

NGO submission to the UN Committee on the Rights of the Child

For the Day of the Day of General Discussion:

**“Children’s Rights and Alternative Care”**

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Submitted by:

Forum for Human Rights (FORUM)[[1]](#footnote-1)

14 June 2021

**ABBREVIATIONS**

**CRC** Convention on the Rights of the Child

**CRPD** Convention on the Rights of Persons with Disabilities

**ECHR** European Convention on Human Rights and Fundamental Freedoms

**ECtHR** European Court of Human Rights

**GC** General Comment

**SCC** Supreme Court of Canada

**UKSC** Supreme Court of the United Kingdom

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# I. BRIEF HISTORICAL BACKGROUND

Article 20 of the CRC formulates alternative care as a right of the child deprived of her family environment. Nonetheless, alternative care is usually connected with the child’s separation from parents, either ordered by an authoritative decision or required by the family’s circumstances. Therefore, it is also one of **the most serious interferences** with the child’s life, and the experience of the alternative care may be for the child **very painful**.

The idea behind the introduction of systems of alternative care dates back to the late 18th and the 19th centuries in Europe and North America. Indeed, then, it was not connected with the idea of children's rights as understood nowadays. It was developed as part of the transition from the traditional society to the modern one – the type of society that Michel Foucault described as **“disciplinary”**.[[2]](#footnote-2) Except for the traditional charity care for orphans and foundlings, the alternative care pursued collective objectives. It became an important instrument of social control. In Foucault's terms, the phenomenon of “panopticism”, apparent in alternative care, aimed to **transform individuals into subjects compliant with certain norms**. These norms were formulated by the emerging industrial and capitalist society that viewed the individual typically as a labour force.[[3]](#footnote-3)

From its very beginning, the alternative care in modern society was directed against the idleness, often understood as school truancy, begging, and vagrancy that concerned mainly children living in poverty. The industrial schools being established in England, Scotland, and other English-speaking countries all over the world since the first half of the 19th century have been an eloquent example of this phenomenon.[[4]](#footnote-4) And a similar type of institutions started to appear all around the world.

To achieve its disciplinary objectives, “panopticism” had to be broken into the law and legal theory.[[5]](#footnote-5) As a consequence, national legislations enabling child removal from her family were formulated **in vague terms**, often referring to **moral categories**, creating sufficient space for the public authorities to enforce currently prevailing social norms. The phenomenon became so widespread and natural, that the ECHR adopted in 1950 legitimised “educational supervision” as a ground to deprive the child of her personal liberty.[[6]](#footnote-6) This enabled to deprive children of their liberty under the pretext of their “need for protection” in situations when the personal liberty of adults would be duly respected.[[7]](#footnote-7)

Recently, the UN Global Study on children deprived of liberty confirmed that the situation of children hasn’t changed much, and children are still massively deprived of their personal liberty as an alternative care measure.[[8]](#footnote-8)

# II. THE APPROPRIATENESS OF THE DISABILITY RIGHTS CONCEPTS

The paradigmatic approach to children changed massively, not only thanks to the adoption of the **CRC**, but also the **CRPD**. Both groups share common characteristics. Both historically belonged to the most affected by the disciplination, both faced strong paternalistic tendencies connected with the stigma of incapacity and both were disproportionately deprived of their personal liberty under the pretext of their “protection”. Ian Binnie, former judge of the SCC, referred to the term “legal disability”[[9]](#footnote-9) expressing that the reasons disqualifying the child from taking her own decision are the consequence of legal approach to the child rather than her real incapacity. X.[[10]](#footnote-10)

Children may profit from many concepts formulated in the field of disability rights. Particularly one should be mentioned, and this is the concept of **inclusive equality**. The concept consists of **four dimensions** to express that equality is a multidimensional phenomenon and requires structural changes in different areas. These dimensions are: “(a) **a fair redistributive dimension** to address socioeconomic disadvantages; (b) **a recognition dimension** to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) **a participative dimension** to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) **an accommodating dimension** to make space for difference as a matter of human dignity.”[[11]](#footnote-11)

The concept of inclusive equality may provide us with a referential framework to formulate the principles that need to be respected to ensure that alternative care is applied as a right of the child and not as an instrument of normalisation of the child and her family.

# III. FORCED INTERVENTIONS V. OPPORTUNITIES

The UN Global Study on children deprived of liberty emphasises that children end up in institutions due to various reasons, including the socioeconomic conditions of the families, discrimination, family violence, and lack of access to essential services (e. g. health, education, rehabilitation, treatment). It is obvious that not all these reasons could comply with inclusive equality.

It seems that forced removal of children from their families is still used as a universal solution to a wide range of negative circumstances in children’s lives which the system is not able to handle otherwise. The last resort rule[[12]](#footnote-12) is usually not contested by the national legislations. Nonetheless, it seems incomplete since it addresses **only the proportionality** of the measure and does not guarantee to the child any redistribution, recognition, participation, or accommodation. The findings by the Study show that in the current discourse, the primary issue to be addressed is that of the **legitimacy** of forced separation. The question is:

* Can it be used in any situation when the rights of the child are threatened, and the less intrusive measures are not sufficient to protect them?

In GC no. 14, the Committee explicitly excluded economic reasons from the legitimate grounds for the forced separation of the child from her family[[13]](#footnote-13), which is closely connected with the redistributive dimension of inclusive equality. Could we formulate further rules that would reflect its other dimensions?

The recognitive dimension of inclusive equality reminds us that the authoritative decisions in the field cannot follow the positively defined models of care and upbringing of a child. Application of such models would lead to **totality instead of plurality**. The legitimate grounds must be **determined in negative terms**. They must refer to behaviours of the child’s family that are **unacceptable** for the child while these situations must be formulated in the national legislations very clearly to meet **the requirements of legality (clarity and foreseeability[[14]](#footnote-14))**, and not vaguely to create an inappropriate risk of arbitrariness.

The child rights-based approach invites us to formulate these unacceptable situations based on the rights of the child. Similar to the CRPD which lists as one of its general principles the individual autonomy and independence of persons, the child’s right to autonomy of her family and herself in compliance with her evolving capacities (Article 5) as well as the right to her parents having the primary responsibility for her upbringing and development [Article 18 (1)] should be taken as the starting point.

The State should have always in mind that the impact of its forced interventions is very limited and that in general those actions are not able to achieve positively formulated objectives like well-being and happiness. The action oriented towards creating an environment accommodating the child’s needs by offering her life opportunities, that are available, accessible, acceptable for her, and adaptable to her, is much more fruitful and correspond better to the idea of rights being for their holder opportunities rather than obligations and restrictions.[[15]](#footnote-15) Forced interventions don’t enable us to bring positive results, they only let us prevent the worst results for the child in situations where no real good solution exists.

# IV. THE PERSPECTIVE OF THE CHILD’S ABSOLUTE RIGHTS AND THE THRESHOLD OF THEIR ENDANGERMENT

We thus have to ask where there is no room to deal with the situation of an individual child in the described accommodating way and take the measure of forced separation of the child as the least bad of bad solutions. Should we follow the rights-based perspective, we can answer that such room will usually not exist in situations when the child is at risk on her **absolute rights**, i.e. **her right to life** (Article 6), **not to be subjected to ill-treatment** [Article 37 (a)] **or any form of exploitation** (Articles 34 – 36) and **freedom from all forms of violence** (Article 19).

The reason is that neither the child’s nor family’s autonomy can go so far as to breach the child’s absolute rights. **The risk has to be caused by the child’s parents or other caregivers**. Other risks to the absolute rights of the child caused by other persons than her caregivers or constituted by the child’s own behaviour (usually classified as “risky” or “antisocial”) should be treated by other mechanisms than the forced separation of the child from her family and her placement in alternative care.

And to be not only legitimate but also proportionate, the risk to the child’s absolute rights has to reach a **threshold**. It seems suitable to define this threshold by the combination of two factors:

1. gravity; and
2. probability.

The forced separation and placement in the alternative care will be possible only in case the threat to the above-mentioned child’s absolute rights is **at the same time grave and probable**.

The requirement to set up national legislations to enable the forced separation of the child and her placement in alternative care only in case the child’s absolute rights are put at the grave and probable risk caused by the child’s parents or other caregivers could constitute a **significant gatekeeping mechanism** to protect children from unnecessary separation from their families. Except for these situations, the national legislation should rather **provide children with legal claims** than the public authorities with powers to forcibly intervene in their lives under the pretext of fulfilment of their rights.

# V. THE NEED TO REDEFINE THE RELATIONSHIP BETWEEN ALTERNATIVE CARE AND DEPRIVATION OF THE CHILD’S PERSONAL LIBERTY

Finally, we would like to call the Committee to use this opportunity to redefine the relationship between alternative care and deprivation of liberty. In GC no. 21, the Committee emphasised that “deprivation of liberty (…) is never a form of protection.”[[16]](#footnote-16) Nonetheless, the concrete examples the Committee gave – detention cells and closed centres - risk introducing a too narrow approach to the definition of deprivation of liberty.

Since the system of alternative care usually comprises a whole complex of measures interfering in different ways with children’s personal liberty, a more subtle approach might be useful. National case-laws may already contain important precedents on this issue. We would like to mention particularly the decision of the UKSC in the case of *Cheshire West* which concerned three persons with disabilities - two of them children of whom one was living in a foster home and the other in a residential home.[[17]](#footnote-17) The Court was to assess whether their living arrangements resulted in their being deprived of liberty. And to do this he applied the so-called **“acid test”**, formulated following the jurisprudence of the ECtHR which started with the case of *H.L. v. the United Kingdom,* and the criterion of “complete control and supervision” formulated therein.[[18]](#footnote-18)

Based on the cited jurisprudence the acid test consists of two components:

1. whether the person is under continuous supervision and control; and
2. is not free to leave.

On the contrary, the following criteria are not relevant:

1. the person’s compliance or lack of objection;
2. the relative normality of the placement (whatever the comparison made); and
3. the reason or purpose behind a particular placement.

The Court formulated also the corrective applicable in cases of children when he removed from the scope of the acid test those measures that are imposed by parents in the exercise of their ordinary parental responsibilities.

The application of the acid test perspective to alternative care would mean accepting that an alternative care measure may constitute a deprivation of the child’s liberty, even in case the child is being placed for instance in alternative family care. It could thus significantly enhance the legal position of children since it would clearly indicate the applicability of safeguards guaranteed under Article 37 (b) – (d) to cases of alternative care placement.

A more subtle approach to the assessment of deprivation of liberty could also serve as another **important gatekeeping safeguard**. It could protect especially those children who are no longer dependent on care, typically adolescents[[19]](#footnote-19), but who should be eventually offered other types of support, including supported and social housing. The decision-making bodies would always have to deal with the question of whether or not it is necessary to deprive a child of her personal liberty when deciding about separating her from her family and placing her in alternative care.

Furthermore, the systemic application of the acid test to cases of alternative care would open the doors to a **CRC-compliant interpretation of Article 5 (d) of the ECHR** that would no longer have to be understood as covering correctional placements of children in closed educational facilities, but on the contrary as reflecting the modern approach to the deprivation of liberty assessment.

# CONCLUSIONS

* **Only a threat to the child's absolute rights from his parents should constitute legitimate grounds for the forced separation of the child from her family.**
* **To ensure that the forced separation is proportionate, the threat needs to reach the threshold of gravity and probability.**
* **National legislations have to be very clear on the legitimacy and proportionality of forced separation of children from her family, don’t include vague terms like “protection” or refer to positively defined models of care like “proper upbringing”.**
* **Forced separation should never be adopted in reaction to self-inflicted threats of a child, classified often as her risky or antisocial behaviour.**
* **The assessment of deprivation of liberty should be reconsidered according to the acid test to cover also alternative care arrangements where the child is subjected to continuous control and supervision and is not allowed to leave.**

Anna Hofschneiderová

Senior Lawyer, **FORUM**

Maroš Matiaško

Senior Human Rights Lawyer, **FORUM**

1. **FORUM** is an international human rights organisation active in the Central European region. It provides support to domestic and international human rights organisations in advocacy and litigation . FORUM has been supporting a number of cases pending before domestic judicial authorities and before the European Court of Human Rights. FORUM has authored and co-authored a number of reports and has provided information to UN and Council of Europe bodies on the situation in the Central European region, especially in Slovakia and Czechia. For more information, please visit [www.forumhr.eu](http://www.forumhr.eu). [↑](#footnote-ref-1)
2. FOUCAULT, M. *Truth and Juridical Forms.* In FOUCAULT, M. *Power. Essential Works 1954-84.* London: Penguin Random House UK, 2020. p. 1-133. [↑](#footnote-ref-2)
3. Ibid. [↑](#footnote-ref-3)
4. <https://core.ac.uk/download/pdf/83889.pdf> [↑](#footnote-ref-4)
5. T FOUCAULT, M. *Truth and Juridical Forms.* In FOUCAULT, M. *Power. Essential Works 1954-84.* London: Penguin Random House UK, 2020. p. 1-133. [↑](#footnote-ref-5)
6. Article 5 (1) (d). [↑](#footnote-ref-6)
7. See, *inter alia, A. and others v. Bulgaria,* judgement of the ECtHR of 29/11/2011, complaint no. 51776/08. [↑](#footnote-ref-7)
8. A/74/136, para. 62. [↑](#footnote-ref-8)
9. [2009] 2 SCR 181, para. 222. [↑](#footnote-ref-9)
10. CRPD/C/GC/6, para. 9. [↑](#footnote-ref-10)
11. CRPD/C/GC/6, para. 11. [↑](#footnote-ref-11)
12. CRC/C/GC/14, para. 61. [↑](#footnote-ref-12)
13. Ibid. [↑](#footnote-ref-13)
14. ECtHR. Guide on Article 8 of the ECHR, updated to 31/12/2020, para. 15. [↑](#footnote-ref-14)
15. The Committee’s GC no. 21 is an exellent example of this approach. [↑](#footnote-ref-15)
16. CRC/C/GC/21, para. 44. [↑](#footnote-ref-16)
17. [2014] UKSC 19. [↑](#footnote-ref-17)
18. 40 EHRR 761. [↑](#footnote-ref-18)
19. See CRC/C/GC/20, paras. 18 – 20 and 39 – 40. [↑](#footnote-ref-19)