

Chapter 19

Article 18

Protection of the family

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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. State parties to the present Charter shall take appropriate steps to ensure the equality of rights and responsibilities of spouses with regard to children during the marriage and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of the child.
3. No child shall be deprived of maintenance by reference to the parent's marital status.

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1 Introduction

The African Charter on the Rights and Welfare of the Child (African Children's Charter)¹ emphasises the importance of protecting the family, particularly in the context of children's rights. However, it does not provide a definition of the 'family', and its composition.² Nonetheless, the criticality of the family as fundamental in African society is indubitable. Relationships leading to marriage and children were invariably cherished among African peoples.³ The African concept of human rights enforces the notion that children are a valuable part of society as traditional African culture recognises the worth of children and the need to protect them. It thus is not surprising that for a charter dedicated to children, the 'family', however conceptualised, forms a significant part of its social fundamentals. The Preamble recognises that the child holds 'a unique and privileged position in the African society' and that for the

- 1 African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999 (African Children's Charter).
- 2 E Fokala 'The impact of the best interests and the respect for the views of the child principles in child custody cases' (2019) 88 *Nordic Journal of International Law* 615.
- 3 See M Epprecht "'Bisexuality' and the politics of normal in African ethnography' (2006) 48 *Anthropologica* 187, 188, where it is stated: 'African societies traditionally placed an extremely high and prodigiously over-determined value on heterosexual marriage and reproduction.' Also, M Epprecht "'Hidden" histories of African homosexualities' (2005) 24 *Canadian Woman Studies* 138, 139.

child to fully develop their personality, the child must grow up in a 'family environment that promotes love, happiness and understanding'.⁴

This chapter offers an analysis of article 18 of the African Children's Charter. Overall, the Charter shows the quintessence of African values that recognise the importance of the family to African children's upbringings. The Preamble presupposes that parties to the Charter considered 'the virtues of their cultural heritage, historical background and the values of the African civilisation which should inspire and characterise their reflection on the concept of the rights and welfare of the child'.⁵ Therefore, the family and its protection need to be viewed within the broader context of the African values.

2 Concept of 'family' in Africa

The concept of 'family' in Africa is complex and evolving, and is influenced by cultural, social and economic factors. Generally, the family is considered the primary social unit that ideally provides care, nurture and socialisation for its members.⁶ Traditional families with the heterosexual marriage form as the cornerstone predominate.⁷ However, this conceptualisation does not encapsulate the increasing family diversity that now exists in the world. In different regions around the world, various family structures and patterns have emerged, such as cohabiting families and same-sex families. Tarimo sees an African family as a 'group' of people held together by blood ties.⁸ While, like other human rights treaties, the African Children's Charter adopts the language of a 'unit' (as opposed to a 'group'), in actuality, the African context of a family often refers to what in Western terms would be the 'extended family'. Families are deeply and expansively woven into the fabric of African societies.

Decolonial approaches view the 'nuclear family' as a colonial concept.⁹ Therefore, the atomisation of the family is historically alien and in conflict with African values. Strictly speaking, no such 'nuclear' family structure has been practised on the continent as a 'norm', historically or currently.¹⁰ In the rich tapestry of African culture, the concept of family extends far beyond the nuclear unit. African families embody traditions, values and interconnectedness. The extended family networks foster solidarity and reciprocal support among relatives. For legal convenience, however, a unit therefore would only refer to the nuclear family. It 'is the nuclear family model which has achieved privileged status in modern social imaginaries and development imperatives'.¹¹ A broader conception of the family would make it legally complex to support amorphous and extended structures.

Like elsewhere in the world, the African family has experienced new family incarnations that have upset deeply-held traditional values. Whereas marriage was the *sine qua non* for the nuclear family, new 'units' – more prevalently, cohabiting and, less so, homosexual 'families' – have also emerged in Africa. These new configurations challenge the scope of the existing law. The changes pose a challenge to states for much more vigilant protection of children's rights.

4 Preamble African Children's Charter.

5 As above.

6 O Dupper and others 'The case for increased reform of South African family and maternity benefits' (2000) 4 *Law, Democracy and Development* 27-41.

7 E Okon 'Towards defining the "right to a family" for the African child' (2012) 12 *African Human Rights Law Journal* 373-393.

8 A Tarimo *Applied ethics and Africa's social reconstruction*, Nairobi (2005) 163.

9 H McEwen 'Nuclear power: The family in decolonial perspective and "pro-family" politics in Africa' (2017) 34 *Development Southern Africa* 738.

10 O Oyěwùmi 'Conceptualising gender: The Eurocentric foundations of feminist concepts and the challenge of African epistemologies' (2002) 2 *Jenda: A Journal of Culture and African Woman Studies* 1-9.

11 McEwen (n 9).

3 Protection of the family in Africa

Extant African human rights law protects the nuclear family and children. While article 18 of African Children's Charter focuses on the 'family', the Charter concerns children. Most international instruments and national legislation dealing with children recognise the need for the protection of the family and for children to grow up in a family environment. Thus, children are often spoken about in the context of the family. The right to protection of the family is not analogous to the 'right to a family'. Sloth-Nielsen and others posit that that 'a child does not have the right to a family in international law'.¹² Neither the African Charter on Human and Peoples' Rights (African Charter)¹³ nor the African Children's Charter contains a specific formulation of 'the right to a family'. The focus of provisions in both, rather, is on the protection of the family.

Provisions on protection of the family have been variously expressed in human rights law. Western regional instruments enunciate the right to protect 'private and family life'. On the other hand, the African Children's Charter distinguishes itself by not only focusing on the protection of the family, but its formation. Article 18(1) of the Charter provides that '[t]he family shall be the natural unit and basis of society'. This is not particularly unique; other human rights instruments employ similar language. However, the African Children's Charter goes further, by obligating 'the protection and support of the state for its establishment and development'. The provision for the *establishment and development* of the family sets the African Children's Charter apart from other human rights protections of families and children, including the Convention on the Rights of the Child (CRC). This obligation precedes protection of 'private and family life'. Because the obligation to 'establish' and 'develop' is foundational, article 18 places a heavier burden on parties to the African Children's Charter.

African regional law recognises the crucial importance of state support to the establishment of the family and, then, its development, perhaps the equivalent of family *life*. The obligation to protect the family, while it features in other human rights treaties, bears greater significance in Africa. The invocation of 'protection' implies both the value and vulnerability of the subject of the protection. In the broader context of Africa, familial roles and responsibilities have been undergoing significant changes due to various global challenges. These challenges include economic restructuring, urbanisation, rapid technological change, chronic health emergencies, climate change, conflict and displacement.¹⁴ These issues are further exacerbated by the impact on family structures of demographic and socio-economic changes.¹⁵ The African Children's Charter came after the devastating Economic Structural Adjustment Programmes (ESAPs) prescribed on African states by the World Bank and the International Monetary Fund (IMF).¹⁶ These changes have contributed to family circumstances that are characterised by economic fragility, debilitating poverty and weakened family support for household chores and care-giving responsibilities.¹⁷ In light of the threats to a central social institution, it is not surprising that special focus was placed on the protection of the family.

12 J Sloth-Nielsen, B Mezmur & B van Heerden 'Inter-country adoption from a Southern and Eastern African perspective' (2010) *International Family Law* 86-96.

13 African Charter on Human and Peoples' Rights (African Charter) adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 IL.58 (1982).

14 R Evans, RA Diop & F Kébé 'Familial roles, responsibilities, and solidarity in diverse African societies' in R Sooryamoorthy & NE Khalema (eds) *The Oxford handbook of the sociology of Africa* (2022) 485-502.

15 A Adepoju *Sociology family, population and development in Africa* (1996).

16 SM Kawewe & R Dibie 'The impact of economic structural adjustment programs (ESAPs) on women and children: Implications for social welfare in Zimbabwe' (2000) 27 *Journal of Sociology and Social Welfare* 79.

17 Z Mokomane 'Social protection as a mechanism for family protection in sub-Saharan Africa' (2013) 22 *International Journal of Social Welfare* 248.

The iteration of this protective spirit within the African legal architecture reinforces the significance of the family. The African Charter also includes a duty for states to protect and assist the family. The distinctiveness of its pronouncements lies in the justification for protection of the family as ‘a custodian of morals and traditional values recognised by the community’.¹⁸ These values are seen as crucial for the sustainability, continuity and well-being of African societies. As recognised in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)¹⁹ discussed below, the African Charter calls for the elimination of all discrimination against women, and to ensure the protection of their rights and those of their children. The African Charter establishes mechanisms to promote and protect human and peoples’ rights, including the African Commission on Human and Peoples’ Rights (African Commission) and the African Court on Human and Peoples’ Rights (African Court). As will be noted later, the African Commission has issued a few remarkable decisions on the protection of the family.

The Maputo Protocol’s focus on the protection of women and children aligns with the broader goal of social protection as a mechanism for family protection in Africa, where the extended family has traditionally provided support in times of need.²⁰ The Protocol recognises different family dynamics occasioned by tradition or social circumstances. Against the backdrop of deep-rooted traditional practice, it recognises the vulnerability of women. Polygamy has been common in African societies. However, the Protocol states that it encourages monogamy as ‘the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected’.²¹ The emphasis on monogamy and de-emphasis on polygamous marriages betrays the gradual perceptual shift from the latter. This perhaps is a recognition of the potentially deleterious impact of polygamous relationships on both women and children.²² Further, the Protocol places equal responsibilities on women and men to jointly contribute to safeguarding the interests of the family, protecting and educating their children. The Protocol is particularly cognisant of the peculiar social conditions of women in Africa, in recognising the protection of ‘poor women and women heads of families including women from marginalised population groups and provide an environment suitable to their condition and their special physical, economic and social needs’.²³

This brief discussion of article 18 of the African Children’s Charter illustrates contested conceptions of the family and its protection in the African context. The theme of protection of the family intertwines with other African legal instruments. The obligation to protect and support the establishment and development of the family is quintessentially African. The broader aims of article 18 demonstrate the importance of the family to African societies. In what follows, I attempt to deconstruct the scope of interests protected under article 18. This is particularly germane in order to establish some clarity on the provisions of the article against a backdrop of new family configurations on the continent.

4 Legal interpretation of article 18

Human rights treaties have notoriously general provisions. Unpacking a treaty provision can help one understand its meaning, scope and implications. Examining the preparatory work or *travaux préparatoires* and drafting history materials usually helps uncover the intentions of the treaty drafters

18 Art 18(2).

19 African Union Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003.

20 Mokomane (n 17).

21 Art 6(c).

22 S Bahari and others ‘Psychological impact of polygamous marriage on women and children: A systematic review and meta-analysis’ (2021) 21 *BMC Pregnancy Childbirth* 823.

23 Art 24(a).

and clarifies ambiguous language.²⁴ However, there are no publicly available and accessible *travaux préparatoires* of the African Children's Charter.²⁵ Notably, the provisions in article 18, like elsewhere, carry the word 'shall' signifying binding obligations to which parties must adhere.²⁶ The following analysis should be understood in that context.

4.1 The family shall be the natural unit and basis of society

The subject of protection under article 18 is the family as the natural unit and basis of society. The idea that the family is the 'natural' unit implies that it arises organically from human relationships. That the family is considered the basis of society implies that society would not exist without families, a recognition of its role in procreation, human existence and continuity.²⁷ However, article 18 does not define a 'family'. A contextual interpretation would recognise the role of the extended family in supporting children.²⁸ Still, the article does not specify the constituents of a family. As will be discussed later, this is rather problematic as questions remain as to whether or not emerging new forms of families constitute a *natural* unit.

4.2 The protection and support of the state for its establishment and development

The accompanying duties of the state in the protection and support for the family are made clear in articles 18(1) and (2). The state shall support and protect the establishment of the family first, and then its development. This is a logical sequence. While the protection of families is a common duty, the obligation to support the *establishment* of a family appears quintessentially African. The guidelines for periodic submission of state reports provide no detail on the support for the establishment of the family.²⁹ In its ordinary meaning, such positive duty suggests that states shall support and not hinder the processes associated with family formation. In societies that associate marital unions with family, the state shall, therefore, facilitate marriages, both customary or civil, for instance, their registration. States may offer financial support to families during critical life stages, such as child birth, adoption, or raising children.

This article falls in line with article 20(2) (discussed in chapter 21 of this volume) which obliges state parties (a) to assist parents and other persons responsible for the child and, in case of need, provide material assistance and support programmes, particularly with regard to nutrition, health, education, clothing and housing; (b) to assist parents and others responsible for the child in the performance of child rearing and ensure the development of institutions responsible for providing care of children; and (c) to ensure that the children of working parents are provided with care services and facilities.

The duty to 'protect' the family thus is a continuum; it refers to the positive and subsequent duty of states to *safeguard* the family. Again, the notion of protection features in several other human rights treaties.³⁰ However, the provisions of article 18 should be distinguished from protection of 'privacy and

24 See VCLT art 32; see also A Orakhelashvili *Treaty interpretation: Rules and methods: The interpretation of acts and rules in public international law* (2008).

25 R Miamingi 'Legitimacy as a challenge to compliance with the norms on the protection of children in Africa' in A Adeola (ed) *Compliance with international human rights law in Africa: Essays in honour of Frans Viljoen* (2022) 117-147.

26 In its jurisprudence, the Commission has held that art 18 imposes a positive obligation on the state towards the family; *Good v Botswana* (2010) AHRLR 82 paras 213-214.

27 W Ncube 'Recognition and monitoring of children's rights in Africa: Challenges and prospects' in E Verhellen (ed) *Children's rights* (1997) 612.

28 See art 19 referring to 'another member of the family'.

29 Guidelines for Initial Reports of state parties to the African Charter on the Rights and Welfare of the African Children's Committee/ACRWC/2 II. Rev2, 2003.

30 See art 10(1) of the International Covenant of Economic, Social and Cultural Rights.

family life' in the European Convention on Human Rights (ECHR). On plain reading, the latter would mean protection of life activities associated with a family rather than the family as a unit itself. In the African context, the family comes first. In its ordinary meaning, 'protection' means 'the act of keeping someone or something safe from injury, damage, or loss, or the state of being protected in this way'.³¹ A presumption of value and vulnerability underlies the provision. This protection extends to various aspects of family life, including privacy, stability and social support. Protection and support of the family's *development* includes supporting families in their efforts to provide a nurturing environment for children. In the African construction, the object is to sustain the family as an essential building block of African communities, because it holds a central place in social structures. In this context, the family serves as the custodian of morals and traditional values.³² Other human rights instruments, such as the ECHR, do not place an obligation on the state to support the development of families.

In summary, the phrase 'the protection and support of the state for its establishment and development' refers to the role of the state in ensuring the well-being, stability and growth of the family as fundamental social unit in Africa. Rather than protecting only family life, it aims to protect the family as a unit.

4.3 Equality of rights and responsibilities of spouses regarding children during marriage

While article 18 focuses chiefly on the family, it recognises the importance of family in a child's life and emphasises collaboration between the state and families to ensure the protection, well-being and preservation of African values for the benefit of children.³³ While the latter parts are devoted to the 'family', article 18 makes obvious reference to children and the responsibilities of parents. When a marriage produces children, both parents have equal responsibilities and rights concerning their children. This includes the right to raise, influence and make decisions on behalf of their children. However, the word 'spouse' is the subject of contention. By definition, a spouse is 'a husband or wife, considered in relation to their partner'.³⁴ The term has predominantly been used to describe married heterosexual couples. However, dynamics of family formation show that this conception now appears anachronistic. As will be shown later, cohabiting unmarried families subsist prevalently, while South African statutes and courts now recognise same-sex spouses. While the Maputo Protocol espouses equality of responsibility of partners in marriage, it refers specifically to a 'a woman and a man',³⁵ implying recognition of only heterosexual marriages. As discussed later, this remains a problematic area in the discourse on African family law.

4.4 Dissolution of marriage and the necessary protection of the child

In the traditional families, the rights and responsibilities do not cease in the event of the dissolution of the marriage or relationship. The same rights and responsibilities apply to spouses during marriage and at its dissolution. In matters related to their children, parents have equal rights and responsibilities, regardless of their marital status. When a family or relationship is dissolved, protection shifts to the children. When children are involved, their welfare takes priority. Traditionally, the extended family network is activated to support children of divorced parents,³⁶ while African countries have established

31 See 'protection' *Cambridge online dictionary*, <https://dictionary.cambridge.org/dictionary/english/protection> (accessed 2 September 2024).

32 Art 18 African Charter.

33 A Strohwalder 'An analysis of the role of African values, traditions and morals in the interpretation of children's rights' (2023) 26 *Potchefstroom Electronic Law Journal* 1-22.

34 'Spouse' *Oxford dictionary* (online).

35 Art 6(i).

36 See eg J Brown and others 'Parenting into two worlds: How practices of kinship fostering shape development in Namibia, Southern Africa' in BK Ashdown & AN Faherty (eds) *Parents and caregivers across cultures: Positive development from infancy through adulthood* (2020) 173-188.

legal frameworks for maintenance payments for the children,³⁷ although, as discussed below, this can be difficult to enforce.

4.5 Child maintenance and parents' marital status

In its ordinary meaning, 'child maintenance' is the payment made (usually by a parent) to the other parent for expenses relating to a child or children. Such maintenance may be paid on a voluntary and agreed basis, or ordered by a court or tribunal. The maintenance (sometimes referred to as 'child support') is designed to ensure that children receive financial support from their parents, irrespective of the living arrangements post-divorce or separation.³⁸ Article 18 does not state who should pay the maintenance, except that a child shall not be deprived of maintenance by reference to the parents' marital status. This includes couples who were never married but are separating, as well as parents who have never lived together. In essence, article 18 places a duty on both parents and the state, the latter with the duty to guarantee the provision. For example, in Ghana, workers at the Department of Social Welfare make arrangements with the non-resident fathers to ensure that they meet their financial obligations, yet some fail to do so.³⁹ Thutse concludes that the overall approach to the treatment of children's arrear maintenance claims compromises the rights of children to social welfare and human dignity.⁴⁰

5 Relationship between article 18 and other Charter provisions

The article 18 duties to protect and support the establishment of the family intersect with provisions of other articles in the African Children's Charter. The 'best interests' provision (article 4) is one of the overarching principles of the Charter. It thus is conjoined with, for example, article 19 which provides for children's rights to non-separation from their parents. It is consistent with the Charter's pronouncement of the duty of the state to protect the family, the Charter's provisions on the duty of parental care (such as article 20, referred to above) and the children's rights to family protection (article 18) discussed in this chapter. Article 23 enjoins states to undertake to cooperate with existing international organisations that protect and assist refugees in their efforts to protect and assist such children and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family. Under article 24, states that recognise the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. According to article 25, no child should be deprived of its family. However, where it is in the best interests of the child to separate a child from its family, the state must provide that child with an alternative family setup or environment to ensure the continuity of the child's upbringing. This is a particularly important caveat; in some cases, it would not be in the best interests to keep a child in, for instance, abusive families.

Families can be ruptured because of conflict with the law. Article 30 (discussed in chapter 31 of this volume) promotes recourse to non-custodial sentences when sentencing mothers of children. Article 31 (discussed in chapter 32 of this volume) gives express recognition to the idea that children

37 See eg SE Laird 'Enforcing the law on child maintenance in sub-Saharan Africa: A case study of Ghana' (2011) 25 *International Journal of Law, Policy and the Family* 220-243; A Armstrong 'Maintenance payments for child support in Southern Africa: Using law to promote family planning' (1992) 23 *Studies in Family Planning* 217-228.

38 See *Bestuursliggaam van Gene Louw Laerskool v JD Roodtman* (A37/2000) [2000] ZAWCHC 2; 2004 (1) SA 45 (C) (29 September 2000) and *Fish Hoek Primary School v GW* 2010 (2) AllSA 124 (SCA).

39 V Awortwe and others 'A reason for the unmet needs of children in contact with social services? Non-resident fathers' perspectives on delinquent child maintenance claims' (2020) 117 *Children and Youth Services Review* 105298; see also Laird (n 37) 220-243.

40 L Thutse 'Does the treatment of arrear maintenance claims of children under the Insolvency Act 24 of 1936 constitute a violation of their constitutionally protected rights to social welfare and human dignity? An exposition' (2023) 56 *De Jure* 340.

also have responsibilities depending on their evolving capacities. These are responsibilities towards family and society to work for the cohesion of the family, to respect parents, superiors and elders and to preserve African cultural values. In its General Comment dealing specifically with article 31, the African Committee of Experts on the Rights and Welfare of the Child (African Committee of Experts) notes that the inclusion of responsibilities denotes that these are not legal duties that could lead to penal sanction if violated.⁴¹

6 Changing family forms and article 18

According to Mwandayi, marriage is the cog around which life in an African society revolves, the absence of which there is no society to talk about, no reason to live for and no future to talk about.⁴²

However, the traditional family structure in Africa, characterised by extended households, has been reshaped by globalisation and modernisation, leading to the rise of single-parent and cohabiting families. It remains unclear how a 'natural unit' as envisaged in article 18 is constituted. The shift in family is particularly evident in the transition from polygamous to monogamous marriages and the reduction in family size. So-called child-headed households defy the ordinary conception of a family, which puts a child as the subject of protection and nurturing at the forefront. Such families proliferated at the height of the AIDS pandemic, which orphaned multitudes of children.⁴³ Child-headed families do not seem to fit into the mould of article 18 in light of its references to 'equality of rights and responsibilities of spouses'. Neither the African Charter nor the Maputo Protocol addresses this arrangement. It thus is safe to conclude that such a formation is not conceived of as a family. However, support for single parents is envisaged.

Cohabitation has become a prominent feature of family transition in sub-Saharan Africa; it entails the co-residence of unmarried partners living as husband and wife, with or without children.⁴⁴ Generally, cohabitation does not conform to cultural norms in most African settings.⁴⁵ Falling outside civil or customary marriage, cohabitation has attracted derogatory epithets. For instance, in Zimbabwe, cohabitation is described pejoratively as *kuchaya mapoto*, a euphemism for promiscuity.⁴⁶ Considering that formation of marital unions involves the payment of bride price by the 'groom' in most African societies, such 'loose' unions, however, have become common. Data suggests a 21,7 per cent prevalence of cohabitation in Central Africa; 11,7 per cent in Eastern Africa; 10,4 per cent in Southern Africa; and 6,8 per cent in Western Africa.⁴⁷ On a continent beset with poverty, it is not surprising that young men, expected to often pay a high bride price, and women, resort to cohabitation.

Article 18 also does not seem to cover cohabiting families. The South African High Court observed that, under the Children's Act 38 of 2005, the difference between unmarried and married people was that, through litigation and the extension of the law, the parties and the children involved in

41 African Children's Committee General Comment on art 31 para 9.

42 C Mwandayi 'Towards a reform of the Christian understanding of Shona traditional marriages in light of ancient Israelite marriages' (2017) 43 *Studia Historiae Ecclesiasticae* 2.

43 AJ Mturi 'Child-headed households in South Africa: What we know and what we don't' (2012) 29 *Development Southern Africa* 506-516.

44 J Haskey 'Cohabitation in Great Britain: Past, present and future trends – and attitudes' (2001) 103 *Population Trends* 4-25.

45 C Odimegwu and others 'Cohabitation in sub-Saharan Africa: A regional analysis' (2018) 18 *Southern African Journal of Demography* 111-170.

46 See V Mbara 'Cohabiting affairs on the rise' *The Herald* (Zimbabwe) 4 March 2017, <https://www.herald.co.zw/cohabiting-affairs-on-the-rise/> (accessed 2 September 2024).

47 OA Popoola & O Ayandele 'Cohabitation: Harbinger or slayer of marriage in sub-Saharan Africa?' (2019) 17 *Gender and Behaviour* 13029.

legally-regulated relationships are protected.⁴⁸ The Children's Act requires a marriage⁴⁹ in order to establish a family and does not provide for families that do not fit this mould.⁵⁰ However, the dynamics of family formation show that this conception now appears anachronistic. The conflation of marriage and family as recognised in law glaringly conflicts with contemporary African reality. The South African courts have found the exclusion of unmarried people in a committed relationship to be constitutionally unjustifiable.⁵¹ If marriage becomes the axiom, then this is bound to discriminate against other relationships of a long-term nature.⁵² O'Regan J in *Dawood* put it succinctly: '[F]amilies come in many shapes and sizes. The definition of 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.'⁵³

Same-sex relationships have raised debate on whether these constitute a 'natural unit'. While some anthropological accounts point to the existence of homosexual relationships in Africa,⁵⁴ the idea of same-sex relationships, let alone marriage, has not found popular traction on the continent. Such relationships themselves are deemed unnatural and the antithesis of natural reproduction. Heteronormativity is upheld to promote heterosexuality as the only normal, healthy and natural pattern of human behaviour. As already noted, the Maputo Protocol only refers to relationships between 'a woman and a man'.⁵⁵ In fact, several countries have proceeded to enact laws that ban homosexuality. In Uganda, for example, the memorandum to the Anti-Homosexuality Bill of 2023 posited that the objective of the legislation is to safeguard the integrity of the traditional family by 'strengthening the nation's ability to address both internal and external challenges that pose a potential risk to the conventional, heterosexual family'.⁵⁶ The subsequent Act⁵⁷ was upheld by the country's Constitutional Court.

In 2006 South Africa became the first, and remains the only, African country to legalise same-sex marriage,⁵⁸ with a Constitution that also protects against discrimination based on sexual orientation. In a recent landmark decision, the South African Constitutional Court upheld that Section 40 of the Children's Act was unjustifiably discriminatory based on marital status and sexual orientation.⁵⁹ The Act was revised to include the terms 'permanent life partner' alongside 'spouse' and 'husband'. Like O'Regan J, in another case, *Du Toit*, Skweyiya AJ stated that 'the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what

48 *VJV v Minister of Social Development* [2022] ZAGPPHC 114 paras 12-3.

49 The Children's Act defines 'marriage' as including a marriage recognised in terms of South African law or customary law, and includes a marriage concluded in terms of religious law. While this clearly includes marriages concluded in terms of the Civil Unions Act, whether same-sex or heterosexual, cohabitation is not expressly mentioned (art 1).

50 *VJV* (n 48).

51 *VJV* (n 48) para 16.

52 *VJV* (n 48) para 26.

53 *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 (CC) para 31.

54 J Ambani 'Triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 14.

55 Art 6(i).

56 See the Anti-Homosexuality Bill 2023 *Uganda Gazette* 16, Vol CXVI, 3 March 2023.

57 See the Anti-Homosexuality Act 2023 (Uganda) (26 May 2023).

58 See Civil Union Act 2006 (South Africa) Preamble & para 6.

59 *VJV* (n 48) para 10.

constitutes family life should change as social practices and traditions change'.⁶⁰ The Court recognised the lesbian family, that wanted to adopt two children, as 'a stable, loving and happy family'.⁶¹

While the African Commission has passed a resolution specifically dedicated to lesbian, gay, bisexual, transgender or intersex (LGBTI) rights,⁶² the regional human system has rarely been tested with cases concerning LGBTI rights and marriage.⁶³ In contrast, some regional courts have ruled in favour of same-sex relationships. For instance, in *Schalk and Kopf v Austria*, the European Court of Human Rights (ECtHR) pronounced that it would be 'artificial' today to consider a same-sex couple as incapable of enjoying a family bond in the same way as a heterosexual couple.⁶⁴ At the Inter-American Court of Human Rights, the Court ruled in *Atala Riffo v Chile* that Chile had violated the American Convention by removing a mother from the custody of her daughters because of her homosexuality.⁶⁵ The ECtHR made a similar decision in the case of *Salgueiro da Silva Mouta v Portugal*.⁶⁶

7 Regional jurisprudence

The African Commission has from time to time pronounced itself on the protection of the 'traditional' family.⁶⁷ It invoked this right in *Modise v Botswana*, in which case it held that Botswana's immigration procedures violated rights to family unity. By deporting the complainant to South Africa, the government 'expose[d] him to personal suffering, it deprived him of his family, and it deprived his family of his support'.⁶⁸ In the landmark decision on the communication involving the Ogoni People and the state-owned Nigerian National Petroleum Company and Shell Petroleum Development Corporation,⁶⁹ the African Commission ruled that the government had violated article 18 because the right to shelter obliged the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. As stated by the Commission, '[t]he right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected'.⁷⁰ This teleological approach summons multiple but related rights.

In the case of the Janjaweed militia in Sudan, which forcefully evicted the victims from their homes, and killed some family members while others fled to different places inside and outside the territory, the African Commission ruled that the events threatened the very foundation of the family and rendered the enjoyment of the right to family life difficult. By not ensuring protection to the

60 *Du Toit and Another v Minister of Welfare and Population Development and Others* (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) (10 September 2002), where the application involved the issue of the adoption of two children to a lesbian couple.

61 *Du Toit* (n 60) para 29. (2001) AHRLR 60 (ACHPR 2001)

62 Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity ACHPR/Res.275(LV)2014.

63 A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in Namwase & A Jjuuko (n 54) 260.

64 See *Schalk and Kopf v Austria* Application 30141/04 24 June 2010, para 94.

65 See *Atala Riffo v Chile* Inter-American Court of Human Rights, Judgment of 24 February 2012.

66 See *Salgueiro da Silva Mouta v Portugal* Application 33290/96 21 December 1999.

67 See eg *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*); *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999); *Chinhamo v Zimbabwe* (2007) AHRLR 96 (ACHPR 2007).

68 *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1997) para 32.

69 *SERAC* (n 67).

70 *SERAC* (n 67) para 60.

victims, thus allowing its forces or third parties to infringe on the rights of the victims, the respondent state was also found to have violated article 18(1) of the African Charter.⁷¹

The African Commission has also pronounced itself on the rights of detainees, holding that '[e]nsuring protection of the family also requires that states refrain from any action that will affect the family unit, including arbitrary separation of family members'. Therefore, incommunicado, arbitrary or unlawful detention, in violation of article 6 of the African Charter, constitutes arbitrary and unlawful interference with the family unit.⁷² Similarly, in *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* the African Commission held that by holding victims in incommunicado detention, the state violated articles 6, 7 and 18 of the African Charter.⁷³ In *Article 19 v Eritrea*⁷⁴ the Commission also held that the illegal and incommunicado detention without trial since 2001 of 11 former senior officials of the Eritrean government was a violation of article 18 of the African Charter on the protection of family life for the inmates as well as their families.

In *Mbiankeu v Cameroon* the African Commission took a contextual approach to determine 'if there is a right to adequate housing under article 14 of the ACHPR read together with articles 16 and 18, in which case it will be important to determine if the facts of the case constitute a violation of the right to adequate housing'.⁷⁵ Along similar lines, the Commission concluded that the forcible expulsion of two men to Malawi by the Zambian government had 'forcibly broken up the family unit which is the core of society thereby failing in its duties to protect and assist the family as stipulated in articles 18(1) and 18(2) of the Charter'.⁷⁶ In West Africa, the *Economic Community of West African States (ECOWAS) Community Court of Justice* has also made decisions on protection of the family.⁷⁷ The protection of the family in article 18 of the African Children's Charter lends itself to align with a wider value system and framework on the continent.

Children are often stigmatised by association as well as harmed by the trauma of separation caused by arrest, pre-trial detention and imprisonment. In November 2013 the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) adopted a General Comment on the rights of children when their parents or primary care givers are in conflict with the law.⁷⁸ The issue of separation is covered under article 30 of the African Children's Charter, discussed elsewhere in this *Commentary*. An obligation is placed on state parties to provide alternatives to pre- and post-trial custody for care givers and/or pregnant women. The General Comment notes: 'When a criminal court detains a child's parent, the court reshapes the child's family just as much as a family law court issuing an order of custody, adoption, or divorce, and as a result children's best interests need to have a primary role in such circumstances.'⁷⁹ In essence, the rights of such children should be guided by the four principles encapsulated in the African Children's Charter: non-discrimination; the best interests of the

71 *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 216. See art 18(1) of the African Charter: '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.'

72 *El Sharkawi (represented by EIPR and OSJI) v Republic of Egypt* Communication 396/11 African Commission on Human and Peoples' Rights (2021) para 324.

73 *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) paras 28-29.

74 *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007); see also *George Iyanyori Kajikabi v The Arab Republic of Egypt* Communication 344/07 (ACHPR 2021)

75 *Mbiankeu v Cameroon* Communication 389/10 African Commission on Human and Peoples' Rights para 120.

76 *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 58.

77 See eg *Dasuki v Nigeria* Judgment ECW/CCJ/JUD/23/16 Community Court of Justice of the Economic Community of West African States (11 April 2016); *Aissaitou Alidou v L'etat du Benin* ECW/CCJ/APP/ 38 of 2017 [2022] ECOWASCJ 9 Community Court of Justice of the Economic Community of West African States 25 March 2022.

78 General Comment on art 30 of the African Charter on the Rights and Welfare of the Child: ACERWC/GC/01 (2013), adopted by the Committee at its 22nd ordinary session (4-8 November 2013).

79 General Comment on art 30 (n 78) para 7.

child; the right to survival; protection and development; and the right to participation. Protection of the family would prioritise non-custodial sentences for parent/primary care givers⁸⁰ to obviate family dislocation. Article 30(d) provides that states must ensure that ‘a mother shall not be imprisoned with her child’. This reflects the importance placed in the Children’s Charter for children to grow up in a ‘family environment in an atmosphere of happiness, love and understanding’.⁸¹

The African Children’s Committee periodically assesses states’ compliance with the Children’s Charter, and issues Concluding Observations and recommendations for better implementation. Family protection and support are interpreted in various ways. A small sample of the feedback to states evinces the centrality of the obligation of family protection. For example, the Children’s Committee noted that family unit in Seychelles has experienced a radical change, which has had various consequences on the way to approach parenthood.⁸² However, as noted earlier, this family transformation is universal. As such, the need to protection for children has become greater. In the case of Benin, the African Children’s Committee enjoined the state to allocate sufficient budget for the operationalisation and sustainability of the social protection benefit for children of underprivileged families.⁸³ The same recommendation was made to Kenya.⁸⁴ Observations for both countries call for stricter monitoring of intercountry adoptions.⁸⁵ In short, the African Children’s Committee through its periodic assessments and General Comments has solidified the normative content of article 18 of the African Children’s Charter.

8 Conclusion

The African Children’s Charter holds immense significance in promoting and safeguarding the rights of children across the African continent. In this chapter, I attempted to interpret article 18 of the Charter. The protection of the family is fundamental in African societies. I have asserted that the obligation to protect the *establishment* and *development* of the family is uniquely African. However, the article does not define the ‘family’ or ‘spouse’. Cohabiting and same-sex couples do not generally receive recognition as families in most African states. At present, there is no General Comment on article 18; the human rights system has not yet been tested on same-sex marriages. The lacuna has bred the assumption that African family law is built on heteronormativity. Such an approach, however, would ignore the new family transitions occurring on the continent.

80 General Comment on art 30 (n 78) para 17.

81 General Comment on art 30 (n 78) para 54.

82 Concluding Observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child on the initial report of the Republic of Seychelles on the status of the implementation of the African Charter on the Rights and Welfare of the Child (2022) para 31.

83 African Children’s Committee Concluding Observations on Benin (2019) para 26.

84 African Children’s Committee Concluding Observations on Kenya (2020) para 40.

85 Benin (n 83) para 30; Kenya (n 84) para 42.