



Monthly Review

published by the International Reference Center for the
Rights of Children Deprived of their Family-ISS

“Children only get one opportunity to grow up, and every day matters to ensure a healthy future.”

Marie Jenny, Coordinator of the global project ‘A better future is possible’ at ISS’s General Secretariat

No. 233
JULY 2019

EDITORIAL

‘Right’ to protection of family life: Implications for children deprived of parental care?

Debate is rife over claims there is a ‘right’ to a family or to live in a family environment – as opposed to the fully-accepted right to the protection of family life. However, little attention is paid to the implications of such claims for children’s rights as a whole, and in particular for those children without parental care. Whilst much time is spent on such discussions, it is important to keep each child’s individual rights at the centre.

Right to protection of family life for all?

International Law and regional provisions¹ clearly set out the protection of family life as an established right in the context of unjustified State interference in private matters. For example, Article 10 of the International Covenant on Economic, Social and Cultural Rights notes States Parties’ obligations to provide protection to the family and family life. Moreover, Article 17 of the International Covenant on Civil and Political Rights protects persons against arbitrary or unlawful interference with their privacy, family, home etc. More recently, Article 23(3) of the Convention on the Rights of Persons with Disabilities (CRPD) notes that children with disabilities have equal rights with respect to family life including preventing their concealment, abandonment, neglect and segregation. In addition to Article 16 of the Convention on the Rights of the Child (UNCRC), the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families also both recognise this right to protection of family life for children on the move, which should be upheld irrespective of residency or nationality status².

In their submission to the Committee on the Rights of the Child’s Day of General Discussion on this same topic, UNICEF noted *‘protecting family life presupposes a set of positive and negative obligations on the part of States Parties. Positive obligations require specific, affirmative measures directed towards guaranteeing and promoting the right to family life. Negative obligations require State Parties to abstain from acts and decisions that weaken or directly infringe on this right. In the context of migration, abstention requires that States Parties refrain from actions that violate CRC rights, including decisions that separate families’* (see p. 8). Whilst States have positive and negative obligations in upholding this established right, its implementation for children deprived of parental care is subject to ongoing discussion.

Right to protection of family life for children at risk of being deprived of parental care?

For children at risk of being without parental care, the established right to the protection of family provides safeguards against their inappropriate separation from their families due to issues related to social exclusion, stigma and discrimination among other things. As a type of warning against potential unwarranted interference, the UN Guidelines for the Alternative

Care of Children (Guidelines) list areas where the State has proven to be particularly critical of parents, whose capacities may be limited by factors, such as disability or drug and alcohol misuse, as well as discriminatory actions against families with indigenous or minority backgrounds. The Guidelines, in particular Paragraph 9, respond to this situation by urging States to ensure appropriate and culturally-sensitive measures as part of efforts to prevent the separation of children from their parents.

Likewise, undue State interference in family life may occur when there is an unjustified separation of siblings. Again, the Guidelines, in particular Paragraph 17, respond to this situation by encouraging States not to separate siblings unless there is a clear risk of abuse or other justification in the best interests of the child. Here, the Guidelines helpfully state that *'every effort should be made to enable siblings to maintain contact with each other, unless this is against their wishes or interests'* (see Monthly review n°229 of February 2019). States equally have an obligation to prevent unnecessary permanent separation between children and their families, by promoting reintegration measures, whenever it is safe to do so and adequate resources are available to respond to the needs of the child and his or her family. Determining when it is safe and in the best interests of the child to remain with their families or not, is a challenging question for the State.

Right to protection of family life for children without parental care?

It seems a fine balance is needed to protect family life against undue State interference resulting in unnecessary separation and under what circumstance there could be due State interference resulting in necessary separation. Assuming that the State has duly made a decision that alternative care arrangements have become a necessity, what are the implications for the right to protection of family life for these children? What are the States' positive obligations? If the child is placed in family-based care, surely this new family should likewise benefit from the protection against undue State interference.

However, is it reasonable to further draw from the established right to protection of family life – related to guarding against undue State interference – that there is a positive obligation to provide a family to children without parental care? Is not the State rather obliged to ensure suitable forms of care both family- and community-based? (see p. 9) Arguably, as outlined in Article 20 of the UNCRC, whilst there is no obligation to provide an 'alternative' family to all children as advocated by some, every effort should be made to secure appropriate kinship or other family-based care. This corresponds entirely to the pertinent provision of Article 23.5 of the CRPD whereby 'States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting'.

Should every effort fail, should there not be other options available? It seems reasonable to argue that for children deprived of parental care, their rights are more closely linked to the State's obligation to provide suitable alternative care offering a range of care options responding to the best interests of each child. It should be noted that Paragraph 21 of the UN Guidelines notes 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.' By insisting only on family-based care as the only solution for children deprived of parental care, there is a risky assumption that every individual child's needs, characteristics, situation and wishes will be met by such arrangements. What is the role of the child's agency in identifying suitable placements in cases for example where he or she does not want to live in a family-based care setting? For example, is it likely to be counterproductive to impose family-based care on all children, such as those who have experienced serial breakdowns in foster care placements or older children on the move accustomed to living independently?

The ISS/IRC hopes that the 2020 Day of General Discussion held by the Committee on the Rights of the Child on alternative care will provide additional clarification on the ongoing debates in order to uphold of the right of children to have suitable care when deprived of their families – if not before. The ISS/IRC notes the particular usefulness of the Guidelines, ten years after their acceptance at the United Nations General Assembly, in helping to uphold the established right to the protection of family life. The ISS/IRC aligns itself with the heart of the Guidelines, while prioritising the protection of family life, putting at the centre the need to respond to the individual needs of each child, noting the necessity for varied quality care options.

The ISS/IRC team,
July 2019

References:

¹ African Charter on the Rights and Welfare of the Child, Article 10: Protection of privacy; American Convention on Human Rights, Article 11 (2); European Convention on Human Rights, Article 8: Right to respect for private and family life.

² Family life (Arts. 14, 17 and 44 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Arts. 9, 10, 11, 16, 18, 19, 20 and 27(4) of the Convention on the Rights of the Child), at Para 27 of the [Joint general comment No. 4 \(2017\)](#): *“The right to protection of family life is recognised in international and regional human rights instruments, including the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Therefore, this right should be fully respected, protected and fulfilled in relation to every child without any kind of discrimination, regardless of their residency or nationality status.”*

