

COMPARATIVE STUDY OF CONSTITUTIONAL PROTECTION OF FAMILY LIFE IN SELECTED AFRICAN COUNTRIES: NIGERIA, KENYA, SOUTH AFRICA AND EGYPT

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Abstract

Family is the foundation of human existence so much that family forms the basis of recognition of most international and regional instruments. It is on this basis that the need to protect this foundation becomes germane and has been accorded protection of varying degrees across the world. This paper examines the protection of family life in Africa with focus on Nigeria, Kenya, Egypt and South Africa. The basis for selecting the jurisdictions of study is to have a representation of West, East, North and South regions of Africa which forms the basis for comparism. The methodology of this research is the doctrinal comparative legal research. The paper examines primary and secondary sources upon which comparative analysis is made to determine the extent of protection of family life in these countries.

1.0 Introduction

The role of the family in the social organization of any society cannot be underestimated as the most important unity of human existence. The family forms a basis of study in many academic units such as law, sociology, medicine, psychology and so on. The international recognition of the importance of family life as the core unit of the society has led to its incorporation in many international and regional instruments across the globe. Many countries have incorporated the right to family life as a fundamental component of the bill of rights of their various constitutions.

It is against this background that this paper seeks to examine the protection of the right to family life in Nigeria, Kenya, Egypt and South Africa. The countries of study were chosen randomly with a representation of the Southern, Northern, Western and Eastern regions of Africa. In so doing, the paper is divided into ten parts with this first part being the introductory part of the paper. The next part analyses the context in which the key terms of family and family life will be used in this paper. Section three examines the international legal framework for protection of family life while section four examines the African regional legal framework for the protection of family life. Effort is made in section five to draw a distinction between the right to family life and the right to found a family in order to lay the basis for the country specific arguments that follows. The protection of family life in Nigeria, Kenya, South Africa and Egypt are discussed in sections six, seven, eight and nine

respectively. The last section provides a concluding summary and recommendations from the findings of the paper.

2.0 Conceptual clarifications

In the course of this paper, references will be made to several terms which necessitates this section to clarify the context in which the terms referred to will be used and applied. Generally, the geographical scope of this work is Africa and as such, the terms will be construed as they mostly apply in Africa. However, this is not to say that international acceptable context will not be referred to as the context permits. Where this is done, explicit clarifications will be made.

2.1 Family

The term 'family' originates from the latin word '*familia*' which means household including kins and servants of that household.¹ Family, as a concept, is not capable of a single definition. The definition ascribed to the term 'family' at every point will depend on the social context in which it is being used in addition to the perception of the person defining the concept. Scholars have defined family from the structural legal, political, social and individual views.² Parsons and Bales defined family as 'containing a male adult, a female adult and at least one child.'³ This definition of family popularly known as the nuclear family can be traced to Judeo-Christian religious views⁴ which has been the traditional family structure in western countries.⁵ There are however other forms of family structures in other parts of the world that are socially accepted and legally recognized.

In traditional African family structure, nuclear family is a foreign concept to the extent that family is largely polygamous in nature with a person married to more than one spouse at the same time with polygyny, the act of a man being married to more than one woman at the same time, being the popular form of polygamy in Africa.⁶ Thus family in Africa is a term used to include immediate

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¹ I Levin, 'Family as Mapped Realities' (1993) 14 *Journal of Family Issues* 82.

² C Schadler, 'How to Define Situated and Ever-Transforming Family Configurations? A New Materialist Approach' (2016) 8 *Journal of Family Theory and Review* <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/jftr.12167>> accessed 25 May 2022.

³ T Parsons and R Bales, *Family Socialization and Interaction Process* (London: Routledge, 1956) 8.

⁴ N Bala, 'The Evolving Canadian Definition of the Family: Toward a Pluralistic and Functional Approach' (1994) 8 *International Journal of Law and the Family* 293.

⁵ W D Manning, S L Brown and J B Stykes, 'Family Complexity among Children in the United States' (2014) 654(1) *The ANNALS of the American Academy of Political and Social Science* 48.

⁶ L P Mair, 'African Marriage and Social Change' in Arthur Phillips (ed), *Survey of African Marriage and Family Life* (London: Oxford University Press, 1953) 1 – 177.

family, extended family and corporate kinship. In recent years however, there has been a gradual shift from this mode of African traditional concept of family towards nuclear households which can be attributed to modernity which has been held responsible for 'breakdown of collective, kinship-oriented systems of production and reproduction.'⁷

Furthermore, the Human Rights Committee on monitoring and implementation of the International Covenant on Civil and Political Rights (ICCPR)⁸ noted that there is no treaty definition of the term 'family' due to the fact that any definition of family at the international level would be ineffective since there are diverse conception of the term around the world and even within a country.⁹ It is therefore safe to say that the concept of family is still a concept in transition.¹⁰

Thus, family can be broadly defined from the angle of residence relationships, relative relationships, blood relationships or legal relationships. Family by residence relationships entails people who live together in the same dwelling as to create a family unit such as census family and economic family who are related by blood, marriage, common law or adoption with clear boundaries.¹¹ Family by blood relationships connotes a biological connection to each other such as parents, siblings and grandparents which are usually recognized by government institutions.¹² Family by legal relationships is the family brought about by the definition of law including marriage and adoption.¹³ Relative family relationships, though not posited in any literature, can be safely said to be an existing family structure in Africa which encompasses all ties including blood, marriage, kinship and communal relationship. One can therefore argue that the recognition of such persons as family gave room for the permission of relative international adoption¹⁴ for Africans residing in the western part of the world.¹⁵

⁷ B Bigombe and G M Khadiagala, 'Major Trends Affecting Families in Sub-Saharan Africa' (2003) <<http://www.un.org/esa/socdev/family/Publications/mtbigombe.pdf>> accessed 28 May 2020.

⁸ UNGA, International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171 <<http://www.refworld.org/docid/3ae6b3aa0.html>> accessed 28 May 2020.

⁹ UN Human Rights Committee, 'CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' 27 July 1990 <<https://www.refworld.org/docid/45139bd74.html>> accessed 6 June 2020.

¹⁰ G van Bueren, 'The International Protection of Family Members' Rights as the 21st Century Approaches' (1995) 17(4) *Human Rights Quarterly* 733.

¹¹ B Tam, L C Findlay and D Kohen, 'Conceptualization of Family: Complexities of Defining and Indigenous Family' (2007) 28(1) *Indigenous Policy Journal* 1.

¹² *Ibid*, 6.

¹³ Tam, Findlay and Kohen, (n 11) 6.

¹⁴ Which ordinary will be seen as fostering.

¹⁵ J L Gibbons, 'Adoption and fostering: Traditional and Contemporary Child Welfare Strategies in Sub-Saharan Africa' in T Tchombe *et al*, *Cross-Cultural Psychology: An Africentric Perspective* (Cameroon: Design House, 2013) 93; A O Omosun and O Kofoworola, 'Knowledge, Attitude and Practice Towards Child Adoption amongst Women

The Child's Rights Act of Nigeria¹⁶ in relation to a child defines a family to include 'a person who has parental responsibility for a child and a person with whom the child is living or has been living.'¹⁷ In the same context of a child, the Children's Act of South Africa¹⁸ defines a family member of a child to be '(a) a parent of the child; (b) any other person who has parental responsibilities and rights in respect of the child; (c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship.'¹⁹

However, factors such as modernization, acceptance of single parenthood, same sex marriage recognition and female and child headed households have changed the context and usage of family as a concept.²⁰ Thus, for the purpose of this research, family will be used in the legal context as permitted by various legislations of the countries under study. Thus, the legal definition of family in each country under study will determine the usage of the concept.

2.2 Family life

No international or regional convention has clearly defined the term 'family life'. Family life has been defined from the grammatical sense to mean the kind of life that a person live when such person is married and has children.²¹ The experiences of family life has been said to shape the quality of people's lives such that it affects the competence and resilience of everyone.²² The quality of family life cannot be detached from the development of individual differences and vulnerabilities.²³

In the legal sense, it is difficult to separate family from family life, thus the term family law since family cannot be detached from its members as having a separate legal status.²⁴ This position

Attending Infertility Clinics in Lagos State, Nigeria' (2011) 3(1) *African Healthcare of Family Health Care and Family Medicine* 120.

¹⁶ Child's Rights Act 2003 (CRA).

¹⁷ CRA s 277.

¹⁸ Children's Act 38 of 2005.

¹⁹ Children's Act, s 1.

²⁰ R Sooryamoorthy and M Makhoba, 'The Family in Modern South Africa: Insights from Recent Research' (2016) 47(3) *Journal of Comparative Family Studies* 309; D E Ogoromegbunem, 'The Changing Nature of the Family and its Duty as Foundation for Morals and Sustenance of Core Societal Value' (2014) 2(1) *Journal of Sociology and Social Work* 195.

²¹ Merriam-Webster, 'Family life' *Merriam-Webster.com Dictionary* 2019 <<https://www.merriam-webster.com/dictionary/family%20life>> accessed 29 April 2022

²² J Weiss, 'Family Health' in N J Smelser and P B Baltes (eds) *International Encyclopedia of the Social and Behavioral Sciences* (USA: Elsevier Ltd., 2001) 5324-5328.

²³ T Y Zhang, *et al*, 'The Epigenetics of Parental Effects' in J. David Sweatt, *et al* (eds) *Epigenetic Regulation in the Nervous System* (USA: Elsevier Inc, 2013) 85-118.

²⁴ Wisconsin Family Impact Seminars, 'What is Family?' <https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s_wifis01c02.pdf> accessed 21 May 2022.

logically flows from the fact that the field of family law substance is not the family as a concept but of its members. The Nigerian Court of Appeal construed family life to be the family structure of the society in the context of a patrilineal society.²⁵ In the same way, the European Courts have ruled that a lawful and genuine marriage will give rise to family life²⁶ just as a stable and committed relationships between unmarried couple may also give rise to family life.²⁷

It is clear from the foregoing that marriage is not a necessary factor to bring about family life such that where a couple have a child together but never live together but share the role of decision making over the child, there exists family life.²⁸ In the African context, each member within the extended family is accorded roles, rights and duties which determines the inclusion of such individual in the social and economic unit of such family.²⁹ Thus, family life in the context of this paper will be used in the light of rights and responsibilities of being a part of a family, whether living together or not.

3.0 International legal framework for protection of family life

The right to family life and protection is recognized as a fundamental right in international law which are set out in various international conventions and human rights laws. The Universal Declaration of Human Rights (UDHR)³⁰ recognizes the family as the fundamental group unit of the society and entitled to protection and assistance.³¹ Similarly, article 23(1) of the International Covenant on Civil and Political Rights (ICCPR),³² article 10(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),³³ article 44 of International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)³⁴ preamble to the Convention on the Rights of the Child (CRC)³⁵ and the preamble to the Convention

²⁵ *Oduche v Oduche* (2005) LPELR-5976 (CA).

²⁶ *Abdulaziz, Cabales and Balkandali v. UK* (1985) 7 EHRR 471, para. 62.

²⁷ *Johnston v. Ireland* (1986) 9 EHRR 203.

²⁸ *Kroon v. Netherlands* (1995) 19 EHRR 263.

²⁹ J A M Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9(3) *Human Rights Quarterly* 309.

³⁰ UN General Assembly (UNGA), Universal Declaration of Human Rights, 10 December 1948, 217 A (III) <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 22 May 2022.

³¹ UDHR, art 16(3).

³² UNGA, International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171 <<http://www.refworld.org/docid/3ae6b3aa0.html>> accessed 22 May 2020.

³³ UNGA, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS, vol. 993, p. 3 <<http://www.refworld.org/docid/3ae6b36c0.html>> accessed 22 May 2022.

³⁴ UNGA, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158 <<http://www.refworld.org/docid/3ae6b3980.html>> accessed 22 May 2022.

³⁵ UNGA, Convention on the Rights of the Child, 20 November 1989, UNTS, vol. 1577, p. 3 <<http://www.refworld.org/docid/3ae6b38f0.html>> accessed 22 May 2022.

on the Rights of Persons with Disabilities (CRPD)³⁶ recognizes family as the foundation of the society and guarantees the protection of family life.

Irrespective of the different choice of words in recognizing the family as the foundation of the society, all these international instruments agree on the fact that the family forms the basis for the existence of any society.

According to article 12 of the UDHR, '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.'³⁷ Similarly, article 17(1) of the ICCPR has a provision that 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' Also, article 23 of the CRPD makes provision for the right of persons with disabilities to found a family and be protected without any form of discrimination. Similarly, article 16 of Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)³⁸ accords all women and girls the right not to be coerced into a family unit through forced marriage and all children have the right to protection from child and early marriage. CEDAW further seeks to protect women and children from harmful and discriminatory practices such as female genital mutilation and dowry related violence which may be perpetrated by family members. Article 16 of CEDAW imposes a duty on states to ensure that women have equal rights in a marriage and upon its dissolution as well as the right to choose and determine the number of children they want and the spacing of the children.

It is important to identify the persons protected by these instruments and the extent of such protection. Mrazik is of the view that since the construction of family could be so narrow and at the same time so encompassing, establishing the existence of family link or life with anyone in claiming the right to family life is subjective and fact based.³⁹ While emphasis may be on emotional ties to establish family life,⁴⁰ economic dependence may also be a factor to consider such that the standard is flexible.⁴¹ It therefore follows that there is the existence of family life

³⁶ UNGA, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I <<http://www.refworld.org/docid/4680cd212.html>> accessed 22 May 2022.

³⁷ UDHR, art 12.

³⁸ UNGA, 'Convention on the Elimination of All Forms of Discrimination Against Women' 18 December 1979 United Nations, Treaty Series, vol. 1249 <<https://www.refworld.org/docid/3ae6b3970.html>> accessed 6 April 2022.

³⁹ R Mrazik and A I Schoenholtz, 'Protecting and Promoting the Human Right to Respect for Family Life: Treaty-Based Reform and Domestic Advocacy' (2010) 24 *Georgetown Immigration Law Journal* 651.

⁴⁰ *Singh v Entry Clearance Officer, New Delhi*, [2004] EWCA (Civ) 1075; S Starr and L Brilmayer, 'Family Separation as Violation of International Law' (2003) 21 *Berkeley Journal of International Law* 256.

⁴¹ *Kugathas v Secretary of State for the Home Department* [2003] EWCA (Civ) 31.

between close family such as spouses, parents and their children,⁴² whether born in wedlock⁴³ or out of wedlock⁴⁴ as well as adopted and foster children.⁴⁵

Where it can be established that extended blood relations such as grandparents, grandchildren, aunts and uncles play an important role in family life, they may be recognized as part of the family life of a particular family.⁴⁶ Article 4 of the CMW provides for the classes of persons to be recognized as members of a migrant's family by providing that 'persons married to migrant workers or having with them a relationship that, under the applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.'⁴⁷

Within the sphere of right to family life is social security and means of subsistence. Article 25 of UDHR provides that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family. . . [and] 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.'⁴⁸ Similarly, article 11 of ICESCR provides that

'States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'⁴⁹

The ICESCR further places an obligation on state parties to offer protection and assistance to the family to the extent possible 'particularly for its establishment and while it is responsible for the care and education of dependent children.'⁵⁰ Article 10(2) further provides that 'special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security

⁴² *X v Germany* (1974) App. No. 6357/73.

⁴³ *Berrehab v Netherlands* (1988) 138 Eur. Ct. H.R. (ser. A), para. 22.

⁴⁴ *Marckx v Belgium* (1979) App. No. 6833/74, 31 Eur. Ct. H.R. (ser. A).

⁴⁵ Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85 (Dec. 3, 1986); *Singh v Entry Clearance Officer, New Delhi*, [2004] EWCA (Civ) 1075.

⁴⁶ *Nsona v Netherlands* (2001) App. No. 23366/94, 32 Eur. H.R. Rep. 9.

⁴⁷ CMW, art 4.

⁴⁸ UDHR, art 25.

⁴⁹ ICESCR, art 11.

⁵⁰ ICESCR, art 10(1).

benefits.’ Article 10(3) also seeks to protect children and young persons in the family by providing that:

‘Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.’⁵¹

These provisions are designed to ensure the economic wellbeing, social development and to encourage the international community to raise the standard of living of members of the family for the effective functioning of the family unit.⁵² Thus this provisions are to encourage equitable distribution of resources to reduce poverty.

It follows therefore that whenever there is a claim of violation of right to family life, the court is saddled with the responsibilities of firstly determining if there is an existence of family life and thereafter determine if there has been an interference with the family life and where there is, whether the interference can be justified.⁵³

4.0 Regional protection of family life

The protection of family life as guaranteed under the identified international treaties are replicated in African regional human rights instruments. Article 18 of the African Charter on Human and Peoples’ Rights (African Charter)⁵⁴ recognizes that the family is the natural unit and basis of the society as a result of which State Parties are enjoined to protect and assist the family. Similarly, article 18 of the African Charter on the Rights and Welfare of the Child (ACRWC) affirms the family as the basis of the society and provides that the family ‘shall enjoy the protection and support of the State for its establishment and development.’⁵⁵ In line with article 19 of the ACRWC, ‘every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents.’ Article 10 protects the child’s

⁵¹ ICESCR, art 10(3).

⁵² Y Merin, ‘The right to family life and civil marriage under international law and its implementation in the state of Israel’ (2005) 1 *Boston College International and Comparative Law Review* 99.

⁵³ Mrazik and Schoenholtz, (2010) 657.

⁵⁴ Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) <<http://www.refworld.org/docid/3ae6b3630.html>> accessed 22 May 2022.

⁵⁵ OAU, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990) <<http://www.refworld.org/docid/3ae6b38c18.html>> accessed 22 May 2022.

privacy and family home and grants the child protection from interference of the right. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)⁵⁶ do not specifically provide for the right to family life but contains several provisions that seek to promote and protect the family life of women and girls. Article 6 of Maputo Protocol enjoins State Parties to ensure that women have equal rights as men in marriage. The Protocol sets marriage age at 18 and encourages monogamous marriages, though polygamous marriage is recognized and seek to protect women in both forms of marriages.⁵⁷ A woman is guaranteed the right to retain her maiden name and may choose to either use it with her husband's name or not.⁵⁸ Article 7 enjoins State Parties to enact legislations that will grant men and women equal rights in separation, divorce and annulment proceedings and the Protocol encourages that separation, divorce and annulment of marriage should be by judicial order. Article 12 places an obligation on State Parties to promote right to education and training and eliminate all forms of discrimination and stereotypes. Article 12(1)(c) protects the woman and girl child from all forms of abuse and sexual harassment. The reproductive rights of women,⁵⁹ right to food security,⁶⁰ right to adequate housing,⁶¹ widows rights,⁶² right to inheritance,⁶³ special protection for elderly women⁶⁴ and special protection for women with disabilities⁶⁵ are all guaranteed by Maputo Protocol. All these specific rights are essential towards the realization of the right to family life. In all, protection of family life entails both the protection of family as an entity and protection of individual members of the family.

5.0 Right to family life and right to found a family

The family is universally acknowledged as the essential unit of society, deserving of respect and protection.⁶⁶ Article 16(1) of the UDHR provides 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.' While the first part of the provision relates to right to found a family, which indicates the option of starting a

⁵⁶ African Union, 'Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' (Maputo Protocol) 11 July 2003 <https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf> accessed 22 May 2022.

⁵⁷ Maputo protocol, art 6(b)-(c).

⁵⁸ Article 6(f).

⁵⁹ Maputo protocol, art 14.

⁶⁰ Maputo protocol, art 15.

⁶¹ Maputo protocol, art 16.

⁶² Maputo protocol, art 20.

⁶³ Maputo protocol, art 21.

⁶⁴ Maputo protocol, art 22.

⁶⁵ Maputo protocol, art 23.

⁶⁶ UDHR, art 16(3).

family which could be by marriage or cohabitation, the second part of the provision relates to the rights that individuals have as members of a family unit which is right to family life.

Article 16(1) of the UDHR and Article 23 of the ICCPR both contain a clause stating that the right to marry and start a family only applies to people of marriageable age and only with their complete and free agreement. According to Article 10(1) of the ICESCR, States Parties must provide the family with the broadest possible protection and aid, notably during its formation and whilst it is responsible for the welfare and education of minor children. The Human Rights Committee (HRC), which monitors states' adherence to the ICCPR, has underlined that the right to form a family entails the ability to live together in practice.⁶⁷

The language of the article 16 of the UDHR has been criticized as limiting the right to found a family to marriage which is the prevailing morality of the time the UDHR was adopted. This position has however been clarified to imply a conscious decision and expanded to include the right to marry and or start a family and thus includes the right to plan births and control reproduction including the use of *in vitro fertilization* (IVF) in *Artavia Murillo v Costa Rica*.⁶⁸

The right to family life has often been misconstrued synonymously with the right to start a family.⁶⁹ The right to marry and start a family is a right of adults rather than all members of the family which may include children. The right to marry and found a family can further be distinguished from the right to family life because the right to family life involves liberty interests.⁷⁰ By way of illustration, right to family life relates to existing relationships and obligations among persons bonded by a social unit of family relationship while the right to found a family relates to the creation of a new social unit which could be brought about by marriage, cohabitation and exercise of reproductive rights to have a child.

6.0 Protection of family life in Nigeria

Chapter four of the Constitution of the Federal Republic of Nigeria⁷¹ guarantees fundamental human rights of Nigerian citizens which falls within first generation rights that are enforceable at

⁶⁷ UN Human Rights Committee (HRC), 'CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' 27 July 1990 <<http://www.refworld.org/docid/45139bd74.html>> accessed 20 May 2022.

⁶⁸ (2012) IACHR Report No 85/10 Case 12.361.

⁶⁹ Y Merin, 'The Right to Family Life and Civil Marriage Under International Law and its Implementation in the State of Israel' (2005) 1 *Boston College International and Comparative Law Review* 86.

⁷⁰ R J Cook, 'International Human Rights and Women's Reproductive Health' in J Peters and A Wolper (eds) *Women's Rights, Human Rights: International Feminists Perspectives* (Routledge New York 1995) 266.

⁷¹ Constitution of the Federal Republic of Nigeria 1999 (as amended).

the High Court.⁷² Section 37 of the Nigerian Constitution guarantees the fundamental right of right to private and family life by providing that ‘the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic conversations is hereby guaranteed and protected.’⁷³ Directly related to the realization of right to family life under chapter four are sections 38 and 43 of the constitution which guarantees the right to freedom of thought, conscience and religion and right to acquire and own immovable property anywhere in Nigeria respectively.

The right to private and family life in Nigeria has not been effectively put to test in courts mainly due to the tolerant social and cultural nature of the citizens.⁷⁴ Thus in *Ezeadukwa v. Maduka*,⁷⁵ the court held that it is a violation of the right to privacy for a police officer or any security personnel to search a person’s residence, his body or phone without a lawful warrant. Similarly, the court in *Kokoro-Owo & Ors v. Lagos State Government & Ors*,⁷⁶ the Supreme Court held that it is unconstitutional to evict individuals and families from their homes and this amounts to a violation of the right to private and family life.

The right to private and family life as guaranteed in the Nigerian constitution has been tested regionally. In *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria*,⁷⁷ the African Human Rights Commission noted that Nigeria was not only in breach of article 18(1) of the African Charter which guarantees the right to family life, but also her constitution when houses and villages of the Ogoni people were destroyed and innocent citizens that attempted to rebuild their homes were forcefully ejected, thereby preventing them and their families a means of shelter.

In furtherance to section 37 of the Nigerian Constitution, Ifemeje has criticized the practice of premarital HIV status testing by many churches in Nigeria as a violation of this constitutional right on the argument that right to family life cannot be qualified on the health status of a person.⁷⁸ He emphasizes that such premarital testing is a violation of the right of persons living with HIV to marry and start a family.⁷⁹ Flowing from the earlier discussion in this paper, it would appear that while the premarital testing may qualify as an infringement on the right of freedom from

⁷² CFRN, s 46.

⁷³ CFRN, s 37.

⁷⁴ Y Olomojobi, ‘Right to Privacy in Nigeria’ 2017 SSRN <<https://dx.doi.org/10.2139/ssrn.3062603>> accessed 7 June 2020.

⁷⁵ (1997) LCN/0328 (CA).

⁷⁶ (2001) JELR 44334 (SC).

⁷⁷ Communication 155/96; Decision handed down at the 30th Ordinary session of the Commission held in The Gambia <<https://www.escri-net.org/caselaw/2006/social-and-economic-rights-action-center-center-economic-and-social-rights-v-nigeria>> accessed 3 May 2022.

⁷⁸ S Ifemeje, ‘Mandatory Premarital HIV Testing Policy in Nigeria: A Gross Violation of the Rights of People Living with HIV/AIDS (2012) 16(3) *The International Journal of Human Rights* 405 <<https://doi.org/10.1080/13642987.2011.566416>> accessed 7 May 2022.

⁷⁹ *Ibid.*

discrimination as guaranteed from section 42 of the constitution as well of infringement on the privacy of the persons concerned under section 37, it cannot be argued that there is a violation of right to found a family which is not expressly guaranteed under the Nigerian constitution. Thus, this is another instance in which the right to found a family is misconceived to be the right to family life.

Nigeria enacted the Violence Against Persons (Prohibition) Act 2015⁸⁰ (VAPPA) which incorporates aspects of the Maputo Protocol as well as the Child's Rights Act 2003⁸¹ (CRA) which seeks to protect children against all forms of ill and to ensure they enjoy family life. These legislations are robust in content and sufficient to protect the right to family life of women and children in Nigeria. For instance, the CRA, in addition to the fundamental rights guaranteed under the constitution, provides for a plethora of rights that guarantees the family life of a child such as the right to survival and development,⁸² right to private and family life,⁸³ right to leisure, recreation and cultural activities,⁸⁴ right to health and heal services,⁸⁵ right to parental care, protection and maintenance,⁸⁶ right to compulsory and free primary education,⁸⁷ prohibition of child marriage and betrothal.⁸⁸

The VAPPA also protects persons from all forms of violence in private and public life.⁸⁹ Specifically, the Act criminalizes the forceful ejection of a spouse from the house by another spouse.⁹⁰ The Act redefines rape to accommodate the possibility of males being the victims of rape as opposed to existing legislations which only recognizes females as the only persons capable of being raped.⁹¹ The VAPPA further prohibits female genital mutilation⁹² and harmful traditional practices.⁹³ It further prohibits the destruction of properties with intent to cause distress as well as prevents economic, emotional, verbal and psychological abuse.⁹⁴ Section 13(1) of the Act provides that 'a person who forcefully isolates or separate another from family and friends commits a crime.' This provision seeks to promote family reunification but the effectiveness of this section

⁸⁰ Violence Against Persons (Prohibition) Act 2015.

⁸¹ Child's Rights Act No 26 of 2003.

⁸² CRA, s 4.

⁸³ CRA, s 8.

⁸⁴ CRA, s 12.

⁸⁵ CRA, s 13.

⁸⁶ CRA, s 14.

⁸⁷ CRA, s 15.

⁸⁸ CRA, s 22-23.

⁸⁹ VAPPA, Preamble.

⁹⁰ VAPPA, s 9.

⁹¹ VAPPA, s 1.

⁹² VAPPA, s 6.

⁹³ VAPPA, s 20.

⁹⁴ VAPPA, ss 11, 12 and 14.

remains questionable especially in times of emergencies situations where families are kept apart against their will and the perpetrators were hardly apprehended. Directly related to family life is the criminalization of abandonment of spouse, children and dependents without means of sustenance with a punishment of three years' imprisonment of a fine of not more than N500,000 or both upon conviction.⁹⁵ Section 19 protects spouses from battering each other by providing that any person who batters his or her spouse commits an offence and upon conviction is liable to a maximum of three years imprisonment of a fine of not more than N200,000 or both. A spouse that attempts to batter another spouse as well as a person who aids and abets or counsel a spouse to batter another spouse is guilty of a crime.⁹⁶

Taking the contents of both the CRA and the VAPPA, one would be assured that the Nigerian laws are so rich in protecting the right to family life. However, the context in which the laws applies is complicated and impedes the effectiveness of the laws. For instance, the CRA is a law on child protection and welfare which falls under the residuary list of the constitution⁹⁷ with the effect that any federal law in this respect must also be domesticated by each state of the Federation for it to have effect in that state. Thus, states are free to domesticate with adaptation or states can choose not to domesticate at all. This can be seen in the attitude of 11 northern states of the Federation⁹⁸ that have refused to domesticate the CRA despite the high rate of abuses and vulnerabilities affecting family lives in these states. Another instance in this regard is the modification of marriage age in the Child's Rights Law of Kwara State⁹⁹ as 16 years old¹⁰⁰ as opposed to the age of 18 years under the CRA.¹⁰¹ This shows the lapses in the lack of uniformity of protecting the family life of the Nigerian child since child welfare matters and protection are left to the state governments to legislate on.¹⁰²

Nwauche posits that chapter four of the constitution can be used both as a shield and a child in respect to child marriage.¹⁰³ He argues that since the CRA is subject to the constitution and any legislation that is contrary to the provisions of the constitution is null and void,¹⁰⁴ it follows that any version of the domesticated CRA by any state that permits child marriage (such as Kwara

⁹⁵ VAPPA, s 16.

⁹⁶ VAPPA, s 19.

⁹⁷ CFRN, Part I of the Second Schedule.

⁹⁸ Adamawa, Bauchi, Borno, Gombe, Kano, Kaduna, Katsina, Kebbi, Sokoto, Yobe and Zamfara.

⁹⁹ Child's Rights Law of Kwara State 2007

¹⁰⁰ CRL Kwara State, s 21.

¹⁰¹ CRA, s 21.

¹⁰² O S Adelakun, 'Application of the Subsidiarity Principle in Intercountry Adoption in Nigeria: Lessons from South Africa' (2018) 2 *Journal of Comparative Law in Africa* 38 <<https://hdl.handle.net/10520/EJC-163d22e909>> accessed 3 May 2022.

¹⁰³ E S Nwauche, 'Child marriage in Nigeria: (Il)legal and (un)constitutional' (2015) 15 *African Human Rights Law Journal* 428 <<http://dx.doi.org/10.17159/1996-2096/2015/v15n2a9>> accessed 7 May 2022.

¹⁰⁴ CFRN, s 1(3).

State) can be nullified and declared unconstitutional as violating the right to private life and freedom from inhumane treatment. The same constitution can however be used as a shield by perpetrators of child marriage by relying on section 38 of the constitution to escape prosecution.

7.0 Protection of family life in Kenya

The Constitution of Kenya¹⁰⁵ confirms the family as the natural and crucial unit of society¹⁰⁶ and recognizes the right to found a family by providing that ‘every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.’¹⁰⁷ Article 45(3) guarantees the right to family life by guaranteeing equal rights to the parties to a marriage at the time of the marriage, during the marriage, and when the marriage is dissolved. The Kenyan Parliament is required by the Constitution to establish laws that recognises ‘any system of personal and family law under any tradition, or adhered to by persons professing a particular religion’.¹⁰⁸ When dealing with family rights, this legislation takes into account the value of the family and the diversity of family structures that must be considered.

Article 53 of the Constitution specifically provides for the rights of the child. Article 53(1)(e) specifically guarantees the right to the child to ‘parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.’¹⁰⁹ In every situation involving a child, the child's best interests are essential.¹¹⁰

The right to family life as guaranteed by the Kenyan Constitution has been put to judicial test in *Sheila Amalemba & another v. Attorney General & 4 others*¹¹¹ where the 2nd Petitioner, who was undergoing deportation charges for being in Kenya unlawfully, contended that the order for his deportation was in violation of Article 45 of the Constitution because it would break a family unit, and that his children would be neglected because their constitutional right to parental care, love, and protection would be breached in violation of Article 53. The Court noted, in dismissing the Petition, that the Petitioners' family was not refused the legal recognition required by Article 45 (1) of the Constitution. The Court went on to say that generic comments to the impression that rights had been violated were insufficient and that more concrete evidence was required. It appears that this decision does not reflect the true intention of section 45. The Kenyan courts may need to pay attention to this in future.

¹⁰⁵ Constitution of Kenya 2010.

¹⁰⁶ Kenyan Constitution, art 45(1).

¹⁰⁷ Kenyan Constitution, art 45(2).

¹⁰⁸ Kenyan Constitution, art 45(4)(b).

¹⁰⁹ Kenyan Constitution, art 53(1)(e).

¹¹⁰ Kenyan Constitution, art 53(2).

¹¹¹ Petition No 417 of 2015.

Furthermore, article 43 of the Constitution guarantees certain economic and social rights. In the light of protection of family life, every person has the right to ‘the highest attainable standard of health, which includes the right to health care services, including reproductive health care.’¹¹² Article 43(1) of the Constitution guarantees the right to housing and appropriate sanitation, the right to live free from hunger and to have sufficient food, the right to clean and potable water in sufficient amount, the right to social security, and the right to education. The state is required by Article 43(3) to give adequate social security to people who are unable to sustain themselves and their dependents. The right to housing of persons wrongfully evicted from their homes have been upheld by the High Court in *William Musembi & 13 Ors v. Moi Education Centre Co Ltd & 3 Ors*.¹¹³ Regrettably, this decision was set aside on appeal in *Moi Educational Co Ltd v. William Musembi & 16 Ors*.¹¹⁴ The matter is awaiting final decision before the Supreme Court of Kenya.¹¹⁵ Similarly, in *Mitu-Bell Welfare Society v. Attorney General & 2 Ors*,¹¹⁶ inhabitants of Mitumba village in Nairobi were forcibly and violently evicted by the Kenya Airport Authority, who were backed up by the police. The Kenya Airport Authority and the government were found to have breached the applicants' right to housing as well as other social and economic rights by the High Court. This decision was also set aside on appeal¹¹⁷ and pending for final determination at the Supreme Court. The High Court of Kenya took a similar decision to uphold the right to housing, sanitation, dignity and right to protect children in *Satrose Ayuma & 11 Ors v. Registered Trustees of Kenya Railways Staff Retirement Benefits Schemes & 3 Ors*.¹¹⁸ The right to housing has been further challenged at the regional level in *African Commission on Human and People's Rights v. Republic of Kenya (Ogiek case)*¹¹⁹ where African Commission filed a complaint with the African Court on Human and People's Rights, challenging the eviction notice issued by Kenya Woodland Service in 2009, which demanded the Ogiek clan and other residents to leave Mau forest within 30 days. Article 22 of the African Charter, as stipulated by Article 43 of the Kenya Constitution, was determined to be violated by the Kenyan government.

It is clear from the approaches of the High Courts and Court of Appeal of Kenya that while the High Courts have displayed a positive attitude towards protecting the family life of the citizens by protecting their right to housing, the same attitude cannot be seen in the decisions of the Court of Appeal. Thus, it is advisable for the Supreme Court to afford the Constitution the interpretation it deserves to protect the right to family life of the citizens.

¹¹² Kenyan Constitution, art 43(1)(a).

¹¹³ [2014] eKLR.

¹¹⁴ [2017] eKLR.

¹¹⁵ Supreme Petition No 2 of 2018.

¹¹⁶ [2013] eKLR.

¹¹⁷ *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 Ors* [2016] eKLR.

¹¹⁸ High Court Petition No 65 of 2010.

¹¹⁹ Application No 006/2012 (ACtHPR 26 May 2017).

8.0 Protection of family life in South Africa

There is no specific legislative definition of family in South African laws but family has been recognized by the courts to come in different shapes and sizes such that the definition of family is not static but changes with social practices and traditions.¹²⁰ Thus, family has been defined in South Africa to include all the people that are related by blood, adoption, marriage and marriage-like relationships.¹²¹

Although the Constitution of South Africa¹²² contains no express provision to protect the family, numerous provisions exist in the Constitution that protect the institutions of family and marriage. The absence of express protection of the right to family life in the South African Constitution was challenged in *Certification of the Constitution of the Republic of South Africa (First Certification case)*¹²³ where the Constitutional Court ruled that the absence of the right to family life in the constitution is justified due to the multicultural context of the country and other provisions provide indirect protection of family life. Thus South African Courts have relied on provisions of the African Charter¹²⁴ to ensure the protection of family life in South Africa.

Section 1 of the constitution creates a society where all are equal with an extensive equality provision in section 9. Specific provision directly dealing with protection of family life can be found in section 28, for instance, which recognises that when a child is separated from the family setting, the child has the right to family or parental care or adequate substitute care.¹²⁵ This provision has contributed immensely to the constitutional jurisprudence of child's rights and protection in South Africa.¹²⁶ In *Government of the Republic of South Africa v Grootboom*,¹²⁷ the Constitutional Court held that section 28 in its entirety imposed obligations on both the state and the families to provide for children. The court noted that the duty to provide housing lies primarily with the family and by way of substitute, with the state but the state has a duty to enact laws and

¹²⁰ *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* (2000) 3 SA 936 (CC); (2000) 8 BCLR 837 (Consolidated cases).

¹²¹ D S P Cronjé and J Heaton, *South African Family Law* (2nd ed, LexisNexis Butterworths South Africa 2004) 3.

¹²² Constitution of the Republic of South Africa, 1996 (CRSA).

¹²³ (1996) 4 SA 744 (CC).

¹²⁴ Specifically, articles 18, 27(1) and 29(1) of African Charter.

¹²⁵ CRSA, s 28(1)(b).

¹²⁶ *Du Toit v Minister of Welfare and Population Development (Lesbian & Gay Equality Project as Amicus Curiae)* (2003) 2 SA 198 (CC); *Christian Education South Africa v Minister of Education* (2000) 4 SA 757 (CC); *Jooste v Botha* (2000) 2 SA 199 (T); *Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)* (2005) 1 SA 509 (T); *Mthembu v Letsela and Another* (2000) 3 SA 867 (SCA); *G v Superintendent, Groote Schuur Hospital* (1993) 2 SA 255 (C); *Hlophe v Mahlalela and Another* (1998) 1 SA 449 (T); *Bhe v Magistrate, Khayelitsha* (2004) 2 SA 544 (C); *Wittmann v. Deutscher Schulverein, Pretoria* (1998) 4 SA 423 (T); *Kotze v Kotze* (2003) 3 SA 628 (T); *Mthembu v Letsela and Another* (1998) 2 SA 675 (T); *Bhe and Others v Magistrate, Khayelitsha, and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) (Consolidated case).

¹²⁷ (2001) 1 SA 46 (CC); (2000) 11 BCLR 1169.

establish mechanisms for the protection of children from any form of abuse and maltreatment.¹²⁸ Subsequently, the Constitutional Court in *Bannatyne v. Bannatyne*¹²⁹ noted that the state owes an obligation to create an enabling environment for parents to care for their children.

The provisions of section 2 of the South African Constitution has been said to be aimed at promoting a healthy parent-child relationship against undue executive and administrative actions and cannot be relied on as a cause of action to claim damages for failure to provide a child with love, attention and interest.¹³⁰ In this case, an 11 year old child born out of wedlock relied on section 28 to sue his father for failure to love and acknowledge him. The court rejected this claim and held that the right to parental care lies with the custodian parent. The decision of the court has been criticized as being inconsistent with the earlier cases which recognized rights and duties of non-custodian parents.¹³¹ It has further been argued that the decision suggests that the extent of a child's right to parental involvement depends on the choice of the parent to the extent that the rights do not interfere with the parent's convenience.¹³²

In recognising and protecting family life of same sex couples to adopt a child, the Constitutional Court in *Du Toit and Another v. Minister for Welfare and Population Development*¹³³ noted that the legal conception of family changes as social practices and traditions changes and thus family life is important for raising a child with child adoption being a good way of giving the child without family an opportunity of family life advantage.¹³⁴ The court therefore declared 17(a) and (c) of the Child Care Act,¹³⁵ which builds on the heterosexual norm of parent-child relationship, as discriminatory against same-sex couples and therefore unconstitutional.

It has however been noted that though the Constitutional Court have taken a position on the changing nature of the family concept to meet up with changing societal norms in defining a child's right to parental care, the court has not displayed the same attitude in recognizing certain forms of family relationships and there exists priority of nuclear family over extended family relationships.¹³⁶ Thus in *Bethell v. Bland*¹³⁷ which is a case of disagreement over the custody of a child born out of wedlock between the maternal grandfather, paternal grandparents and the natural

¹²⁸ Paragraphs 76-79.

¹²⁹ (2003) 2 SA 363 (CC); (2003) 2 BCLR 111.

¹³⁰ *Jooste v Botha* (n 126).

¹³¹ G J Van Zyl and J C Bekker, 'Unmarried Fathers Should Not Have Their Cake and Eat it: Case comment on *Jooste v Botha*' (2000) 33 *De Jure* 149.

¹³² E Bonthuys and T Mosikatsana 'Law of Persons and Family Law' (2000) *Annual Survey of South African Law* 152.

¹³³ (2003) 2 SA 198 (CC).

¹³⁴ Paragraph 18.

¹³⁵ Child Care Act 74 of 1983.

¹³⁶ P T Moyo, 'The relevance of culture and religion to the understanding of children's rights in South Africa' (LLM Dissertation, University of Cape Town 2014) 23.

¹³⁷ (1996) 4 SA 472 (W).

father, the court granted custody to the natural father while referring to the grandparents as third parties with no inherent right to custody.¹³⁸ Thus there are variations in terms of individual rights and familial rights in family protection relating to child custody in South Africa.¹³⁹

Additionally, the right to housing is guaranteed under section 26(1) of the Constitution. Section 26(3) expressly forbids evictions and demolitions without obtaining a court order and the court has a duty to consider all relevant facts before making such an order. This right to housing has been developed more than any other social and economic right in South Africa and this can be attributed to the rate of evictions and forced removal during the apartheid period.¹⁴⁰ In *Government of the Republic of South Africa v. Grootboom*,¹⁴¹ the court held that the right to housing goes beyond bricks and mortar and that the social infrastructures such as water and sewage disposal that are provided by the government are parts of the right. The court therefore held that the people must be supported by the state to provide housing for themselves. The *Grootboom* case has impacted positively on the right to housing in South Africa and has promoted right to family life in this respect. The case has led to the enactment of the Housing Act,¹⁴² the Rental Housing Act¹⁴³ and the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act.¹⁴⁴

9.0 Protection of family life in Egypt

Article 10 of the Constitution of Egypt 2014¹⁴⁵ recognizes family is the foundation of society which is rooted in religion, morality and patriotism. Article 11 provides that ‘the state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution.’ Article 11 also states that the state is committed to protecting women from all sorts of violence and ensuring women's empowerment in order to balance a woman's responsibilities to her family and her job obligations. The government has a responsibility to provide for motherhood and childhood, as well as breadwinning, elderly women, and women in need.¹⁴⁶

¹³⁸ This decision has been followed in a number of cases such as *Townsend-turner and Another v Morrow* (2004) 2 SA 32 (C) and *Hlophe v Mahlalela* (1998) 1 SA 449 (T).

¹³⁹ A Armstrong, ‘School and Sadza: Custody and the best interests of the child in Zimbabwe’ (1994) 8(2) *International Journal of Law, Policy and the Family* 151.

¹⁴⁰ L A Williams, ‘The Right to Housing in South Africa: An Evolving Jurisprudence’ (2014) *Columbian Human Rights Law Review* 819.

¹⁴¹ (2000) 11 BCLR 1169.

¹⁴² Housing Act No 107 of 1997.

¹⁴³ Rental Housing Act No 50 of 1999.

¹⁴⁴ Prevention of Illegal Eviction from an Unlawful Occupation of Land Act No 19 of 1998.

¹⁴⁵ Constitution of Egypt 2014 (Translated by International IDEA).

¹⁴⁶ Egypt Constitution, art 11.

In the event of inability to work, old age, or joblessness, the constitution provides for social security services to secure a good life for themselves and their family.¹⁴⁷ Article 18 guarantees the entitlement of every citizen to healthcare and the state commits to allocate at least 3% of the Gross Domestic Product (GDP) to health. Every person has the right to education which is obligatory until the end of secondary school or its equivalent.¹⁴⁸ The government also pledges to put in place a housing plan that tries to strike a balance between population expansion and available resources.¹⁴⁹ It is noteworthy that these rights and obligations are not fundamental rights in the constitution.

Chapter three of the constitution deals with public rights, freedoms and duties. Article 53 accords equal rights to all citizens and affirms that discrimination and incitement to rape are punishable crimes. Except in circumstances of danger or when a demand for help is issued, article 57 ensures the inviolability of private life, while article 58 assures the inviolability of dwellings. The human body's inviolability is guaranteed, and assault, defilement, and mutilation are all crimes that are penalized.¹⁵⁰ In further guarantee of the right to family life, 'the state guarantees citizens the right to decent, safe and healthy housing, in a way that preserves human dignity and achieves social justice.'¹⁵¹ Additionally, 'each citizen has the right to healthy, sufficient amounts of food and clean water. The state shall provide food resources to all citizens. It also ensures food sovereignty in a sustainable manner, and guarantees the protection of agricultural biological diversity and types of local plants to preserve the rights of generations.'¹⁵² Article 80 of the Constitution guarantees children's rights to free immunizations, health and family care or alternative care, basic nutrition, safe shelter, religious education, and emotional and cognitive development.

It has been posited that the fundamental rights under the Egypt Constitution are not properly entrenched since ordinary majority in parliament can easily curtail the rights.¹⁵³ It is noteworthy that the surveillance policies and practices established under the Mubarak 30 year regime are still ongoing in Egypt.¹⁵⁴ This is a clear violation of right to family life and privacy. There is no development of case laws in Egypt to validate the fundamental right of family life as guaranteed

¹⁴⁷ Egypt Constitution, art 17.

¹⁴⁸ Egypt Constitution, art 19.

¹⁴⁹ Egypt Constitution, art 41.

¹⁵⁰ Egypt Constitution, art 60.

¹⁵¹ Egypt Constitution, art 78.

¹⁵² Egypt Constitution, art 79.

¹⁵³ G P Parolin, 'The 2014 Constitution of Egypt: An Overview' 2014

<https://www.iemed.org/actualitat/noticies/publicacions/historic-de-publicacions/anuari-de-la-mediterrania/sumaris/avancaments-anuari-2013/The%202014%20Constitution%20of%20Egypt%20_Med2014.pdf> accessed 8 May 2022.

¹⁵⁴ Reporters Without Borders, 'Internet Enemies 2012: Countries under Surveillance - Egypt, 12 March 2012

<https://en.rsf.org/IMG/pdf/rapport8internet2012_ang.pdf> accessed 8 May 2022.

by the constitution. This can be attributed to the long period that the country operated under an official state of emergency until 2012 which promoted violations of constitutional rights.

10.0 Conclusion and Recommendations

This paper examined the constitutional protection of right to family life in four selected African countries – Nigeria, South Africa, Kenya and Egypt. The approach was to examine the right to family life from the aspects of basic needs that will make the right realizable in the countries studied. It was found that while the right to family life is expressly guaranteed in the constitutions of Nigeria, Kenya and Egypt, the right is not expressly provided for in South African Constitution. However, the South African Constitution has made provisions for the social and economic rights to promote and protect family life. The courts in South Africa have displayed a positive attitude and commitment towards protecting family life in South Africa.

On the other hand, the right to family life, though expressly provided for in the Kenyan Constitution, in addition to social and economic rights that will complement the right to family life as fundamental rights in Kenya, have been met with mixed attitudes from the High Courts and the appellate courts in Kenya. While the High Courts have taken proactive steps in the interpretation of aspects of the constitution to protect family life, this action has been met with a negative attitude at the Court of Appeal. However, eyes are on the Supreme Court in a number of pending cases on the approach the apex Court will take.

The right to family life is protected as fundamental right in both Nigeria and Egypt but the social and economic rights that will complement the right to family life remains mere directive principles under both constitutions. The focus of litigation in Nigeria is on the right to privacy in terms of interference with communication without sufficient records of citizens challenging the lack of protection of other aspects of right to family life such as social security, housing, safe and clean water, child marriage, access to food, and so on. It appears that this part of the constitution has not been sufficiently challenged due to the citizens' attitude to enforcement of rights as well as the length of judicial process in the country. Though the complementary rights to effectively protect the right to family life in Egypt are directive principles just like Nigeria, the lack of judicial pronouncements on the protection of family life lies more in the state of emergency under which the country was governed for decades till 2012.

It is therefore recommended that:

- a) South Africa continues to protect the right to family life by further strengthening its systems of human right enforcement.

- b) Kenyan courts should be more proactive in interpreting the constitutional provisions of family life to actually protect the right to family life as anticipated by the drafters of the constitution.
- c) The Kenyan Supreme Court should be sensitive to the long term effects that its decisions will have on the protection of family life in Kenya and thus be meticulous in making its rulings in the pending cases on the right to family life in Kenya.
- d) Both the Nigeria and Egypt Constitutions should be reviewed to move beyond classifying social and economic rights, necessary to protect family life, as directive principles but should become fundamental rights.
- e) The Nigerian courts should adopt an approach of interpreting fundamental rights in the light of connecting social economic rights that will make fundamental rights to be effectively realized.
- f) The government of Egypt should commit to protecting and promoting human rights in the country and empower the courts to make decisions that will be free from fear or favour.