

# POSITION PAPER

## Deinstitutionalisation and early childhood care

### I. KEY POSITION AND PRINCIPLES

Institutions for young children raise serious concerns from philosophical and human rights perspective, since their governing principles are discipline within the institutional walls and segregation from the outside. Institutionalisation is psychologically harmful to young children and complete deinstitutionalisation is a legal obligation.

Since 1989, when the UN Convention on the Rights of the Child (*hereinafter* ‘the CRC’) has been adopted, the overall legal approach to children significantly transformed. Children have been acknowledged not only as objects of care and protection, but most importantly as holders of their own rights and freedoms. This development is sometimes described as a paradigm shift from the so-called irregular situation doctrine or paradigm of tutelary protection based on a paternalistic discourse to the comprehensive protection paradigm.<sup>1</sup>

In legal terms, it is connected with the so-called ‘child rights approach’, as introduced especially by the UN Committee on the Rights of the Child (*hereinafter* ‘the UN CRC Committee’), mirroring the traditional principle of *primum non nocere* (first do no harm). This approach, in principle, requires that a child - as the rights holder - does not have to pay for her protection a too high price, usually in the form of long-standing or lifelong impacts. Within the existing normative framework, it may be best ensured when all rights and freedoms guaranteed under the CRC are respected, protected and fulfilled to their *maximum* extent and when the protection of a child is not oriented to only one aspect of her life, for instance her survival. And this is exactly the point where traditional approaches to child protection built on the idea of institutional care in residential facilities, including for children in their early childhood, must inevitably appear as unsustainable.

In developmental psychology, institutionalisation has been criticised as long as in 1950s, when John Bowlby published a study on negative effects of early maternal separation.<sup>2</sup> Already Bowlby advocated that children should remain in their families or be placed into families, and this position has been reaffirmed in numerous psychological studies and positions. In 2018, the existing research was summarised by Mr. Dainius Pūras, the former UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>3</sup> He noted that institutionalised children have significant development deficits across virtually every domain that has been examined, especially if they are institutionalised below the age of two. In concrete, when young children experience institutionalisation, social and interpersonal development is impaired, physical growth is slowed, and cognitive and language

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<sup>1</sup> Inter-American Commission on Human Rights. The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalisation in the Americas (2014), para. 176.

<sup>2</sup> Bowlby J. Maternal care and mental health. Geneva: World Health Organization, 1952.

<sup>3</sup> See, Observations of the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 2018. Available at: <https://rm.coe.int/cc157casedoc4-en-observations-by-the-un/16808c5968>

development is delayed. And even if it were possible to provide conditions in institutions that are not per se inhuman or degrading, still, it is almost impossible for children to form a consistent attachment to a carer, leading to detrimental effects on their development.<sup>4</sup>

The human rights law has not been ignorant of these facts. Institutionalisation of children has been especially criticised in a number of UN and Council of Europe soft-law documents and various human rights bodies have called for deinstitutionalisation. Similarly, yet incidentally, the ‘institutionalisation’ of children has been a concern also for the European Court of Human Rights. Institutionalisation results in the deprivation of liberty.<sup>5</sup> It has particularly detrimental impact on children, because it deprives them of the period of life when they should ‘develop their personality, their emotional relationships with others, their social and educational skills and their talents; it deprives them of their childhood’.<sup>6</sup> The recent UN Global Study on Children Deprived of Liberty highlights the role of the family as ‘as the natural and fundamental group unit of society’, and therefore children ‘should grow up in a family environment where they experience love, protection and security.’<sup>7</sup>

Among all the institutionalised children, the particular attention has always been paid to children in early childhood. Even though institutionalisation has been in general described as an environment where violence is common, both interpersonal and structural,<sup>8</sup> the impact on children in early childhood differs, both in its form and intensity. It is thus not surprising, that institutional care for children in early childhood was also described as ‘one of the most egregious forms of abuse in health and social care settings’ that ‘is unique to children’, because it grossly violates the child’s fundamental need for connection and emotional companion’.<sup>9</sup> Yet, in 2020, we are still in a situation when children, for various reasons, are placed into more or less specialised facilities sharing profound similarities which can be only attributed to ‘institutions’. It is symptomatic, that it concerns especially the most vulnerable children, typically children with disabilities or Romani children who are facing prolong and sometimes even life-long institutionalisation.

If we follow a premise that institutionalisation is wrong and harmful, the following question emerges: what can be done to transform the existing structures causing this consequence? One way is, indeed, a step by step method. It is possible to start developing exemptions from institutionalisation or alternatives to existing institutions that would depart to a certain extent from the existing system. This method raises a concern of solidification. Once developed and in operation, existing ‘interim solutions’ became the new standard. Hence, to avoid new harms to children, maybe less visible but certainly more difficult to challenge, we should seek to transform the whole landscape radically. And this is the first principle of this position paper. In other words, we argue in favour of radical reconfiguration of support to natural families and total elimination of child harming structures, in this particular context exemplified by the operating system of institutions, regardless of their size or location in the community. The second principle is practical and legal. It concerns the presumption that the human rights law already provides an adequate basis for such a fundamental requirement. And the third principle relates to the method. We argue that it should be designed, from the beginning, both positively and negatively like a combination of steps that should be taken but also as a clear delimitation of those boundaries, which cannot be crossed under any circumstances.

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<sup>4</sup> *Ibid.*, pp. 1-6.

<sup>5</sup> A/HRC/38/36, paras. 5 and 58.

<sup>6</sup> A/74/136, paras. 2 and 3.

<sup>7</sup> A/74/136, para. 2.

<sup>8</sup> A/HRC/38/36, paras. 32-33 and 58.

<sup>9</sup> A/HRC/28/68, para. 56.

## II. HUMAN RIGHTS LAW

Article 20 of the CRC guarantees to children who have been temporarily or permanently deprived of their family environment, or in whose own best interests cannot be allowed to remain, in that environment, the right to special protection and assistance provided by the State in the form of alternative care. Alternative care should take, primarily, the form of family care while the residential form of care should be applied only in cases when it meets the conditions of necessity and suitability (see Article 20 para. 3 of the CRC).

Since the adoption of the CRC in 1989, the development of human rights discourse has shown that institutional care can never fulfil the *suitability* requirement. The UN Guidelines on Alternative Care for Children, adopted by the General Assembly at the end of 2009,<sup>10</sup> uses with the term ‘residential care’ instead of ‘institutional care,’ emphasising that the ‘use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests’.<sup>11</sup> The UN Guidelines further provide that these conditions can never be met in the case of children under the age of 3 who should be provided alternative care in family-based settings.<sup>12</sup> The UN Committee on the Rights of the Child in its General Comment no. 7 of 2005,<sup>13</sup> as well as the former UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Dainius Pūras, extended this age limit to 5 years of age.<sup>14</sup>

Another relevant provision is Article 19 of the UN Convention on the Rights of Persons with Disabilities (*hereinafter* ‘the CRPD’), formulating the right to independent living and to be included in the community. According to the UN Committee on the Rights of Persons with Disabilities (*hereinafter* ‘the UN CRPD Committee’), this provision excludes all forms of residential care. When determining the ‘independent living arrangement’, the UN CRPD Committee highlights that ‘large or small group homes are especially dangerous for children, for whom there is no substitute for the need to grow up with a family. “Family-like” institutions are still institutions and are not a substitute for care by a family.’<sup>15</sup>

This standard formulated by the UN CRPD Committee can be considered, on first sight, as hardly achievable. Yet, it must be understood within the development in the understanding of alternative care, as apparent in the General Comment of the UN CRC Committee no. 21. In this document, the UN CRC Committee takes a significant step away from the traditional concept of forms of alternative care and includes among alternative care (or special protection for children deprived of their family environment) also the support that the child is provided in her natural environment.<sup>16</sup> Even though this General Comment relates specifically to the rights of children in street situations, the principle that lies beyond the cited conclusions is much more far-reaching. In light of this principle, the standard formulated by the UN CRPD Committee should be read as a requirement to search and adopt all possible options to support any child while at the same time avoiding her placement in a residential setting. Thus, there should always be available and accessible such an alternative, should it be the support of the child in her natural environment, e.g. material support to the child and her family, social housing programmes, outreach social services, outpatient health services, or in the form of alternative family care.

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<sup>10</sup> A/RES/64/142.

<sup>11</sup> A/RES/64/142, para. 21

<sup>12</sup> A/RES/64/142, para. 22.

<sup>13</sup> CRC/C/GC/7/Rev.1, para. 36 (b).

<sup>14</sup> A/70/2013, para. 73.

<sup>15</sup> CRPD/C/GC/5, para. 16 (c).

<sup>16</sup> CRC/C/GC/21, para. 43.

### **III. RECOMMENDATIONS**

These recommendations provide a basic method and are intuitive. The aim is to sketch several ground rules which may govern implementation of a transformative change and combined several positive rules and one crucial negative standpoint. We shall first formulate this standpoint, considering that it should clearly define the boundaries that cannot be, under any circumstances crossed. Namely, that the new system provides only for family care, if necessary professional family care, without exemptions. In other words, there are no institutions, regardless of their size, community location, or presumed wealthiness of material conditions.

Walking down from this navigation point, which we can imagine as a horizon limiting the space for the transformative change, we may formulate several positive principles. The first rule concerns the transparency and accuracy of the process. We argue that the whole process of deinstitutionalisation should be managed by public authorities, with participation of experts, including experts by experience and children themselves. The outcome of the process should lead to the formulation of a binding policy and legislative changes. All changes must fully reflect the highest human rights standard achieved in this field, expressed especially in general comments of the UN CRC Committee, the UN CRPD Committee and the UN CERD Committee.

Any policy concerning deinstitutionalisation should be binding upon the public authorities. It should formulate precise targets, including a timeframe, and identification of responsible bodies. The implementation of the policy should be overseen by an independent body. It should be accompanied by a necessary legislative change, prepared transparently, with an active participation of those concerned, and discussed among experts.

The transformative change may require a redefinition of existing spending patterns and redistribution of resources. It is plausible to expect, that the new system would not be more expensive, just the opposite. Nevertheless, existing patterns must change significantly and for this purpose, must be designed anew. All new funding patterns must be provided on the basis of personalised criteria and take into account family and social network around a child.

Further, existing institutions for young children must be considered as a part of a net, a whole operating structure. Hence, the deinstitutionalisation must be accompanied by changes, if necessary, also in other systems, e.g. the health care system. Family based alternatives must be protected and controlled by independent external authority. Family members, including the child's family members, may participate in the control process. Education must be ensured and provided.