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Legal Family Definitions and the Right to Refugee Family Reunification

A Comparative Study on Ethiopia and Sweden

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Abstract

This study is an evaluation on the right to refugee family reunification, aiming to find if and how the right is provided in Ethiopia and in Sweden. The main focus is to critically look into the question of which circle of persons are entitled to the right of refugee family reunification.

The right to refugee family reunification is first argued to be a human right. It is concluded that the family concept is not defined in detail on a global level. Still UNHCR, the main authority on the area, has expressed that the right shall be executed in a generous and flexible manner, taking the specific context of the refugee into consideration.

The next part presents findings from a field study in Ethiopia, investigating how refugee family reunification is handled there. It is found that for the purpose of migration a very open and generous family definition is used. It is also showed how legal issues regarding family relations are largely addressed by customary legal practices.

After that Swedish law and practice is briefed. It is showed that the family is defined as the nuclear family and that this is, in essence, the circle of persons allowed to reunite in Sweden.

Lastly the findings from Ethiopia and Sweden are compared to each other and to the obligations under international law. It is concluded that the Swedish family definition is better adapted to a typical Swedish family than to a refugee from another context. The human right is fulfilled materially in Ethiopia, but the very informal manner in which refugees are accepted is little transparent and predictable. Swedish laws formally restrict the human right; the restrictions seem to oppose the purpose of the right.

The concept of family varies from time to time and place to place, and this must be considered when the right to refugee family reunification is executed.

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Abbreviations and words

AAU – Addis Abeba University

ARRA – Administration for Refugee and Returnee Affairs

Banjul Charter – African Charter on Human and Peoples’ Rights

Birr – Ethiopian currency

Child Convention – United Nations Convention on Rights of the Child

Family Reunification Directive - Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EPRDF – Ethiopian Peoples’ Revolutionary Democratic Front

EU – European Union

ICCPR – International Covenant on Civil and Political Rights

ICESC – International Covenant on Economic, Social and Cultural Rights

ICRC – International Committee of the Red Cross

IOM – International Organization for Migration

Irregular family constellation – Non nuclear family constellations

Korsasho – Voluntary commitment to raise someone else’s child in some Somali cultures

MFS – Min Field Study

Nuclear family – Parents and biological or formally adopted minor children

Refugee Convention – The 1951 Convention relating to the Status of Refugees

RSD – Refugee Status Determination

Sponsor – The one refugee with whom family members seek reunification

TFEU – Treaty on the Functioning of the European Union

UN – United Nations

UDHR – Universal Declaration on Human Rights

UNHCR – United Nations High Commissioner for Refugees

UNHCR Handbook – UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees

1 Introduction	7
1.1 Purpose	8
1.2 Methods.....	9
1.2.1 Disposition.....	12
2 Refugee family reunification	13
2.1 The right to family life and unity.....	13
2.2 Family reunification in general	14
2.3 The specific case of refugee family reunification	16
2.3.1 The refugee definition.....	16
2.3.2 International law on refugee family reunification	17
2.3.3 Practice regarding refugee family reunification.....	21
2.3.4 Cases on family reunification in general	21
2.3.5 Application of refugee context on the criteria from ECtHR praxis.....	22
2.4 The family entitled to the right.....	24
2.4.1 Defining family in the reunification right context.....	24
2.5 Concluding remarks	26
3 Ethiopia and refugee family reunification	26
3.1 Ethiopian context	27
3.1.1 Ethiopian legal history	28
3.2 Ethiopian legal family	29
3.2.1 Legal family of formal Ethiopian law	29
3.2.2 Legal family of customary Ethiopian law	30
3.3 Ethiopian regulation on refugee family reunification.....	31
3.3.1 An overview of the Ethiopian formal legal system.....	31
3.3.2 Customary law in Ethiopia.....	34
3.4 The African Union and family reunification.....	38
3.5 The Ethiopian family norm.....	41
3.5.1 Family definition in other parts of the Ethiopian law.....	42
3.6 Statistics on family life Ethiopia.....	43
3.7 Concluding remarks	43
4 Refugee family reunification in Sweden	43
4.1 The Swedish context.....	44
4.1.1 Legal history.....	44

4.2 Swedish legal family.....	45
4.3 Swedish regulation on refugee family reunification	45
4.3.1 Examples of practice	47
4.4 The European Union and refugee family reunification.....	48
4.4.1 The Family Reunification Directive.....	49
4.5 The Swedish and European family norm.....	51
4.5.1 Other legal family definitions in Swedish law.....	52
4.6 Some statistics on Swedish families	53
4.7 Upcoming possible changes in Swedish refugee law	53
4.8 Concluding remarks	54
5 Discussion and analysis.....	54
5.1 What constitutes a family for the purpose of refugee family reunification?.....	54
5.1.1 Defining family	54
5.1.2 Legally defining family	54
5.2 A comparison between Ethiopia and Sweden	56
5.2.1 Finding comparable parables.....	56
5.2.2 Difference in legal norms on family reunification	57
5.2.3 Comparing the family norm.....	57
5.3 Is the human right to refugee family reunification fulfilled in Ethiopia?.....	59
5.4 Is the human right to refugee family reunification fulfilled in Sweden?.....	59
5.4.1 A short discussion on possible upcoming changes in Swedish law	61
5.5 Discussion around example cases and specific requirements	62
5.5.1 Stepchildren.....	62
5.5.2 Children above 18	63
5.5.3 Extended family	64
5.5.4 Polygamy.....	64
5.6 Another solution.....	65
5.7 Conclusions.....	66
Bibliography	68

1 Introduction

What is a family? Few would claim that the question has one fixed answer. Naturally, individuals will define different circles of people as their family.¹ Family norms look different in different places, and are changing over time.² The diversity of family structures is a rather uncontroversial observation. Nevertheless, when a legal right is entitled to “family members” it suddenly becomes necessary to define what a family is in a legal sense.

Unified families have more strength to face adversity than families who are split up.³ For refugees, having fled their home country, the supportive network of a family is crucial. If the whole family of the refugee is granted residence permit, integration and economic independency is faster achieved in the host country.⁴ Aside from having the positive effects just stated, increasing possibilities to family reunification is a way to work against gender inequality. People become refugees regardless of their gender and age. But for those refugees reaching Europe around 60 % are men, 16 % are women and 24 % are children.⁵ To ensure that protection is not given mainly to men it makes sense to facilitate the possibility for them to bring also their spouse and other family members.

Families become split up for different reasons. Circumstances that create refugee situations tend to split up families, which leads to family members possibly ending up in different parts of the world. The family may not be able to leave together or they can get separated during the flight.⁶ Other reasons for irregular family constellations can be simply cultural traditions or diseases such as HIV/AIDS.⁷

¹ Lundberg, A, Hellström, K, Hökfelt, E. ‘Rätten till familj’ in *Mänskliga Rättigheter – juridiska perspektiv*, p 323

² Casey J, *Familjens historia*[The History of the Family], p 11, 33, 153

³ Families in Exile: Reflections from the Experience of UNHCR, p 3

⁴ Id. 4

⁵ UNHCR data, <http://data.unhcr.org/mediterranean/regional.php>, accessed December 14th 2015.

⁶ Hathaway, J. C., *The Rights of Refugees Under International Law*, p 533

⁷ Poluha, Eva ‘Research on Ethiopian Children, Subjects Covered and Possible New Themes’, in *The World of Girls and Boys in Rural and Urban Ethiopia*, p 184

As a human right, the right to refugee family reunification is universal and entitles all human beings.⁸ Both Ethiopia and Sweden have signed international agreements binding them to protect the right to refugee family reunification.⁹ Still, it does of course come down to the nations to facilitate the right. The regional implementations might be colored by the context in which they operate and the family entitled to the right to reunite might be defined differently.

There is previous research on the area of international refugee law that points out the problem of inadequate family definitions.¹⁰ Still, no concrete studies showing how they are inadequate have been presented. What is lacking is an analysis of why the family definition looks the way it does, concrete examples on how it is treated in different national contexts and suggestions of other solutions.

1.1 Purpose

The aim of the study is to critically analyze what constitutes a family for the purposes of refugee family reunification. Furthermore, the study will investigate if the human right to refugee family reunification is fulfilled in Sweden and Ethiopia. The differences in implementation of the right will be compared and discussed.

Having this broader purpose in mind, this paper will answer three partial research questions before getting to the overall analysis. These partial questions are:

- (1) What constitutes a family for the purposes of refugee family reunification in the area of international refugee law?
- (2) How is the right to refugee family reunification implemented in Ethiopia?
- (3) How is the right to refugee family reunification implemented in Sweden?

⁸ OHCHR, *What are Human Rights*, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> , accessed February 26th 2016

⁹ OHCHR, *Ratification status by country*, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=168&Lang=EN , accessed February 26th 2016

¹⁰ See for example Poluha, Eva 'Research on Ethiopian Children, Subjects Covered and Possible New Themes', in *The World of Girls and Boys in Rural and Urban Ethiopia*, s 205 and Hathaway, J. C., *The Rights of Refugees Under International Law*, p and Lundberg, A, Hellström, K, Hökfelt, E. 'Rätten till familj' in *Mänskliga Rättigheter – juridiska perspektiv*, p 323

1.2 Methods

Methods must be adapted to the object of research, which is why different methods and sources of law have been used for different parts of this study.¹¹

Partial research question (1) regards the content of international law; consequently international legal sources have been used. International treaties have been studied, global practice has been looked into and relevant doctrine has been examined. In general it can be said that human rights for the purpose of this study are used as sources of law without being further criticized as a phenomenon. Much can be said about what human rights are and how they have formed, but that will have to be the topic for another thesis.

Partial research question (2) explores the implementation of the right to family reunification in Ethiopia. The findings in this part of the study were achieved during a two-month field study in the country. In Ethiopia, it turned out to be necessary to use innovative methods to find the desired information. Using only the traditional sources of national law would have given inadequate results. Much information was oral and could not have been gotten in any other way, as practices are not written down and formal laws are not always followed.¹² Therefore, in addition to examining the written law, interviews were made with actors working within the field to get the right information on how family reunification is handled in Ethiopia. The interviews were also helpful in pointing out where to find further information on local legal practice. The informants were chosen qua being the main actors working with family reunification in Ethiopia.¹³ Interviews were usually about an hour long and in total 12 were conducted.

Interviews were done with representatives from the International Organization for Migration (IOM), the Agency for Refugee and Returnee Affairs (ARRA), Charity for Legal Pluralism in Ethiopia, Ethiopian Women Lawyer Association, the legal department at Addis Abeba University (AAU), the Swedish Embassy in Addis Abeba and the United Nations High Commissioner of Refugees (UNHCR). The interviews

¹¹ Ahrne G, Svensson P, *Handbok i kvalitativa metoder*[Handbook on qualitative methods], p 19

¹² Patrick Glenn, P, *Legal Traditions of the World*, p 61

¹³ Ahrne G, Svensson P, *Handbok i kvalitativa metoder*[Handbook on qualitative methods], p 21

with representatives were semi structured. In addition five persons active in traditional courts were interviewed about how family issues are solved in their communities. The interviews with them were unstructured and in two cases performed without translator.

In order to get some information about general family values in Ethiopia also anthropologists at AAU have been spoken to.

Research question (3) aims at investigating the provision of the right to refugee family reunification in Sweden. Although the chapter tries to mainly follow the setup of the previous chapter about Ethiopia, the sources of law used have been different. For this part mainly the written law has been examined, and the motives to it. Practice has been looked into and current development of the legal area considered.

To get some comparable data to the Ethiopian general family values, Swedish anthropology has been investigated through literature.

The findings of the study will primarily be discussed in the last chapter. The main method chosen for analysis is comparative legal method. The comparative perspective is chosen for several reasons. A comparison gives the possibility to see a problem from more than one angle and it can present a possible other solution than the one perceived as paradigm in a certain context.¹⁴ To use comparison is a way of making the study scientifically more valid, a way of finding new solutions and a way of finding arguments to criticize the stated law of the own country.¹⁵

To make an accurate comparative legal study it is essential to identify the function of the laws compared, rather than focusing on their written content.¹⁶ It is therefore essential to understand the context the norms are operating in; culturally and legally. Different legal families have different characteristics and ways of interpreting the law. For this reason this thesis places emphasis on describing not only existing laws but also the surrounding contexts.

¹⁴ Zweigert K, Kötz H, *An Introduction to Comparative Law*, p 15

¹⁵ Id. p 20 ff

¹⁶ Id. p 36

To find out which norms are ultimately governing reunification in Ethiopia, it has been necessary to dive deep into the Ethiopian cultural context. Comparative law is a discipline that lays in many ways close to sociology.¹⁷ It turned out to be mainly customary practices guarding the family unit in Ethiopia. As this non-formal source of law is little known to people in the West and, for that matter, not fully formally acknowledged even in Ethiopia, it is necessary to explain this phenomenon. For this part of the research anthropological and sociological studies on Ethiopia have been of great help.

The study has been limited to the reunification right for refugees, rather than to the right to family reunification in general. The focus is put on problems regarding what we call irregular family constellations.

Ethiopia is chosen as the place of interest for the field study for a number of reasons.

Ethiopia receives many refugees; it is actually the country that receives most migrants per BNP in the whole world.¹⁸ Another important aspect is the fact that Ethiopia hosts many refugees both from Somalia and Eritrea, which are also countries where many refugees in Sweden come from.¹⁹

Sweden also has a long history of receiving refugees from Ethiopia, hence there are several family reunification cases regarding Ethiopian family members in Swedish legal praxis. These can constitute interesting examples of when different family conceptions clash. Also numerous Somali immigrants reunite in Sweden, of whom many arrive first in Ethiopia.

Sub-Saharan legal systems are very much underrepresented in legal literature,²⁰ hence this comparison might fill a knowledge gap in this aspect and possibly bring some new angles to the issue. Among the African legal systems Ethiopia has the unique

¹⁷ Zweigert K, Kötz H, *An Introduction to Comparative Law*, p 10

¹⁸ UNHCR, *2015 Country Operations Profile – Ethiopia* <http://www.unhcr.org/pages/49e483986.html> , accessed February 27th 2016

¹⁹ Migrationsinfo, *asylsökande i Sverige*, <http://www.migrationsinfo.se/migration/sverige/asylsokande/> , accessed February 27th 2016

²⁰ Patrick Glenn, P, *Legal Traditions of the World*, p 59

history of never having been colonized and therefore never having been forced to adapt a foreign legal system.²¹ This could indicate a more culturally adapted set of laws in Ethiopia than compared to countries, which had these laws imposed on them.

Lastly, the author of this paper has personal experience from the country, which helped in finding contacts and sources. Also pre-knowledge about the culture and language were of good use.

In general it can be said about the process preceding this thesis that collecting legal information in Ethiopia was a challenging process, much like a detective inquiry. Formal law could be very politically sensitive and traditional practices were hard to get confirmed. Answers were to be found in unexpected places and sometimes not to be found at all. Either there were no answers, or maybe they were simply just hard for a foreigner to find. Many relevant Ethiopian norms turned out to be unwritten, and many written laws were repealed by disuse. All findings had to be controlled and confirmed from different actors and often the opinions about the state of law was different between people asked. The findings from the fieldwork resulted in a rather long descriptive part about the Ethiopian system. Something that may be not showing is that prior to the findings excessive analytic work was performed. The selection of informants, of questions to ask them and which of the information gained to build upon were all analytic processes. Moreover it should be underlined that the rather arbitrary method that was required to find the desired information is a factor making the results less reliable, and the results likely contain a research bias. The bias is probably harder to detect than when an on forehand given legal method is followed.

The idea for the thesis is to investigate and present the current state of law in chapter 2 - 4, to go into deeper analysis of the findings in chapter 5.

1.2.1 Disposition

Chapter one is an introduction to the subject and a presentation of the comprehensive research purpose.

²¹ Abate, T, *Introduction to Law and the Ethiopian Legal System*, p 97

Chapter two is an analysis of the human right in question, through which partial research question (1) will be answered.

Chapter three will describe continent wide regulations on family reunification in Africa and the findings from the field study in Ethiopia, through which partial research question (2) will receive an answer.

Chapter four is an overview of the European and Swedish refugee family reunification regulation. It will present how reunification is facilitated and the limits to the right, answering partial question (3).

Chapter five contains an analysis, using findings from all previous parts. This is where the comparison is made. A concluding discussion on the broader question of what problems the family concept creates will wrap up the study.

Lastly comes the bibliography.

2 Refugee family reunification

This chapter aims at determining the human rights status of refugee family reunification and further at investigating how a family is defined in international human rights law. Although the effects of a well-developed family reunification policy are well noted, the right is not explicitly stated in the human rights charters. It is therefore necessary to further examine the legal basis of the right's existence.

2.1 The right to family life and unity

The right to refugee family reunification is a logical extension of the better-documented general right to family unity.²² The right is expressed in several international documents. It is worth reminding oneself that any human right, being universal and entitled to all human beings, is also entitled to the refugee.²³

²² Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, summary

²³ OHCHR, *What are Human Rights*,
<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> , accessed February 26th 2016

The Universal Declaration of Human Rights (hereinafter UDHR) stipulates in article 16 that the family unit is the “natural and fundamental group unit of society”, and further states that the family unit should be protected by the state and the society. The right to family unity is expressed also in article 17 and 23 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) and in the International Covenant on Economic Social and Civil Rights (hereinafter ICESCR), article 10. The Convention on Rights of Children (hereinafter the Child convention) emphasizes the right for children not to be separated from their family and, notably, protects the family rights for refugee children explicitly.

Also regional rights catalogues declare the right to family unity. Article 17 and 11(2) of the American Convention on Human Rights, article 18 of the African Charter on Human and Peoples’ Rights (hereinafter the Banjul Charter) and article 8 of the European Convention on Human Rights and Fundamental Freedoms all protect the family life.

It can be underlined, for the purpose of this paper, that none of the documents in public international law gives an explicit definition of the family. It is nowhere explained who are comprised by the right to kept unity. One exception is the somewhat vague guideline given in the Banjul Charter, that cultural values in the given case should be considered when the right to family unity is executed.²⁴

What lies beyond doubt is the fact that the right, qua being a human right, only may be limited for reasons acknowledged by international human rights law.²⁵

2.2 Family reunification in general

A closer look will reveal that a general right to family reunification is not expressed in human rights law. An evaluation of relevant regulations will show that it’s not clear that the right to family unity implies a general right to family reunification. However, by looking into under what conditions the right exists, one can determine the reunification rights in refugee situations.

²⁴ African Charter on Human and Peoples’ Rights, art 18(2)

²⁵ Hathaway, J. C., *The Rights of Refugees Under International Law*, p 548

As family reunification as phenomenon involves migration the often discussed tension between national prerogatives in controlling borders and international human rights principles arises.²⁶ The right to family life and the national sovereignty are the two interests conflicting.

The right to reunite with ones family is expressed in some sources of international law, although always in a specific context, such as the involvement of a child or in a migrant worker context.

Article 44 of the Migrant Workers Convention tells the parties to “take measures they deem appropriate and fall within their competence to facilitate the reunification of migrant workers with their spouses”. Already from the literal expression of the article it’s made clear that the right is limited by what the state actors consider appropriate. In practice the national policies often promote border control, which consequently is a valid excuse not to provide reunification.

In the Child Convention family rights are tightly tied to the rights of the child. Article 10 deals with situations when a child’s parent is deported. It urges the states to handle such cases in a “positive, humane and expeditious manner”. Even though it’s discussed what the word “positive” implies, it places a higher burden on the state to show a legitimate reason for exclusion compared to status quo; that states do not need to show any reason for denying applicants entry into the country. The right expressed in the Child Convention is entitled to children; meaning persons not yet turned 18.²⁷

The African Charter on the Rights and Welfare of the Child clearer expresses the right of children to their family in its article 25. It is there stated that:

“[States] shall take all necessary measures to re-unite children with parents or relatives where separation is caused by internal or external displacement arising from armed conflicts or natural disasters.”

²⁶ Lundberg, A, Hellström, K, Hökfelt, E. ‘Rätten till familj’ in *Mänskliga Rättigheter – juridiska perspektiv*, p 329

²⁷ UN Convention on Rights of the Child, art. 1

None of above-mentioned articles provide a general right to family reunification. It is either subordinated to national sovereignty and border control or tied to the specific situation of the child, which automatically excludes families with no, or just no minor, children. In other words, although mentioned in several treaties, a general right to family reunification trumping the right nations have to control their borders cannot be extracted from the letter in separate documents.

2.3 The specific case of refugee family reunification

This study aims at analyzing the specific case when a refugee seeks family reunification. By placing the refugee in context as a legal entity in the light of both above briefed human rights principles and refugee law generally, this section will argue in favor of the existence of a right to family reunification for refugees.

2.3.1 The refugee definition

Importantly the right to refugee family reunification does of course depend on the refugee definition. The question this paper is looking into, what family the refugee has the right to reunite with, is on a right naturally first of all limited to individuals legally labeled as refugees.

One refugee definition can be found in the UN Convention Relating to the Status of Refugees (hereinafter the Refugee Convention). It's there defined as a person who:

*“Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*²⁸

Several regional instruments also define the refugee, notably the Convention Governing Specific Aspects of Refugee Problems in Africa copies the above definition and adds in a second part that the term refugee also applies to:

²⁸ UN Convention Relating to the Status of Refugees, art 1

“Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”²⁹

Applying a broader definition obviously includes more individuals into the set of rights entitled to refugees.

The more restricted refugee definition of the UDHR has gained critique, as it sometimes seems unmotivated why some categories of migrants should not be entitled to the rights given to refugees.³⁰ United Nations Children’s Fund (hereinafter UNICEF) addresses the problem that article 22 in the child convention does not cover migrant children who are not refugees. They mention internally displaced children as a big group falling outside the technical definition.³¹ Also so-called economic migrants, children fleeing from poverty and lack of opportunities, and trafficked children, fall outside of this scope. They are all vulnerable groups not granted the protection that would have been given them if they were labeled as refugees.

This being said, this paper henceforth will mainly focus on the family definition.

2.3.2 International law on refugee family reunification

To find what rights are entitled to a refugee, a natural place to start seems to be the Refugee Convention and its protocols.

One main protection granted to refugees under the Refugee Convention is the principle of *non-refoulement*.³² This principle inhibits states from returning persons risking persecution or harassment. This principle is a clear constraint on the sovereign rights of the state to control its borders; if someone enters as a refugee she cannot be

²⁹ Convention Governing Specific Aspects of Refugee Problems in Africa, art 1(2)

³⁰ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, p 15

³¹ UNICEF Implementation Handbook for the Convention on Rights of the Child, p 305

³² Stern, R, ‘Migrationsrätt’ in *Mänskliga Rättigheter – juridiska perspektiv*, p 293

expelled like any illegal immigrant but rather must be dealt with according to the refugee convention.

Importantly, the Refugee Convention is not to be read as an exhaustive list of the rights of a refugee, but must be understood from the background of more general human rights principles. The fact that the Refugee Convention does not mention any family rights does not mean that refugees don't have any. It couldn't readily be the case that refugees would enjoy a less complete set of rights than any other person.

The not exhausting nature of the Refugee Convention is visible even prima facie from the letter of it. The instrument does stipulate in article 35 that the state parties shall cooperate with the United Nations High Commissioner for Refugees (hereinafter UNHCR), the international body entrusted the mandate to interpret and supervise the application of the protocol. By this, the UNHCR has an acknowledged large part in continuously developing and defining international refugee law. This is the reason why the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter the UNHCR Handbook) is acknowledged as a source of law on the area of international refugee law.

In the UNHCR Handbook the family unit is given its own chapter.³³ It is emphasized that the family as an entity is important for society and the Final Act of the Conference that adopted the 1951 Convention is quoted:

*“[the Conference] recommends Governments to take the necessary measures for the protection of the refugee’s family”.*³⁴

It is thereafter admitted that the convention does not incorporate the principle of family unity in the definition of the term refugee, but that most states, rightfully, still observe the above quoted and include the family of the refugee in their set of rights.³⁵

UNHCR urges in their conclusion “Protection of the Refugee’s Family” that there

³³ UNHCR Handbook, chapter 10

³⁴ Final act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons

³⁵ UNHCR Handbook, art 181-188

should be a “prioritization of family unity issues at an early stage in all refugee operations”.³⁶ In the same document it is described that this is normally done by also granting the refugees’ family members refugee status.³⁷

In the Final act of the Conference of Plenipotentiaries recommendation B the conference notes that: ”the rights granted to a refugee are extended to members of his family” and recommends governments to:

”take the necessary measures for the protection of the refugee's family, especially with a view to:

- (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country:*
- (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.”*

This recommendation is sometimes an explicit buttress for national policies.³⁸

The Child Convention explicitly targets the reunification issue for refugee children in its article 22. It there says that:

“States Parties shall provide, as they consider appropriate, cooperation in any efforts (...) to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.”

It is an important article as it is the only explicit reference to refugees in general treaties.³⁹ It also explicitly places a positive obligation on the state party to assist in family tracing.

³⁶ UNHCR Executive Committee Conclusion No. 88

³⁷ Id. No. 88 (b) (iii)

³⁸ See for example *Munim v. Secretary of State for the Home Department*, Lexis Unreported Decisions (Eng. CA, May 3, 2000), quoting the statement of Mr. Nicholas Baker MP to the House of Commons, Mar. 17, 1995.

The right is targeted also in a number of comments from the Committee; an example is the comment ‘Treatment of Unaccompanied and Separated Children outside their Country of Origin’.⁴⁰ States are there urged to:

“Make all efforts, as quickly as possible, to trace the family of unaccompanied or separated children and reunite them, unless this is contrary to children’s interests, or would jeopardize the family. Child refugees may not be returned to their country of origin; where there are smaller risks it may also be necessary to balance them against the children’s right to be with their family. Applications by family members to join the child should be dealt with in a positive, humane and expeditious manner”

This once again proves that at least in situations where a refugee child is involved, there is an absolute right to family reunification; a right that places positive obligations on the state actor.

The International Committee of the Red Cross (hereinafter ICRC) has found that the right to refugee family reunification is customary international law.⁴¹

In addition, UNHCR states in a conclusion on family reunification that:

“1. In application of the principal of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families. 2. For this purpose it is desirable that countries of asylum and countries of origin support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay. [...] 4. Given the recognized right of everyone to leave any country including his own, countries of origin should facilitate family reunification by granting exit permission to family members

³⁹ UNICEF Implementation Handbook for the Convention on Rights of the Child, p 305

⁴⁰ Committee on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children outside their Country of Origin, 2005

⁴¹ ICRC, Henckaerts, *Study on Customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*. Rule 131, s 209

*of refugees to enable them to join the refugee abroad. 5. It is hoped that countries of asylum will apply liberal criteria in identifying those family members.*⁴²

A comprehensive understanding of the above listed sources leaves little doubt that necessary *opinio juris* for recognition of a customary established right to refugee family reunification exists.⁴³ A fact that, as we will see, is important especially in the so-called “elsewhere approach” of European Court of Human Rights (hereinafter ECtHR), the refugee family is precluded from family life in the country of origin.⁴⁴

This scope of *opinio juris* coincides with the state practice, a second critical element for establishing a customary international legal obligation.⁴⁵

2.3.3 Practice regarding refugee family reunification

While state practice almost universally confirms the duty of states not to interfere with the refugee’s family unity, the question of a right to family reunification is more controversial.⁴⁶ As it requires affirmative steps to facilitate the reunification it asks for more from the state actor. It does, nonetheless, exist practice stating a right to reunification.

2.3.4 Cases on family reunification in general

International case law on the issue can prominently be found as decisions from the ECtHR. By briefing the legal development on family reunification in the ECtHR practice, it will be evident that the criteria formed establish a human right to refugee family reunification.

The court deems that the right to family reunification extracts from article 8 in ECHR; stipulating the right to family unity. The finding was first noted in the case of *Abdulaziz and more vs the UK*. The case regarded three women applying for their husbands to join them in the UK. They got denied and compiled a complaint to the

⁴² Executive Committee Conclusion Number 24 (XXXI) (1981), Family Reunification

⁴³ Hathaway, J. C., *The Rights of Refugees Under International Law*, p 550

⁴⁴ Id. p 552

⁴⁵ Id. p 545

⁴⁶ Id. p 546

ECtHR. The court stated that the article 8 applied to migration and reunification and that it may include positive obligations on the state. The denial of their application was, however, not found being a violation of article 8. This was based on the grounds that it was not proven that family life could not be established elsewhere.

From this it appears to be at least two conditions determining if article 8 can apply to reunification cases. Firstly, there needs to be an existing or intended family life and secondly, the country of application must be the only possible place for reunification. If that is not the case, state parties are given a wide margin of appreciation.

In the case of *Gül v. Switzerland* a mother and a father applied for reunification with their son, him still being in their home country of Turkey. In their case ECtHR confirmed that article 8 of ECHR does place a positive obligation on the state to reunite families, although with a margin of appreciation. The individual interest is balanced against the one of the community. In this case, the family got denied reunification as the father failed to prove his status as political refugee. It was thereby not proven that family life could not be obtained elsewhere.

Another limitation of the right was marked in *Ahmut v. the Netherlands* according to which it was not a violation of article 8 to deny a 9-year-old son to reunite with his father in the Netherlands. The fact that the father voluntarily had chosen to live away from his son in Morocco was given as the reason. Notably, the court did not, perhaps unfairly, consider the fact that Ahmut had remarried and had a wife and three stepchildren in the Netherlands.

From these cases the conclusion can be drawn, that the right to family reunification exists but is broad for the states to interpret. The states can lawfully decide to deny entry unless the applicants lack possibility to form family life elsewhere.

2.3.5 Application of refugee context on the criteria from ECtHR praxis

In the cases explored above ECtHR apply a balancing test, weighing the right to family unity against the right of the state to protect its borders. As it is a balancing test, there must be situations when the states lack right to control their borders, where

other interests trump. If not, it could not be said to be a balancing test at all, then the state would just have a mere right to always deny entry.

With that in mind, the following investigates how the limitations from the ECtHR practice apply to the refugee context.

In the case of *Abdulaziz* the main reason for the court's decision was the fact that the parties had the possibility to choose between two states to reside in after marriage. In the refugee situation, the applicant is legally recognized as not having a home country where family unity can be enjoyed; hence this limitation does not affect the case of a refugee.

As for the case of *Gül* the main obstacle to reunification was the fact that Mr. *Gül* failed to prove his refugee status. This is something that hints at the existence of an absolute reunification right for refugees, Mr. *Gül* would have gotten to reunite, if he could have proven his refugee status. It is also another example of a limitation to the right that does not affect the refugee.

In the case of *Ahmut* the court stressed the fact that *Ahmut* moved away from his son by a conscious choice, once again this is never the case for a refugee.

From above it seems as if the balancing act between state sovereignty and human rights lacks relevance in the refugee context. In the case of *Ahmut* the court stated:

“The extent of a State’s obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest.”

The refugee is *per se* subject to specific circumstances and their human right to family unity cannot be granted anywhere else.

To conclude, also practice confirms the existence of a human right to family reunification for refugees.

2.4 The family entitled to the right

Having concluded the existence of a human right to refugee family reunification it is a motivated question to ask who is legally included in the family of a refugee.

2.4.1 Defining family in the reunification right context

There is no universally accepted written legal definition of what a family is.⁴⁷ Whenever the family is mentioned it is never closer defined. As noted though, most explicit rights regarding the family concern non-interference by the state; hence a specified definition might not be as much of an urgent issue in those cases. Positive rights, such as refugee family reunification, which emerged from the more basic rights as the right to family unity, might require more specific definitions. This is because states likely will be reluctant to do more than they have to in their efforts to facilitate reunification. This will be further elaborated later.

The UDHR itself contains no explanation of exactly who's included in the right to family unity. Hints, however, can be found in different surrounding instruments.

In the Procedural Standards for Refugee Status Determination under UNHCR's mandate it is explained that family members of the refugee can apply for a derivative refugee status. The derivative refugee status is given to someone close to the refugee and entitles the holder to the same rights as if she herself got the refugee status. Even if derivative status is given to someone due to his or her relation to a refugee, it does not cease to exist if that bond would break. The claim to derivative status roots in the right to family unity and is, in many ways, an equivalent to the right to refugee family reunification.⁴⁸ Thus, an investigation of who's entitled to apply for the derivative status might give a hint onto who counts as family.

The explanation of derivative status in the procedural standards follows by a description of who can apply. The circle of people eligible for derivative status is firstly nuclear family members, here defined as first of all spouses, of all kinds. That includes polygamy relations, customary nuptials, common law spouses and same sex couples. Secondly, unmarried minor children of the applicant are included. Thirdly

⁴⁷ Hathaway, J. C., *The Rights of Refugees Under International Law*, p 547

⁴⁸ Procedural Standards for RSD under UNHCR mandate, p 101

parents or other caregivers, if the applicant herself is minor, as well as dependents of that person are included. Fourthly, minor siblings of the applicant are also granted. Importantly, the age assessments count as for the date when the Principal Applicant was recognized.⁴⁹

Further, other individuals can also be eligible for derivative status. The necessary requirement they have to show is either a social, emotional or economic dependency between them and the applicant. As examples of who that might be, dependent married children with their spouse, dependent children above 18, other dependent relatives sharing the household with the applicant and foster children, are mentioned.

Lastly, actors get reminded that determining derivative status requires a close look at all presented documents but also a detailed examination of other information and personal circumstances regarding the applicant. It is also stated that national regulations of countries of resettlement should not be considered.

UNHCR also urges executing officers to adopt a flexible approach, taking cultural norms and other special circumstances into account.⁵⁰ Now, these are procedural standards for when the UNHCR itself is doing the refugee status determination. Its criteria are still relevant to study though, as they are the most influential human rights body on the refugee area.

From the previously described circle of persons, it seems like the UNHCR has defined the family members eligible for derivative status as a broader category than just the nuclear family.

The UNHCR handbook describes the minimum circle of persons included in the right to family unity:

“the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependents, such as aged parents of refugees, are normally considered if they are living in the same household (...) the principle of family

⁴⁹ Procedural Standards for RSD under UNHCR mandate, p 102

⁵⁰ Id. p 103

*unity operates in favor of dependents, and not against them. The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.*⁵¹

In there, the nuclear family is mentioned as the minimum requirement. Also, the household is brought up as something that could help defining the family unit.

An overview of state practice suggests that the scope of family members who may claim the right to family unity is limited to opposite-sex-spouses and minor, dependent children. The practice regarding extended family and other household members is too diverse to generalize.⁵²

2.5 Concluding remarks

As can be extracted from the reasoning above the legal situation on the area of refugee family reunification is not all clear. It can be concluded that a human right to refugee family reunification does exist, extracted from the right to family unity. The right is motivated by the noted positive effects a kept family unit has. Customary international law and legal practice further confirm its existence. The circle of people covered by the right is not yet clear customary law. Minimum requirement is in any case to accept the nuclear family, but actors are urged to adapt the definition after the specific situations.

3 Ethiopia and refugee family reunification

This chapter will further investigate partial research question (2), how the human right to refugee family reunification is implemented in Ethiopia. As already hinted, this requires a broad exploring of Ethiopia and its legal and cultural context.

⁵¹ UNHCR Handbook, art 184-187

⁵² Hathaway, J. C, *The Rights of Refugees Under International Law*, p 547

3.1 Ethiopian context

This field study was executed in Ethiopia. It is, however, inadequate to generalize too much about what is Ethiopian and what is not. The borders of the nation are little more than lines on the map. There are more than 200 nationalities sharing the country, all with their own significant traditions and, as will be evident later on, legal practices. Furthermore, there are Somali nationalities living permanently in Ethiopia, as well as nomad clans moving across the borders and therefore living in more than one nation state.⁵³ As an example the majority of the Djibouti population does in reality live most their lives on Ethiopian territory.⁵⁴ This means that it would be unwise to generalize too much on what Ethiopian practice or culture is in general. Later occurring descriptions should rather be received as a collection of examples than as representing the entire country of Ethiopia.

Ethiopia is indeed diverged on many levels, the two most widespread religions are Ethiopian Orthodox Christianity and Islam, but also Protestantism, Catholicism, Judaism and indigenous beliefs are practiced.⁵⁵

Ethiopia is located in the East African sub-region known as the Horn of Africa. The country is landlocked and shares borders with Sudan, South Sudan, Kenya, Somalia, Eritrea and Djibouti. The population is estimated to be around 90 million of which 80 % live in rural areas, most of them being pastoralists and constituting the backbone of the country's economy.⁵⁶ Ethiopia is a developing state, with around a third of the population living under the poverty line.⁵⁷

Ethiopia is considered to be the oldest independent nation in Africa. Its history reaches back at least three thousand years; the formation of contemporary Ethiopia

⁵³ Yntiso, G, Azeze F, Fiseha, A, *Customary Dispute Resolution Mechanisms in Ethiopia, Volume 2*, p 212. For example Marehan, Garri and Digodia are transnational Somali clans.

⁵⁴ Landguiden, *Djibouti, seder och bruk*,

<http://www.landguiden.se/Lander/Afrika/Djibouti/Seder%20och%20bruk> accessed February 27th 2016

⁵⁵ Landguiden, Etiopien, religion, <http://www.landguiden.se/Lander/Afrika/Etiopien/Religion> , accessed February 27th 2016

⁵⁶ Poluha, E, 'Research on Ethiopian Children, Subjects Covered and Possible New Themes', in *The World of Girls and Boys in Rural and Urban Ethiopia*, s 199

⁵⁷ World bank, *Poverty and Equity, Country dashboard, Ethiopia*

<http://povertydata.worldbank.org/poverty/country/ETH>, accessed February 27th 2016

was in late 1800 when Emperor Menelik II defeated the Italian colonial army in the famous battle of Adwa.⁵⁸

Today Ethiopia is ruled by Ethiopian Peoples' Revolutionary Democratic Front (hereinafter EPRDF); a party that gets nearly all of the votes in the elections, which are held every fifth year.⁵⁹ With many imprisoned journalists the country ranks as number 142 out of 180 countries by Reporters Without Borders, where the highest number indicates the lowest protection of freedom of speech.⁶⁰

3.1.1 Ethiopian legal history

Historically Sub-Saharan Africa was ruled for centuries with its own ancestral customary laws. The traditions and laws were different between groupings and settlements of people and even more distinctively different between tribes.⁶¹ This very same customary system exists still today in essentially the same form, parallel to the formal laws of the nations.⁶²

The formal law of Ethiopia today has been formed by at least four separate but interrelated sources.⁶³ The first one is “Fetha Negast”, the law of kings, translated from Arabic and introduced in the 1400th century. It was applicable mainly on the Christian population, whereas non-Christians solely relied on their own customary practices. The second legal system was “Kibre Negast”, the glory of kings. This system introduced the decentralization of power that is still practiced in Ethiopia. The first modern constitution was introduced by Emperor Haileselassie in 1931. It was revised in 1955 to cope with political and social changes in the country and in the 60s the current code system was introduced with an explicit purpose to modernize Ethiopia by adopting a comprehensive set of laws.⁶⁴ The new laws were mostly of European origin and were meant to completely replace the customary systems, which

⁵⁸ Wendirad, A, *An Overview of the Ethiopian Legal System*, p 175

⁵⁹ Landguiden, Etiopien, politiskt system, <http://www.landguiden.se/Lander/Afrika/Etiopien/Politiskt-System> accessed February 27th 2016

⁶⁰ Reporters without Borders, 2015 Press Freedom Index, <https://index.rsf.org/#/> accessed February 27th 2016

⁶¹ Glenn, P, *Legal Traditions of the World*, p 61

⁶² Id. 59

⁶³ Yntiso,G, Azeze F, Fiseha, A, *Customary Dispute Resolution Mechanisms in Ethiopia, Volume 1*, p 22

⁶⁴ Wendirad, A, *An Overview of the Ethiopian Legal System*, p 175 ff

were still very much active next to the formal law. The fourth source is often mentioned to be just that: the customary laws. Despite the efforts to modernize Ethiopia and put them out of use, customary legal practices remained strong.⁶⁵

The current Constitution was ratified in 1994 by the EPDRF, that took over power from the infamous communist Derg Regime in 1991.⁶⁶

With the background of the Ethiopian legal system in mind it is easier to see it for the patchwork of regulations it still is. Parallel and interacting systems have, and are still, forming the legal mechanisms used.

3.2 Ethiopian legal family

For the purpose of making a comparative legal study it is recommended placing the legal systems of choice into legal families.⁶⁷ This is meant to give tools for the comparison. Interestingly this labeling is easier said than done when it comes to Ethiopia.

When reading literature overviewing legal systems globally one can easily get the impression that legal traditions of the Sub-Saharan countries are somewhat underdeveloped, or maybe too unorganized to form a legal system. Some scholars even suggest that they should be classed together as their own legal family, the African Legal Family.⁶⁸

The above classification would be a poor tool for comparison as none or little research has defined what the African Legal Family would actually consist of.

3.2.1 Legal family of formal Ethiopian law

As made clear above under the legal historical brief, the formal law of Ethiopia has been influenced by several different legal systems. Still, the country might be the only African country that never had to adopt any foreign colonial laws.

⁶⁵ Glenn, P, *Legal Traditions of the World*, p 84

⁶⁶ The Constitution of the Federal Democratic Republic of Ethiopia, preamble

⁶⁷ Zweigert K, Kötz H, *An Introduction to Comparative Law*, p 83

⁶⁸ *Id.* p 66

The diverse origin of the formal law has the consequence that the current Ethiopian legal system shows characteristics of more than one legal family. The classification problem was expressed by one of the informants interviewed for the study, a law professor at Addis Abeba University (hereinafter AAU). He expressed it in the following words:

*“Ethiopian law is a mix of common law, traditional laws and civil law. The procedures in the courts have more the character of a common law system.”*⁶⁹

With this in mind, it would probably be a mistake to place the formal law of Ethiopia into one of the legal families we already know. Different areas of law as well as different geographical areas within the country are vastly different from each other.

To conclude, the written formal law shows characteristics of a civil law system while court procedures follow more of a common law pattern.

3.2.2 Legal family of customary Ethiopian law

The role and function of the customary laws in Ethiopia will be further described later on. Being of another character and origin than the formal laws they can be placed into another legal family. The informal legal practice can be described as an example of a *chthonic* legal tradition.⁷⁰ The chthonic legal family is an umbrella term for the folk law practiced by peoples often named “natives”, “aboriginals” or “indigenous people”. In other words, it rather lets itself be negatively defined, being something else than the European tradition often forced upon these people at one point in time or another.⁷¹

The chthonic legal tradition is said to be as old as humanity, gradually adapting as societies have changed.⁷² The most evident feature of a chthonic system is orality. Orality may appear as a risky way of transmitting information through ages, but it has

⁶⁹ Yonas Birmeta, law professor at AAU

⁷⁰ Glenn, P, *Legal Traditions of the World*, p 59

⁷¹ Id. p 60

⁷² Id. p 61

shown to have capacity to preserve also details, such as words of a specific ceremony.⁷³

The informal character goes for all areas that chthonic law covers. The cases of family law, marriage, divorce and adoption are not in institutional control and often reflect the communal way of living. As an example polygamy, explicitly prohibited in Western societies, is accepted in several African chthonic traditions.⁷⁴

It does seem accurate to classify the customary laws of Ethiopia as chthonic tradition. Still it must be underlined that it is not one single informal legal system existing in Ethiopia. The traditions are numerous and highly individualized. Factors influencing the traditions are among others: ethnic group, highland or lowland, religion and region.⁷⁵

Ethiopia is one of the few countries in the world that has granted the chthonic law in the country legal status through its constitution.⁷⁶⁷⁷

Often mentioned about chthonic traditions is their failure to ensure the protection of human rights,⁷⁸ especially on the area of gender equality but also in general.⁷⁹

3.3 Ethiopian regulation on refugee family reunification

As will be made clear below, there is no simple and clear set of rules regarding refugee family reunification in Ethiopia. There is probably more than one reason for this, which will be further developed later on in this paper.

3.3.1 An overview of the Ethiopian formal legal system

The Ethiopian constitution recognizes the diversity of nationalities residing in Ethiopia.⁸⁰ Law making power, even on the area of criminal law, is given to regional

⁷³ Glenn, P, *Legal Traditions of the World*, p 62

⁷⁴ Id. p 70

⁷⁵ Yntiso,G, Azeze F, Fiseha, A, *Customary Dispute Resolution Mechanisms in Ethiopia, Volume 1*, p 22

⁷⁶ Glenn, P, *Legal Traditions of the World*, p 84

⁷⁷ The Constitution of the Federal Democratic Republic of Ethiopia, art 9.1

⁷⁸ Glenn, P, *Legal Traditions of the World*, p 86

⁷⁹ Id. p 87

⁸⁰ The Constitution of the Federal Democratic Republic of Ethiopia, Art 39.1

governments with the limitation that the regional laws cannot in any way contradict the constitution.⁸¹

The formally recognized courts are: State Courts, Municipal Courts, Social Courts and Religious Courts. The Social Courts were established to handle smaller cases, with monetary claims up to 5000 Birr. They are not bound to strictly enforce the law but can achieve arbitration by for example observing local customs. Also the Religious Courts can be formally recognized.⁸²

Ethiopian formal law consists in the constitution, codes and proclamations.

Refugee family reunification in Ethiopia

Formally, refugee rights in Ethiopia are regulated in the Refugee Proclamation.⁸³ The unity of the family is regulated in article 12, which in essence provides all family members of the refugee the same rights as those given to the refugee. The refugee definition is given in article 4, the criteria resembles the more generous ones in the African Banjul Charter. Who the family members legally are, is defined in article 2.8; spouse and unmarried, minor children.

It was an unexpected discovery, finding this quite narrow family definition in the Ethiopian law. It does not match the picture of the actual refugee process provided by the informants to the field study. Informants repeatedly referred to the “African family definition” apparently applied, which seems to mean something else than the nuclear family only.⁸⁴ The interviewed actors often even seemed unaware of the written definition of family members in the Refugee Proclamation. On the question what family definition is used in the migration process one informant answered:

“[...]we accept an extended family and apply a very flexible definition. Elderlies are in any case included. You might call it more of an “African definition.”⁸⁵

⁸¹ Id. Art 39.3 and 9.1

⁸² Id. Art 34.5

⁸³ Proclamation No. 409/2004, Refugee Proclamation

⁸⁴ Interview with Yonas Birmeta at AAU

⁸⁵ Interview with Yonas Birmeta at AAU

In Ethiopia the body entrusted to handle all refugee issues is the Administration for Refugee and Returnee Affairs, ARRA.⁸⁶ They are the only ones in Ethiopia with mandate to do refugee status determination (hereinafter RSD). Their work is to a large extent financed by UNHCR, but the mandate is solely ARRA's. During the study, other legal professionals in Ethiopia that got the question about the family definition all referred to ARRA as the one single actor on the field able to answer questions about this.

After a rather long bureaucratic process the opportunity to talk to people working for ARRA finally came. The purpose was to ask about the use of the Refugee Proclamation in their work. One important question was how the definition of the family members was used. The head of office that first had to approve the request of making an interview made clear that he thought the whole question was weirdly asked. No need to explain further, it wasn't an applied definition:

“People that come here. They are pastoralists, almost all of them. From Sudan, Somalia, Eritrea. They don't live in nuclear constellations.”⁸⁷

During the actual interview with a protection officer at ARRA the explanation was more extensive. The following extract from the interview illustrates how much of the information in this study was collected and also explains how the formal refugee family member definition is used by ARRA.

How do you use the family definition in the refugee proclamation?

“In reality this [the application] is much more relaxed than the legal definition of family members. For example everybody living in the same household counts, regardless if the children are not minor anymore [...] This view of the family is natural if you look at our legal background, in Africa we focus on group rights rather than individual rights. And in Africa, with family, we mean extended family.”

Why is there a legal definition that is not used?

⁸⁶ Proclamation No. 409/2004, Refugee Proclamation, part 1, art 2.1

⁸⁷ ARRA deputy officer, interviewed November 30, 2015

“I can’t tell you why it was adopted in the first place but we have several laws in Ethiopia repelled by disuse. In some areas tradition is so strong laws can’t change it. For example [...] polygamy is still a widespread habit in some areas.”

Is there some kind of internal guidelines for how to apply the law instead?

“No not on this area. They would need to be approved by the Minister Council and it is a long process, maybe it will come.”

From a legal point of view the above answers are obviously far from satisfying. It became clear, however, that as for applied refugee law in Ethiopia, getting oral information from ARRA staff was the one way of getting information. The ARRA representative interviewed further explained that case law on family reunification could not be presented. This was due to the fact that refugees coming to Ethiopia nearly never get residence permit on grounds of family bonds. They are rather given independent refugee status, which is why statistics do not show who came as a family member.

Many of the informants to the study underlined that the issue of refugee family reunification is not commonly actualized in Ethiopia. One informant, a lawyer at the Ethiopian Women Lawyer Association, suggested that one reason for that could be the fact that many refugees in Ethiopia are expected to return home after some time. Family reunification might be more urgent for refugees that can never return back home.⁸⁸

3.3.2 Customary law in Ethiopia

The above-mentioned institutions are the ones formally in charge. In reality, nevertheless, more than 70% of the legal disputes in Ethiopia are estimated to be handled by customary courts and family councils.⁸⁹ Also in urban areas where formal justice is believed to be strong the customary resolution mechanisms are widely

⁸⁸ Stern, R, ‘Migrationsrätt’ in *Mänskliga Rättigheter – juridiska perspektiv*, p 294

⁸⁹ Estimate by Charity for Legal Pluralism in Ethiopia

used.⁹⁰ One reason for this is probably explained by the legal history mentioned above. Whilst the formal law to a large part consists of legal transplants, which are imported values with little anchoring in the local way of life, the customary laws have been formed within the communities over the course of thousands of years.⁹¹ The enacted values are linked strongly with the local morals and beliefs; the customary laws therefore own a legitimacy the new formal laws never got from the people.⁹²

The relationship between the formal law and the customary practices in Ethiopia is not uncomplicated. Customary practices are both recognized and generally disclaimed in the constitution, and referred to in a number of proclamations and codes,⁹³ and it does happen that formal courts refer cases to be solved in the local councils.

In some rural areas insufficient accessibility to federal courts make the customary courts the only option.⁹⁴ Customary courts also have the advantage that they are free to use and require no written application. Their actual efficiency is therefore often stronger than the formal law.

It is often emphasized that the traditional system aims at not only solving the specific conflict at hand but also to restore community peace. It therefore tends to more often address the root cause of the conflict.⁹⁵

Elders usually manage the customary dispute resolution mechanisms, but the structure and form does vary from society to society. They can exist on different levels, where for example there can be one council for inter-family conflicts only and another for other issues.⁹⁶

⁹⁰ Yntiso,G, Azeze F, Fiseha, A, *Customary Dispute Resolution Mechanisms in Ethiopia, Volume 1*, p xii

⁹¹ Id. p 38

⁹² Id. P 26

⁹³ Civil Code of Ethiopia, art. 3307, 3318, 3325–3345, Proclamation No 377/2003, Proclamation No 211/2000, Proclamation No 210/2000.

⁹⁴ Yntiso,G, Azeze F, Fiseha, A, *Customary Dispute Resolution Mechanisms in Ethiopia, Volume 1*, p 27

⁹⁵ Id. p 25

⁹⁶ Interview with elders from Harari traditional courts.

With the limited foreseeability that chthonic traditions offer due to their informal character they are often criticized for not being all satisfying from a rule of law perspective, and for not protecting individual human rights.⁹⁷ The Ethiopian customary systems have received critique especially for not being gender equal and for allowing harmful practices.⁹⁸

As described above the customary laws are no uniform set of rules. It is therefore impossible to brief what the informal legal systems in Ethiopia generally say about the family of refugees. By looking into practices and by talking to people acting in customary courts a hint can be given though, on what family values that are practiced.

There is no comprehensive overview that has documented all customary laws of Ethiopia. Documentation of customary laws is fragmented and arbitrary.⁹⁹ Following examples of different customary solutions regarding family constellations in Ethiopia therefore must be seen as what they are: fragments and glimpses from different contexts and situations.

Somali refugees in Ethiopia

Ethiopia has by tradition an open door policy towards Somali refugees. In reality, that means that Ethiopian authorities allow illegal Somali immigrants to stay in the country.¹⁰⁰ The backside is that the refugees then don't get access to institutions they could benefit from, such as courts and registration.¹⁰¹ When it comes to stepchildren, for example, there aren't even means to make the custody transfer anything else than an oral agreement.¹⁰² With this said, there are still systems governing family constellations among Somalis in Ethiopia. They are just not formal or recognized.

⁹⁷ Yntiso,G, Azeze F, Fiseha, A, *Customary Dispute Resolution Mechanisms in Ethiopia, Volume 1*, p 32

⁹⁸ Id. p 33

⁹⁹ Yntiso,G, Azeze F, Fiseha, A, *Customary Dispute Resolution Mechanisms in Ethiopia, Volume 1*, p xii and p 32

¹⁰⁰ Interview with ARRA officer

¹⁰¹ lifos.migrationsverket.se, "Förändringar av traditioner rörande vårdnadsfrågor bland somalier i Etiopien" <http://lifos.migrationsverket.se/dokument?documentAttachmentId=34831> accessed February 27th 2016

¹⁰² lifos.migrationsverket.se "Förändringar av traditioner rörande vårdnadsfrågor bland somalier i Etiopien"

“Korsasho” is a voluntary commitment to care for a child that is not your own. A korsasho child might still have her biological parents alive but is moved to other parents in the clan.¹⁰³ Reasons can be more than one. Maybe there were too many siblings at home, maybe family bonds needed strengthening, maybe the grandparents, for example, were getting lonely. Sharia laws often guard the transfer but there is no administration or registration guarding the procedure. Korsasho children do not inherit their stepparents but are apart from that treated just like biological children.¹⁰⁴

Orphaned children can become similar to korsasho children. In different traditions the first choice of stepparents is different; it can be the mother’s side, the father’s side or just anyone in the clan with good resources.¹⁰⁵

In other words it is not a problem for a Somali family to reunite in Ethiopia as they relatively easily cross the border, regardless of their family constellation. On the other hand they lack possibilities to use any formal institutions.

Harari example

Talking to cultural experts belonging to the Harari folk group in Ethiopia, they defined family as everybody living in the household. The household in the Harari communities is nearly never consisting of the nuclear family only.¹⁰⁶ Parents and also other elders are almost always part of the family, as well as all unmarried children, not regarding age and, if there is space, even married children. Polygamy is not very common in the Harari communities according to the informants, but they took the Muslim part of the Oromo folk group as an example of where this is common practice.

When talking about children in the household one informant distinguished between “yeweled lij”(biological children) and “ye injera lij”(other children living there), giving the impression both kinds frequently existed.¹⁰⁷ When asked about the

¹⁰³ lifos.migrationsverket.se, Äktenskap samt vårdnad av barn, Rapport från utredningsresa 27 februari – 12 mars 2009 till Hargeisa och Nairobi, p 30

¹⁰⁴ Id. p 31

¹⁰⁵ Id. p 30 ff

¹⁰⁶ Interview with cultural experts at Harari Cultural Bureau

¹⁰⁷ The concept (ye injera lij) has a widespread use in Ethiopia, see for example Abdulwaise, Awan ‘Conceptualizations of Children and Childhood: The Case of Kolfe and Semen Mazegaja, Addis Abeba’, in *The World of Girls and Boys in Rural and Urban Ethiopia*, Poluha, Eva(ed), p 45

stepchildren, and if there were any legal formalities for when the custody was transferred, the answer was a simple no. This was an issue always taken care of within the family only. “This is a Muslim way of family life”.¹⁰⁸

Another Harari informant told that if the mother dies, the children are usually taken away from the father, if he remarries. This is because stepmothers are known not to be good with their husband’s previous children.

Wolena example

Polygamy is formally forbidden in Ethiopia.¹⁰⁹ Still, the practice is very common in some areas. One informant described how his father, being of Wolena nationality and living in a rural area, has four wives. In the local community this was accepted and even expected from a man of his rank.

3.4 The African Union and family reunification

Compared to the strong link between Swedish migration law and the laws of the European Union later on presented, the African Union regulations seem rather disconnected from Ethiopian law. The AU regulation is, however, still an expression of values common for the continent. The documents brought up are all signed by Ethiopia and in some cases formally express values that Ethiopia shows in legal practice but not formal law.

The central rights document of the African Union is the Banjul Charter. It is of slightly different character than both the UDHR and the ECHR; a difference explicitly stated in the preamble. Firstly, the more collective values are emphasized already by placing rights not only on individuals but also on people.¹¹⁰ The preamble furthermore states the importance of seeing the rights’ charter in the context of historical traditions and values of the African civilization.¹¹¹ Secondly, the charter makes clear that it also places duties on people and individuals.¹¹²

Article 18 protects the family unit:

¹⁰⁸ Interview with elder from customary Harari court

¹⁰⁹ The Revised Family Code, Proclamation of 2000, art 11

¹¹⁰ Banjul charter, preamble

¹¹¹ Banjul charter, preamble

¹¹² Id. preamble

- 1. 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.*
- 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.*
- 3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.*
- 4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.*

Notably this article protects the family within the frame of traditional values in the community. The elderly and disabled are mentioned without any further explanation, which can be read as if they are meant to be included in the right to family unity.

Chapter II in the Banjul Charter lists duties. Article 27, first bullet point reads:

Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.

Article 29, first bullet point develops the individuals' duty towards the family:

The individual shall also have the duty:

- 1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.*

In other words, not only is the family an important unit in society, but the individuals also have a duty to maintain family members, such as parents. Noteworthy is the fact that parents of grown ups are not even included in the European family definition; even less do they carry any obligation to maintain for anyone above 18.

Just like in UDHR and ECHR there is no explicit right to family reunification in the Banjul Charter. However, also the African Union has adopted additional documents establishing the right.

In the Migration Policy Framework for Africa countries are encouraged to “give priority to family tracing and reunification for separated and unaccompanied refugee children”.¹¹³ The importance of facilitating family reunification is also mentioned under actions for integration.¹¹⁴

More specifically targeted on family issues is the Plan of Action on the Family in Africa.¹¹⁵ It motivates in its second chapter why the family is an important unit to protect.

“As the core of the society, the Family can be seen in three dimensions: firstly, as a psycho-biological unit where members are linked together by blood ties – kinship relationship, personal feelings and emotional bonds of its members; secondly, as a social unit where members live together in the same household and share tasks and social functions; and thirdly as the basic economic production unit. It is, therefore, imperative to provide sustained support and encourage cohesion of the family to enable it play its role. In this regard, it is necessary to develop and implement social policies to address the various concerns of families.”¹¹⁶

The action plan claims to have as its goal to improve the life of all families in Africa,¹¹⁷ but also explicitly mentions refugees when specifying its objectives.¹¹⁸

That the African Union has no specific regulation on refugee family reunification could be for several reasons. First of all the refugee definition applied is broader, as stated above. Through this family members get their own refugee status rather than

¹¹³ Executive Council, Ninth Ordinary Session, Ninth Ordinary Session, 25 – 29 June 2006, Banjul, The Gambia, ex.cl/276 (IX) The Migration Policy Framework for Africa art. 3.3, comment no 17

¹¹⁴ Id. art. 3.6, comment no 2

¹¹⁵ Plan of Action on the Family in Africa, 16 July 2004

¹¹⁶ Plan of Action on the Family in Africa, summary, p1.

¹¹⁷ Plan of Action on the Family in Africa, art 34

¹¹⁸ Id. 35, vii

being accepted as family members. Second of all the extended family and the strong family ties are a continent-wide accepted paradigm, which is why this right is provided to a large extent without legal enforcement. Thirdly, the traditionally open door policies between African countries often allow a generous circle of persons to join the sponsor.¹¹⁹

It might be argued though, that with the current global trend of straining migration flows an explicit family reunification policy would soon be necessary also in Africa, to preserve the right to family reunification for refugees.

3.5 The Ethiopian family norm

As mentioned above the Ethiopian society is extremely diverse. It would be a mistake to try to generalize how a “typical” Ethiopian family looks. Yet, some general conclusions can be drawn.

It is no coincidence that the African Charter is the one rights document extending the right to family unity to include cultural perceptions. It is considered being a common African value to include the extended family in the family definition.¹²⁰ Ethiopia is no exception. The household norm is not the nuclear family. Generations do live together, as well as siblings and other relatives. Children usually live with their families until they marry; turning 18 has no impact on this.¹²¹

Urbanization is a factor often said to strengthen the nuclear norm, as households tend to be smaller in the city. Despite this, even in Addis Abeba, the biggest city of Ethiopia, the households are often consisting of more family members than the nuclear ones. According to a survey from 2008 at least 27 % of the participant households had one or more family members from the extended family living with them.¹²² Reasons for this can vary.¹²³ Children can be orphaned for different reasons

¹¹⁹ Interview with staff at IOM in Ethiopia

¹²⁰ Interview with staff at UNHCR regional office in Addis Abeba

¹²¹ Interview with cultural experts at Harari Cultural Heritage Bereu

¹²² Berhanu, Abeje ‘Family Disorganization in Addis Abeba: Causes and Consequences’, in *Journal of Ethiopian Studies*, Vol. XLI, Nos. 1-2, A. Yonas (ed), p 210

¹²³ Abdulwaise, Awan ‘Conceptualizations of Children and Childhood: The Case of Kolfe and Semen Mazegaja, Addis Abeba’, in *The World of Girls and Boys in Rural and Urban Ethiopia*, Poluha, Eva(ed), p 46

and therefore taken care of by others than their biological parents.¹²⁴ It can also simply be a more convenient solution for the upbringing of the child. For obvious reasons, in areas where conflicts and or HIV/AIDS cause scattered families the phenomenon becomes more common.¹²⁵ No need to say, these areas also tend to produce refugees.

One cannot claim to define one family norm as Ethiopian, but it is clear that there are widespread norms declaring what we call irregular family constellations to be considered family.

3.5.1 Family definition in other parts of the Ethiopian law

To see if there are formal recognitions of family constellations expressing a family norm, other areas of formal law were also studied.

Family law and other legal areas regarding family values is a legal area where customary law explicitly is given space to act and is a recognized source of law.¹²⁶ Almost all regions have enacted their own family laws; hence the Federal Family Code is now only applicable in Addis Abeba and Dire Dawa. A formal regulation on family definition therefore naturally has little actual impact. It can still be worth investigating if it does define the family in any way though, as the findings can indicate the view of the lawmakers.

The Family Code gives no explicit family definition but articles placing rights and duties on family members give the impression that a family is more than the nuclear concept. Article 198 places obligation to supply maintenance to all ascendants and descendants related in direct line, and adds that this obligation exists also between siblings.

In article 225 the relatives called to be guardians of a child who has lost its previous guardian is listed. Apart from the nuclear family members also uncles and aunts are mentioned. Concerning that article an informant, a lawyer working with family law,

¹²⁴ Berhanu, Abeje 'Family Disorganization in Addis Abeba: Causes and Consequences', in *Journal of Ethiopian Studies*, Vol. XLI, Nos. 1-2, A. Yonas (ed), p 199

¹²⁵ Poluha, Eva 'Research on Ethiopian Children, Subjects Covered and Possible New Themes', in *The World of Girls and Boys in Rural and Urban Ethiopia*, p 184

¹²⁶ The Constitution of the Federal Democratic Republic of Ethiopia, art. 34.5

added that in practice also grandparents are always considered, even if not mentioned in the article.¹²⁷

3.6 Statistics on family life Ethiopia

The fact that there is a gap between actual practice and formal law makes it hard to find comprehensive statistics on household compositions in Ethiopia. The governmental numbers provided have low credibility. There are some different non-governmental surveys that have presented numbers though.

Population Council did a survey on Ethiopia 2010 with interviews performed in seven different regions. From the statistics they got on household composition it is clear that non nuclear family members are very common in the households. For example 62 percent of the households had grown up children still living with them, 30 percent had parents from the older generation in the household, 15 percent hosted some other relative. In rural areas 10 percent of the households took care of somebody else's child or children, in cities the corresponding number was 6 percent. Apart from that, the survey showed that friends, coworkers and domestic workers of the household often resided together with the family.¹²⁸

3.7 Concluding remarks

Ethiopian law is characterized by a great variety of laws in the family area. A common value though, is the collectivist approach that individuals have responsibility for their whole family, not only the nuclear members. There are formal laws regulating refugee family reunification. The circle of persons there described is, however, not used and in reality the refugee can bring any kind of family to reunite with her.

4 Refugee family reunification in Sweden

The following chapter presents how the human right to refugee family reunification is implemented in Swedish law. The Swedish regulation is to a large extent influenced and bound by regulations from the European union. Therefore, an analysis has to

¹²⁷ Interview with lawyer at Women Lawyer Association.

¹²⁸ A. S. Erulkar, *Ethiopia Gender Survey a Study in Seven Regions*, The Population Council and United Nations Population Fund, p 7

include that level. For the purpose of later comparing the Swedish regulation with the former presented Ethiopian one, this chapter will follow mainly the same structure.

4.1 The Swedish context

Sweden is by surface one of the bigger countries in Europe, although its population reaches only about ten million.¹²⁹ Due to the welfare system that developed during the second half of 1900, Sweden is considered a welfare state, providing one of the highest living standards in the world. Life expectancy and access to education are both rated to be in the top ten worldwide.

Sweden is one of the most secularized countries in the world but a majority of the inhabitants are still members of the Lutheran Church.¹³⁰

4.1.1 Legal history

The story about how the Swedish legal system emerged is a story that to a large extent is shared by the Nordic countries.¹³¹ The close political and cultural ties that always have connected the countries explain these similarities. In different constellations the countries have been ruled under the same crown. Historically the Nordic law is based on old Germanic law, which is part of the civil law family.¹³² Since the twelfth century the laws are written down. It started as numerous local laws, which became city laws and in the fourteenth century Sweden managed to enforce a nation wide law, replacing all local ones. The Scandinavian legal system has not developed in complete isolation though. At the time of the Thirty Year War Sweden was an important power within European politics. The new interest in the world outside of Scandinavia allowed continental legal thinking to make its impact on Sweden. When Sweden lost their position as a great European power, the new law that was drafted was an attempt to return to the more legal way that existed before continental influences. Still, of course, some influences remain. Current Swedish law is based on this law, The Swedish code of 1734. It is drafted in a clear style and is a lot less extensive in volume than other European laws from the time.¹³³

¹²⁹ Landguiden, Sverige, <http://www.landguiden.se/Lander/Europa/Sverige> accessed February 27th 2016

¹³⁰ Landguiden, Sverige, religion <http://www.landguiden.se/Lander/Europa/Sverige/Religion> accessed February 27th 2016

¹³¹ Zweigert K, Kötz H, *An Introduction to Comparative Law*, p 277

¹³² Id. p 278

¹³³ Zweigert K, Kötz H, *An Introduction to Comparative Law*, p 280

4.2 Swedish legal family

Swedish law belongs to the Nordic legal family, which is considered being a special legal family even though it is closely interrelated to the Civil law family. Even if not identical, the Nordic legal systems share some common characteristics separating them from the continental systems. Danish, Norwegian and Swedish are closely related languages, which has favored a common development in the legal area.¹³⁴ Being not very populous countries their joint experiences could together produce better, more effective legislation. Contract laws and legislation regarding commercial sales are still today very similar in the Nordic countries. The legal emancipation of women happened significantly earlier in Sweden and Denmark than in continental Europe. Another characteristic is the strong and innovative consumer protection. On the area of family law the Scandinavian countries were early in ensuring equal rights for husband and wife, and entitling illegitimate children to the same rights as legitimate ones.¹³⁵

4.3 Swedish regulation on refugee family reunification

The set of rules guarding family reunification in Sweden is easier to identify than in the above stated Ethiopian example. The issue is explicitly dealt with in the Alien act. After briefing the Swedish family reunification rules, eventual other Swedish legal family definitions will be presented.

The regulation on family reunification today in Sweden is found in the Alien act¹³⁶, chapter 5, 3-3e §§. The revision of the law enacted in 2005 aimed at harmonizing the Swedish national regulation with the family reunification directive.^{137 138} The preparatory report on the revision mentions as a sub target for the investigation to evaluate if the more favorable conditions for refugees, found in the directive, are provided also nationally.¹³⁹

¹³⁴ Id. p 278

¹³⁵ Id. p 280

¹³⁶ In swedish: Utlänningslag(2005:716)

¹³⁷ Fridström, Ingela, Utlänningslag 5 kap. 3 §, lagkommentar not 126, (18 December 2015, Karnov Internet)

¹³⁸ SOU 2005:15. Familjeåterförening och fri rörlighet för tredjelandsmedborgare[Family Reunification and Free movement for Third Country Nationals], Delbetänkande av utredningen om uppehållstillstånd för familjeåterförening och för varaktigt bosatta tredjelandsmedborgare, p 58

¹³⁹ Id. p 59

Similar to the structure in the family reunification directive, first the rules for family reunification in general are described.

Chapter 5, 3 § clarifies that spouse, married or common law spouse, and unmarried children of the sponsor *shall* be given residence permit in Sweden.

Chapter 5, 3a § adds which circle of persons that *may* be allowed to reunite within the frames of Swedish law. Those are people planning to marry or become common law spouse of the sponsor, close relatives if they share a household with the sponsor and they are interdependent, parents to a minor sponsor that are living with the child and a person who wants to practice her or his right to access to a child for not a negligible amount of time. Anyone who is granted permit to enter Sweden based on relation to the sponsor has the right to bring her or his minor unmarried children, regardless if they are or are not in any way related to the sponsor.

Lastly, the 3a § allows for the possibility that, if extraordinary reasons, people adopted in Sweden in a grown up age and people related to a refugee and people that in some other way are closely tied to Sweden, can get permit to stay in Sweden.

Relatively little changes depending on required refugee status. 3§ p 4 expresses the unaccompanied refugee child's right to her parents. A parent or another grown up guardian can reunite with the child also if their asylum request is cumulated with the one of the child. 3c § also relieves the refugee from the requirement stated in 3b §, to be able to economically maintain reuniting family members.

Before 1997 the Swedish laws guarding migration gave more room for relatives to join the sponsor. Before those changes were made a child had the right to reunite with its parents until the age of 20. It was also then the requirement on a previous existent household unity for non-nuclear-family-members added. The possibility to get admitted as a so-called "last link case" got removed, which was a possibility to get residence permit on the sole ground that one had all living relatives in Sweden.¹⁴⁰

¹⁴⁰ SOU 2005:15. Familjeåterförening och fri rörlighet för tredjelandsmedborgare [Family Reunification and Free movement for Third Country Nationals], Delbetänkande av utredningen om uppehållstillstånd för familjeåterförening och för varaktigt bosatta tredjelandsmedborgare, p 108

Looking into how the laws are applied it gets clear that the practice pretty much follows the letter of the written law. The exceptions enabling other than nuclear family members to reunite are very restrictively used.

4.3.1 Examples of practice

Listed below are some examples of Swedish family reunification practice.

They also serve to concretize what kind of cases that have indicated this study and to point to concrete situations when the family definition can constitute an obstacle.

Stepchildren and other non-biological children

The situation when a household has custody of a child which is not their own often becomes a problem in migration situations. Most informants brought this up as a commonly arising problem when families migrate to western countries. The following will show examples of how it has been handled in a Swedish migration context.

In one case a Somali woman came to Sweden and was granted asylum. Her family, consisting of her husband, their six biological children and two children of her sister, who had passed away, was seeking protection in Ethiopia. In 2012 her family applied for reunification with her in Sweden. Her spouse and biological children were given permit to come to Sweden after a DNA analysis but the two stepchildren were not. This was due to her not being the legal guardian of her stepchildren according to the court. The court could not determine who else their legal guardian would be.¹⁴¹

The problem in this and in similar situations is, in other words, that stepchildren not formally adopted are not counting as nuclear family members and therefore lack the right to reunite.

Children turning 18

Another occurring obstacle to family reunification is the problem with a strict enforcement of the age limit for when a child is not minor anymore.

¹⁴¹ Carlsson Anki et al. *Vägen till familjeåterförening, nulägesrapport från arbetet med att återförena splittrade flyktingfamiljer*, p 14

A Somali man came to Sweden and his wife and seven minor children in Somalia applied for reunification with him. They got denied at first as they could not prove their identities but applied again and got granted entrance after a DNA analysis that proved them to be biological children. The three oldest children, however, had by then turned 18, and got denied again.¹⁴²

According to Swedish law, being older than 18, strictly legally you are not considered part of the family anymore. In reality this splits up families as the children above 18 rarely have the right to family reunification.

Extended family members

Another common situation is the one when the household also consists of extended family members, such as elderly parents, siblings of grown ups, uncles or similar.

In 2004 a Somali woman applied for reunification with her grown up daughter in Sweden who had had permanent residence since 2003. The court admitted that they did share household before the daughter left but ruled that no interdependency was proved, which is why the mother could not be admitted.¹⁴³

The interdependency that has to be proven for non nuclear family members to get to reunite is a tough requirement. Not only is for example emotional interdependency hard to prove, but it is also not always the case that the people a person considers as her or his family are theoretically necessary for the person's immediate survival.

4.4 The European Union and refugee family reunification

Swedish refugee law is more or less entirely determined by the regulation on the European Union level. This motivates a closer look into what type of regulation that actually is.

On a union level a general right to family reunification for third country nationals can be found in the Treaty on the Functioning of the European Union (TFEU) in article 79:

¹⁴² Carlsson Anki et al. *Vägen till familjeåterförening, nulägesrapport från arbetet med att återförena splittrade flyktingfamiljer* p 15

¹⁴³ MIG 2007:18

”The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.(...) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in (...)the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification ”¹⁴⁴

4.4.1 The Family Reunification Directive

The right to family reunification for refugees is implemented through the directive 2003/86/EG (the Family Reunification Directive).¹⁴⁵

It was first drafted in 1999 in response to the above quoted article¹⁴⁶ with the initial purpose of complete harmonization on the area of family reunification for third country nationals. After having incorporated the majority of the amendments suggested by the European Parliament, the agreement however granted room for a great deal of flexibility for the member states.¹⁴⁷ In the second proposal the Commission changed the objective of the directive from *creation of a right* to family reunification to be a description of the *conditions for the exercise* of the right. The initial proposal also constituted a more generous circle of relatives entitled to reunification.¹⁴⁸

In the preamble of the final draft the directive is said to have the purpose of protecting the family unity, as described in ECHR article 8 and in other international human

¹⁴⁴ TFEU article 79.1-2, ex 63.3 (a) in TEC

¹⁴⁵ Directive 2003/68/EC, of September 2003 on the right to family reunification, OJ of the EU of 3 October 2003, L-251.

¹⁴⁶ At that time known as article 63(3) (a) of Title IV of the EC Treaty

¹⁴⁷ Wiesbrock, A., *Legal Migration to the European Union - Immigration and Asylum Law and Policy in Europe*, p 253

¹⁴⁸ Wiesbrock, A., *Legal Migration to the European Union - Immigration and Asylum Law and Policy in Europe*, p 254

rights documents.¹⁴⁹ It is further emphasized that family reunification is necessary to provide the right to family unity and that it helps social and cultural stability, which in turn supports the economic and social unity, which is the very purpose of the European Union.¹⁵⁰ Importantly the ingress also mentions refugees as a group that shall be given more favorable conditions to reunite, considering the reasons that forced them to flee in the first place.¹⁵¹ The preamble states that the minimum circle of people that has the right to reunite is the nuclear family; here defined as spouse and minor children. It thereafter adds that the member states are given the possibility to, if they decide; give permit also to other first-degree relatives.¹⁵² Interestingly it is stated that the right to family reunification should be provided in accordance with the values of the member states. This goes directly against the principles described in the UNHCR procedural standards, where it is explicitly urged no to consider the receiving country's values. In the directive preamble, however, this is motivating a prohibition to accept polygamist marriages.¹⁵³ Lastly the preamble states that reunification can be denied only on valid grounds.¹⁵⁴

In the directive itself the circle of persons granted the general right to family reunification is specified in article 4. There spouses and minor children, biological or legally adopted, and children of which the sponsor has custody, are given the right to reunite. The article continues by mentioning other persons the member states are allowed to give the possibility to reunite with. These are first-degree relatives, ascendants and descendants, other economically dependent relatives that lack other family support in the home country, and non-minor children, if they are proven dependent due to health reasons. Also partners not yet married may be granted reunification, including dependent children. Article 4 paragraph 4 states an exception as to whom is allowed into the union on grounds of family reunification. It states that the state should not allow people in polygamist marriages to reunite with a third spouse in the case where two of them are already living together. This is an explicit prohibition.

¹⁴⁹ Preamble to the Family Reunification Directive, (2)

¹⁵⁰ Id. (4)

¹⁵¹ Id. (8)

¹⁵² Id. (9-10)

¹⁵³ Id. (11)

¹⁵⁴ Id. (14)

Article 9-12 address the specific situation when the sponsor is a refugee. In general, the articles constitute a broader possibility to reunite than for non-refugees. Member states are allowed to apply these more generous rules exclusively on family situations that existed already before the refugee entered the Union.¹⁵⁵ Article 10 stipulates that the definition of family members in the refugee case is mainly the same as the general definition. Although, a wider circle of other people that can be eligible for the right is added. Firstly, other family members than those defined in 4.1 can be included, if dependent on the sponsor. Secondly, if the sponsor is an unaccompanied minor, first-degree relatives do not need to prove the dependency prerequisite to be granted reunification with the child. In addition, if no first-degree relatives are found, any other family member or guardian can get to reunite. Article 11 regards the proof of alleged family ties. It urges the member states to not look only at official documents proving family bonds but also at other types of proofs. It is explicitly stated that a denial may not be given on the sole reason that proper written documents are missing.

4.5 The Swedish and European family norm

The nuclear family seems to constitute a Western norm. The concept of the nuclear family has not always been the standard norm, anyways. The family structure consisting of one married couple and their children were present in Western Europe and New England in the 17th century. The constellation was promoted by the church, which played an important role in society at that time.¹⁵⁶ The emerging industrialization came with an escalating urbanization and in the cities households became smaller, for practical reasons. The idea of the nuclear family was introduced not until beginning of the 1900. This concept is often said to have been introduced by George Murdock, an anthropologist who focused on families. He defined the family as:

“The family is a social group characterized by common residence, economic cooperation and reproduction. It contains adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults.”¹⁵⁷

¹⁵⁵ The Family Reunification Directive, art 9.2

¹⁵⁶ Casey J, *Familjens historia*[The History of the Family], p 11

¹⁵⁷ Casey J, *Familjens historia*[The History of the Family], p 153

It could be added that in modern times there are many Swedes with a foreign background, representing also other non-typical family views.

4.5.1 Other legal family definitions in Swedish law

Just as in the case of Ethiopia a look into how the family is legally defined in other contexts than migration law could possibly shed some light on Swedish family values in general.

Nowhere in the Swedish law is a clearly stated general family definition to be found. In several laws a family definition is hinted though. In the Children and Parents Code¹⁵⁸ the rules regarding custody is found in chapter 6. In the chapter thereafter a duty for the parent(s) to maintain for the child until she turns 18 is stated,¹⁵⁹ 18 is also the age for achieving majority.¹⁶⁰

These rules all presuppose nuclear family constellations. Duties are placed solely on parents, towards minor children. Not even between siblings are any obligations to be found. Rules for custody and maintenance are mainly formed to follow family relation patterns, as opposed to for example household compositions.

Also in the inheritance code¹⁶¹ a Swedish view of family relations is mirrored. The closest heirs to the deceased are the first-degree descendants. After them, the parents to the legator are entitled to heritage. Next in line are siblings, or their descendants in their place, and if none of the previous are present, grandparents of the deceased inherit the assets.

The rules on inheritance are, as evident above, not as closely tied to the idea of the nuclear family as the parental rules.

¹⁵⁸ In swedish: Föräldrabalk (1949:381)

¹⁵⁹ Föräldrabalk 6:2

¹⁶⁰ Id. 9:1

¹⁶¹ In swedish: Ärvdabalk (1958:637)

4.6 Some statistics on Swedish families

The Swedish national organ for statistics, Statistics Sweden¹⁶², has defined different family constellations for the purpose of presenting statistics. They define “family” as nuclear family, meaning here one or two parents living with their minor children.¹⁶³ Statistics show that in Sweden, 7 out of 10 children live with both their parents, in a so-called traditional nuclear family.¹⁶⁴¹⁶⁵ That does not give any information on the household composition though. Theoretically there could also be extended family members living in those households. According to household statistics, around 2.5 % of households in Sweden were consisting of “other cohabiting households” in 2013.¹⁶⁶ This is the one category mentioned, not being a nuclear family. Both the statistics and how they are presented suggest that the general Swedish family view is the nuclear family.

4.7 Upcoming possible changes in Swedish refugee law

The 24th of November 2015 the Swedish government launched a suggestion to toughen the refugee laws in Sweden, as a response to what Swedish media call a refugee-crisis.¹⁶⁷ Apart from other restrains the new suggestion leaves very little room for family reunification. Family reunification will be an option exclusively for those with refugee status and the refugee status will become harder to achieve. The restraints also contain a demand for the refugee to be able to economically maintain the family members. Spouses wanting to reunite must have both reached the age of 21, and no extra favorable rules for children should apply. Importantly, this is still only a suggestion and it is still to be confirmed how and if it will actually be enforced.

¹⁶² In Swedish: Statistiska centralbyrån (SCB)

¹⁶³ SCB, Familj, civilstånd och sammanboende Terminologi och definitioner, accessible at: http://www.scb.se/grupp/hitta_statistik/forsta_statistik/metod/_dokument/mis19991familj.pdf

¹⁶⁴ Id. p11

¹⁶⁵ SCB, barn och familjestatistik, http://www.scb.se/sv/_/Hitta-statistik/Statistik-efter-amne/Levnadsforhallanden/Levnadsforhallanden/Barn--och-familjestatistik/15659/15666/Behallare-for-Press/Barn--och-familjestatistik1/, accessed February 2016

¹⁶⁶ SCB, number of households by type of households, http://www.scb.se/en/_/Finding-statistics/Statistics-by-subject-area/Household-finances/Income-and-income-distribution/Households-finances/Aktuell-Pong/7296/Households/163554/, accessed February 28th 2016

¹⁶⁷ Regeringen.se, Regeringen föreslår åtgärder för att skapa andrum för svenskt flyktingmottagande, <http://www.regeringen.se/artiklar/2015/11/regeringen-foreslar-atgarder-for-att-skapa-andrum-for-svenskt-flyktingmottagande/>, accessed February 28th 2016

4.8 Concluding remarks

In essence, the nuclear family has the possibility to reunite with a refugee in Sweden. Supported by statistics and other contextual information on Sweden one can conclude that the nuclear family is an accepted norm in the Swedish society.

5 Discussion and analysis

In this section the aim is to discuss and further analyze the chapters above and to compare and evaluate the findings. What constitute a family for the purpose of refugee family reunification? And is the human right to refugee family reunification fulfilled in Sweden and respectively Ethiopia? What are the differences in implementation and how can they be explained? The following will try to answer these questions with the above presented tool.

5.1 What constitutes a family for the purpose of refugee family reunification?

An attempt to answer this question was made in chapter two. The answer was then searched for in international legal sources. The following investigates if the answer changes when the facts in the third and fourth chapter are added to the reasoning.

5.1.1 Defining family

To define a family has shown to be a delicate issue, highly dependent on the context in which the word is used. In Ethiopia the word “family” means a lot more than the nuclear family and other relatives, cohabitating or not, are without any further explanation included in the concept. In daily speech a Swede would likely, by using the word “family”, be referring to her parents and possibly also siblings that she grew up with, or to her partner and their possible children. Other relatives are probably referred to as relatives.

Though few would argue the fact that who is considered to constitute a family is culturally dependent, this understanding seems to not have reached the legal area.

5.1.2 Legally defining family

In Swedish migration law, a fixed family definition is to be found. The definition is along the lines of the EU directive conforming legislations on the area within Europe.

The definition corresponds rather well to the cultural context in which it is made, but does not consider the context from which the refugee has come.

Within Ethiopian migration practice seemingly no fixed family definition is applied, despite the fact that the refugee proclamation contains more or less the exact same definition as the one in Swedish law. The explanation to this, given by informants to the study, is that the legal family definition simply does not match the families it is targeting.

“(Refugees) that come here. They are pastoralists, almost all of them. From Sudan, Somalia, Eritrea. They don’t live in nuclear constellations.”

In the aspect of defining family, Ethiopia more than Sweden does what the UNHCR also urges: they consider the actual context of the refugee when providing the right to refugee family reunification. One could add that the applied definition in Ethiopia also is in conformity with the Ethiopian way of living, which is why it is not necessarily adapted to the refugees but perhaps simply to an Ethiopian understanding of the family. In any case, the consequence is still a more flexible approach towards the arriving refugees and their families.

One could ask if it is even necessary to legally define what a family is. An argument for a clear definition is the foreseeability it would entail. An argument against a fixed definition is the limited room for contextual adaptation such a fixed frame would bring.

On a human rights level the family is not further defined. This is probably motivated by the implied universality of human rights. The Banjul Charter even explicitly stresses that the family concept depends on the specific cultural context.

The right on a human rights level is rather a statement of the fact that the refugee has the right to reunite with her family, than a precise description of exactly who the family is. To achieve this right should be the purpose of all regional legislations on refugee family reunification. As cited in previous chapters the right is supposed to work in favor of the refugee, not against her. With this in mind, it is relevant to look

into how the family is regionally defined. Is the definition designed to facilitate the right, or maybe to limit it?

From the letter of international law, a family definition cannot be extracted. It is likely kept open to leave room for the differences in family structures that de facto exist. To practically provide the right, however, actors need to decide who is entitled. The critical question is therefore if the applied definition serves the goal of providing the right or not. However, from custom, state practice and statements by the UNHCR a minimum definition can be extracted, including nuclear family members of all kinds.

5.2 A comparison between Ethiopia and Sweden

The previous chapters on Ethiopia and Sweden evidently show two different ways of treating the family of a refugee. This part will elaborate these differences further.

Considering that both Ethiopia and Sweden are receiving many refugees from Somalia and Eritrea one could assume the countries would face similar challenges on the refugee area. Still, the overviews above have shown two very different legal systems tackling the refugee flows.

5.2.1 Finding comparable parables

When comparing laws it is crucial not to compare incomparable parables. Mainly by looking into their actual function comparable laws can be identified. In this study the purpose is to investigate similarities and differences in how the respective countries have implemented the right to family reunification for refugees. The above chapters have sorted out what rules in Ethiopia and Sweden govern the right. Evidently, a comparison of the wording of written paragraphs would be unwise and purposeless.

In Ethiopia the practice on refugee family reunification follows traditional values, extracted from the customary legal practices. In other words, the laws that actually govern the right, which has the function to facilitate family reunification for refugees, are found on local level. In Sweden, the rules governing refugee family reunification are an implementation of the EU directive and the values they preserve match the Swedish cultural family norm. In other words, in Ethiopia we find the rules and norms on family reunification by looking at local practice, whilst the Swedish equivalents are found on EU level.

The fact that the protection of the right is located in such different places can be explained by the different legal traditions that Ethiopia and Sweden are located in. The legal system of Ethiopia is a conglomerate of laws from different times and political powers, operating next to ancient chthonic laws. Especially issues regarding family values are mainly submitted to traditional courts. Sweden is part of the Nordic legal family and a member of the EU. The regulations are by tradition rather literal and even if Sweden would want to make other laws, the country is bound by the rules within the EU. In the written laws differences can be explained by their different ways of developing. In Sweden the law has emerged relatively un-dramatically through history whilst Ethiopia has had more than one quite spectacular overthrow of ruling powers. The political chopping and changing of the legal system in Ethiopia has naturally left the system less comprehensive and coherent. Likely this non-enduring character could be a reason for mistrust from the people, therefore leaning back to their customary practices, more lasting and predictable.

5.2.2 Difference in legal norms on family reunification

To clearly state what the difference in implementation of the human right to refugee family reunification is, Ethiopia allows any family to join the refugee within the country whilst Sweden clearly states who and under what conditions can join the refugee in Sweden.

One could question how come the low-income country Ethiopia shows a more generous policy than the richer country Sweden. Critics would maybe stress the fact that Ethiopia lets many migrants in but does then not care much for them. Sweden, with a well-developed welfare system, might pay a higher cost for every migrant let into the country, which could motivate a more restrictive approach to immigration in general. Likely the diverse family norms in the two countries are also affecting the regulations. In Ethiopia, a society with collectivist values, it becomes more natural to entitle a right to an entire family, while Sweden with an individualist approach might be more reluctant to do so.

5.2.3 Comparing the family norm

Made evident in previous chapters the countries seem to have a diametrically different view on what a family is, can be and maybe even should be. It is impossible to

identify exactly what reasons lie behind the diversion, as they are likely numerous and correlated. Despite this, some mechanisms identified to have affected the family norm can be worth identifying and compared.

When comparing the family norm, being more of a social phenomenon than a legal concept, it could still be helpful to look into the function. Families likely fill different purposes in Ethiopia and Sweden, and the different functions might explain some differences in the family norm and regulations.

In Ethiopia, a family is not only a basic social unit but also a building block in the social security structure. It is not merely a person's closest relations, it is an economic unit to which individuals are obliged and entitled. The many functions of the family are in many cases formally recognized, as in the brief examples regarding maintenance duty, existing between all kinds of family members. These functions all support the more inclusive family norm existing in Ethiopia. Family members need each other and are closer tied by obligations.

In Sweden, the nuclear family is a widespread norm. As seen in the historical brief this has not always been the case in Sweden. The smaller kind of household was preferred in the city, as it was more crowded. Families did no longer have to have a lot of children for the reason that they could help taking care of the farm. Rather, more children meant another mouth to feed. Urbanization, industrialization and opinion from the church are all factors that together have shaped the nuclear norm. The function a family fills in Sweden today is predominantly social. Legal obligation to care for a child ends when the child turns 18, and no duty to maintain economically is placed on family members. The individualist approach has made every individual independent.

Urbanization has not yet reached its culmination in Ethiopia, as shown above a majority of the population is still small-scale farmers. Possibly, as urbanization escalates, the family norm in Ethiopia will approach the western ideal. Although, nothing of course guarantees that the development will look the same as in the West.

5.3 Is the human right to refugee family reunification fulfilled in Ethiopia?

The rather long exposé on Ethiopian law regarding family reunification above has shown that the family definition mainly follows the customary legal traditions. In practice, a refugee gets to bring her family into Ethiopia, whoever she consider her family to be. The family members get derivative refugee status and can reunite in Ethiopia. From this, one can conclude that the right is materially provided. Interestingly through the impact of traditional practices, often criticized for not protecting human rights.

Formally, however, Ethiopian law defines a refugee family as the nuclear family. Comparing this definition to the actual families of the refugees reaching Ethiopia, it seems as if the purpose to retain their family unity would not match. The family definition of many refugees in Ethiopia, as well as of many Ethiopians, is depending on social relations rather than biological connections.

To conclude, Ethiopia provides the right materially but not formally. The purpose of the right, to reunite split up families of refugees, is provided.

5.4 Is the human right to refugee family reunification fulfilled in Sweden?

The right to refugee family reunification is supposedly provided through the rules in the alien act briefed above. The circle of persons entitled is undoubtedly clearly defined. The right to reunite with a refugee in Sweden is given to the nuclear family, and with exception to other household members. In addition, further requirements are put up, such as previous longstanding cohabitation or interdependency. This detailed description of who can reunite does indeed come out as a list of necessary qualifications. The human right to refugee family reunification should, by being a human right, be provided to all. When looking closer at who can actually fulfill the requirements and prove them, is it even the case that the Swedish regulation put up obstacles to the right by its detailed regulation? Does the legal framework, such as the definition of who constitutes a family, prevent or ease the purpose of the right?

In the case of Sweden, the family definition is deducted from the EU directive. On some level it can be said to aim to fulfill the human right to refugee family reunification. More hands on, however, is the purpose to harmonize Swedish law with

EU law. The EU directive claims to aim at expanding upon the right to family unity, as expressed in ECHR. At the same time the EU is an economic union. The EU regulations in general mainly serve to maintain the economic cooperation, which the EU was designed to build. The idea of family reunification was first facilitated for workers, as an extension to their right to free movement, which was an expression of the free market within the union. These rights, facilitating for EU citizens within the EU, connect in a clearer way to the very purpose of the union, than the ones that protect refugees, coming from outside the EU. This should activate a more critical reading of a EU document claiming to facilitate a right for refugees, as the said purpose also takes the main purpose of the EU into consideration.

Looking at the preamble to the directive it brings up the priorities of the union in that order, first of all the inner free market must be protected and other issues such as migrating third country nationals are referred to as “flanking measures”.

Considering this it becomes evident that the purpose of the EU regulation on refugee family reunification is two fold: It wishes to provide the right, but also to protect the inner market of the EU.

The human right to refugee family reunification has, as stated above, the sole purpose to reunite families. UNHCR urges for state parties to consider where the refugee came from when defining her family, and further to be flexible in the approach and to grant the family of the refugee the same rights as the refugee. UNHCR lists a minimum of family members that should be eligible for reunification in the handbook. In the procedural standards UNHCR shows that it interprets polygamy relations as nuclear relations.

In order to scrutinize the Swedish rules to see if they fulfill the human right to refugee family reunification, one can start with examining the circle of persons included. The basic circle of people that can reunite in Sweden is the nuclear family. In the interpretation as used in Swedish law, this does not include polygamy relations. The exclusion is in accordance with the explicit prohibition to accept such links, found in EU law.

This means that as for the circle of people constituting a family according to Swedish law, the one restriction clearly going against human rights law is the prohibition to accept polygamy relations.

But even when looking only at the level of the EU directive it is not at all clear that Sweden fulfills the right. It is clearly stated in article 11 of the directive that it is forbidden to deny applicants their right to reunification on the sole reason that written documents cannot prove the alleged family bond. Instead, instruction is to adopt alternative ways of proving family bonds, used in the home country of the refugee. From the Swedish practice it does in deed look like this is an article not implemented at all.

The strictly defined family definition is dubious also from a global human rights perspective. It does not give room for the contextual consideration that UNHCR asks for from actors in their handbook.

Sweden further has additional requirements that the refugee and the family members need to fulfill to get to reunite. Proof of cohabitation and interdependence is also required. The legality of these requirements are harder to determine the, as they are less elaborated on a global level. The UNHCR brings up interdependence, although as an independent reason to grant derivative status and not as a way of proving that the relation really is a family bond.

From the above stated it is not clear that Sweden formally does facilitate the right to refugee family reunification. After having looked into the previous example cases in detail the material aspect will be further elaborated.

5.4.1 A short discussion on possible upcoming changes in Swedish law

If the suggested changes in Swedish migration law are enforced, it is a step away from, rather than towards, fulfillment of the right to refugee family reunification. It is hard to see how the changes can be motivated from a human rights perspective. Notably, the motivation is not to better facilitate the rights of the refugees, but to lighten the burden for the Swedish receiving system. The function the human rights

have in the discussion seem to be to define a minimum, to set the limit for how low Sweden is allowed to put the bar.

5.5 Discussion around example cases and specific requirements

The following discussion will take a deeper look at the concrete examples brought up in previous chapters. Specific requirements and practices will be viewed from a broader perspective, using the findings of the study.

5.5.1 Stepchildren

The case of stepchildren constitutes a very interesting example of a situation viewed completely different in Sweden than in Ethiopia. The study has shown how children in many Ethiopian communities often are raised by other grown ups than their biological parents, for different reasons. However, it is common that formal adoptions are a rare phenomenon in Ethiopia. The formal adoption is mainly a tool for when adopting an unrelated child through an agency. When someone takes care of the child of a deceased sibling or some other relative who cannot take care of the child, the transfer in custody is customary. The informal character of the custody transfer is the norm in many cases, but as in the example about undocumented Somalis living in Ethiopia, there are not even formal institutions obtainable.

Still, Swedish law requires strong proof of guardianship to accept family reunification for a child, not being a biological one. Even if there are alternative ways in which guardianship can be proved, written documentation is what the court in Sweden trust the most. This is not only ringing badly with the urge from UNHCR to consider the context of the refugee in the trade-off, it is also probably a breach against article 11 in the directive.

There are of course reasons for why Sweden asks for strong proof. If alleged family relations were not controlled, room for different kinds of trafficking and kidnapping would be opened up. There is also the aspect of identification; Sweden requires knowledge of everybody migrating. For people without papers, a DNA test can show that they are at least related in the said way. That is, if they are biologically related.

Nevertheless, as seen from previously described, the proof required is in many cases impossible to produce for the refugee. The consequence becomes that irregular families in reality cannot reunite.

5.5.2 Children above 18

It is also interesting to study the different views on children above 18. In both countries compared, the age for obtained majority is 18 years. In Sweden, the age limit means that you are not legally part of the family anymore, in the sense that the parents no longer have any obligations to maintain for the child. In Ethiopia, reaching majority means less for the family structure. The whole family legally still has obligations towards on another. Many children do not leave the household until they marry and are cared for until that day.

The differences can probably be understood on the background of the partly different functions the family unit has in the two countries. In Sweden, there is little culture of protecting collective rights, such as the right to reunification of a family. It therefore seems reasonable to use fixed and individually applied criteria to determine who is entitled to the right. The problem is that this perspective does ignore the collectivist character of the right to family unity and reunification. It is not merely about the right for a minor child to have a parent; it is a right to keep and to restore family unity. It is a right for the whole family to continue being a “basic social unit in society”. The basic social unit that a family constitutes, does not cease to exist when the child turns 18, it ceases to exist when the unit transforms into new, other family units. Or when family members become independent and stop integrating with the family members. In this sense, actions of choice can in some cultural contexts determine when a family bond starts and ends.

The age limit of 18 for majority is the one used also in public international law. It is also listed in the minimum requirements of the UNHCR that minor children must have the possibility to reunite. Notably, the UNHCR states in their procedural standards for RSD that the age should be considered at the time of application, not the time of decision. This is something Sweden is not following.

On these grounds it is probably not right claiming the close to absolute age limit in Swedish law as illegal. When looking at the consequences it has, it can still be said that its application does not serve the purpose of reuniting families.

5.5.3 Extended family

The concept of extended family is a widespread and accepted norm in many places all over Africa. It is so common that even the Banjul charter, when copying the right to family unity from global documents, added that the local traditions of course get to define the family more specifically.

As evident from chapter 3 in this study, this view of the family is taken for granted in Ethiopian practice and application of family rules. In Sweden on the other hand, it is close to impossible to be joined in Sweden by any other family member than those who are a part of the nuclear family.

A refugee that comes from a bigger household might not have been equally close to all household members, but the primary relations does not necessarily have to have been the nuclear family members. Within the frames of Swedish law, there is very little room for taking this into consideration. The interdependency links that must be shown for non-nuclear household members to be accepted has to be of a unique character.

Human rights law sources do not explicitly deal with the concept of an extended family. There are of course many conclusions that can be drawn from that, one could look into the context the human rights were formed and what cultural values they are protecting. Such an analysis is not within the scope of this study, here it can only be concluded that also in this aspect, the cultural context on the refugee is ignored.

5.5.4 Polygamy

The issue of polygamy relations is controversial. Polygamy is forbidden in Ethiopia and in Sweden, and for motivated reasons. It is most commonly a man having several wives, which is, perhaps rightfully, viewed as an oppressive pattern. The question here is however not about the prohibition of polygamy marriages. It is about the situation when a polygamy marriage exists and a family member becomes a refugee

and wants to reunite with her family. Polygamy marriages do exist, and polygamy families can be split up and become refugees.

Chapter 4 has shown how the EU explicitly prohibits family reunification to be given to polygamy relations. The question is how that prohibition serves the assumed purpose of protecting women? In a reunification case family life is already established; the polygamy marriage has happened.

It should also be remembered that the UNHCR explicitly mentions that also polygamy relationships are included in the nuclear family.

It does seem like the prohibition to even let polygamy families reunite after a refugee situation has split up the family, is motivated by an institutionalized sense of European moral. It is no longer about prohibiting oppressive practices but about stating what is the right way to live in Europe. It would be one thing to declare a polygamy relationship legally invalid once the family arrived in Europe, but to solely deny reunification does not serve family unity, or prevent oppressive practices.

5.6 Another solution

From this thesis it is clear that current protection of the right to refugee family reunification is different in different places, and it will serve different families differently, depending on their culture and background. In other words it seems like the universality supposedly characterizing a human right, is not obtained.

The question then is what another solution would be. Entirely allowing a subjective family definition, like in Ethiopian practice would undoubtedly cause problems proving the bonds. During the study a lawyer at the Ethiopian Women Lawyer Organization received the question if they did not have any trouble proving claimed family bonds, and she said: “it is possible to ask relatives and friends, they will know”. Although this answer might not solve the problem it does point out something very important: That there are alternative ways of showing family bonds.

Even if the family definition does not constitute the whole problem it does seem like one of the biggest obstacles to the right to refugee family reunification. The fixed and narrow definition in Europe and Sweden is obviously not well fitted for some cultural contexts. Could a solution maybe be to broaden the definition? Would we want a comprehensive definition? As pointed out, family norms are not only different between countries but also varying over time. It would be difficult to find an all-including definition.

A clear definition on a global level would have positive effects. It would be a transparent process determining who is part of what family. It would decrease possibility for state actors to apply a more narrow definition. On the other hand it would in a definitive manner exclude everyone not mentioned.

The Ethiopian solution of not using any definition at all does in deed solve the problem but might not be sufficient for a EU country, also protecting the outer border of the EU.

An alternative could be to have a fixed definition, determining a subjective requisite, something along the lines of “a family is a social unit, related by blood or living together, considering themselves a family”. With this definition families would not have to be split up. It would also solve the problem possibly occurring with the AU definition, that cultural practices would have to be defined and documented.

It would of course come with new sorts of problems. Critics could point at the possibility of exploiting the concept of family unity and reunification, in order to use it to bring migrants with no legitimate reasons.

5.7 Conclusions

The question of what constitutes a family for the purpose of family reunification is not possible to answer in a clear fashion. It is probably not even desirable, as the perception of what a family is and the function the family has is so diverse and dynamic.

The difference is significant between the two examples of Ethiopia and Sweden. Family norms vary, as well as the function the family unit serves in society.

In Ethiopia the human right to refugee family reunification is provided or at least not blocked by the laws.

In Sweden the family definition used when applying the right to refugee family reunification is static and quite restricted. At a closer look the regulation does not work in favor of the right. The fact that the right, entitling refugees specifically, does not take the specific context of the refugee into consideration is dubious from the perspective of international public law. Rather than aiming at fully providing the right, the formulation suggests that within the frames of the human right the right has been as limited as possible. Family has been given the narrowest definition possible and the refugee definition also. This prohibits the purpose to be fulfilled. If Sweden wants to provide the right to refugee family reunification, the family definition and other requirements in the Alien Act must be amended.

Bibliography

Abate, Tesfaye, *Introduction to Law and the Ethiopian Legal System*, Alpha University College, 2009

Abdulwaise, Awan 'Conceptualizations of Children and Childhood: The Case of Kolfe and Semen Mazegaja, Addis Abeba', in *The World of Girls and Boys in Rural and Urban Ethiopia*, Poluha, Eva(ed), Forum for Social Studies (FSS), Addis Abeba, 2007, pp. 39-66.

Ahrne G, Svensson P, *Handbok i kvalitativa metoder* [Handbook in Qualitative Methods], Liber, Kina, 2015

Berhanu, Abeje 'Family Disorganization in Addis Abeba: Causes and Consequences', in *Journal of Ethiopian Studies, Vol. XLI, Nos. 1-2*, A. Yonas (ed), Institute of Ethiopian Studies Addis Abeba University, Addis Abeba, 2008, pp. 199-221.

Carlsson, Anki et al. *Vägen till familjeåterförening, nulägesrapport från arbetet med att återförena splittrade flyktingfamiljer*. Report from Sociala Missionen och Röda Korset. Stockholm, 2012.

Casey J, *Familjens historia*[The History of the Family], Studentlitteratur, Lund, 1993

Eastmond M, Åkesson L, 'Introduktion' in *Globala Familjer – Transnationell migration och släktskap* [Global Families - Transnational Migration and Kinship], Eastmond M, Åkesson L(eds), Gidlunds Förlag, Riga, 2012, pp. 7-43

Erulkar, A S, *Ethiopia Gender Survey a Study in Seven Regions*, The Population Council and United Nations Population Fund, Addis Abeba, 2010

Fiseha A, Ynitso G, Azeze F, 'The State of Knowledge on Customary Dispute Resolution in Ethiopia' in *Customary Dispute Resolution Mechanisms in Ethiopia*, Ynitso G, Azeze F, Fiseha A(eds), the Ethiopian Arbitration and Conciliation Center, Addis Abeba, 2011, pp. 21-36

Glenn, H. Patrick. *Legal Traditions of the World*, Second edition, Oxford University Press, New York, 2004

Hathaway, J. C., *The Rights of Refugees Under International Law*, Cambridge University Press, New York, 2005

Henckaerts, Jean-Marie. *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*. International Review of the Red Cross, Volume 87 Number 857 March 2005.

Lundberg, Anna 'Inledning och introduction till internationell rätt', in *Mänskliga rättigheter – juridiska perspektiv*, Lundberg, Anna(ed), Liber AB, Sahara printing, Egypten 2010, pp 9-47

Lundberg, A, Hellström, K, Hökfelt, E. 'Rätten till familj', in *Mänskliga rättigheter – juridiska perspektiv*, Lundberg, Anna(ed), Liber AB, Sahara printing, Egypten 2010, pp 321 – 335

Meyer, L.H, Sanklecha, P. 'Introduction: Legitimacy, justice and public international law. Three perspectives on the debate', in *Legitimacy, Justice and Public International Law*, Meyer, L.H.(ed), Cambridge University Press, New York, 2010, pp. 1-28

Poluha, Eva 'Research on Ethiopian Children, Subjects Covered and Possible New Themes', in *The World of Girls and Boys in Rural and Urban Ethiopia*, Poluha, Eva(ed), Forum for Social Studies (FSS), Addis Abeba, 2007, pp. 181-211

Smith, K.M. Rhona. *Textbook on International Human Rights*, Oxford University Press, New York 2010

Stern, R, 'Migrationsrätt' in *Mänskliga rättigheter – juridiska perspektiv*, Lundberg, Anna(ed), Liber AB, Sahara printing, Egypten 2010, pp 293-320

Strömberg, Tore. *Rättsfilosofins historia i huvuddrag* [Main Historical Features of Legal Philosophy], tredje upplagan, Studentlitteratur, Lund 2009

Sundquist Anders et al. *Familjeåterförening, en (o)möjlighet?*, nulägesrapport 2013. Report by: Rädda Barnen, Rådgivningsbyrån, Sociala Missionen, Röda Korset. Stockholm 2013.

Wendirad, Ameha, *An Overview of the Ethiopian Legal System*, published in NZACL, August 2013

Wiesbrock, A., *Legal Migration to the European Union - Immigration and Asylum Law and Policy in Europe*, Martinus Nijhoff Publishers, Leiden, Netherlands, 2010

Ynitso G, Fiseha A, Azeze F, 'Introduction – Customary/Alternative Laws: Values, Practices and Legality' in *Customary Dispute Resolution Mechanisms in Ethiopia, Volume II*, Ynitso G, Azeze F, Fiseha A(eds), the Ethiopian Arbitration and Conciliation Center, Addis Abeba, 2012, pp. 25-48

Zezelew M, Madda M, 'Customary Dispute Resolution in Addis Abeba: The Case of Merkato' in *Grassroots Justice in Ethiopia. The Contribution of Customary Dispute Resolution*, Pankhurst A, Assefa G(eds), French Center of Ethiopian Studies, 2008, pp. 249-256

Zweigert, K., Kötz, H., *An Introduction to Comparative Law*, third edition, Oxford University Press and J. C. B. Mohr (Paul Siebeck), New York, 2011

Web pages

Landguiden, *Djibouti, seder och bruk*,

<http://www.landguiden.se/Lander/Afrika/Djibouti/Seder%20och%20bruk> accessed

February 27th 2016

Landguiden, *Etiopien, politiskt system,*

<http://www.landguiden.se/Lander/Afrika/Etiopien/Politiskt-System> accessed February 27th 2016

Landguiden, *Etiopien, religion,*

<http://www.landguiden.se/Lander/Afrika/Etiopien/Religion> , accessed February 27th 2016

Landguiden, *Sverige,*

<http://www.landguiden.se/Lander/Europa/Sverige> accessed February 27th 2016

Landguiden, *Sverige, religion*

<http://www.landguiden.se/Lander/Europa/Sverige/Religion> accessed February 27th 2016

Migrationsinfo, *asylsökande i Sverige,*

<http://www.migrationsinfo.se/migration/sverige/asylsokande/> , accessed February 27th 2016

OHCHR, *What are Human Rights,*

<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> , accessed February 26th 2016

Regeringen.se, *Regeringen föreslår åtgärder för att skapa andrum för svenskt flyktingmottagande,*

<http://www.regeringen.se/artiklar/2015/11/regeringen-foreslar-atgarder-for-att-skapa-andrum-for-svenskt-flyktingmottagande/> , accessed February 28th 2016

Reporters without Borders, *2015 Press Freedom Index,* <https://index.rsf.org/#/> accessed February 27th 2016

SCB, *barn och familjestatistik,* http://www.scb.se/sv/_Hitta-statistik/Statistik-efter-amne/Levnadsforhallanden/Levnadsforhallanden/Barn--och-familjestatistik/15659/15666/Behallare-for-Press/Barn--och-familjestatistik1/ ,

accessed February 28th 2016

SCB, *number of households by type of households*, http://www.scb.se/en/_Finding-statistics/Statistics-by-subject-area/Household-finances/Income-and-income-distribution/Households-finances/Aktuell-Pong/7296/Households/163554/ , accessed February 28th 2016

UNHCR data, <http://data.unhcr.org/mediterranean/regional.php>, accessed December 14th 2015.

UNHCR, *2015 Country Operations Profile – Ethiopia*
<http://www.unhcr.org/pages/49e483986.html> , accessed February 27th 2016

Worldbank, *Poverty and Equity, Country dashboard, Ethiopia*
<http://povertydata.worldbank.org/poverty/country/ETH> , accessed February 27th 2016

Reports

Familj, civilstånd och sammanboende Terminologi och definitioner

Family, Marital status and Consensual Union Terms and definitions, Reports on Statistical Co-ordination for the Official Statistics of Sweden 1999:1, available at http://www.scb.se/grupp/hitta_statistik/forsta_statistik/metod/_dokument/mis19991familj.pdf

Families in exile: reflections from the experience of UNHCR, Vienna : United Nations, 1995. Occasional papers series (United Nations); no. 17 1995.

“Förändringar av traditioner rörande vårdnadsfrågor bland somalier i Etiopien”
Sveriges Ambassad i Addis Abeba, Stockholm : UD, 2009-06-25 accessible at lifos.migrationsverket.se, document no 21146

Äktenskap samt vårdnad av barn, Rapport från utredningsresa 27 februari – 12 mars 2009 till Hargeisa och Nairobi, accessible at lifos.migrationsverket.se, Document no 15-2009-3380

Swedish governmental prints

SOU 2005:15. *Familjeåterförening och fri rörlighet för tredjelandsmedborgare*[Family Reunification and Free movement for Third Country Nationals], Delbetänkande av utredningen om uppehållstillstånd för familjeåterförening och för varaktigt bosatta tredjelandsmedborgare

SOU 2005:103. *Anhörigåterförening*[Family Reunification], Slutbetänkande av Utredning om uppehållstillstånd för familjeåterförening och varaktigt bosatta tredjelandsmedborgare