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# Defining the Family

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It would be ignorant to claim that the perfect family exists. Despite many similarities, no two families are the same. There is no accepted definition of what a ‘family’ is. Herring states, “family law is usually seen as the law governing the relationships between children and parents, and between adults in close emotional relationships”.<sup>1</sup> A defined ‘family’ is difficult to determine due to the subjective opinions of what the ‘ideal family’ is. Following the *Human Rights Act 1998* (HRA), the importance of ‘right to family’<sup>2</sup> has led to much legal significance in determining the definition of the legal family.<sup>3</sup> This essay will discuss in turn the theoretical approaches used to define the legal family, an analysis of cases regarding the courts approach, and an evaluation of the cases using the theoretical approaches previously discussed, ultimately concluding that a functionalist approach, in addition to judicial discretionary factors are the best criteria to define the legal family.

## 1. Theoretical Approaches

### (a) The functionalist Approach

There is no clear way to approach family law; therefore, there has been much debate over how to assess it.<sup>4</sup> The first approach to consider is a *functionalist* approach (functionalism). This approach is based on common sense and assesses family law by how well it succeeds in fulfilling its goals.<sup>5</sup> Eekelaar<sup>6</sup> states that family law seeks to fulfil three basic goals: (i) Protective – shielding family members from emotional, physical, and economic harm, (ii) Adjustive – aid broken families to adjusting to new lives, and (iii) Supportive – to support and encourage familial lifestyles.<sup>7</sup>

The functionalist approach has been criticised for being too narrow in scope. First, the law rarely has one identifiable goal to be achieved. For example, the *Family Law Act 1996* was an attempt to protect the institution of marriage while decreasing the difficulty of the divorce procedure.<sup>8</sup> These goals are contradictory in nature, therefore the success of the law is difficult to determine. Second, family life is rarely conducted by way of the law.<sup>9</sup> The national divorce rate may drop, yet this could be mostly due to the drop in marriages opposed to a change in the divorce procedure.<sup>10</sup> There is also the potential of pursuing the wrong goal and overlooking what the law does not regulate.<sup>11</sup>

The advantage that functionalism maintains is its ability to use ‘rules’. Eekelaar<sup>12</sup> discusses the impact that a particular era in society has on our approaches to law. The more formal our culture is currently, then the more likely our legal approaches will be based in functionalism. John Dewar has added that the more ‘chaotic’ the era of society we are in, results in a more discretionary approach.<sup>13</sup>

Considering the subjective nature of determining a ‘legal function’ (i.e. one family may view the importance of family life to be on the marriage between husband and wife; and another family may view the importance to be on the happiness of the children), when approaching

<sup>1</sup>Herring, J. (2017). *Family Law* Seventh. Harlow, United Kingdom: Pearson. Pg.16

<sup>2</sup> Human Rights Act 1998, article 8

<sup>3</sup> Herring, J. (2017). *Family Law* Seventh. Harlow: Pearson. Pg. 2

<sup>4</sup> Ibid, Pg. 17

<sup>5</sup> Ibid

<sup>6</sup> Eekelaar, J. 2006. *Family law and personal life*. Oxford: Oxford University Press. Chapter 6

<sup>7</sup> Herring, J. (2017). *Family Law* Seventh. Harlow, United Kingdom: Pearson Pg. 17

<sup>8</sup> Family Law Act 1996, s 1

<sup>9</sup> Herring, J. (2017). *Family Law* Seventh. Harlow, United Kingdom: Pearson Pg. 17

<sup>10</sup> Trinder, L. (2015). *In anticipation of a temporary blip: Would a change in the divorce law increase the divorce rate?* LexisNexis. [Online]. [Accessed 19 March 2018]. Available from:

<[http://www.familylaw.co.uk/news\\_and\\_comment/in-anticipation-of-a-temporary-blip-would-a-change-in-the-divorce-law-increase-the-divorce-rate#.WqfNZ2aPnq2](http://www.familylaw.co.uk/news_and_comment/in-anticipation-of-a-temporary-blip-would-a-change-in-the-divorce-law-increase-the-divorce-rate#.WqfNZ2aPnq2)>

<sup>11</sup> Herring, J. (2017). *Family Law* Seventh. Harlow, United Kingdom: Pearson Pg. 17

<sup>12</sup> Eekelaar, J. 2006. *Family law and personal life*. Oxford: Oxford University Press. Chapter 6

<sup>13</sup> Dewar, J. 1998. *The Normal Chaos of Family Law*. *Modern Law Review* 467

individual cases an examination of the *formalistic* definition is necessary. The formalist definition focuses on the objective traits that individuals and a family maintain (ex. is a couple legally married, do they have children, how long have they been together, etc.).<sup>14</sup> Taking a formalist approach in addition to considering the goal (functionalism) in which the parties and legal principle aim to achieve would be the most accurate method of defining the legal family.

## (b) Feminist Perspectives

Even in modern society, there remains an unfortunate amount of inequality amongst men and women. In 2009, the hourly pay gap between men and women who work fulltime was 12.2 per cent.<sup>15</sup> Despite the fact that the law may imagine that the two guardians have equality with parental rights and duties, in actuality, women complete most assignments of parenthood. So it is contended, the lawful picture of parental parts does not coordinate the truth.<sup>16</sup> At the core of women's activist methodologies is the thought of how the law impacts on the two men and women; specifically how the law is and has been utilized to empower men to exercise control over women (ex. domestic violence). Feminism aims to change the unfairness of the law and this reasoning is categorized by focusing on individual rights as 'male' and undermining the values of women (such as relationships)<sup>17</sup>.

There are two most common forms of feminist perspectives: (i) feminism of equality, and (ii) feminism of difference. Feminism of equality argues that women and men should be treated identically. This might work to the disadvantage of women who do not want to enter the workforce but want to focus on child and homecare. Herring argues that middle-class women have only felt able to go into the workforce if they employ other women to look after the home and children.<sup>18</sup> Feminism of difference proposes that we need to ensure that childcare is valued and compensated for those who carry it out.<sup>19</sup> Although Herring states that "by stressing difference, it can be seen as exuberating and reinforcing the traditional roles that men and women have, therefore limiting options for women".<sup>20</sup>

The difficulty with using feminist perspectives to define the legal family is its exclusivity. As discussed in cases below, a lot of issues relating to the definition of a legal family have had to do with same-sex couples. Therefore, it is illogical to apply the criteria of feminism to define the legal family due to its inability to apply to male same-sex couples.

## (c) Rights Based Approach

With the integration of the 'right to life'<sup>21</sup>, family members are now claiming cases that this right has been breached in opposition of the European Court of Human Rights (ECHR). Cases can be brought in for 'absolute' or 'conditional' rights. Articles contained within the *Human Rights Act*<sup>22</sup> (HRA) can be; absolute rights – such as the right to not be held in slavery<sup>23</sup> - cannot be infringed upon. Or conditional rights – specifically the right to 'family life'<sup>24</sup> – that can be infringed if there is good reason.

<sup>14</sup> Herring, J. (2017) *Family Law* Seventh ed. Harlow, United Kingdom: Pearson. Pg. 17

<sup>15</sup> Holdsworth, C. 'Patterns of Pay: Results of the Annual Survey of Hours and Earnings 1997 to 2009', Office for National statistics, published 26 February 2010, available: <<http://www.statistics.gov.uk/cci/article.asp?ID=2370>>

<sup>16</sup> Wallbank, J. (2009) '(En)Gendering the fusion of rights and responsibilities in the law of contact', in J. Wallbank, S. Choudhry and J. Herring (eds) *Rights, Gender and Family Law*, Abingdon: Routledge. Pg. 27

<sup>17</sup> Gilligan, C. (1982) *In a Different Voice*, London: Harvard University Press.

<sup>18</sup> Herring, J. (2017). *Family Law* Seventh. Harlow, United Kingdom: Pearson Pg. 18

<sup>19</sup> Laufer-Ukeles, P. (2008) 'Selective recognition of gender difference in the law: revaluing the caretaker role', *Harvard Journal of Law and Gender* 31:1.

<sup>20</sup> Herring, J. (2017). *Family Law* Seventh. Harlow, United Kingdom: Pearson Pg. 18

<sup>21</sup> Human Rights Act 1998, article 8

<sup>22</sup> Human Rights Act 1998

<sup>23</sup> *Ibid*, article 4 (1)

<sup>24</sup> *Ibid*, article 8

The benefits to the rights-based approach relate to the attention each case is given. There are debatably less judicial biases as the judgements for each case are open to scrutiny and the judiciary's reasoning must set out the rights of each party. This approach applies more balancing of both children and parental rights; therefore, it is arguably better than the 'welfare principle'<sup>25</sup> as the children's rights do not automatically override parents. Although, a departure from the 'welfare principle' into a more rights-based approach could result in a child's rights being less protected.<sup>26</sup>

There is criticism that the rights-based approach considers every party as an individual (i.e. my right, your right etc.) rather than as a collective whole. Treating parties separately rather than interconnected is arguably not as helpfully because in reality family life is linked. Another issue with this approach is that there is often a 'clashing' of competing rights between parties. Rights can mean many things to many people; therefore, it is difficult to attach a precise meaning, which results in unsolved cases and people 'questioning the utility of the rights-based approach'.<sup>27</sup>

## 2. Judicial Approaches

The definition of a 'family' can be debated amongst members of the public and academia, but when it comes to judicial matters the importance of what is considered a 'family' – particularly when a loved one has become deceased - cannot be overstated. In *Brock v Wollams*<sup>28</sup> the 'ordinary person' test was considered as such: "would an ordinary person, addressing his mind to the question whether the defendant was a member of the family, have answered yes or no".<sup>29</sup> In 1950, it was stated in *Gammans v Ekins*<sup>30</sup> that, "two people masquerading as these two were husband and wife, that they were members of the same family", yet the law has since moved on from this view. The law went a step further (and disapproved the rationale of *Gammans*) in *Dyson Holdings Ltd v Fox*<sup>31</sup> where the defendant (who was unmarried with no children), had lived with the tenant for 21 years until his death. Lord Denning stated, "The popular meaning given to the word 'family' is not fixed once and for all time. The cases reveal that it is not restricted to blood relationships and those created by the marriage ceremony".<sup>32</sup>

The principle determined in *Dyson* was then considered in the crucial case of *Fitzpatrick v Sterling Housing Association*.<sup>33</sup> In this case, Mr. Fitzpatrick was arguing for statutory tenancy as a spouse of Mr. Thompson (the deceased) since they had been living together in a homosexual relationship for a period of 18 years. At the time of this case the *Rent Act*<sup>34</sup> had only been applicable to a husband and wife, therefore the question at hand was if it could be applicable to people in same-sex relationships. The decision was ruled in favour of Mr. Fitzpatrick in a 3/2 majority that followed the principle in *Dyson* that the meaning of family is not restricted to people linked by marriage or blood.

The Lords in favour of the decision emphasised three main components: (i) that the hallmarks of family life were 'that there should be a degree of mutual inter-dependence, sharing of lives, caring and love, or commitment and support'<sup>35</sup>, (ii) that the legislation passed by Parliament may be interpreted to the scenario if there is a purpose to do so<sup>36</sup>, and (iii) that a sexual element is important if a distinction was to be drawn between families and acquaintances<sup>37</sup>. Herring

<sup>25</sup> "The Welfare Principle in Family Law." *InBrief.co.uk*, available: <[www.inbrief.co.uk/child-law/welfare-principle-in-family-law/](http://www.inbrief.co.uk/child-law/welfare-principle-in-family-law/)>. Defines it as: "the proceedings relating to a child's upbringing or the administration of the child's property... the court's paramount considerations shall lie within the welfare of the child".

<sup>26</sup> Eekelaar, J. *Family Law and Personal Life*. Oxford University Press, 2017 Pg. 27

<sup>27</sup> Choudhry, S. 2009. Chapter 3 *In: Human rights and family law*. Oxford: Hart, p. 117.

<sup>28</sup> [1949] 2 KB 388, see para 19 below for a brief description of this case facts

<sup>29</sup> *Ibid*, Cohen LJ at Pg. 395

<sup>30</sup> [1950] 1 FCR 21

<sup>31</sup> [1976] QB 503, [1975] EWCA Civ 8

<sup>32</sup> *Ibid*, Denning LJ at Pg. 396

<sup>33</sup> [2000] 1 FCR 21

<sup>34</sup> Rent Act 1977

<sup>35</sup> [2000] 1 FCR 21, per Lord Slynn

<sup>36</sup> *Ibid*, per Lord Nicholls

<sup>37</sup> *Ibid*, per Lord Clyde

summarizes those in dissent of the judgement, “that the paradigm of the family was a legal relationship (e.g. marriage or adoption) or by blood (e.g. parent or child). As the couple did not fall into these definitions, nor did they mirror them, they could not be regarded as family”.<sup>38</sup>

Herring also notes that the Lords in favour of the decision responded to the dissent with the proposition that Parliament should consider reforming the law to incorporate same-sex relationships.<sup>39</sup> This arises an interesting situation because at the time of *Fitzpatrick*, civil partnerships were not available between same-sex couples, therefore a common combat against the *Rent Act* was that the couple was not married simply because they were not allowed to be married. This is could be considered a double-edged sword in this case because if Mr. Fitzpatrick and Mr. Thompson were able to be in a civil partnership but choose not to then it could have tipped the decision.

In *Ghaidan v Godin-Mendoza*<sup>40</sup> another same-sex couple who had been together for several years attempted to argue that Para 2 (2) of schedule 1 to the *Rent Act*<sup>41</sup> had to be re-interpreted in accordance with the integration of the HRA.<sup>42</sup> The House of Lords concluded that paragraph 2 did violate the HRA and that there was no justification for the treatment of heterosexual and same-sex couples. The interpretation was to read ‘as if her or she were his wife or husband’ and ruled that this would apply to long-term same-sex partners.<sup>43</sup>

Blakeley has identified that the problem in *Ghaidan* is the ‘lack of explicit factual reasoning given from the Lords in majority’.<sup>44</sup> Lord Millet’s dissent identifies that the judiciary does hold the power to interpret section 3 of the HRA into statutes without going against what Parliament had intended.<sup>45</sup> However, Marshall has stated that, “when exercising the section 3 obligation, the courts should not always find an interpretation consistent with the Convention, for to do so is to hypothesise that all statutory restrictions on rights are inadvertent”.<sup>46</sup> Therefore the judiciary should be thorough in their judgements when exercising their interpretations.

As discussed above, the definition of a ‘family’ has been determined through case law to not be restricted to those who are related by blood or married, but also incorporates those who have demonstrated a close relationship to each other. This has been found to apply to adoptive parents and their adopted child<sup>47</sup>, in addition to a foster child and their foster children.<sup>48</sup> In the case of *G v Netherlands*<sup>49</sup> a man who donated his sperm was not considered ‘family’ to the resulting child. *Nutting v Southern Housing Group*<sup>50</sup> concluded that the amount of ‘permanence’ that a relationship has had in the past and going forward, will also be a proving factor in determining a ‘family’. Therefore, it can be concluded that when determining a ‘family’, the judiciary tends to follow a functionalist approach because its aims are to protect, adjust, and support those who are involved, in addition to formalist analysis of the case at hand.

### 3. Criteria

The functionalist approach was first applied in *Brock v Wollams* when a woman who had been informally adopted was deemed as a member of her late father’s family despite the absence of

<sup>38</sup> Herring, J. (2017). *Family Law* Seventh. Harlow, United Kingdom: Pearson. Pg. 6

<sup>39</sup> Ibid

<sup>40</sup> [2004] UKHL 30

<sup>41</sup> [1977] states: ‘as if her or she were his wife or husband’.

<sup>42</sup> Human Rights Act 1998

<sup>43</sup> This decision was confirmed in *Telfer v Kellock* [2004] SLT 1290 (OH)

<sup>44</sup> Blakeley, R. *Counting Sheep: Ghaidan v Godin-Mendoza and the true extent of section 3 of the Human Rights Act* [Cambridge Student Law Review 2005]

<sup>45</sup> Ibid

<sup>46</sup> Marshall, G. ‘The lynchpin of Parliamentary Intention: Lost, Stolen or Strained’ [2003] PL 236, at pg. 243

<sup>47</sup> X v France Application No 9993/82 [1982] DR 241

<sup>48</sup> X v Switzerland Application No 8257/78 [1978] 13 DR 248

<sup>49</sup> [1990] 16 EHRR 38

<sup>50</sup> [2004] EWHC 2982

any formal legal adoption. The use of the ordinary person test in this case shows flexibility from the courts when defining “family” and a shift to function rather than merely form. However, Brock concerned a child of the family, so children were still a defining factor, which suggests some use of a formalist approach remaining.

The ordinary person test had shifted to include a cohabiting couple without children in *Dyson Holdings Ltd v Fox*. The functionalist approach allowed for judicial discretion and flexibility to adapt to changing societal norms and the ordinary notion of family.

In *Fitzpatrick v Sterling Housing Association*, although the judges in the House of Lords did not take a functionalist approach to the definition of the term “spouse”, rejecting the possibility that it could apply to same sex couples, the majority employed the functional approach as to whether Fitzpatrick was a “family member”. Again, the ordinary person test was the criteria used to determine “family” and the ordinary meaning had altered once more following changes within society. Nevertheless, the judgement meant that same sex claimants could only succeed if deemed by the court to be a member of the tenant’s “family”, whereas opposite sex couples had the additional statutory definition of “spouse”.<sup>51</sup>

Further, now that civil partnerships are available for same-sex couples, many individual case outcomes will be decided based upon the discretion of the judiciary. This is due to the fact that if a couple is looking to be defined a “family” and is not married or within a civil partnership, then the judiciary would likely determine them not to be considered a family because they are acting against *ex concessis*<sup>52</sup>. Other formalistic factors that the judiciary could consider would be the length of time of which the couple was together (i.e. if a couple was not married but together for 30 years; the judiciary may be more likely to define them as a family) or the addition of children between the couple.

Many cases discussed have not only show the complexity of family life, but also the profound impact that it has to be legally recognised as one. Unfortunately, same-sex couples were not offered that recognition until recently. After analysis of the main approaches to defining a legal family, it is clear in some areas they strive to protect the rights of some groups, but neglect needs of others. The functionalist approach would remain the most adequate method for defining a “family” because its goal can be applicable to all shapes and sizes of families. This approach does not exclude any particular group from its approach because the goals of protection, adjusting, and support is the same for both same-sex and other married couples. The addition of the HRA in *Ghaidan* adds a further approach to aid the continually shifting notion of “family”. Therefore, functionality is the best approach used to define the legal family, alongside formalistic and rights-based factors where necessary.

<sup>51</sup> This discrimination was addressed in *Ghaidan*

<sup>52</sup> Defined as: In view of what has already been accepted... In this case, couples in civil partnerships are now considered a family.

