) allows for adoption of the child if the child is above 10 and consents to it or is below 10 but is rationale enough to make the choice.

Furthermore, Section 243 allows for the rescission of an adoption order among other applicants and most notable from the adopted child. The Act is however, not clear on the periods on which such an application can be made. This period should be included in this Act

⁵⁴³ Section 59 of Children's Act Zimbabwe.

⁵⁴⁴ Section 67(a) of Children's Act Zimbabwe.

⁵⁴⁵ Section 231(4) of the Children's Act of South Africa.

⁵⁴⁶ *Ibid*.

if contained in other provisions to provide clarity and certainty to all stakeholders who may seek relief and when they can seek such relief. Overall, in RSA, the best interests of the child are of paramount importance and unlike other States; the voice of the child is given paramount importance.

5 10 Marriage laws

In RSA the Marriages Act, Matrimonial Property Act and the Recognition of Customary Marriages Act and Civil Union Act govern marriages. Key features of these Act include section 10 of the Marriage Act allows for marriages between a citizen and non-citizen.⁵⁴⁷ The Matrimonial Property Act governs the acquirement and ownership of material property during a marriage.⁵⁴⁸ There are namely three marital regimes recognised in RSA and they are marriage in community of property governed by chapter 3 of the Act, marriage in community out of property and marriage in community out of community of property with accrual system governed by chapter 1 of the Act.⁵⁴⁹ The Civil Union Act allows the union of same sex couples. The Recognition of customary marriages Act seeks to recognise customary marriages and gives them force of law as civil marriages. These entire Acts indirectly recognise that a family is a by-product of marriage however; they do not explicitly seek to recognise or cater for family life.



Section 78(3) of the Constitution Zimbabwe prohibits same sex marriages as such the Marriage Act only governs heterosexual marriages.⁵⁵⁰ This Act generally governs the technical aspects of a marriage. The Customary Marriages Act provides some detail regarding marriages and the envisaged protection and promotion of family life.⁵⁵¹ Section 16 and 17 seek to protect all marriages from dissolution that were entered under customary marriages Act. Not much guidance is provided in the legislation in terms of marriages and family life as such the Constitution provides the best guidance, in terms of section 26 (c) which provides for equality amongst the spouses and section 26(d) requires State to ensure that there is adequate protection of children and spouses in the event of dissolution of marriage by either death or divorce.

⁵⁴⁷ Marriages Act 25 of 1961.

⁵⁴⁸ Section 10 of the Matrimonial Property Act of South Africa.

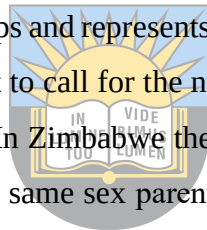
⁵⁴⁹ Chapter 1 & 3 of the Matrimonial Property Act of South Africa.

⁵⁵⁰ Marriages Act chapter 5:11, Zimbabwe.

⁵⁵¹: Customary Marriages Act Chapter 5:07 of 1951 of Zimbabwe.

This section can be read together with section 25 requires the State to take measures to ensure the provision of care and assistance to mothers, fathers and other family members who have charge of children. The family in most instances is a by-product of a marriage as such it allows adequate legislative protection of family and family life in marriage.

In Canada, the Civil Marriage Act governs marriages.⁵⁵² Section two of the Act states that, marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.⁵⁵³ The reference to “two persons,” replacing “one man and one woman” in the former definition, that opens marriage to persons of the same sex.⁵⁵⁴ This in extension excludes polygamy. Section 5(1) recognises marriage of non-residents. Not much is provided for in terms of marriage and family life since Family life in Canada is already tied to children’s Welfare. The Act recognises in its preamble that marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians. This continues to highlight to call for the need for express legislative recognition and protection of family life in RSA. In Zimbabwe there is need however to recognise same sex marriages and by extension afford same sex parents’ ability to raise children and have a family life.



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5 11 Divorce Action

In Canada, the Divorce Act governs the dissolution of marriages.⁵⁵⁵ Section 15(1) requires that a court may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.⁵⁵⁶ This is possibly the only provision that regards the welfare of children. The Canadian Divorce Act requires parents to continue to provide material support towards the children’s upbringing. In Zimbabwe, the Matrimonial Causes regulates the dissolution of marriages in Zimbabwe. Section 10 of the Act regulates the welfare of children born of such marriages.

⁵⁵² Civil Marriage Act S.C. 2005, c. 33 Canada.

⁵⁵³ *Ibid.*

⁵⁵⁴ Hogg “Canada: The Constitution and same-sex marriage” 2016 *Oxford Journals* 712-721.

⁵⁵⁵ Divorce Act R S C 1985 c 3 Canada.

⁵⁵⁶ *Ibid.*

Section 10(2) allows the court to commit the children into the custody of such of the parties or such other person as the court may think best fitted to have such custody or make an order in terms of section seven for maintenance of the children. This section like its Canadian counterpart do not provide for children's participation in the divorce proceedings to come up with the best remedy to their family life.

In RSA, the Divorce Act governs divorce action of all civil and customary marriages. Section 6 of the Act further provides context of how divorce law should deal with the issues relating to the child a welfare to try to ensure that the family life a child needs continues to be provided for despite the circumstances. Section 6 (a) provides that a divorce decree must not be granted until the court is satisfied that sufficient provisions have been made or contemplated with regard to the welfare of the minor or children born of the marriage are satisfactory and to the best of the circumstances.⁵⁵⁷ In all jurisdictions, the welfare of children if taken into account even though there continues to be lack of the voice of the child with regard in these proceedings.



5 12 Succession.

The Deceased, Estates Succession Act governs the distribution of deceased assets in the event of their passing on.⁵⁵⁸ Section 3 of the Act allows the spouse to inherit the estate or residue of the estate. Nothing else in the Act other than children indirectly benefiting from the inheritance of their other parent in this case the surviving spouse. The Act does not in any way allow the children's views to be considered in the distribution nor allow them to claim maintenance from the estate.⁵⁵⁹

In Canada the Wills, Estates and Succession Act governs such succession matters.⁵⁶⁰ Section 20 states that if a person dies without a will leaving a spouse but no surviving descendant, the intestate estate must be distributed to the spouse. Children indirectly benefit through the surviving parent. In Canada unlike other jurisdictions, the law attempts to retain the spousal home. This perhaps may be in recognition of the role of a home to the family life of the

⁵⁵⁷ Section 6 of Divorce Act South Africa.

⁵⁵⁸ Deceased Estates Succession Act Chap. 6:02 Act No. 16 of 1873 as amended through Act No. 6 of 1997 Zimbabwe.

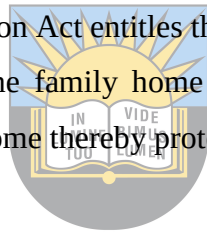
⁵⁵⁹ Section 3 of the Deceased Estates Succession Act Zimbabwe.

⁵⁶⁰ Wills, Estates And Succession Act Chapter 13 (Sbc 2009) Zimbabwe.

surviving spouse. Section 33 (a) allows the court to grant the surviving spouse, the spousal home at the time of the deceased person's death. While 33(e) (I) the surviving spouse has resided in the spousal home for a enough period of time to have established a connection to the spousal home.

In RSA, The Wills Act and Interstate Succession Act govern succession in RSA.⁵⁶¹ Section 2 C (1) and (2) addresses the benefit for surviving spouse and children in cases where a renunciation of the ability to inherit or who would obtain their share of the estate in the event of preceding the death of the spouse or being a minor etc.⁵⁶² This allows the children of deceased to claim for their late parent's estate for the material support. Section 1(a) to (c) provides for the estate to be distributed between the surviving spouse and children. This provision ensures that the children are the first beneficiaries of this estate.⁵⁶³

Unlike the other two jurisdictions, RSA allows the descendants to claim maintenance if not provided for in the Wills and Succession Act entitles them to benefit through the child share. RSA should also seek to preserve the family home like Canada in the best interests of providing the spouse and children a home thereby protecting family life.



5 13 Refugees

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In Canada, the Immigration and Refugee Protection Act govern the welfare of refugees.⁵⁶⁴ Section 99 of the Act allows claims to be made in and out of Canada. Section 100(1) places the burden on the applicant to prove that they are a refugee. Section 108 outlines the requirements of when one cannot qualify to be a refugee.⁵⁶⁵ The requirements include most importantly 108(e), which states that the reasons for which the person sought refuge protection have ceased to exist.⁵⁶⁶ In Canada, applications for refugee status are assessed individually and thus a granting of this status does not extend to the family. Similarly, there is no provision for unaccompanied minors.

⁵⁶¹ Wills Act 7 of 1953 and Interstate Succession Act of South Africa.

⁵⁶² Section 2 of Wills Act of South Africa.

⁵⁶³ Interstate Succession Act 81 of 1987 RSA.

⁵⁶⁴ Immigration and Refugee Protection Act (S C 2001 c 27) Canada.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid.*

In Zimbabwe, the Act of 1983⁵⁶⁷ on refugees governs the welfare of refugees in the country. Section 11(1) of the Act states that the Minister shall endeavour to ensure that members of the family of a recognized refugee are permitted to enter Zimbabwe and, subject to this section, to remain therein. Section 11(2) requires that the refugee be issued with an identity card in the form prescribed; and be permitted to remain within Zimbabwe for as long as the recognized refugee concerned is permitted so to remain.⁵⁶⁸

Section 11(3) where a member of the family of a recognized refugee is within Zimbabwe in terms of this section and ceases to be a member of such family by reason of his marriage, his attaining the age of eighteen years or the cessation of his dependence upon the recognized refugee, as the case may be, he shall be permitted to continue to remain within Zimbabwe in accordance with this Act.⁵⁶⁹ Zimbabwe thus on a legislative framework provides much protection to the refugee and refugee life.

In RSA, the Refugee Act governs the welfare of refugees. Chapter 5 of the Act provides a detail of the rights and obligations of the refugees when in the republic in particular section 27(1) (b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution⁵⁷⁰ and the right to remain in the republic in accordance with the provisions of this Act.⁵⁷¹ Moreover section 3 (e) of the Act states that the family must not be in the republic at the time of application and it can therefore be argued the drafters anticipated the reunion of refugee families in RSA.⁵⁷² The Refugee Act and legislation in RSA prohibits the implementation of refugee camps because they are said to separate people from society and restrict freedom of movement.⁵⁷³ RSA thus needs to adopt similar legislative provisions as Zimbabwe in order to protect the family life of the refugee and offer more protection to unaccompanied minors.

⁵⁶⁷ Refugees Act Chapter 4:03 Act of 1983 of Zimbabwe.

⁵⁶⁸ Section 11(2) Act on Refugees of Zimbabwe.

⁵⁶⁹ Section 11(3) Act on Refugees of Zimbabwe.

⁵⁷⁰ Chapter 2 of the Constitution of Republic of South Africa 1996.

⁵⁷¹ Refugees Act of South Africa.

⁵⁷² Khan Refugee Law in South Africa (2014) 45.

⁵⁷³ Magnes, "A bleak reality of migrants and their children in South Africa" Daily Maverick http://www.dailymaverick.co.za/opinionista/2016-06-20-a-bleak-reality-of-migrants-and-their-children-in-south-africa/#.V_pa2Pl97IV (accessed 10 October 2016).

5 14 Social welfare

In RSA, the Social Assistance Act governs the social security law. The preamble of the Act states that since the constitution, provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance, and obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.⁵⁷⁴ Section 28(1) (c) further grants every child the right to basic social services.⁵⁷⁵ In this case, we will infer the dependents to include children. A child grant, care dependency grant and foster grants are among other social welfare benefits the State provides towards the welfare of children.

In Zimbabwe the Social Welfare Assistance Act.⁵⁷⁶ The Act makes no special provisions for children but allows those who qualify to benefit. However, Section 75(I) of the Children's Act sets up the Child Welfare Fund established shall be the development and promotion of the welfare and protection of children and young persons. Section 75(e) any other activities or projects aimed at promoting the welfare and protection of children and young persons.⁵⁷⁷ This fund may at the discretion of the government be used to provide support to children. Social services are instrumental in assisting individuals, families and communities in preventing or changing the social conditions that adversely affect them.

By the mid-seventies, Canada had become a modern “welfare State” with an expensive and comprehensive “safety net”.⁵⁷⁸ Each province operates its own insurance program. Virtually all residents are enrolled in these programs. Most of the programs are funded through tax revenues, but some provinces also place a special tax on employers. The federal government gives financial assistance to the provinces to help defray health care costs.

When the single-payer systems were created in the 1960's, the federal government paid approximately fifty percent of the programs' costs.⁵⁷⁹ In 1946, the Family Allowance was

⁵⁷⁴ Preamble Social Assistance Act South Africa.

⁵⁷⁵ Section 28(1) (c) of the Constitution of Republic of South Africa 1996.

⁵⁷⁶ Social Welfare Assistance Act Title 17 Chapter 17:06, Act 10/1988 22/2001.

⁵⁷⁷ Section 75E Children's Act.

⁵⁷⁸ Durst “Social Welfare and Social Work Education in Canada: Implications for Canada's North International Co-operation In Social work and Social policy”

<https://open.library.ubc.ca/media/download/rdf-turtle/24/1.0067657/0> (last accessed 22 October 2016).

⁵⁷⁹ *Ibid.*

introduced to assist women leaving the workforce and ensure high spending and consumption. Soon after, Old Age security, Unemployment Insurance and benefits to persons with disabilities were implemented. One of the most dramatic programs was the Canada Assistance Plan of 1966⁵⁸⁰

The federal government stepped into the mandate of the provinces and into a host of social programs by offering a 50/50 split in costs of income security programs. Under general and broad guidelines, each of the provinces could develop and implement their own programs and the federal government would cover half of the financial costs.⁵⁸¹ Social assistance or “welfare” was heavily funded by both the provincial and federal governments and now was a major publicly funded and administered program. It was no longer the domain of private charities and philanthropists. Programs in child welfare, childcare and persons with disabilities expanded in size and sophistication⁵⁸² Canada as a welfare state is already taking care of the welfare of children and families and RSA alongside Zimbabwe can emulate more from what Canada is doing



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⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.*

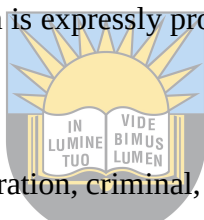
⁵⁸² *Ibid.*

5 16 Summary

The chapter started by providing a summary on why a comparison with other States was necessary and provided a brief description of the legal systems of Zimbabwe and Canada. The study observed that both countries are signatories for the same international treaties and had some laws, which are similar because of the influence of the British legal system, and as such, it provided a suitable comparison.

The chapter evaluated the Children's Acts in all the three countries to identify the differences and similarities that they both have. It is important to note that Canada was found to have an Act, which recognises children and family life as being not mutually exclusive. The best interests of the child standard, which is entrenched in the CRC, was also analysed. The study noted that RSA and Canada had through legislative provisions provided an account of what this standard entails. While Zimbabwe did not have such a provision, it must be noted that the right to family life for children is expressly provided for in the constitution unlike in RSA and Canada.

A study of various laws such as immigration, criminal, labour adoption etc. which all have an impact on family life were evaluated to find the States perform on each. The study noted that various States perform differently e.g., Canada has good labour laws that allow for family life while Zimbabwe is still trailing behind by not recognising same sex families. RSA was found to be doing well by having social welfare programs that a specific to children's needs such as foster grants, child welfare grants etc. However, in terms of its immigration laws they were found to be hindering family life and despite legislative framework to protect refugees more needs to be done on a policy and practical level to ensure the family life is preserved. The next chapter will provide a conclusion to the whole study and recommendations.

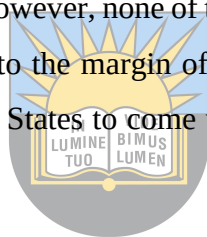


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6. CONCLUSION

In conclusion, the study started off by tracing the historical meaning of family life. Different schools of thoughts such as the sociologists and historians were evaluated, who trace the origins of family life from pre-industrial French and British societies. The study also traced the emergence of modern families. All schools of thought concur on the need for a definition of a family however; they seem not to provide that definition due to various factors but instead choose to provide an understanding of the role of a family to a person. Sociologists define the family more in terms of the way members relate to one another than on a strict configuration of status roles.

These legal instruments include UDHR, ICCPR, ICSECR, and CRC and on a regional level, the ACRWC was discussed. It was observed that most of these instruments reaffirmed the position of a family in society and underscored the need for States to promote, protect and preserve the family life for children. However, none of these instruments attempted to provide a definition of a family. Perhaps due to the margin of appreciation the interpretation of the treaties was left to individual member States to come up with definitions that suit their own circumstances and societies.



RSA has made significant strides in its attempt to provide for children's right to family life as part of its international and constitutional obligations. Notably the wider definition of a family and attempt to contextualise what the best interest of the child entails. Other branches of law such as family law, labour law etc. have all been structured in such a manner that ensures that the interests of families and children are catered for and where a conflict of laws exist the best interests of the child standard is of paramount importance. However, in as much as legislative and policies have been drafted that advance family life, the implementation of these policies through the administrative bodies continues to be a challenge.

The State has made great strides in some respects by providing a contextualised understanding on the best interests of the child standard, seeking to protect unaccompanied minors, allowing children to claim from their deceased parents will etc. Such measure goes a long way to improving the family life for children even though more rigorous legislative and administrative measures need to be put to strengthen the promotion and protection of children's right to family life.

The study evaluated the Children's Acts in RSA, Zimbabwe and Canada to identify the differences and similarities that they both have. It is important to note that Canada was found to have an Act, which recognises children and family life as being not being mutually exclusive. The best interests of the child standard, which is entrenched in the CRC, was also analysed. The study noted that RSA and Canada had through legislative provisions provided an account of what this standard entails. While Zimbabwe did not have such a provision. The right to family life for children is expressly provided for in the constitution unlike in RSA and Canada.

A study of various laws such as immigration, criminal, labour adoption etc. which all have an impact on family life were evaluated to find the States perform on each. Various States perform differently e.g., Canada has good labour laws that allow for family life while Zimbabwe is still trailing behind by not recognising same sex families. RSA was found to be doing well by having social welfare programs that a specific to children's needs such as foster grants, child welfare grants etc. However, in terms of its immigration laws they were found to be hindering family life and despite legislative framework to protect refugees more needs to be done on a policy and practical level to ensure the family life is preserved.

The aim of this study was to understand the contents of the international obligations to promote protect and respect the right to family life for children in South Africa. The study had three main objectives. Firstly, to understand the nature of the family, the historical development of the right to family life in general and in particular what this means for children. The study evaluated different fields of study to try to understand the development of a family and to define it. In terms of international law, the UDHR described the family as natural and fundamental group unit of society and is entitled to protection by society and the State".⁵⁸³ A sentiment shared in other treaties as well such as the ICCPR in Article 23(1) of the Covenant states that the family is the "natural" and fundamental group unit of society.⁵⁸⁴

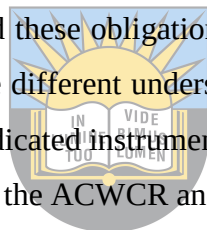
The ICSECR in Article 10 goes on further to state that the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and

⁵⁸³ UDHR Article 16(3).

⁵⁸⁴ ICCPR Article 23(1).

education of dependent children.⁵⁸⁵ Several other regional legal instruments such as the ACWCR, AYC among others, also share this sentiment. However, none of these instruments provides a definition of what a family is. Perhaps the drafters left it to individual States to interpret on their own what a family is, nevertheless they provide an understanding of the role of family to the community and what the States responsibilities towards a family are. Other fields of study such as sociologists, religious and customary understandings of family life were also examined to understand how different communities define and understand a family to be. Thus, the study was able to provide a historical background to the development of family life and an understanding of family life for children.

The second aim was to understand what the obligations under international law for promoting, respect and protecting the right to family life for children. Some of the instruments mentioned above were discussed in detail to ascertain what the drafters expected States obligations to be. The study was able to examine several international and regional instruments to understand how different regions have interpreted these obligations. It was noted that different regions had different areas of focus due to the different understandings of family life and priorities. Africa was the only continent with dedicated instruments addressing children's rights and by extension; their familial rights namely the ACWCR and the AYC.



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The third aim was to evaluate whether South Africa is fulfilling the obligations in comparison with Zimbabwe and Canada. The study examined different fields of the law regulating family life including social welfare, education, criminal law, immigration, refugee law etc. It was noted that South Africa has no express provision for the right to family life in its Constitution or in any other legislation. Thus, the right to family life can be inferred through other rights. In terms of social welfare, it was noted that RSA provides five different types of grants towards the family and with two dedicated for children. However, on an immigration level it was noted that laws in RSA were very restrictive and ultimately affected the family life by not supporting families composed of different nationalities. Thus, like any other State study noted that there were areas on improvement and some in which RSA was performing better than others.

⁵⁸⁵ ICSECR Article 10.

The study recommends that a definition for a family /family life should be provided by RSA. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*, the court stated that families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench forms of family at the expense of other forms.⁵⁸⁶

Thus in the RSA context, the concept of family includes when we speak of RSA families, we talk not only of the nuclear family, but also of extended families, as well as caregivers or guardians.⁵⁸⁷ Scholars such as Ekanem Okon argue that the definition must be based on its function and tailor-made by each State to suit its societal circumstances.⁵⁸⁸ The author argues that such a definition would provide clarity to the concept and aid in avoiding the legal limbo, which sometimes affects children's family status⁵⁸⁹. A definition will ensure that all social setups that currently provide familial duties to a child are protected unlike in the current status quo where the definition of a family is based on structure i.e. nuclear and extended family instead of functional point where the definition encompasses the functions of a family.

The study further recommends that the right to family life must be legislated either in the constitution of legislation like in Zimbabwe. While 28(1) (b) of the Constitution of RSA states that every child has a right to family care or parental care or to appropriate care when removed from family environment.⁵⁹⁰ It has been noted that the lack of definition of what constitutes family environment, who is a parent and what family care mean makes it difficult for the courts in deciding on such matters and allows the State to sometimes violate the right to family life because of the ambiguity of the law. It will also help to provide clarity and the legal limbo, which sometimes affects children's family status.⁵⁹¹

Furthermore, RSA could also incorporate some of the legislations and policies from Zimbabwe and Canada to improve the family life for children. In terms of labour law, Canada

⁵⁸⁶ *Dawood v Minister of Home Affairs and Others* 37.

⁵⁸⁷ Holborn and Eddy "First Steps to Healing the South African Family" 2011 *South African Institute of Race Relations* 7.

⁵⁸⁸ Okon AHRJ 2012 383.

⁵⁸⁹ *Ibid.*

⁵⁹⁰ Section 28 of children's Act of South Africa.

⁵⁹¹ Okon AHRJ 2012 383.

provides generous rights to families in distress and where a new born child has arrived. Such measures could also be introduced in South Africa to provide a safer environment for the children. Zimbabwe immigration laws ensure that law protects multinational families by granting citizenship to married couples. Such rights could be extended as well to multinational families in RSA to protect the family life for the children.



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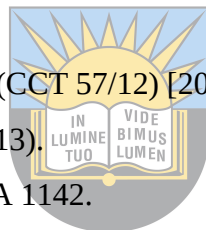
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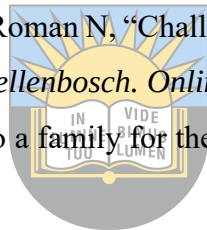
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