Routledge International Handbook of Children’s Rights Studies

Wouter Vandenhole, Ellen Desmet, Didier Reynaert, Sara Lembrechts

The human rights of children in the context of formal alternative care

Publication details
https://www.routledgehandbooks.com/doi/10.4324/9781315769530.ch15
Nigel Cantwell
Published online on: 27 Mar 2015

https://www.routledgehandbooks.com/doi/10.4324/9781315769530.ch15

PLEASE SCROLL DOWN FOR DOCUMENT

Full terms and conditions of use: https://www.routledgehandbooks.com/legal-notices/terms

This Document PDF may be used for research, teaching and private study purposes. Any substantial or systematic reproductions, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The publisher shall not be liable for an loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.
The human rights of children in the context of formal alternative care

Nigel Cantwell

The alternative care of children comprises all measures taken, once a child cannot be looked after by his or her parents, for whatever reason. These measures may have to respond to anything from sudden emergencies and short- or medium-term incapacities of various kinds to more durable situations such as the death of the parents, the abandonment of the child or the definitive withdrawal of parental rights and responsibilities. This variety of circumstances and, consequently, of the aims and nature of a given placement indicates the complexities of providing suitable alternative care and, even more, doing so in compliance with the overall human rights of the child. The term “alternative care for children” should never mask the fact that what is at stake is the most appropriate care solution for each individual child.

In most countries, the great majority of alternative care for children in situations such as these is arranged on an informal basis. Members of the extended family or others in the community who are known to them take over day-to-day parental tasks for the time and to the degree required, with no outside decision-making involved and invariably no special supervision or support on the part of official services.

A smaller, but often significant, proportion of children deemed to need alternative care are subject to formal arrangements. Broadly, these are of two main kinds: family-based settings, such as foster care, and placements in residential facilities, ranging from small group homes to larger establishments. In these formal cases, the State – usually through its official services and sometimes in conjunction with the courts – has ultimate responsibility both for assessing the need for the placement and for ensuring the suitability and quality of the care provided.

It is important to note that legalised adoption is generally not viewed as a form of alternative care but rather as a potential outcome for children in formal or informal alternative care who will never be able to return to the care of their parents but could benefit from living in another “permanent” family. Thus, an adopted child is considered to be once again in (new) parental care, not in “alternative” care. At the same time, of course, there is such an intimate linkage between adoption and alternative care that reference to the former cannot be entirely dismissed from the discourse on alternative care measures themselves.

The alternative care (and adoption) of children is a sphere that crystallises, and creates much debate on, crucial issues regarding the realisation of a wide range of the human rights of children, as well as attitudes towards children themselves.
A key background feature to this debate is undoubtedly the particularly high significance of “localisation” factors, alluded to in the Introduction, for interpreting rights’ implications and how the best interests of the child are perceived (Bessell and Gal, 2008). Every society has developed its own informal ways of responding to children without parental care, with social and religious tenets often influencing how that care can or cannot be envisaged in practice. Those same tenets, together with historical, political and economic factors, have also determined the way that formal alternative care has come to be organised in each society, resulting in what are now vastly divergent systems throughout the world. Similarly, both informal and formal care provision reflect diverse “child images” (Bessell and Gal, 2008) – though too often the image of total dependency and of needs limited to little more than basic survival – not to mention discriminatory images of specific groups, such as children with disabilities and those of ethnic minorities. Consequently, and notwithstanding what might generally be promoted as “good” or qualified as “bad” practices, context-specific considerations are particularly vital in the field of alternative care, meaning that a constructively critical review of global conventional wisdom on children’s rights is necessary if those rights are to be seen as relevant and applicable in each situation.

This chapter therefore first looks at how the rights of the child “in relation to formal alternative care” (i.e. not only regarding the provision of alternative care but also through explicit recognition of the need to prevent recourse to it) have evolved. It then considers in more detail what efforts are to be made before formal alternative care can be seen as justified from a children’s rights standpoint and, from that same perspective, what factors might determine the degree to which such care provision is acceptable once it is shown to be necessary. In so doing, it seeks to give examples of how practice and approaches vary widely, and often reflect different images of the child, but should be seen in a broader context before they are assessed and reacted to in the light of children’s rights criteria. It concludes by pointing to a number of issues that need to be tackled – or at least to be tackled differently – in order to enhance respect in practice for the human rights of children in this sphere.

1. Changing approaches, developing standards

It is instructive to review briefly how alternative care has been broached in international human rights instruments over the course of time. As in other spheres, these instruments trace a gradual move away from considering the child purely as a vulnerable being in need of protection to someone who is a member of a family and community and who, in particular, must be consulted and involved in decisions about, in this instance, by whom and where he or she wants to be cared for, and with what aim.

Initially, the focus was indeed a purely charitable one, limited to responding to the situation of parentless and destitute children. Thus, the first allusion to the question in an internationally approved text was a reference to “the orphan and the waif” who “must be sheltered and succoured” (League of Nations, 1924, Principle 2).

The subsequent 1959 UN Declaration of the Rights of the Child gave some needed perspective to the provision of alternative care by stipulating notably that “[the child] shall, wherever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother.” This Declaration noted that “society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support…” (United Nations, 1959, Principle 6). That provision expanded somewhat the range of situations in
which children might be seen as needing some form of alternative care provided by others — “without a family” is wider than “orphan” — and it introduced the concept of “duty”, stressing accountability as opposed to moral obligation. What was notably missing, from a rights standpoint, was any indication of the way in which provision of such “particular care” should be envisaged.

Subsequent general human rights instruments reinforced the “duty” aspect but also shed no light on what kinds of alternative care would be deemed acceptable. The only child-specific article of the 1966 International Covenant on Civil and Political Rights (ICCPR) notes the child’s right “to such measures of protection as are required of his status of minor, on the part of his family, society and the State” (Art. 24). For its part, Article 10(3) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) simply calls for “special measures of protection and assistance”.

These lacunae were tentatively addressed in broad terms by a far more focused UN text that followed in 1986: the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally (United Nations, 1986). The principles set out in this text, approved during the period when the 1989 Convention on the Rights of the Child (CRC) was being drafted, had a substantial influence on the way the relevant rights in that treaty were shaped. First, it states unequivocally that “[t]he first priority for a child is to be cared for by his or her own parents” (United Nations, 1986, Art. 3). Second, in comparison to previous instruments, it broadens considerably the scope of situations covered to comprise any child for whom parental care is “unavailable or inappropriate” (United Nations, 1986, Art. 4). Third, it refers for the first time to how alternative care is to be provided, strongly promoting recourse to family-based alternative care “by relatives of the child’s parents [or] by another substitute – foster or adoptive – family”, with placement in an “appropriate institution” only to be considered “if necessary” (United Nations, 1986, Art. 4), thereby establishing a first appreciation of the overall relative desirability of the different options. In addition, its Preamble recognises the role of ḥalala of Islamic law as an alternative care option, the very first mention of this measure in an international instrument. All of these elements find reflection in the CRC, as does, albeit on a more general level, the principle that, “as appropriate”, the child should be “involved” in all matters relating to a foster placement (United Nations, 1986, Art. 12), which clearly signalled a first step towards acceptance of a child’s agency rather than the child image founded essentially on protection needs.

At the same time, this Declaration inadvertently introduced a degree of confusion into the debate, not least by dealing with a single form of alternative care – foster care – alongside a potential outcome of such care, adoption. This confusion was unfortunately maintained in the CRC (Art. 20.3). In contrast, the 1986 Declaration diverges from the CRC by making a clear distinction between parental care and care within the child’s wider family, since it groups “relatives of the child’s parents” with “another substitute – foster or adoptive – family” (United Nations, 1986, Art. 4) rather than espousing the overall notion of “family environment” that, as noted below, characterises the approach in Article 20.1 of the CRC. The latter’s implicit – though only implicit – recognition of the importance of the informal role of the extended family in providing alternative care in most societies is more in line with context-specific interpretations. It also shores up the child’s right to live in his or her “family environment” as the first option wherever possible, and can thus be viewed as constituting grounds for efforts to minimise recourse to formal extra-familial placements.

Otherwise, the CRC essentially reinforces the various recommended thrusts of the 1986 Declaration in binding form. It sets great store in upholding the child’s right “as far as possible
to know and be cared for by his or her parents” (Art. 7.1) and obligates States Parties to take a variety of measures designed to enable this. It stipulates in essence that alternative care must be foreseen for any child who is “temporarily or permanently deprived of his or her family environment” or “cannot be allowed to remain” there, and gives non-exclusive examples of such care as being “foster placement, _kafala_ of Islamic law, adoption or if necessary placement in suitable institutions…” (CRC, Art. 20). Through Article 12.2, it establishes the child’s right to be consulted in “any judicial and administrative proceedings affecting the child”, which obviously includes placement in formal alternative care. In addition, Article 20.3 requires that the “continuity of the child’s upbringing” and his or her cultural background be given due consideration in decision-making, which again might be seen, _inter alia_, as the implicit promotion of kinship care. The CRC also institutes a previously non-existent obligation to review the necessity and appropriateness of any placement on a regular basis (CRC, Art. 25), for which any changes in the family situation would be relevant. Interestingly, however, while the CRC indeed talks of the need for alternative care of children who cannot be in their “family environment” – a term clearly wider than “parental care” – it in fact makes no explicit reference to the role of the extended family as a provider of informal kinship care (their role as per Art. 5 of the CRC in providing “appropriate direction and guidance” for the child to exercise his/her rights cannot be interpreted _prima facie_ – or on the basis of the _Travaux préparatoires_ – as extending to this; Cantwell and Holzscheiter, 2008, pp. 32–36). This and certain other questions raised by the tenor of Article 20 of the CRC regarding the proper approach to alternative care are discussed later.

Notwithstanding the CRC, the lack of detailed and concrete internationally-agreed standards in this sphere led to a UNICEF-inspired initiative calling for the development of such an instrument. The result was the 2009 Guidelines for the Alternative Care of Children, which the UN General Assembly approved by consensus, that seek to build on the rights set out in the CRC and to give detailed policy indications on three main issues: how can recourse to alternative care be avoided, when should alternative care be deemed necessary and, in that case, how is an appropriate care setting to be ensured (United Nations, 2009).

The initial draft of the 2009 Guidelines was prepared by international NGOs and UNICEF, with numerous direct inputs from individual experts and young people with experience of alternative care, and finally negotiated with and among governmental representatives. As noted in the Guidelines themselves, they are designed to “[t]ake account of the developing knowledge and experience in this sphere” (United Nations, 2009, §2) and they indeed arguably constitute the best available compilation, and accessible synopsis, of state-of-the-art thinking and approaches to the promotion and protection of the human rights of “children who are deprived of parental care or who are at risk of being so” (United Nations, 2009, §1). Along with the CRC, these Guidelines naturally form the main backdrop to the issues reviewed in this chapter.

2. Necessity and suitability

The 2009 Guidelines contain a raft of recommended policy orientations directed towards family strengthening and support, underscoring the upstream linkage of the alternative care system with overall social and economic policy. It is not sufficient to foresee “quality care” as such; tackling the factors behind family breakdown is now an integral part of strategies on alternative care.

This implies efforts at both the macro level of primary prevention – ranging from providing access to basic services and social security through to combating societal problems such as
stigmatisation, discrimination and marginalisation – as well as targeted, secondary prevention measures to support families that are vulnerable or in crisis. It also involves setting limits on when “child protection” concerns should lead to decisions to withdraw a child from parental care: material poverty alone, for example, is no longer considered good cause to do so (United Nations, 2009, §15). This has given rise to the idea that placements in formal alternative care settings must conform to the “necessity principle”, i.e. they should not be ordered or allowed unless it is shown that, despite support, the child genuinely cannot be maintained in his or her family environment.¹

If recourse to formal alternative care is deemed necessary for a child, it must take place in an appropriate setting, in other words the concomitant “suitability principle” has to be respected. This principle is grounded in a variety of criteria involving both the setting’s compliance with the human rights of the child as a whole and its fitness to meet the specific needs of the individual child in question (Cantwell et al., 2012). It underpins a major aspect of current policy: the move towards deinstitutionalising the alternative care system, with a clear emphasis on promoting family-based or family-type settings where the child can forge a bond with surrogate parental figures. At the same time, the fundamental importance to be given to the child’s own family means that alternative care is seen primarily and ideally as a temporary measure, designed above all to look after a child until he or she can return to the family environment or, failing that, move to a “permanent” family setting such as through adoption (Human Rights Council, 2009, §II(13)).

This has challenging implications for the child protection system. It is often difficult, for example, to identify families that are both willing and able to look after children for undetermined but relatively short periods, providing care and affection without becoming overly-attached, as well as in many cases taking on the delicate task of ensuring constructive relations with the child’s parent(s). In addition, as discussed later, deinstitutionalisation is an objective that is by no means always shared, particularly (though by no means only) by private care providers running large residential facilities. But grosso modo, the quality of an alternative care system is currently assessed largely on the basis of its ability to plan for, and then put into practice under appropriate conditions, the child’s departure from it as soon as possible. The main exceptions to this will be the relatively small proportion of children who need long-term specialist treatment, those for whom neither return to the family nor adoption is feasible or desired, and those who freely express their preference to remain in their alternative care setting.

Two mechanisms are key to ensuring that both the necessity and suitability principles are adhered to and to safeguarding children’s rights when formal alternative care is envisaged or undertaken. The first is a “gatekeeping” body that is in a position to examine systematically whether all options have been pursued to avoid a formal care placement – which itself requires the existence of community-based support services – and determines which kind of care setting is likely to respond best to the individual child’s needs, characteristics and circumstances, in turn presupposing the availability of a range of settings from which to choose. The second is a placement review process that regularly evaluates both the continuing need for the placement in the light of any significant changes or in the family circumstances, and its on-going appropriateness for meeting the child’s specific (and potentially evolving) needs. Both mechanisms are notably to foresee full consultation with the child concerned before reaching decisions. According to the country situation, however, effective mechanisms of this kind are

¹ For a discussion of the principles of “necessity” and “suitability”, see Cantwell et al., 2012, pp. 22–23).
avowedly difficult to set in place, not only in terms of resource allocation as such but also in view of what may be only nominal implication of the State in alternative care provision.

All of these basic policy orientations seem clear and well-founded in rights considerations but, as in other spheres affecting children, there are dangers that they be taken as unassailable principles for blanket implementation and unquestioned watchwords for “best practice”. In line with the critical approach proposed in this Handbook, many deserve to be analysed in greater depth if responses to the alternative care needs of children are to correspond both to the fullest enjoyment of their human rights and to the realities in which that is to be effected. The range of issues that are pertinent to alternative care provision, as reflected in the wide scope of the 2009 Guidelines, clearly defies comprehensive examination here. The following pages focus on three key areas where it seems particularly important to emphasise context, dig deeper and potentially adopt a more nuanced approach:

1. The role of informal kinship care in preventing the need for formal placements
2. The limits of family-based formal alternative care
3. Strategies for deinstitutionalisation

3. Reducing recourse to placements in formal alternative care

As noted above, the State’s obligation to “ensure alternative care” (CRC, Art. 20.2) first implies primary and secondary prevention measures to enable the child to remain with his or her family wherever possible. These should include support for informal solutions as a means of avoiding the need for placements in formal alternative care. Indeed, in most countries, industrialised and developing alike, the great majority of children who are unable to live with their parents are cared for on an informal basis by relatives (kin) or, in some cases, close members of their community (United Nations, 2009, §18). At the same time, from a children’s rights standpoint, there remains both confusion and debate as to the role that the State might validly play regarding such informal arrangements, in terms of support, protection and making certain that the child agrees with the kind of arrangement offered.

3.1. The role and recognition of informal kinship care

The vital role played by kinship care is widely acknowledged. This is reflected, for example, in concerns expressed about the ramifications of the growing inability of such traditional coping mechanisms to cater to the needs of children who have lost one or both parents as a result of the AIDS pandemic, or in contexts where extended families are geographically separated due to younger members migrating to urban areas (Nyambedha et al., 2003). In a different vein, it is also demonstrated by the fact that statutory services in a number of countries, such as Australia and New Zealand, have been increasingly formalising kinship foster care arrangements instead of placing children in designated unrelated foster families (Boetto, 2010).

As intimated previously, States’ precise obligations under the CRC regarding recognition of, and support for, kinship care are quite difficult to discern. While the requirement to provide “special assistance and protection” kicks in when it is not viable that the child remains in his or her “family environment” (CRC, Art. 20.1), other assistance and protection demands of the State set out in the treaty refer not only to parents and family but also to others having legal or de facto responsibility for the child. Thus, among many examples, a child has the right, as far as possible, to know and be cared for by his or her parents (CRC, Art. 7.1) and States are to assist parents and legal guardians in their child-rearing responsibilities (CRC, Art. 18.2), whereas
the child’s right to benefit from social security may depend on the resources and circumstances of the persons having responsibility for the maintenance of the child (CRC, Art. 26) and the parents or others responsible for the child have primary responsibility to provide appropriate conditions of living, with the State obligated to assist them, where necessary, to implement that right (CRC, Arts. 27.2 and 27.3).

Against that background, the 2009 Guidelines make a special effort both to recognise the role played by kinship care and other informal traditional arrangements, and to set out the kinds of support that States should grant to those caring for a child in this way (United Nations, 2009). There is, however, a palpable – and somewhat understandable – tension in the document regarding the level and form of State intervention that would be both warranted and acceptable in what is essentially viewed as a “private” sphere. While informal coping mechanisms should be “respected and promoted to the extent that they can be shown to be consistent with the children’s rights and best interests” (United Nations, 2009, §75), at the same time “special and appropriate measures designed to protect children in informal care” (United Nations, 2009, §79) are to be devised.

Among the identified advantages of kinship care are: preservation of the child’s family, community and cultural ties; avoidance of trauma resulting from moving in with strangers; and less likelihood of multiple placements. However, kinship or friendship is no guarantee of welfare, protection and ability to cope. Although “available research suggests that most children are at least as safe in kinship care as they are in non-relative foster-care” (National Resource Center for Foster Care and Permanency Planning, 1995, p. 83), this means that a minority are not, and “some relatives may be abusive or neglectful toward the children because they come from the same ‘troubled’ family” (National Resource Center for Foster Care and Permanency Planning, p. 5). Other identified risk factors and problems associated with this form of care include: children being less likely to receive services than in non-kin foster care; relatives unable to access services and support available to formal foster carers; and risk of intra-familial conflict over the division of responsibilities and decision-making powers. Further, if kinship care is formalised or carers receive special allowances, there may be financial disincentives to returning the child to parental care.

Taking account of these issues and making certain that kinship care takes place in positive conditions of course poses numerous practical problems. In most countries, State resources are vastly inadequate for ensuring protective support and supervision in informal kinship care, especially where such arrangements carry known risks yet are fully accepted by the communities concerned. In addition, resources made available through foreign donors are invariably devoted to the development of formalised care provision, which only tends to weaken the kinship care option.

Overall, the protection of children’s rights through and in kinship care starkly highlights – even in industrialised countries – the difficult relationship between customary coping mechanisms and duties of the State, all the more so in that State obligations in this case are not fully clarified in the CRC.

---

2 Notably § 75, 76–79 and § 18.
3 Analogously, while it was agreed in discussions during the drafting of the 1993 Hague Convention on Intercountry Adoption that preference should normally be given to potential adopters who are family members, the treaty contains no dispensation from the normal vetting process in their respect.
4 These and other issues are discussed in National Resource Center for Foster Care and Permanency Planning (1995).
3.2. Child-headed households

If it had been finalised a few years later, the CRC might well have included explicit reference to child-headed households, as it does to child refugees and asylum seekers. Households composed of minor siblings and, in some cases, other children from the extended family or community, in the absence of available adult caregivers, are a long-standing phenomenon, particularly in Africa and Asia. However, child-headed households only captured international attention once the ramifications of the AIDS pandemic became clear in the late 1980s, subsequently reinforced by the consequences of events such as the genocide in Rwanda in the mid-1990s. This attention came too late for reflection in the CRC (Sloth-Nielsen, 2004, p. 6). As it stands, therefore, the CRC has had to be “interpreted” as regards State obligations to these households and the most appropriate response to the children concerned. The debate on these issues provided a particularly evocative example of the dispute between those espousing the “protective” approach to children’s rights, with the children concerned being seen solely through a vulnerability lens, and those more inclined towards a participatory perspective where children have agency and are recognised as being actors in the exercise of their rights (CRC, Art. 5) and involved in decision-making (CRC, Art. 12).

Not surprisingly, the immediate reaction – in the industrialised countries at least – tended to be “protective” and “paternalistic”: such households were “automatically […] judged as unacceptable” (Dube, 2011, p. 1). These children were without parental care and vulnerable to exploitation, with the household head taking on tasks and responsibilities incompatible with the status of “child”.

Gradually, however, “participation” issues began to prevail, as more attention was paid to the child’s “right to be heard” (CRC, Art. 12.2) and understanding increased of both the motives behind children’s choice of remaining together and the ways in which the support they required might be foreseen. Various studies documented their fears about being separated if taken into a formal care setting, being exploited if placed with extended family members, and losing the family house, land, and other possessions if they were moved elsewhere. At the same time, they complained of lacking resources, protection and guidance. Attention thus turned towards enhancing coping strategies and finding appropriate ways of satisfying those needs: taking these concerns into account, it could be posited that, from a children’s rights standpoint, these children were in a family environment and therefore eligible, as a family, for assistance and protection in situ from the State (Sloth-Nielsen, 2004, p. 5 ff).

South Africa played a key role in moving this second approach forward. Its Law Reform Commission decided to assimilate child-headed households with informal kinship care rather than looking at them as an “extraordinary” phenomenon by virtue of a child being responsible for the group (South African Law Reform Commission, 2002). It found that there was general agreement that child-headed households “have the advantage of enabling siblings to remain together and provide mutual support, while also providing for continuity of relationships with and support from their community” (South African Law Reform Commission, p. 561) as well as for their continued residence in their family home and control of family assets (Tolfree, 2004). The Commission proposed their legal recognition “as a placement option for orphaned children in need of care” (South African Law Reform Commission, 2002, p. 561) and consequently for provision to be made to ensure adequate supervision and support by persons or entities selected or approved by, and accountable to, an official body. This stand

informed the relevant provisions of the Children’s Act of 2005 and has had considerable impact on the way child-headed households are viewed globally today.

4. How should formal alternative care be provided?

Once the necessity of a formal alternative care placement has been demonstrated, a decision has to be made as to the care setting that should correspond best to the needs, situation and wishes of the child.

This last factor – the child’s wishes – is a nascent element in decision-making, growing in importance according to where and when the language of rights becomes more accepted by the alternative care system, but as yet is totally ignored by most. Given the wide variety of reasons for children coming into formal alternative care (from orphanhood and relinquishment through to maltreatment and poverty), the temporary or longer-term nature of the envisaged placement, and the fact that the latter may have been instigated by the family, offered by a facility or ordered by the competent authorities, it is unsurprising that children will express diverse expectations regarding their care environment – if they are invited to do so. Peterson-Badali et al. (2008), for example, have found that, as a group, “[c]hildren with histories of maltreatment who are living in care may find abuse and safety issues less salient than non-maltreated youth because they have already experienced violations of their rights to physical and emotional integrity…” (p. 114). Individual children within each group will also have differing concerns and priorities that should help determine the most appropriate care setting for them.

At a recent meeting, a workshop of young people with experience of out-of-home care characterised what children and young people are looking for in a placement as: “safety, stability and support”, in order to give them “a sense of confidence and security” (Quality in Alternative Care Conference, 2011). They thus implicitly recognised that settings have to differ and also may unavoidably change – not least as a result of the placement review process – but those realities should not in themselves constitute an obstacle to the child being able to benefit from “safety, stability and support” in each placement.

There is undoubtedly a need to look more closely at how well that vision corresponds to the ultimate goal of “permanency” that placements should be seeking to achieve according to the mission statement, or its policy equivalent, of most organised alternative care systems. As just one example:

Permanency is a priority area to provide stability for children and young people in care. Governments should provide all children with the right to a comprehensive range of permanency options, including adoption. Decisions about permanency should be made as soon as possible to provide the child/young person with a sense of belonging and security. Early decision-making is important to avoid deleterious delays in establishing permanency.

(Association of Children’s Welfare Agencies, n.d.)

“Planning for permanency”, through family reintegration or a durable (usually family-based) alternative, thus figures large in the 2009 Guidelines (United Nations, 2009, § 60–63). Of course permanency can be foreseen but never guaranteed. Up to 8% of children adopted from foster care in the USA “were placed out of the home after 4 years” (Child Welfare Information Gateway, 2012, p. 6). In the UK, it is estimated that breakdown rates for children adopted at age 6 or over are around 25%, and for those aged 1 to 5 years at adoption, the figure is 10% (UK Parliament, 2012). Concern is increasingly being voiced that the overriding quest for
“permanency” as such is leading to rushed decisions and undue pressures on all involved (families, social workers, courts and the child protection system as a whole), coupled with inadequate assistance in subsequently ensuring the viability of the “permanent” arrangement. Importantly, the call for permanency as the ultimate goal may detract attention from the more immediate goal of “safety, stability and support” through alternative care provision itself and its outcome.

In addition is the “wicked” problem that, as Bessell and Gal (2008, p. 283) point out, “[c]hildren in the care and protection system do not fare well on a range of indicators, when compared to the overall population”. Poor outcomes might be expected for young people leaving institutional care; in Russia according to a study cited by Holm-Hansen et al. (2003), for example, 20% resorted to crime, 14% ended up in prostitution and fully 10% committed suicide (p. 83). But in Scotland, children leaving the largely family-based formal alternative care system are at least ten times less likely to go on to higher education than their peers and in England and Wales, 11.5% of young offenders are, or have been, looked-after children (Scottish Government, 2014; Patel, 2004).

It follows that decisions on formal alternative care placements as a protection measure may respond to valid children’s rights concerns but can equally create children’s rights problems themselves, and these are not resolved simply by preferring family-based settings to residential care.

4.1. The promotion of formal family-based alternative care

While the development of foster care and similar family-based settings is a key thrust of initiatives to improve alternative care for children, in many societies taking an unrelated child into one’s home, whether on an informal or formal basis, is by no means an anodyne act. It may be, variously, culturally unacceptable, or subject to certain conditions, or generally undertaken for reasons likely to be incompatible with the aims of foster care or similar practices.

An assessment carried out in Syria, just prior to the outbreak of conflict there in 2011, showed that the way that certain religious tenets were interpreted and applied in that country meant that, in principle, fostering unrelated children is seen as counter to Islamic traditions and values (Cantwell and Jacomy-Vité, 2011). Only “foundlings” (babies or young children abandoned with complete anonymity) are entitled to family-based care, under the practice called el haq. Children who are orphaned, relinquished or deprived of parental care for other reasons have little prospect of living in a family-based setting unless they are taken in by the extended family (Cantwell and Jacomy-Vité, 2011). In other countries of Islamic Law, there can be more flexibility in this regard. In Sudan, for example, it has proved possible to set up programmes to identify, prepare and support families willing and able to provide alternative care on either an emergency or a more permanent basis, as well as for “specialist” care for children with special needs (UNICEF Sudan, 2007). Algeria has long recognised kafala for both orphans and children “abandoned” (not necessarily anonymously) and the kafil undertakes to care for the child as he would his own.

An (unpublished) assessment of the situation in Ghana by this author in 2013 provided only slightly more nuanced findings. Thus, in general, “stranger children” could and would be taken

---

6 The term “kafala” is a generic concept roughly equivalent to “sponsorship”. As applied to child protection in countries of Islamic law, the implications of this “sponsorship” vary significantly from one to another. Reference to kafala in the CRC and 2009 Guidelines is clearly intended to denote the child’s physical presence in the home of the (kafila) family concerned, and the latter’s responsibility for all aspects of his/her care and welfare on a day-to-day basis.
into a household, but invariably with the intention of creating a long-term relationship in the form of customary adoption. Not only does this mean that the notion of providing temporary foster care to “stranger children” has been virtually unknown, but also that, if the child proves “unsuitable” for any reason, care in the family will end. Alongside this practice, in significant parts of the country, women who inherit the title of, or are designated as, Queen Mothers shoulder responsibility for the care of unaccompanied children who arrive in a community from elsewhere, sometimes in their own home but more usually by placing them with other families – whose motives, it is sometimes alleged, lie more with a desire for domestic or other help than to fulfilling the child’s need for alternative care, but as yet there is no documented evidence in this respect.

Clearly, as internal migration to cities has increased in countries such as Ghana, the physical proximity of extended family members – and hence even affective links within families – has been eroded. Societies, communities and families that are otherwise used to relying on kinship responses to children’s needs in these situations are suddenly – within less than a generation – confronted with predicaments concerning their children that were previously almost unknown.

It is against such backdrops, where the significance of “localisation” in efforts to promote children’s rights seems crystal clear, that the almost unquestioned global effort to promote formal foster care has to be assessed.

Formal foster care is defined by the 2009 Guidelines as the placement of children by social services with families that are “selected, qualified, approved and supervised” to look after them for the period required (United Nations, 2009, § 29.c.ii). It is widely considered to be the preferred form of alternative care if informal kinship care is unavailable or inappropriate.

Without putting it into doubt as such, this standpoint has to be examined more closely. Over and above obstacles to caring for “stranger children”, the elements of the above-quoted definition (“selected, qualified, approved and supervised”) are particularly important: setting up and maintaining a functional foster care system requires considerable investment and expertise for ensuring that carers are selected on the basis of recognised criteria and then validly “supervised” – a term that can be taken to include support – during placements. Matching for each placement must be ensured, so that the capacities of the carers can be determined as meeting the needs of the child. Serial and destructive foster placements are indicative both of a policy imperative that family-based alternative care be prioritised in all cases, regardless of a child’s needs and characteristics, as well as of inadequacies in the matching and support processes.

Foster care demands an unusual level of commitment, flexibility and professionalism, usually including the willingness and ability to engage positively with a child’s parent(s) with a view to family reintegration. This means that the potential pool of foster carers may be small as compared with the perceived need: a government-backed recruiting drive in Britain in 2000, for example, reportedly resulted in just 1,000 applications compared with a target of 7,000 (McVeigh, 2001). Reliance on a formal foster-care system can become exaggerated, especially in the context of moves towards deinstitutionalisation. One result can be the recruitment of insufficiently prepared and supported foster carers, another the over-burdening of existing foster carers.

Countries considering the establishment or development of formal foster care clearly need to be made aware of the dangers of pinning their hopes significantly on this system. The resource and other implications of ensuring its operation in accordance with international standards and the protection of children’s rights are very considerable, as are the risks for children of not doing so. These considerations must never be marginalised in the “rights-based” promotion of family-based alternative care.
4.2. Deinstitutionalisation

The only explicit example of non-family-based care given in both the 1986 Declaration and the CRC is an appropriate or suitable “institution”. This has to some extent fuelled an unhelpful and unwarranted amalgam between residential care and institutional placements, where anything other than a family-based care setting tends to be unjustifiably decried, not to say demonised.

The 2009 Guidelines have managed to clarify this issue to some degree, by limiting the meaning of “institutions” to “large residential care facilities” (United Nations, 2009, § 23). Only these facilities are to be targeted by deinstitutionalisation, whereas residential care in general is recognised as a necessary component of the range of options to be foreseen to cater to the varied needs and circumstances of individual children, provided it is used only for positive reasons, i.e. when it is seen to correspond better to those needs and circumstances than would a family-based setting (United Nations, 2009, § 54 and 21).

It would be difficult to identify any current evidence-based study that takes issue with the finding that, not only do placements in institutional care generally have less favourable outcomes than those in family-based settings, but also that those placements often have a negative impact on children’s overall development that may be serious and irreversible.

As noted previously, the subsidiarity of institutional placements was established by Article 4 of the 1986 Declaration and echoed in the CRC which notes, as the final item in a list of alternative care options, that these could include “if necessary placement in suitable institutions for the care of children” (CRC, Art. 20.3). The CRC Committee has interpreted both the substance and the positioning of this wording to indicate that this solution is a last resort, and consistently advocates in its Concluding Observations on States Parties’ reports that active measures be taken to phase out recourse to institutional care.

The 2009 Guidelines go further. They suggest that, “in accordance with the predominant opinion of experts” (United Nations, 2009, § 22) and with limited exceptions, alternative care for young children, especially those under 3, should be provided only in family-based settings. They also propose that each State puts in place “an overall deinstitutionalisation strategy” aimed at the “progressive elimination” of such facilities (United Nations, 2009, § 23).

A report adopted by the Inter-American Commission on Human Rights in 2013 sees this approach as not only responding to research findings but also as being grounded in “the child’s right to grow up, develop and be cared for in a favourable family environment […]” (Comisión Interamericana de Derechos Humanos, 2013, p. 302). References such as this to a “right to [live in] a family” are, however, not necessarily helpful to rights-based advocacy regarding alternative care. First, as Van Bueren (1998, p. 93) has stated very clearly, “[a]lthough children have a right under a variety of treaties to respect for family life, […] children, as with adults, understandably, do not have a right to a family per se under international law”. Second, such a “right” would imply that any child not being cared for in a family setting – for example in a “suitable” residential facility as foreseen under the CRC – would automatically be considered as a victim of a rights violation, thereby invalidating the approach based on a “range of options”, including residential settings, espoused by the 2009 Guidelines. It is thus wise to disregard any
so-called “right to a family” argument in promoting deinstitutionalisation; embracing the recognised policy objective of securing a family-based placement wherever possible and appropriate is a far sounder basis on which to proceed.

4.2.1. Varied contexts of the development of institutions

Action to pursue the goal of phasing out institutions has to take account of the history of their implantation and development in each country, the role they currently play, socio-cultural factors and resources that governments are potentially able to devote to child protection and alternative care provision. This means, inter alia, that only a limited number of direct lessons can be learned from the experience of economically privileged countries that have moved away from placements in institutions. In addition, it follows from the earlier discussion that promoting deinstitutionalisation cannot be reduced to pointing out the potentially negative effects of institutional placements but has to be accompanied by feasible substitute proposals. The reasons why institutional care has developed and persists therefore vary, with several (significant) points in between, from the strict application of an ideologically based policy to the effective absence of any policy whatsoever. Recognising this, acknowledging the varied aims and outcomes of institutional placements, and identifying the consequently very different issues to be addressed, is an essential first step in any strategy towards their being phased out.

There are many different scenarios, but most instances where institutional care persists can be reasonably categorised under three broad headings.

4.2.1.1. The alternative care system in private hands with foreign support

The most challenging realities are undoubtedly the many countries where alternative care is essentially in private hands, often financed wholly or in good part from abroad and invariably in the form of so-called “orphanages”. Here, the involvement of the State is minimal not only in terms of direct provision, but very frequently also as regards the regulation and monitoring of the sector and development of policy. In some cases, such as Ethiopia, Guatemala, Haiti and Nepal, significant numbers of these institutions have been linked directly or indirectly to the procurement and/or channelling of children for intercountry adoption. When the government is unable to ensure or promote effective preventive services and options to institutional placements, private providers are in a strong position to maintain their activities. They resist initiatives to reduce recourse to placements in the facilities they own or manage since their income from foreign financial backing is dependent on the number of children in their care.

4.2.1.2. Institutional care financed in-country

In many Islamic countries, for example, as a logical consequence of various degrees of societal resistance to the idea of families taking in a “stranger” child, alternative care provision is also mainly “institution”-based. While some facilities may be State-run, most tend to be run by religious entities, with the active agreement of the State though with more or less direct oversight. In contrast to the previous category, however, their financing invariably comes from charitable sources within the country. Although these facilities are often large, they may in practice be less isolated (in all senses) than elsewhere and seek to avoid the worst excesses of impersonal regimes, with more emphasis on preparing a child for future life in the community than simply meeting minimum basic day-to-day needs. The benefits of such facilities are rarely questioned.
in-country, and alternatives to residential care are often difficult to envisage in the specific context concerned.

4.2.1.3. The alternative care system in State hands

The situation is completely different in countries such as those of Central and Eastern Europe and the former USSR, where institutions were set up, run and financed solely by the State, and were considered to be a logical reflection of its responsibility for children who could not be looked after by their parents. With, in essence, no other formal options being available for almost two generations, society has still viewed the placement of children in such institutions – including temporarily – as normal practice well after the onset of “transition” in the early 1990s. The fact that the State remains the direct provider of most alternative care, on the basis of policies that it sets, means that moves towards deinstitutionalisation can in principle be more immediately effective, once political will is engaged. This is being demonstrated to some degree by uptake on a region-wide initiative launched by UNICEF and OHCHR designed to ensure that no child in the 0–3 years age-range be the subject of a placement in an institution (the campaign is largely grounded in the findings of UNICEF, 2012).

4.2.2. The common logic underlying institutional placements

While there are many variations of the above scenarios, one factor is common to all, albeit for often different reasons: a child who is deemed, by whomsoever and on whatever basis, to require formal alternative care is more than likely to be automatically placed in a “large residential facility” regardless of his or her specific needs and situation, and similarly regardless of his or her wishes and opinions.

Thus, over and above issues relating to whether or not such care could in fact be avoided (the necessity principle) and whether it responds effectively to the child’s individual circumstances (the suitability principle), systems such as these reflect the “image” of a child as being simply one of a vulnerable group for whom a single form of “protection” can validly be applied.

Undoubtedly this generalised and depersonalised perception of the child has to be kept very much in mind when envisaging the already complex task of drawing up “localised” strategies for deinstitutionalisation that take account of the diverse contexts in which institutional care has developed.

4.3. Strategies for deinstitutionalisation

This diversity of how and why institutional care is provided underpins the call in the 2009 Guidelines for each State to develop its own strategy for reducing both the actual and perceived need for placements in these facilities, in response to the specificities of its context and system. If we accept this call on children’s rights grounds, account must be taken of three issues in particular.

First, what is required above all is a strategy for deinstitutionalising the alternative care system, not one for deinstitutionalising children who are currently in those facilities: it is primarily designed to install a system that replaces the one whereby children are more or less automatically pushed or sucked into institutional care when parental or kinship care is not available.

Second, and a direct consequence of the above, the strategy has to begin well up-stream and be wide-ranging in scope. Beginning up-stream implies focusing efforts on enabling the child
to remain within his or her family and, if that fails, disrupting the complex “institutionalising circuits” that can pervade social systems and implicate poor families, social services, the judicial system and municipalities, among others. Policy and legislative measures must be supplemented by creating a propitious climate for that change. This will involve, *inter alia*: influencing community attitudes regarding families in difficulty and responses that will be in the child’s best interests; securing the understanding and cooperation of professionals; alleviating the employment fears of current institutional staff; setting in place a gatekeeping mechanism; as well as ensuring the prior development of substitute community-based care settings and making certain that budgeting and financing are such as to promote and enable their use.8

Third, in terms of financial resources, the key issue to be addressed may often be less one of reallocating funding and more one of facing up to the ramifications of how that funding is currently sourced. A system essentially comprising “orphanages” funded by foreign charities will not willingly reallocate funds for family strengthening programmes or the development of foster care. Other strategies have to be sought, such as long-term effective awareness-raising in the donor countries and requesting bilateral assistance to develop family-based care that can demonstrate a diminishing need for residential facilities and justifies hastening their closure. At the other end of the spectrum, where all or most of the system is publicly funded, the problem may lie in division of responsibilities between, for example, central funding for institutional care and local funding for family-based and family-type care settings. This was the case in Ukraine, where it was not only administratively far easier to place a child in an institution than to seek a suitable foster home, but also that solution created no additional burden for cash-strapped municipalities. The perverse effects of how, as opposed to how much, financing of alternative care takes place are regularly overlooked.

Examining all these issues within the specific context in which institutions have been maintained to date is clearly a major exercise. Despite the CRC Committee being “concerned that the institutionalisation of children is used systematically” (United Nations, 2006, §27) and its general push in favour of family-based alternative care, it recognises that “dogmatic implementation of the principle that placement in an institution must be the last resort” could “leave the institution in which the child is ultimately placed with an impossible mission” (United Nations, 2006, §22). The Committee also “acknowledges that it is challenging to change the deep rooted ideology behind the institution model” (United Nations, 2006, §23). Comments of this nature from the Committee are too rarely taken into account in analyses of how to move forward to improve respect for children’s rights in relation to alternative care.

5. By way of conclusion: The essential challenge

This chapter has sought above all to demonstrate that, while there has been substantial progress in establishing a solid internationally recognised children’s rights base in relation to the provision of formal alternative care, the context-specific interpretation and application of those rights is of special significance in this particular sphere.

The range of reasons for which formal alternative care may be envisaged or undertaken for children is vast, and the relative importance of each such reason, in practice, differs considerably among countries and regions, with clear implications for how care provision is, can or should be envisaged. Approaches, attitudes and systems currently in place also vary widely,

---

8 The issues reviewed in this paragraph are documented in detail in the case studies of deinstitutionalisation efforts in Argentina, Chile, Uruguay, Italy and Spain, see UNICEF (2002).
largely in response to socio-cultural, economic, political and historical realities. The chapter has hopefully shown that advancing the rights of children against backdrops of such a diverse nature cannot be achieved simply through global advocacy grounded in the rigid conventional wisdom of children’s rights and the watchwords adopted to date, which have often led, for example, to the out-and-out promotion of formal family-based care together with, in many cases, its counterpart of demonising residential care provision.

This need for circumspection is all the greater in that, even in countries with long-standing programmes of formal fostering and similar measures, for example, the documented difficulties in ensuring effective systems and positive outcomes for children should put into question the legitimacy of consistently promoting this path where the practice is to all intents and purposes unknown. A better guide to our assessment of solutions proposed and provided could surely be whether or not they represent a society’s best efforts to ensure the perceived “safety, stability and support” that children concerned say they are looking for from their alternative care setting. Here, as suggested in the chapter, it will be necessary to take a closer look, inter alia, at how “stability” in alternative care links coherently with the concept of “permanency” as an outcome of that care, and at the ramifications of any such linkage.

Building as they do on the rights set out in the CRC, the 2009 Guidelines for the Alternative Care of Children have arguably set the stage for a more nuanced view of how efforts might be oriented towards the context-specific viewpoint put forward in the Introduction. Thus, they emphasise the need for a “range of options” that includes residential care, not only noting the conditions to be met if the latter is to be suitable but also setting out stringent requirements for a well-functioning foster care system. They also encourage States to draw up strategies for deinstitutionalising their respective alternative care systems, but in a bespoke fashion that takes account of the very different contexts of – and reasons for – the existence of institutional care in each country.

The 2009 Guidelines do a lot more for advancing the children’s rights agenda. By emphasising initiatives to prevent recourse to formal alternative care, they highlight the broader rights issues that must be tackled if formal out-of-home placements are, as they should be, destined for use only as a truly exceptional measure. Such prevention includes support for the child to remain in his or her family environment through informal kinship care, a rights-based practice not always sufficiently recognised given the frequent Western obsession with formalised arrangements as the best means for “ensuring” protection and assistance, even though such formal solutions in many cases could not be envisaged anyway because of human and material resource restrictions. That said, and as noted in the chapter, there are tensions between recognising informal customary practices and enabling the State to meet its protective and other obligations towards children: these need to be resolved on a context-specific basis.

The requirement that children be meaningfully consulted before any decisions related to alternative care are made also figures large in the 2009 Guidelines. Effective children’s agency, however, cannot be promoted and developed in a vacuum, in relation to alternative care alone, although it might serve as one acceptable entry point or a trigger for wider consideration of the child’s right to be heard. Yet again, context-specific sensitivity must clearly underlie any approach to bolstering the rights of the child in this regard.

The chapter has also shown that the 2009 Guidelines deal with issues that, while significant for moving forward the children’s rights agenda, have tended to escape sufficient attention to date. One example of these concerns the financial motives that can influence – far more than pure children’s rights questions – how alternative care is provided, such as the fact that in many economically underprivileged countries, there has been a major reliance on residential facilities
wholly or substantially financed from foreign private sources, with generally inadequate State regulation and oversight. Despite the paradox involved in “orphanages” being funded from countries where institutional care has been roundly criticised and often almost eliminated, there is unlikely to be spontaneous reallocation of those “charitable” contributions to family strengthening, support for informal care arrangements or even – to the extent that these might be feasible in the context – for family-based alternative care programmes. In such cases, any argument based on children’s rights needs to be put forcefully to the donors rather than to the “beneficiaries”. Simultaneously, governments concerned should negotiate bilateral and multilateral development aid for programmes that will reduce the need for recourse to institutional placements, as a means of improving their compliance with international standards.

But “children’s rights” arguments anyway need to be subject to more scrutiny. To begin with, there is a regrettable and dangerous tendency towards “human rights inflation” where children are concerned. This chapter has pinpointed one such instance in particular concerning alternative care – a so-called “right to a family” unwarrantedly extrapolated from what is no more than an agreed policy objective. In addition, a “purist” view of genuine rights can lead to simplistic representations that, however unassailable they are from a juridical standpoint, may be directed (often for reasons of sheer facility) towards the wrong actors – as in the above-mentioned case of residential care financed from abroad – or make futile assumptions as to the automatic justification for their acceptance (in the face of, for example, entrenched societal resistance to family-based care for “stranger children”).

In sum, the essential challenge may be less a question of marshalling general arguments for the human rights of children to be respected as regards formal alternative care, but more one of identifying, proposing and enabling viable means for making that possible in each situation.

Questions for debate and discussion

- What realistic measures can be envisaged to ensure that children are not placed in formal alternative care settings simply because of their family’s material poverty?
- How can customary care arrangements be simultaneously encouraged and supported by the State yet also adequately monitored without unduly compromising their informal nature?
- What effective gatekeeping mechanisms can be envisaged in countries where formal alternative care is essentially in the hands of private providers?
- What feasible measures can be taken to prohibit or dissuade foreign donors from funding large residential facilities in developing countries?
- How do the practical implications of a “permanency planning” imperative correspond to the need for “safety, stability and support” expressed by children in alternative care settings?

References


