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*Erasmus*

**Alternative for Care for Children in Brazil:**

**How social norms are influencing judges' capacity to fulfil the  
child's right to family and community living**

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***Disclaimer:***

This document represents part of the author's study programme while at the Institute of Social Studies. The views stated therein are those of the author and not necessarily those of the Institute.

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## List of Acronyms

BCN	Better Care Network
CELCIS	Centre for Excellence for Looked after Children in Scotland
CF	Constitution of the Federative Republic of Brazil
CNCA	National Registry of Children in Care
CNJ	Brazilian National Council of Justice
CNMP	Brazilian National Council of the Prosecution Service
CRC	Convention on the Rights of the Child
CRP	Child Rights Programming
DCI	Defence for Children International
ECA	Brazilian Statute of the Children and Adolescent
EU	European Union
HRBA	Human-rights based approach
ISS	International Social Service
NGO	Non-Governmental Organisation
OEA	Inter-American Commission on Human Rights of the Organization of American States
OHCHR	United Nations High Commissioner for Human Rights
PNAS	National Policy of Social Welfare
UN	United Nations
UNCRC	United Nations Committee on the Rights of the Child
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNICEF	United Nations International Children's Emergency Fund
WB	World Bank

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## **Abstract**

This study looks into how the standards of child care, shaped by the Convention on the Rights of Child (CRC) and UN Guidelines for Alternative Care of Children have led to progressive reforms of Brazil's alternative childcare system. The current gap that exists between law and practice in this realm has been associated with social norms that are in ways determining judges' ability and willingness to comply with Brazil's internationally embraced plan. The research aims to show that efforts must be made to engage with judges at a local level throughout the country to increase commitment to the country's initiative to move away from the institutional systems that have been predominant throughout Brazil's history. To present this case, I have utilized both theoretical and analytical methods to attain a deeper understanding of the elements creating the reality of the role of the judiciary and more specifically of judges in the country's intricate alternative care system. The relationship between law and social development and law and governance along with sociological approaches such as the social construct of childhood and norm socialization were all considered in the Brazilian context and combined with an investigative study revealing the evolution of Brazil's contemporary child based approach to alternative care. To better understand the magnitude of a judge's duty and how social norms can affect that responsibilities, a capacity gap analysis was performed. The data used to perform this analysis was collected in Brazil through a series of interviews with over twenty individuals including judges, heads of ministries and grassroots workers. Their testaments confirmed among other things, that a judge's commitment and leadership in this movement are paramount in ensuring the implementation of new norms that promise to act in the best interest of children and adolescents.

## **Relevance to Development Studies**

The CRC guarantees the child's right to live in a family and have a community life and the UN Guidelines for the Alternative Care of Children have established that the "removal of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration" (UN Guidelines 2010). However, while the universalization of children's rights protection tends to be comprehensive, the same conclusion is not feasible when applying these rights in a contextual approach. There is an estimated 8 million to 10 million children living in institutions around the world, in which 80% or more have at least one living parent (LUMOS 2015). Numerous studies have exposed the shortcomings of institutionalized care's ability to properly address the needs of children and youth, and their inability to invest psychologically in each child is leading to great developmental deficiencies (Johnson, Browne, Hamilton-Giachritsis 2006).



Brazil has embraced these international standards at a national level and currently has a framework in place for the alternative care of children that aims to move the country away from its historic preference of institutional care. Even though Brazil was in an opportune moment of transition in relation to children who are separated or at risk of being separated from their families, a culture that still undervalues social services and the family is affecting social work provision, social workers performance and the implementation of policies (Graham 2013: 45). “Entrenched child-welfare and care practices among policy makers, decision makers and practitioners”; aside from “social and cultural norms among wider society that perpetuate inadequate care” are aspects that are ultimately holding Brazil back from full successful implementation of its child care system (Gale and Csaky 2015: 29).

This study is relevant to developmental studies as it provides a better understanding of the gap between law and practice in Brazil’s alternative child care system through observation of how law and development shape various dimensions of young peoples’ lives and comprehending where children and youth are situated in both global and local developmental processes. Critical engagement with the realities and social constructions of childcare and childhood along with the country’s aspirations reveal tensions that may be relieved by utilizing human rights approaches as a keys to social justice for children.

## **Keywords**

Children Rights. Family and Community living. Alternative Care. Brazil. Social norms. Judges.

## Glossary

**Children without parental care:** Are not necessarily orphans. The term refers to “All children not living with at least one of their parents, for whatever reason and under whatever circumstances” (Unicef 2010: 11)

**Alternative Care:** “Alternative care’ refers all care provided to children deprived of parental care. It does not refer to alternatives to institutional care, since alternative care can include institutions for children” (European Guidelines: 28). It does not extend, however, to children that are deprived of liberty because infringed the law, care by adoptive parents of informal arrangements of care (UN Guidelines 2010: 7).

**Residential care/Institutional Care:** UNICEF defines residential care as “care provided in any non-family-based group setting, in facilities housing large or small numbers of children” (Unicef 2010: 11). In Brazil there are which in Brazil can have two types:

*Casa-Lar:* Is the temporarily care of children in a larger facility for a group of a maximum of 20. Children and adolescents (see definition of family-like care)

*Abrigo Institucional:* Is the temporarily care of children in small housing facility where at least one person or a couple work (not live) as an educator or caregiver caring for a group of a maximum of 10 children and adolescents (see definition of family-based care)

**Foster care:** UNICEF defines it “children in foster care are in formal care in the legal sense, but placed with families rather than in institutions. Foster parents normally receive a special fee and an allowance” (Unicef 2010:11). In this research foster care is related to programs in Brazil called *Familia Acolhedora* or *Acolhimento Familiar*. Some people refer to foster care in Brazil as any form of alternative care that it is not provided by the family of origin. In this case, reference is made to what in Brazil is called *colocacao em familia substituta* [substitute family] and it can be done through custody, guardianship or adoption. Legally, when the Judiciary decides to put children in a temporarily formal care arrangement (institutional or family-based care), it is conceding the guardianship of those children.

**Family-based care:** “A short- or long-term care arrangement agreed with, but not ordered by, a competent authority, whereby a child is placed in the domestic environment of a family whose head(s) have

been selected and prepared to provide such care, and who are financially and non-financially supported in doing so” (European Union 2012: 28)

**Family-like care:** Arrangements whereby children are cared for in small groups in a manner and under conditions that resemble those of an autonomous family, with one or more specific parental figures as caregivers, but not in those persons’ usual domestic environment (Unicef 2010).

**Deinstitutionalization:** Deinstitutionalization is not simply closing institutions but according to Unicef “the full process of planning transformation, downsizing and/or closure of residential institutions, while establishing a diversity of other child care services regulated by rights-based and outcomes-oriented standards.” (Unicef 2010: 52)

**Gatekeeping:** A systematic procedure to ensure that alternative care for children is used only when necessary and that the child receives the most suitable support to meet their individual needs. [...] Gatekeeping has evolved into a central issue for those within the child-care and child-protection sector, and for all responsible for implementing international standards for children’s rights, especially those contained within the Convention on the Rights of the Child (CRC) and those found in the Guidelines on the Alternative Care of Children, endorsed by the UN General Assembly in 2009 (Gale and Csaky 2015: 6)

# Chapter 1

## Background of the study

### 1.1 Introduction

The child care given in a loving family environment and the State's mandate to provide adequate care when the child is deprived of such a setting are basic universal children's rights enshrined in the Convention on the Rights of the Child (CRC, Article 20).

Nevertheless, despite this recognition and the negative effects of institutional care<sup>1</sup>, there are an estimated 8 million children living in institutions (also known as residential care or orphanages) around the world, in which 80% or more have at least one living parent (LUMOS 2015).

This number caught my attention from the moment I started my Child and Youth Studies in Development Contexts. Therefore, as a Brazilian, a lawyer and a public servant of the Judiciary Branch for the last 10 years, I decided to develop a study that situates the Brazilian context in this international framework of child rights protection. In light of the many gaps between law and practice that I discovered in this academic course, this paper presents my reflections on the important role of the Judiciary, especially the role of local judges, in the realization of the rights of children deprived from parental care in Brazil.

### 1.2 Research context and problem

Since the emergence of The CRC and the UN Guidelines for the Alternative Care of Children (hereinafter UN Guidelines), there have been few countries that have taken such strides towards complete alternative childcare reformation as Brazil. Compared to its neighbouring countries in South America, Brazil is considered a leader when it comes to investing in the process and delivery of child protection that focuses on alternative care provision (Gale 2016: 56).

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<sup>1</sup> Countless studies in the last decades have exposed the harmful shortcomings of institutionalized care for the physical and emotional development of children and adolescents. Researchers from the University of Birmingham, for example, made sobering confirmations about the known effects of institutional care on crucial aspects of a child's upbringing including brain growth, attachment, social behaviour, and cognitive development. These known pitfalls of institutional care date back to the writings of Goldfarb and Bowlby in the mid-20th century. After all, it was Bowlby's attachment theory of 1969, which associated many of the institutional shortcomings to a child's lack of attachment to a mother figure, which acted as one of the first catalysts promoting family based care (Johnson, Browne, Hamilton-Giachritsis 2006).

Over the past quarter century improvements in legal and policy framework, as well as thematic plans of action have led to positive outcomes concerning this topic. Since 2006, for example, the country launched a specific National Policy to protect the child's right to family and community living: 'The National Plan on Promoting, Protecting, and Defending the Right of Children and Adolescents to Family and Community Living (PPPDRCA) [*Plano Nacional de Promoção, Proteção e Defesa dos Direitos de Crianças e Adolescentes à Convivência Familiar e Comunitária*].

All this progress, which will be more thoroughly explained during this research, was recognized by the Committee on the Rights of Child in the last Brazilian review of the monitoring process of the CRC (CRC Committee 2015), by The Inter-American Commission on Human Rights of the Organization of American States (OEA), NGOs and academic studies. (Gale and Csaky 2015, Gale 2016, Graham 2013, IACHR and UNICEF 2013).

Nevertheless, in a real-life setting, the country still faces challenges ensuring the enforcement of what is guaranteed by law.

When it comes to numbers, no accurate data exists to illustrate the problem:

“Data about Brazilian residential care should be carefully analysed, since this field of study still has to face a lack of organization of the care system as a whole. The information provided by the Brazilian government agencies are contradictory, and in various situations, reality and data diverge” (Schutz et. al 2017).

However, in order to provide an overall idea, data produced through a survey conducted by the *Conselho Nacional do Ministério Público* (CNMP) [National Council of the Prosecution Service] in 2013 showed that over 30.000 children and adolescents were in formal care in Brazil, with less than 3% in family-based care (foster care) program. The main causes pointed out for separation of children from their parents are: Negligence of the parents or guardians (more than 80%); parents or guardians dependence on alcohol or drugs (more than 80%); abandonment (around 70%); domestic violence (around 60%); and sexual abuse (around 45%) (CNMP 2013). The current available data provided by the *Cadastro Nacional de Crianças Acolhidas* (CNCA) [National Registry of Children in Care] administered by the *Conselho Nacional de Justiça* (CNJ) [National Council of Justice] shows that currently there are more than 40,000 children and adolescents in care, around 10,000 of whom are institutionalized for more than 2 years (CNJ 2017).

In the last review of the monitoring process of the CRC that took place in 2015, The CRC Committee concluded that the institutionalization of children in Brazil still points to **socioeconomic vulnerability** as the strongest cause of

separation and the **lack of family-based care** is a stark fact (CRC Committee 2015)

The unnecessary removal of children from their families and the lack of prioritization of family-based care were also reported by a Coalition of NGOs called Defence for Children International (DCI) in the same monitoring procedure (DCI 2014).

Outside the monitoring procedure of the CRC, NGOs and academics are also reporting the gaps between the law and practice. This incongruity is present throughout the stage of preventing the separation of children from their families, the moment they enter the care system and beyond.

At the prevention level, the lack of capacity of social workers and funding are substantial. There is a weakness of the national workforce in terms of professionalism and training recruitment to provide sufficient numbers of child care professionals to serve large populations (Gale 2016: 57). Low salaries for many professionals working within the system from Social Assistance Secretariats to members of the Tutelage Councils are keeping the most qualified professionals from entering into the profession and discouraging those already in it. Insufficient funding is also resulting in poor quality training for many gatekeeping professionals in various municipalities, which affects their ability to properly assess, analyse and make fundamentally sound decisions about the cases they are presented with (Gale and Csaky 2015: 17, 24).

When children enter in the care system, the alternative care provided is not suitable. Unfortunately, there is a strong reliance on institutions, foster care is an uncommon practice and the participation of children and parents in the decision making is unusual. Furthermore, practitioners face challenges in reinventing the role and effectiveness of the residential care system that it already has in place. There are delays in case solving and proper monitoring of institutions and of individual care plans is not being carried out regularly. Judicial interprofessional teams have varying understandings of their roles. With Small numbers of professionals and high demand for care, many cases are not receiving as much attention as they deserve. Besides that, the country does not have a system of national post-care planning for the youth who age out of the system or for those who are reintegrated to families or adopted (Gale and Csaky 2015, Gale 2016, Graham 2013, Guara and Bernardi 2015, Rizzini and Rizzini 2003).

What called my attention for the purpose of this research is that in some of these previous assessments, the issue of cultural and social norms appear as contributors to the gaps found between rights and realities.

The DCI Report states that “the effectiveness of the precepts of full protection is great difficulty on this **‘culture of institutionalization’**, still quite rooted in society, combined with the socioeconomic conditions of the population, which remain quite exclusive and unequal”. (DCI 2014: 13)

The global network Family for Every Child mentioned in 2013 that, even though Brazil was in an opportune moment of transition in relation to children who are separated or at risk of being separated from their families, **a culture that still undervalues social services and the family** is affecting social work provision, social workers performance and the implementation of policies (Graham 2013: 45).

In the same manner, Better Care Network and UNICEF state that “**entrenched child-welfare and care practices among policy makers, decision makers and practitioners**”; aside from “**social and cultural norms among wider society that perpetuate inadequate care**” are aspects that are ultimately holding Brazil back from full successful implementation of its child care system (Gale and Csaky 2015: 29).

Finally, noting that biased attitudes of political decision makers, judges, practitioners and the general public can act as proponents of the ineffective and harmful residential care facilities, CELCIS brings attention to the fact that in Brazil, 67 percent of residential facilities are church funded (Gale 2016: 31, 56). In a society that generally values religion over politics, church support for residential care facilities exposes a potentially great obstacle in the deinstitutionalization process.

As informative as they are, these reports don't specify exactly how these social-cultural norms are constraining the childcare mechanism nor have they proposed a way to overcome this issue considering Brazil's idiosyncrasies.

In my opinion, understanding this dynamic is crucial when thinking about future interventions. If the law and policy keep advancing and aligning with international norms but the personal motivations and commitment of the state actors who implement them do not follow these innovations (based on deep-rooted practices and cultural norms), the system will not flow the way it should. As a result, there will be more children in institutions.

### 1.3 Thesis statement

Despite Brazil being hailed for its implementation of international standards for alternative care of children, this research is going to show how the national discourse is distant from practice at the grassroots level throughout the country. Considering that the decision-making process in Brazil is heavily reliant on judicial resolution, which justifies the focus on the Judiciary, I will show how social norms from the past are still embedded in judge's justifications for non-compliance with Brazil's new internationally impacted norms. I will also show how judges that embrace the modern national policy are capable of influencing their communities and are achieving positive results based off of their decisions. Therefore, future interventions should consider local judges as a strategic target group for engagement in order to shift the social norms and preferences needed to generate the expected development outcomes of the law.

## 1.4 Research Questions:

With this context in mind and considering that in Brazil the Judiciary is one of the most important actors involved in the decision-making process, the question that stimulated this research was:

***How social and cultural norms in Brazil are constraining in practice the capacity of judges to fulfil the child's right to family and community living?***

Understanding the social construction of childhood care and how the judge's preferences and beliefs can influence the decision-making process are crucial to promote social justice and the development of young people's lives. Familiarity with these judicial behaviours and unpacking them are essential to strengthen the salience or legitimacy of the domestic norms, or in Cortell and Davis' (2000) words, "to promote an international norm attaining the status of an 'ought' in the domestic politics arena".

In order to answer the main question, the sub-research-questions that drive the study are:

*- What is the social construct of childhood care in Brazil and how are the international standards about alternative care impacting this standpoint?*

The first step in analysing the judge's decision making process is knowing more about the people that they represent. The social attitude towards children determines their role and place in the community and judges will often manifest these social norms through their choices concerning alternative childcare options.

*- How is the process of decision-making on alternative care in Brazil taking place and what is the role of the judges in implementing the child's right to a family environment?*

Once an understanding about the culture of care in Brazil is reached, it is relevant to describe how the decision-making process is taking place and what is the judges role. This overview of the current law will help to show the relevance, power and the high influence of judges in the alternative care system.

*- Since the domestic impact of international norms has not been strong enough to bring a real change, how are social norms from the past still countervailing judge's normative claims in practice?*

In order to understand the way that social and cultural norms can influence the role of judges in practice I will refer to my fieldwork in Brazil where I was able to interact with various actors at different levels of authority.

*What are the intervention options considering the scenario at hand?*



Taking into account how social and cultural norms are influencing the capacity of judges and the fact that changing deep-rooted practices is a slow moving process, what reflections can I bring to the table concerning future interventions.

## 1.5 Research methodology and Sources of Data

In order to assess how social norms are influencing the capacity of the Judiciary, a qualitative socio-legal research methodology was required and conducted using different sources of data, in a three step process.

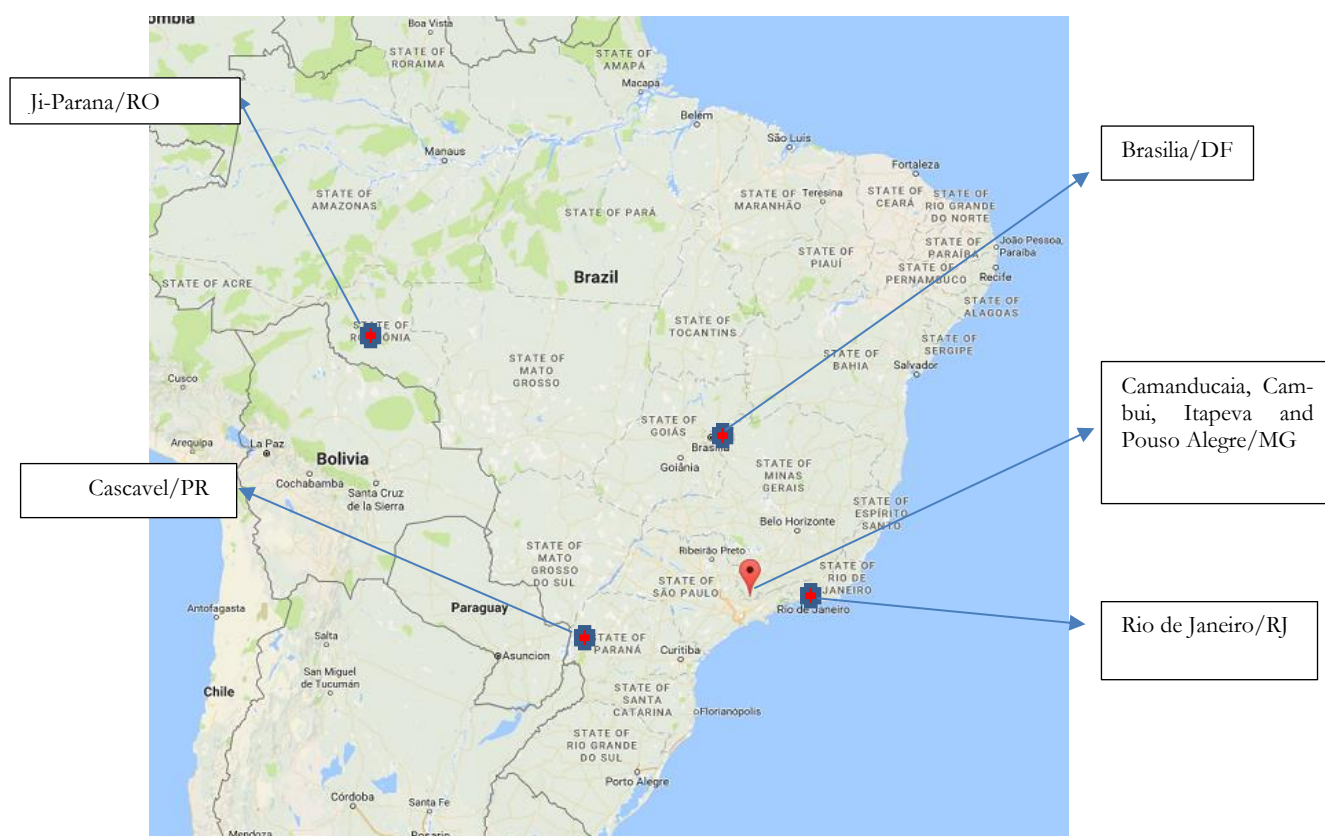
The **first step** required my own engagement and understanding about the international context and the international norms governing the alternative care of children. I did a doctrinal analysis of the CRC and the UN Guidelines, endorsed by the United Nations General Assembly on November 20th, 2009 (UN General Assembly A/RES/64/14223 Feb 2010). I took into consideration some manuals produced by international organizations intended to be an assessment tool for the implementation of the UN Guidelines, especially: ‘Moving forward: Implementing the Guidelines for the Alternative Care of Children’ (Cantwell et al. 2013); and the ‘Implementation Handbook for the Convention on the Rights of the Child’ (Unicef 2007).

The **second step** was taken aiming to understand how these international norms impacted the domestic legislation and policy in Brazil. In order to analyse this impact, it was first necessary to have a broad and historical understanding of the social construct of childhood care in Brazil before the internalization of these international standards. Next, a legal analysis of current legislation and policy was needed. And finally, a study about the strengths and weakness of the current system and the attributing causes. Hence, I did a **literature review** of the academic work and reports from different organizations that intended to analyse the alternative care system in Brazil and a **legal analysis** of the *Constituicao da Republica Federativa do Brasil* [Constitution of the Federative Republic of Brazil] (CF 1988) and the *Estatuto da Crianca e do Adolescente* [Statute of Child and Adolescents] (ECA 1990). For the literature review I used reports and academic papers from different sources (Gale and Csaky 2015, Gale 2016, Graham 2013, Guara and Bernardi 2015, IACHR and UNICEF 2013, and Rizzini and Rizzini 2003).

The **third step** taken for this research focused on one of the challenges presented in the previous studies - social norms as constraint to the decision-making - to see how this particular issue is being handled in real practice. In this stage, I performed fieldwork in Brazil, where I collected data through **interviews** and **observation** at both the national and local level. At the national level, I went to capital of the country, Brasilia, where the National policies and law are created. After that, in order to analyse local realities, I went to the city of Rio de

Janeiro and in 4 small cities located in the southern state of Minas Gerais<sup>2</sup> (Camanducaia, Cambui, Itapeva e Pouso Alegre) and connected with one judge from the State of the Parana through Skype. In the end, I conducted 21 interviews with different key actors of the Brazilian National Child Protection System, which ranged about hour each. In Brasilia, it included government officials of the *Ministerio dos Direitos Humanos* [Ministry of Human Rights], the *Ministry of Hunger and Alleviation* and the *National Council of Justice*, as well a psychologist from an NGO that supports family-based care initiatives and two judges. One of the Court of the Child and Adolescent of Brasilia and one from the city of Ji-Parana, State of Rondonia. In the other cities, it included government officials and grassroots actors involved in the delivery of public services and one NGO that supports family-based care initiatives. All respondents, except one, signed an informed consent and agreed to be mentioned in this research. The list of the respondents is in the Appendix I.

**Map 1 – Areas covered by the study**



Source: Google Maps 2017

<sup>2</sup> It is important to mention that I chose the States of Minas Gerais and Rio de Janeiro because, according to reports extracted from the National Register of Children in Alternative Care in Brazil, they have the second and the third highest number of children in formal care when compared to the rest of the country (CNJ 2017).

Finally, it's important to clarify that some interviewees were selected through a **hand-picked sampling** process, especially in Brasilia, while others were selected through a **snowball sampling** process, in which my respondents identified others that could meet the study criteria" (O'Leary 2014: 190). In addition, they were conducted in an **informal, one on one** and **unstructured** manner. Considering that my aim was to assess social norms, which involves personal opinions and beliefs, I chose this approach to make my interviewees comfortable enough to talk and express their ideas and to "draw out rich and informative conversation" (O'Leary 2014: 218).

Regarding the **observation** data collection, it was done during my field-work in a **non-participant, candid** and **structured** way. It was non-participant because my position was unobtrusive. It was candid because I offered a full disclosure of my research and structured because I had a predetermined criteria (O'Leary 2014: 231). My specific goal through observation was to analyse the "power bargaining" in the decision-making process, or, in other words, assess the influence that judges have in their interactions with the other duty bearers and civil society.

This observation was crucial to explain why I decided to target my research in the capacity of the judges. My observation was fundamental to conclude on the strong potential of influence that they have to achieve the law and policy outcomes.

### ***1.5.1. Data Analysis:***

The data analysis was made through a manual handling in which I classified the data, transcribed all my interviews and observation notes and extracted my specific thematic units.

## **1.6 Research challenges and limitations**

The first challenge of this research is representativeness. As is well known, Brazil is a country of great proportions and different realities. There are around 15,000 judges spread amongst the grassroots level around the country (CNJ 2017b: 59). Since the time dedicated to this research was not sufficient to cover what's happening in all 27 States, I chose to conduct my research in 3 different locations, as explained in the last section. Therefore, the opinions and beliefs of each judge that is presented in this research does not necessarily represent the opinion of the other judges. However, I still believe that the dynamic interactions among judges and the other actors that is presented in this research doesn't vary significantly in broad terms.

Another challenge of this research is the concern to make sure that the research content is not misinterpreted. For example, speaking of the importance of the Judiciary in this system does not imply that the judge has more responsibility than the other actors in the system, or even authority over these actors.

After the ECA's legislative reforms, an intersectoral strategy for the protection of children and adolescents - "Child Rights Guarantee System", also known as "Network", was established. What I'm trying to demonstrate in this work is how the Judiciary has a strategic role in decision making, not only due to the fact that the main decisions about children are made by judges, but because in Brazil the judges have an intangible form of power and can influence behaviour change among various different actors. Another aspect that needs to be clarified is that this research does not intend to claim that we need neutral judges that apply the law in a vacuum. Judges belong to the society and their personal motivations are intrinsically related to the history of each one's life. However, impartiality is different from neutrality. Impartiality is judicial duty, a result of complex of guarantees related to the independence of the Judiciary added to the prohibitions that are imposed on it, which in this case is to apply the command of the law (Sampaio 2007: 155). Finally, I'm not claiming that we need "super judges" that by themselves can shift deep-rooted social norms that are constructed over hundreds of years. Their activity is constrained in most of the cases to the lack of resources and technical support. However, I'm going to present some evidence that even within particular constraints, judge's preferences matter.

The third challenge that I encountered regards the data collection and data analysis. Interviewing different actors at different levels to have a good overview of the system and ensure that the interviews added value to the research in a short amount of time was a hard task. Moreover, all the interviews and data collected were in Portuguese and the translation of all the documents were time consuming.

## 1.7 Outline of the research

This research paper contains five chapters.

In the following chapter (**Chapter 2**), the theoretical and analytical framework of the research is explained

**Chapter three** will provide explanation of the social construct of childhood care in Brazil and how the international standards about alternative care impacted this standpoint.

**Chapter four** will be dedicated to showing the empirical data collected from my fieldwork.

**Chapter five** will present my reflections about the intervention options considering the scenario at hand

# Chapter 2

## Theoretical and analytical frameworks

### 2.1 Introduction

Much has already been written about the potential of the law, especially human rights law, in promoting development. At the same time, much has already been written about the necessity to go beyond the law in order to achieve a real social change (Tubrek 2015). This is why nowadays, the legal scholarship is moving forward switching from doctrinal research, the tradition of simply focusing upon the law itself (what is called the “black-letter law”), to a “law in context” approach that seeks to “understand the way that laws work and the ways that it affects people and organisations” (McConville and Chui 2017: 4-5).

In an era of global interdependence where human rights treaties are impacting national discourses, institutions and policies of developing countries, an empirical socio-legal study that promotes critical thinking about how domestic values and norms can influence this translation of rights is essential:

“Problem, policy and a law reform research often includes a consideration of the social factors involved and/or the social impact of the current law and practice. [...] Such research is often referred to as social-legal research” (Dobison and Johns 2017: 23)

### 2.2 Law and Social Development

Reference is made in scholarship to “Law and development” as “organized efforts to transform legal systems in developing countries to foster economic, political and social development” (Trubek 2015: 443).

The legal obligations and adjudication of human rights’ are gaining ground as an entry point to effective social change. Countries that have recently drafted constitutions are all very likely to depend on judicial scrutiny to interpret the array of social and economic rights elements, giving a significant amount of power to the courts when it comes to rights realization, especially for the poor (Sano 2014: 42).

There are two general viewpoints concerning the role of law in the process of social change. Some see law as a proactive catalyst that can facilitate and expedite change while others see law as a retroactive consolidator of change that has already taken place (Gready and Vandenhole 2014: 7).

Today the role of human rights law seems to have a more positive perception than other types and opened spaced to the human-rights based approaches to development (HRBA). Most agree that law is a potentially useful tool in development, however there are still a number of challenges ranging from

fragmentation (human rights and development law/formal and informal justice) to basic issues of access to justice for the poor. The primary contribution of international human rights law for many according to Gready and Vandenhole (2014:8), should be to render development actors more accountable, in particular the state, as well as international financial institutions, corporations and NGOs. They point out a series of preconditions that must exist in order to promote and push for change which consists of the presence of social action groups, an independent and socially activist judiciary, the rule of law and a human rights bill.

Gauri and Gloppen provide an empirical model of HRBA that looks past law providing a single way to designing and implementing policy. They distinguished four types of HRBA, which include “global compliance, programming, rights talk [rights consciousness and politics from below], and legal mobilization” (Gauri and Gloppen 2012: 502). Their conclusion is that while HRBA approaches can vary, the way to analyze the political change that they have to generate is through “the basis of the modalities and institutional mechanisms through they speak” (ibidem). Hence, understanding how judges are applying the legal framework that is at their disposal to improve the development of children and bring change is imperative.

## **2.3 Law and Governance**

The interplay between the rule of law and governance is an approach that has been gaining strength in recent times. In 2007, the Office of the United Nations High Commissioner for Human Rights (OHCHR) highlighted the importance of good governance to the protection of human rights. The report explained good governance as a way of carrying out authority by means of transparent and accountable political and institutional methods that promote the participation of its rights holders. To be more specific for this research, it is the ‘rule of law’ mediating the space between human rights and governance that must be carried out effectively in order to make advances in development. (OHCHR 2007: 2).

According to the UN, a lack of good governance creates an environment in which human rights cannot be respected, protected or upheld which means that good governance and human rights are directly linked. The principles established by human rights give way to the set values that governments, political and social actors can use to direct their work. Human rights approaches also create the guidelines that can hold the duty bearers accountable for their actions (OHCHR 2007: 2).

Law in a very general sense can be looked at as a set of rules that facilitate the order of social and economic activities within a society. In the last World Development Report entitled “Governance and the Law” the World Bank (WB) (2017) proposes a framework of rethinking the role of law and governance for

development in order to address the underlying determinants of policy effectiveness.

The WB (2017: 83) states that today law serves three primary functions in the larger arena of governance, which is to **order the behaviour, power and contestation** of those within its territory. The ‘order to behaviour’ refers to the law’s role of organizing the standards of behaviour among individuals and organizations through legal institutions so that policies may result into outcomes. The second role, ‘ordering power’ refers to the duty of establishing the structure of government and distributing power among government actors as well as between the State and citizens. The role of ‘ordering contestation’ is the law’s need to provide the adequate procedural mechanisms that will make states more accountable for their actions, resolve disputes and change rules in a peaceful manner.

The ‘rule of law’ is only possible if a government as well as its citizens live within the boundaries of the law. Good governance is dependent on this core requirement and provides platforms for legal institutions to improve the functionality of other institutions, enhance growth, and deliver justice in society, among other things (WB 2017: 83).

Law can be seen as the result of social and power relations while at the same time it acts as an outlet to challenge those relations. Law is capable of changing incentives for the players involved by creating different rewards or punishments. It can act as a central source to alter preferences and beliefs within a society and make way for the procedures that boost the contestability of the policy arena. The law’s ability to accomplish its intended goals depends on three main components. First, the law must be backed up by a substantial **commitment** among players. It must then be able to **coordinate** the expectations of behaviour before it is finally able to establish **cooperation** among players and produce social goods. The WB (2017: 83-84) states that the law’s ability is greatly shaped by the interest of elites and **prevailing social norms**. For this reason, the WB (2017: 29) team proposes three principles that any state considering change should take into account to promote good governance and solve commitment and collective barriers that are holding back development. The first proposal is for governments to think beyond the formation of institutions and understand exactly what functions institutions should be expected to carry out. The second proposal urges to not only focus on capacity building, but to understand the power asymmetries that capacity building depends on among the bargaining powers of the actors involved. Finally the report proposes that states strengthen the different roles of law to improve the system’s contestability, change incentives, and **reshaping preferences in order to achieve not only the rule of law but the role of law**. These explain, one more time, why the study of the influence of prevailing social norms in reshaping actor’s preferences (judge’s preferences) to achieve the role of law and thus, social change and development is relevant.

## 2.4 Sociological approaches

All the above theories emphasize the power of law to reshape preferences and values and at the same time recognize that social norms can constrain this process. But what are the social norms in Brazil regarding childcare? If we look ahead, the internalization of the child's right to family and community living passed through a process of socialization that changed the collective understanding about the way that governments and the society need to behave with this subject (the socializing norms approach). However, understanding how this process can move forward is only possible by understanding its evolution, which is the reason why it is necessary to analyse the social construct of childhood care in Brazil.

### 2.4.1 *Socializing norms*

For over two decades, Brazil has been overhauling its alternative childcare system to be more aligned with the International norms that focus on the basic human rights of children. The preference for family based care alternatives for abandoned children has made its way into the national discourse by following a process of socialization. Socialization, as mentioned by Risse and Sikkink (1999:11), is the process where “principled ideas held by individuals become norms in the sense of collective understandings about appropriate behaviour which then lead to changes in identities, interests and behavior”. Socialization therefore is defined as “the induction of new members into the ways of behaviour that are preferred in a society” (ibidem). The idea behind it is to motivate actors to internalize norms to the point that no outside pressure is needed to ensure compliance, regardless of who is controlling the State. By understanding this procedure, it is possible to understand the progress that Brazil has made in modernizing alternative childcare as well as give insight to what still lies ahead to complete the socialization process.

In a general sense, domestically diffusing international norms in the human rights arena, according to Risse and Sikkink (1999: 5) begins with the establishment and maintenance of national and transnational advocacy networks that can link with international regimes in order to call attention to any violation of rights that may be taking place. These advocacy networks serve three principal purposes. One is to put the norm violating states on the international agenda in terms of moral consciousness. They are also meant to empower and legitimize the claims of opposition groups towards norm violating governments and help mobilize domestic opposition, social movements and NGOs. Finally, they are meant to challenge the norm violating governments by creating a transnational structure that pressures regimes “from above” and “from below” and provides less options for rulers to continue repression.

The way in which principled ideas (an individual's beliefs about right and wrong) become norms (the collective expectations about proper behavior) that



can ultimately influence the domestic structure and actions of a state is of particular importance for this study. When it comes to translating international norms into domestic practice, there are three mechanisms that are needed to ensure enduring internalization. The process of instrumental adaptation and strategic bargaining, the process of moral consciousness-raising, argumentation, dialogue and persuasion and the process of institutionalization and habitualization are all significant during different stages of the socialization process (Risse and Sikkink 1999: 5).

The instrumental adaptation and bargaining takes place early in the socialization process and refers to both the international and domestic pressures a government will face once they have been accused of violating a human rights norm. Typically the first response is for a government to make tactical concessions such as signing an international agreement in order to avoid being cut off from things like foreign aid or sanctions. It is common during this phase for norm violators change their behaviour to pursue instrumental or material interests that have been defined by exterior bodies such as the UN. Actions are initially adjusted to agree with international human rights discourse even when governments don't particularly believe in the validity of the norms (Risse and Sikkink 1999: 12).

To continue further into socialization procedure, a process of communication, argumentation and persuasion is a complex phase in which actors finally accept a norm as valid and significant in how they choose to continue their practices. Risse and Sikkink (1999) focus on the communicative behavior that they identify with the notion of "discourse" which challenges the validity of information. They say that it is common at this stage in the socialization process for actors to try and clarify if they understood the information that they have received and that the situation they are facing has been defined correctly. In some cases there are moral discourses that may challenge the validity claims of the norm that is being pushed on a state.

Despite human rights being considered universal, some actors may argue that their culture and way of life are in no way connected to the individualistic norms. Moral discourses challenge and seek justifications of norms while entailing identity arguments since what people perceive as morally appropriate depends on how they see themselves. It can be argued that human rights relate to collective identities of those that believe in them and as such, the process of argumentation and persuasion can prevail when actors develop collective understandings that contribute to their identities and define their interests (Risse and Sikkink 1999: 13).

These principled beliefs have the potential of persuading actors in strong coalitions to interpret material, political interests and preferences with the idea in mind as being an appropriate social obligation which can in turn convince people to change their instrumental interests. Actors must appeal to people's emotions through the use of evoking symbolism as well as arguments that define

the logic in the extension of norms as both emotion and cognition operate together when it comes to changing attitudes (Risse and Sikkink 1999: 14).

This brings us to the last phase in the socialization process. So far it is understood that actors will normally incrementally adapt to norms by initially responding to external pressures and enacting instrumental change. Governments may then change their rhetoric and through the process of communication, argumentation and persuasion the validity of the norms becomes more collectively accepted which then leads to more dialogue about the norm implementation. At this point the institutionalization and habitualization of the human rights practice may be domestically incorporated. Once human rights norms are part of a country's standard operating procedure, it has become internalized and independent from individual belief systems. Actors comply with the norm not because they personally feel morally motivated to act in such a way, but rather because it is just the normal thing to do, like stopping your car when a traffic light turns red, for example. When a human right norm has become institutionalized to this degree, changes in government leadership will begin to matter less and less until ultimately, norms are implemented independently from moral consciousness and simply taken for granted (Risse and Sikkink 1999: 17).

#### ***2.4.2 The Social Construct of Childhood***

One of the critical elements behind a child-rights based approach to the alternative care of children involves understanding to some extent what the true perception of childhood is in the domestic arena, and what social norms among societies shape the place of children not only as citizens, but as actors that are capable of having a say on issues that directly affect them. It can be assumed that contradicting points of view concerning a child's place in some countries is slowing the implementation process of policies directly addressing childcare initiatives based on international or to be more specific, Western constructed definitions of 'global childhood'.

The middle and latter half of the 20th century was a time when children and childhood became central concerns for post war non-government entities such as the United Nations that delved into children's issues more than any previous generation had before. The hegemonic worldviews of Global Northern powers prevailed in proceedings and conventions such as the CRC, resulting in international policies embracing a rights-based discourse on children and a view of childhood that has often been at odds with the social construct of developing and underdeveloped countries such as Brazil (Cregan 2014: 8).

The way in which childhood is constructed within a particular culture is a possible insight into what may influence a decision maker such as a judge in matters concerning children. Cheney points out that while children are in many cultures considered to be embodiments of the future, childhood in the minds of masses of adults is a reference to an idyllic notion of the past and as a result

childhood is framed in a nostalgic social space for today's adult that lacks the subjectivity of children (Cheney 2007: 10).

With this being said, it is possible to see how the Developmental Rights Based approaches to alternative childcare may be easy to draft, yet slow to implement in some countries due to contradicting social norms that have embraced childhood from a socialization standpoint.

For this research, the social construct of children and childhood in Brazil will be discussed as a possible historical attribute to the cultural environment that has been limiting the country's progress towards deinstitutionalization.

Producing a better understanding of childhood requires integrated methods of research that look beyond the narrow versions of 'the child' that has been available through academic literature and traditional theorizing (Alanen 2011: 147). My critique of this aspect of Brazilian society will provide insight that will be useful in understanding how the country is currently positioned to advance its alternative childcare system.

## **2.5 Analytical framework: Child-rights programming**

Child-rights programming can be considered as a subcategory under the greater umbrella of Human Rights based approach to development. Save the Children's handbook on child rights programming (2006) defines the process as:

The use of the principles of child rights to plan, implement and monitor programs with the overall goal of improving the position of children so that all boys and girls can fully enjoy their rights and can live in societies that acknowledge and respect children's rights (Save the Children 2006: 24)

Save the Children (2006: 27) has narrowed down the practice of child rights programming down to twelve main components that states must take into account when constructing framework surrounding children's issues. Among these components are focusing on children, their rights, and their role as social actors; taking a holistic view of children when developing strategies and expectations and considering at all times what is in the best interest of the children when measuring what a program's impact will be.

More complex components include accountability, with a particular emphasis on promoting, protecting and fulfilling children's rights through a spectrum of duty bearers including central and local governments, to childcare professionals and others in the private sector. Understanding the part that children play in their families as well as the community as a whole and the role of parents and other caretakers in keeping a child's development on track goes along with addressing root causes and broader issues that are leading to violations. This knowledge can help with the component of creating partnerships among duty

bearers at all levels that can make the realization of children’s rights possible (Save the Children 2006: 27).

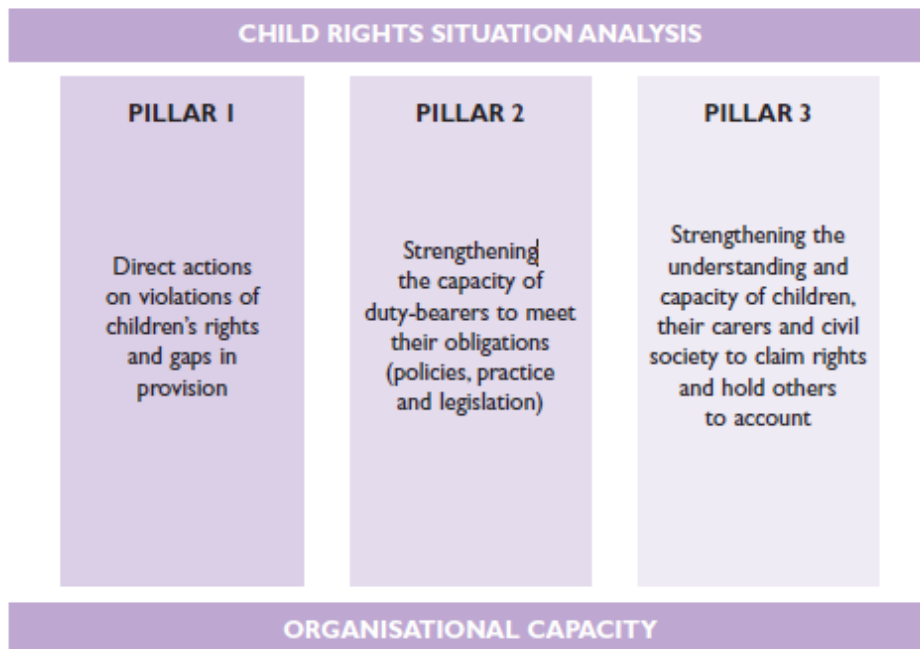
Ideally, Child rights programming will ensure that developing states will always take a child’s best interest into account in order to promote not only their survival, but personal development and furthermore, any decision made concerning children is always made with knowledge of their opinion and stance on the issues, making sure not to exclude or discriminate marginalized groups (Save the Children 2006: 27).

### 2.5.1 The Three Pillars Tool

The ‘Three Pillars Tool’ provided by Save the Children (2006: 42) gives a simplified prospective as to what proper CRP should entail. Every program will always address at least one, but will most likely combine any of the elements. The first pillar is to point out gaps and violations of rights that are currently taking place. The second pillar is to strengthen structures and mechanisms whether legislative, executive or judicial. Pillar three sets out to build up the community and civil society’s capacity to support children’s rights through the creation of children rights coalitions or youth clubs.

**Figure 1 - The Three Pillars Tool**

#### The three pillars of CRP



*Source: Save The Children 2007*

According to Save the Children (2006:42), the use of this tool doesn’t involve necessarily all Three Pillars, but “may emphasise only one or two of the pillars”. This research is focused on the first two pillars, but can create a path for future interventions regarding the third. After showing the gaps between law in practice in the first chapter (Pillar 1), showing the way that social norms are

influencing the judicial capacity has the ultimate goal of strengthening the Organizational Capacity of Judiciary (Pillar 2), but also can be a good indication for future interventions regarding the capacity of children in this context (Pillar 3).

### 2.5.2 The Capacity Gap Analysis Tool

The analysis of the Second Pillar mentioned above can be supplemented by another tool proposed by Save The Children (2009): The Capacity Gap Analysis Tool. This tool is indicated for assessing the reasons why duty bearers are not meeting their responsibilities, through 3 different aspects: their **personal motivations**, their **authority to carry out** their role and the **resources** needed to meet their responsibilities:

**Figure 2 - The Capacity Analysis Tool**

Capacity analysis				
Level of duty	Role analysis	Motivation	Authority	Resources
As defined in relation to the issue and local situation	Who is supposed to do what to help solve the problem?	Does the duty bearer accept the responsibility? <b>If not, why not?</b>	Does the duty bearer have the authority to carry out the role? <b>If not, who does?</b>	Does the duty bearer have the knowledge, skills, organisational, and human and material resources? <b>If not, what's missing?</b>

*Source: Save The Children 2009*

The findings of the field of this research were grouped in these three aspects, highlighting how the social norms are directly influencing each one.

## 2.6 Conclusion

The theories that underpinned this study belong to what is known as contemporary perspectives on social justice. In sum, they aim to explain why human rights impact and implementation can differ among States. The comprehension of the impact of the CRC and the UN Guidelines as drivers of legal and organizational change in Brazil is related to the analysis of Law and Human Rights for Development. The comprehension about the social dynamics behind this process demands an analysis of the socialization of norms, as well as an understanding of the social construct of childhood care that precedes the internalization of these new rights. Finally, finding a path to properly address the way that the rule of law can order behaviour change and reshape preferences and beliefs demands good governance.

## **Chapter 3**

# **The legal transition: from the social construction of childhood to the impact of the CRC and the UN Guidelines on Brazilian law and policy**

### **3.1 Introduction**

This chapter aims to analyse, from the social construct of childhood care in Brazil, the current configuration of the law and public policies directed to the alternative care of children deprived from parental care, especially considering the influence of international legislation in this context.

This analysis is relevant because the first step in understanding the impact of the CRC and the UN Guidelines in these policies and laws relates not only to evaluating to what extent they are embedded into the domestic institutions, but also to knowing what has been proclaimed about childhood in a particular historical construction (Cruz et.al 2005: 42). In the case of Brazil, the existence of institutions for adolescents has a deep rooted history, which may very well explain the cultural psyche that has resulted in the ongoing existence of institutions today, despite it being widely accepted that institutions should be a last resort for children in need.

### **3.2 The “culture of care”: A brief history of the institutionalization of children in Brazil**

Beginning in colonial times, Portuguese colonizers and Jesuit missionaries believed that it was the role of the church to educate indigenous children, whose parents were incapable of teaching them values based on European standards. This mindset led to the first residential care facilities aimed at separately converting indigenous boys and girls into citizens who could be of use to the Portuguese State (Shutz et. al 2017: 59).

Through the centuries boarding schools, seminaries and reformatories are just some examples of institutions that oversaw the development of many children, most of whom came from the poorest social classes (Rizzini and Rizzini 2009: 5). An accepted objective would be for a vulnerable minor to be shaped into a functional rural worker or urban citizen as was deemed necessary at the time (Shutz et. al 2017: 59).

The first official child care mechanism for abandoned children was the *Roda dos Expostos* [Wheel of Exposed], which was created in the colonial times and was only discontinued in the 1950s. The children were left in wooden cylin-

ders that separated the catholic monasteries from the outside world, and whoever collected them had no contact with the person who left them (Cruz et. al 2005: 42-43).

By the end of the 19th century the newly formed State of Brazil had judicially categorized the poor class of youth as *menores* [minors], and they took on a distinct social and political character within Brazilian society becoming popular targets for government intervention. It was not uncommon for police in cities to collect abandoned children and adolescents wandering the streets and put them into correctional facilities (Rizzini and Rizzini 2009: 5, 10).

Legislation aimed specifically at children came about in the 1920s. The first decree recognizing the maltreatment of abandoned youth came in 1923 and the first law known as the *Codigo de Menores* [Code of Minors] was passed in 1927. This law provided the first official protection of the population under 18 years of age and among other things, banned any kind of labour for children under the age of 14. It was at this point in history that the State officially took over the responsibilities of dealing with the country's most vulnerable children and adolescents (Shutz et. al 2017: 59).

The Ministry of Justice introduced the Child Care Service in 1942, which was a prison style institution that had the intention of educating the abandoned youth through means of obedience and resignation in order to curb violent behaviour. In theory, they wanted to prepare these children for a productive role in society while in the institutions so that they could leave ready to work in a job offered to them (Shutz et. al 2017: 60).

A lack of formidable alternatives was one reason for the support of institutes as well as government endorsement. Pro-institutional sentiment strengthened when the military dictatorship took power of Brazil in 1964.

Despite emerging studies revealing the many shortcomings and problems caused by the institutionalization of children, the military government implemented its *Fundacao Nacional do Bem Estar do Menor* (FUNABEM) [National Policy for the Well-Being of Minors], which backed the institutional model as a means of national security. Children on the streets were considered to be possible dangers to themselves as well as to society, and therefore their detainment and placement into State run institutions was justified. It was also normal for families to give up their children to state run institutions believing that the State was better equipped to feed and educate their children than they were (Rizzini and Rizzini 2009: 6)

New concepts of childhood and child's rights started entering Brazil ratified the CRC in September 24, 1990. Through the guidance established by the CRC, Brazil adopted its own *Estatuto da Crianca e do Adolescente* [Statute of Child and Adolescents] (ECA), and began working on legislation leaning more towards a family based approach to dealing with abandoned or orphaned children. The

long standing National Policy for the Well-being of Minors was finally abandoned completely in 1995 (Shutz et. al 2017: 61).

Through the ECA, children were finally guaranteed rights to things such as food, education and the recognition as citizens in social policy matters. They were also promised protection from family mistreatment without immediate separation from their parents. Practices that deprived children of liberty or separated them from their family or community became unfavourable yet institutional care has continued to be prominent into the 21st century. (Shutz et. al 2017: 61)

### **3.3 The paradigmatic change: The CRC and the UN Guidelines and the rearrangement of the alternative care system**

Kreuz, using the Boaventura de Souza Santos concept of paradigmatic transitions, points out how after the CRC there was a radical change in Brazilian legislation for the protection of children and adolescents, especially reflected in the Federal Constitution of 1988 and the Statute of the Child and Adolescent in 1990 (ECA). This transition involved the disruption of paternalistic and welfare practices and the adoption of a doctrine of integral protection where one observes the best interest of each child (Kreuz 2012: 138-143).

In the field of alternative care, another significant change took place through the influence of the UN Guidelines. Two of my interviewees<sup>3</sup> have participated directly in the elaboration of the UN Guidelines, which was drawn up almost in parallel with the Brazilian National Plan on Promoting, Protecting, and Defending the Right of Children and Adolescents to Family and Community Living. They highlighted how Brazil is strongly influenced by the Guidelines' terms and also reported how the work to improve the local legislation was created with the concepts of the Guidelines in mind.

Claudia Cabral, the founder of the Association Terra dos Homens, a Brazilian NGO that works with this subject, explained how the international concern about alternative care spiked after the 2004 tsunami that affected Asia. The effects this disaster had on so many children, along with the countless number of institutionalized children already scattered around the world triggered UNICEF International along with the International Social Service (ISS) to call for the establishment of international standards to improve the protection available to children without parental care.

The recommendations that were collected gave way to a first version of the guidelines that was put together in 2006 by a working group of NGOs committed to helping children without parental care and submitted for consultation

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<sup>3</sup> Personal interview with Claudia Cabral and with a civil servant of the MDS that asked not to be identified.



at the CRC, which strengthened and gave more substance to the guidelines in order to prepare for a review by UN member states. Claudia Cabral, among other Brazilian experts was part of this group.

A 2006 meeting held in Brasilia brought together experts to go into even more detail and refine the guidelines. The culmination of these discussions led to a Brazilian led “Group of Friends” consisting of 14 other countries that would go on to host a series of intergovernmental consultations to enhance the guidelines. These consultations all came together in June of 2009 when the Guidelines were submitted to the UNGA, and finally adopted in November of that same year.

The same group that worked on the draft of the UN Guidelines, were part of a domestic working group called *GT Nacional Pro-Convivencia Familiar e Comunitaria* that was responsible for creating the Brazilian National Plan, which was launched in December, 2006.

This historical perspective is relevant because it was these principles laid down in the UN Guidelines and in the National Plan that gave rise to several amendments in the ECA through Law 12010, which was adopted on August 3, 2009, as a part of a legislative amendment package in honour of the ECA’s twentieth anniversary.

I will dedicate the next topic to the legal system in Brazil in order to give an overview of these conceptual alignments.

### **3.4 Overview of the Brazilian current Law and Policy regarding the right to family and community living**

The Constitution of the Federative Republic in Brazil (CF, 1988) states that the protection of the child’s right to family and community living is an absolute priority duty of the family, society and the State (Article 227).

The Statute of the Child and the Adolescent (ECA, Law 8.069, July 13, 1990) established that every child has the right to be raised in a family and the child’s right to freedom encompasses the participation in family and community life, without discrimination (Articles 15, 16 and 19).

The general provisions regarding the right to family and community living in an environment that guarantees the full development of a child/adolescent are regulated in Chapter III of the ECA. For the purposes of this research, it is necessary to highlight the following provisions:

- The exceptionality of placement of child into formal care (article 19).
- The preference for family reintegration (article 19, paragraph 3)
- The obligation of reassessment of the situation of each child in care every 6 months and the necessity of a judicial decision for

family reintegration or placement in foster family (article 19, paragraph 1)

- The maximum period of 2 years in institutional care, unless there is judicial recognition that a longer time is in the best interest of the child (article 19, paragraph 2)
- Poverty (the lack or shortage of material resources) is not sufficient reason for the separation of the children from their families and, when this occurs, there is a State obligation to implement special services of protection and support (article 23)

The ECA, among others, consider putting the children into care as a protection measure, whenever their rights are threatened or violated by the action or omission of the Society, the State, parents or guardians, or by reason of their conduct (Article 99). Aside from institutional care and foster care, there are other protection measures such as inclusion of the family/parents in a government or community program of aid, as well as orientation and treatment of alcoholics and drug addicts.

The principles governing the implementation of this protection measure are: Children and adolescents are subjects of rights; integral and priority protection; primary responsibility and solidarity of the State for the full realization of human rights; best interest of the child; privacy; early (fast) and minimal (by the competent authority) intervention; family prevalence; information obligation; hearing of the children voices and participation (Article 100).

The judicial proceeding, on the initiative of the prosecution service or another legitimate person, have to observe the following aspects:

- The voices of the children should be considered whenever possible and it is mandatory to listen to them when they are over 12 years of age (Article 28, paragraphs 1 and 2)
- Parents or guardians have the right to fully defend themselves (Article 100, paragraph 2)
- Siblings must be kept together (Article 28, paragraph 4)
- The need for a judicial decision to institutionalize a child, except in an emergency situation, when the fact has to be communicated to the authorities within a maximum of 24 hours (Article 93).
- Family-based care has preference over institutional care and the government's duty to support the preceding one as public policy (article 33, paragraphs 1-4).

The ECA also foresees the need of the Judiciary to maintain and update the registry for all children in foster or institutional care. According to the law, this registry is necessary for the implementation of public policies that allow reduction of the number of children deprived of their parental care and to shorten the period in care placements (Article 101, paragraphs 11 and 12).

The policies of preventing or shortening the period of family living and enforcing the rights of the child and adolescent have to be implemented through a coordinated complex of governmental and nongovernmental actions within the Federal Government, States, Federal District and municipalities. In addition, the law provides the operational integration of the entities of the Judiciary, Prosecution Service, Public Defenders, Tutelage Councils and Social Assistance, for the purpose of expediting the care of children and adolescents inserted in family or institutional care, the rapid family reintegration, or if this solution is not feasible, their placement in a foster family (Articles 86-88). This network consists of a Rights Guarantee System [*Sistema de Garantia de Direitos*], commonly known in Brazil as “Rede”, and involves the participation of various actors of the three branches of the government.

The obligations and requirements for the establishment and operation of the institutions (governmental or non-governmental) are laid out starting in article 90 of the ECA, but a deeper specification is provided by the *Orientacoes Tecnicas para os Servicos de Acolhimento para Crianças e Adolescentes* [Technical Guidelines for Residential Care of Children and Adolescents] (hereinafter Brazilian Guidelines).

The principles that have to be adopted by all institutions and foster families are: preservation of the family bonds and promotion of family reintegration; integration in a foster family as a measure of last resort, personalized treatment in small groups, development of activities in a context of coeducation, non-separation of groups of siblings, avoiding unnecessary transfers to other entities, participation in local community life, gradual preparation for severance from the system and participation of persons from the community in the educational process (Article 92).

The monitoring and supervision of these institutions is the duty of the Judiciary, the Prosecution Service and the Tutelage Councils (Article 95).

### **3.5 The gatekeeping mechanism and the important role of judges**

The gatekeeping process in Brazil is highly dependent on the actions of the Judiciary, however the country has created a fragmented mechanism that pulls from resources from the outside of the Judiciary as well. Before a case finally arrives on a Judge’s desk, the child or children in question along with their families will have already gone through an extensive process in order to be sure that a judge’s determination is necessary.

UNICEF’s series provides an overview that puts the process into perspective and helps in understanding the strengths and weaknesses of this relatively new approach to implementing alternative care in the country (Gale and Csaky 2015). Another good source for understanding the social work is provided by the global coalition *Family for Every Child* and it is entitled *Improving Social Work*

*in Brazil: The Results of an Appreciate Inquiry on Social Work whit Vulnerable Children and Social Workers in Brazil* (Graham 2013).

The entity that is responsible for the oversight of child protection and welfare issues is the *Ministerio do Desenvolvimento Social e Combate a Fome* [Ministry of Social Development and Hunger Alleviation] (MDS) and it is regulated at a national level by Law n. 8.742, from December 7<sup>th</sup> 1993<sup>4</sup> (*LOAS – Lei Organica da Assistencia Social*) and the *Politica Nacional de Assitencia Social* [National Policy of Social Welfare] (PNAS) launched in 2014. Within this Ministry the Secretariat of Social Assistance is in charge of all social welfare support involving the care of children (UNICEF, 25). According to article 6-A of Law 8.742/93 the social protection in Brazil is divided in 2 forms: basic protection and special protection.

The basic protection is focused on services, programs and projects that are related with the prevention of the vulnerabilities and social risk through the strengthening of family and community ties. In the basic protection, there are some eventual benefits that are given to individuals and families due to birth, death, situations of temporary vulnerability and public calamity. Each state in Brazil can regulate how these benefits are going to be provided (LOAS, Article 22).

The special protection, on the other hand, targets the families and individuals that are already at risk. It aims at the reconstruction of the family and community ties and the protection of the individuals from the violation of their rights. It is divided into medium complexity, when it is still possible to prevent the failure of family ties, and high complexity, which is the case when alternative care is necessary. (LOAS, Article 22)

Along with the social workforce, the mechanism in place consists of four main players that work together to ultimately decide whether an individual case will require the placement of a child into some form of alternative care. The efforts of what are known as Tutelage Councils, the Court of the Child and Adolescent, Public Defenders [*Defensores Publicos*], and Public Prosecutors [*Promotores Publicos*] are essential in Brazil's gatekeeping process (Gale and Csaky 2015: 26).

The *Guardianship Councils* came to be in 1990 and are considered to be non-judiciary, autonomous statutory bodies that serve at the municipal level for every 100,000 citizens. Each council consists of five councillors that come from the community itself that have been successfully vetted. They are required to be at least 21 years of age and among other requirements, they must have proper child rights experience, pass a written exam on child protection matters and undergo specific training. Once accepted, Guardianship Councillors are given tenures of four years in which they are to uphold their duties as listed in the Statute of the Child and Adolescent. These duties include receiving complaints of child-

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<sup>4</sup> Available in: [http://www.planalto.gov.br/ccivil\\_03/LEIS/L8742.htm](http://www.planalto.gov.br/ccivil_03/LEIS/L8742.htm) . Access in September, 12<sup>th</sup> 2017.

rights violations, case management and when necessary, referring cases to the judiciary authority (Gale and Csaky 2015: 26)

The other two non-judiciary duty bearers in the Brazilian mechanism are the *Public defenders* and the *Public Prosecutors*. The public defenders are legal representatives acting on behalf of children or adolescents that are responsible for initiating and overseeing custody and guardianship. Public prosecutors on the other hand, work for the state in cases that may result in the removal of parental rights. The Prosecutors request investigations and police interventions in cases of child abuse as well as suggesting guardianship or alternative care placement to the Court of the Child and Adolescent. Besides that, they have an important monitoring role. (Gale and Csaky 2015: 26)

Ultimately it is the Judiciary, in specific, the *Court of the Child and Adolescent* that exists in each municipality<sup>5</sup> that has the authority to make judgments and rulings on cases that involve placement of children in alternative care, guardianship or adoption (Gale and Csaky 2015: 26) It is because of this that Judges must be equipped with vast knowledge of child development theory and how it relates to each specific child's circumstance in order to make appropriate and sound judgments (Cantwell et. al 2013: 124).

When the child or adolescent arrives in the institution or enters into a foster family program, a technical team has to elaborate an individual plan [*Plano Individual de Acolhimento* – PIA] that, based on an interdisciplinary evaluation, establishes the commitment made by the child and parents as well as the necessary actions that will be adopted in order to achieve the family reintegration or, if the judge decides that it is not possible, a permanent placement in a foster family (ECA, Article 100, paragraphs 5-6).

Once the decision has been made, the constant monitoring and evaluation involving the child and family is the last phase of the gatekeeping process. Every six months an updated Plan of Support must be submitted to the *Court of the Child and Adolescent* and by law, two years is the maximum tenure for a child in alternative care, unless extreme circumstances and the court dictate otherwise (Gale and Csaky 2015: 27). As previously stated, it is only the *judge* who may decide if a child and family are ready for reunification.

### 3.6 Conclusion

The history of institutionalized childcare in Brazil is relevant today because it exposes a deep lying pro-institutionalization culture.

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<sup>5</sup> Some municipalities doesn't have an exclusive Court of the Child and Adolescents. In this case, the civil or family court accumulate jurisdictions.

On the other hand, a doctrinal analysis of the current law and policy shows the strong influence of the principles of the CRC and UN Guidelines and how embedded they are in the domestic institutions.

When putting both aspects together, it is possible to affirm that the rule of law brought a significant change in the national agenda and the state's institutions. Brazil has made great progress in addressing the necessity of transition to a more child-rights based approach to alternative child care especially in terms of its legal framework and policy. However, the gaps between the "law in the paper" and the reality, as shown in the introduction of this research, are substantial, which leads to the conclusion that the culture of the society as a whole has not caught up with the new norms that are to be expected as the country continues its mission to modernize its approach to alternative childcare.

According to Cortell and Davis, when international norms "appear in the domestic discourse, producing some change in the national agenda and the state's institution, but still confront countervailing institutions, procedures and normative claims" they enjoy a **moderate degree of salience** (Cortell and Davis 2000: 72). World Bank called this phenomenon "**legitimacy deficits**" and explained how legitimacy matters of cooperation, coordination and cooperation, are the "drivers of effectiveness" of any policy:

Legitimacy matters for cooperation and coordination because it implies voluntary compliance with an act of authority. Even if a government delivers on its commitments and is able to coerce people into complying, there may be "legitimacy deficits" if the process is perceived as unfair and people may not be willing to cooperate and would rather opt out of the social contract.

So, considering that the domestic impact of international norms has not been strong enough to bring about widespread change, how are social and cultural norms still countervailing judge's normative claims in practice? This question will be investigated in the next chapter.

## Chapter 4

# A capacity gap analysis: How social norms are influencing the role of the judges in practice?

### 4.1 Introduction

During my fieldwork I had the opportunity to talk with different judges in order to assess their discourse about the decision-making process and try to understand their preferences when it comes to acting consistently with law. What I found out was a complex interaction of the law with knowledge, power, different personal motivations and resources.

### 4.2 Motivation/willingness (Does the duty bearer accept their responsibility? If not, why not?)

Assessing the motivation of the judges to act consistently with the law is a subjective analysis of each individual. What I have observed in the field is that social norms can affect judge's commitment, motivations, preferences and beliefs through the lack of knowledge and external pressure.

Let us first use the example of Judge Sergio Kreuz<sup>6</sup>, from the State of Paraná (PR). In 2006, even before the Guidelines, he implemented a program of foster care in the city of Cascavel and today the program is known as one of the biggest programs of this kind in Latin America, with more than 150 foster families and 200 children in care.

In his interview for this research it was clear that his commitment used the power of knowledge as a foundational aspect. His personal knowledge about foster care has been acquired through years of studies and research. He was especially inspired from his experiences in England and Portugal. When he started the program in his city, his intention was to find a solution for the many institutionalized children and adolescents who had no perspective of adoption. He said that the greatest challenge was to find the families, but with limited resources he organized the "Network" and created a technical team.

His was commitment to implement the family-based program was gained through the knowledge that he personally acquired he really **believed** that this was the best option. This reflection already helps us to distinguish this judge from the others who were blindsided in 2009 when new norms stated that foster family programs are a priority. For many judges in Brazil this was a standard that they had never even heard of. It is interesting to note, that out of the 21 people that I interviewed, only Judge Kreuz and 3 other interviewees from the

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<sup>6</sup> Personal interview through Skype with Sergio Luiz Kreuz.

Ministry of Human Rights, the Ministry of Hunger and Alleviation, and from an NGO had ever heard about the UN Guidelines.

Continuing with the history of Kreuz, when asked about the resistance that he encountered during the deinstitutionalization process, he said that the resistance came from everywhere and still persists today.

The first resistance that he mentioned came from the society. For example, if a foster parent was to beat a child in their care, this would create a big scandal and due to this he had to deal with formal complaints and disciplinary threats.

The second resistance he attributes to the power of the child care institutions:

In Brazil we have an interesting situation. The institutional host units have a very large amount of power. They are infiltrated in all Councils, they have a good relationship with the press in general, they are connected to Freemasonry, the Church, to everything that has social influence. In addition, they enjoy a great social tolerance, since people see a person who manages a shelter as practically "holy." (Sergio Kreuz 2017, Judge)

In this regard, he reported that the most famous TV channel of Brazil – Rede Globo – was in the city of Cascavel twice to do a report that would be shown on the TV show called *Fantastico* [Fantastic]. However, the show was never aired:

What is missing? Fantastico has been twice to Cascavel, recorded great stories, has interviewed all the actors, yet when the time comes the report never hits the air. I do not know what it is. We have such beautiful experiences” (ibidem).

When the Director of the Ministry of Human Rights<sup>7</sup> was asked about this power in the Brazilian reality, she confirmed that to bring the law into practice it's necessary to face the power of the institutions.

The power of institutions and its relation with the church is also mentioned by the Judge who works in the National Council of Justice (CNJ)<sup>8</sup>. According to her, Brazil is not is not a secular state on the matter of institutionalization of children:

Brazil has in its history the institutionalization of children by the churches. From the time when children were put in the wheel, religious sites were the appropriate places

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<sup>7</sup> Personal interview with Fabiana Gadelha in Brasilia/DF

<sup>8</sup> Personal interview with Sandra Silvestre in Brasilia/DF.



to receive the shame of society. This is all impregnated in the DNA of a society, which is an important cultural aspect. So I think it is essential that one be aware that there is even a market side, it is essential that one be aware that there is an ideological side. The question of religious formation is very embedded in Brazil. Although Brazil is officially a secular state, where religion should be separated from government, you often do not get this dissociation. (Sandra Silvestre 2017, Judge, personal interview)

The same observation about how religion still influence the view of the society of children in care was made by the Director of the Ministry of Human Rights:

The path of alternative care is born of philanthropy, from the need of the society to give shelter for the orphans and the need of the church to seek in the society this kind of support. [...] So this path came from the church and the philanthropic entities, and the need to help. “Where will I leave the clothes I no long wear? In the child care institution. “Where am I going to make Christmas and Easter donations? In the child care institution. So the existence of institutions serves to purge the guilt of society (Fabiana Gadelha 2017, Director of Ministry of Human Rights, personal interview).

A representative example of the influence of the religious aspect of the social construct of childhood care was seen in the discourse of the founder<sup>9</sup> of one of the institutions that I visited in the State of Minas Gerais. Religion is part of the foundation and values of the institution. The discourse on the salvation of children is still strong and when asked about the possibility of maintaining the institution for strengthening family-oriented programs, the interviewee's response was that "if the family based care programs were implemented in the region, I would close the institution because our only aim is to look after children”.

These facts led me to believe that if the society doesn't believe that foster care is the better option and it still continues to rely on institutions, a legitimacy deficit is created due to the norm that is hard to overcome. When this happens, if the Judge is not empowered by the ideology of this kind of program, external pressures, added to the complexity of going against the social construct of childhood care, can undermine this kind of initiative. This was reported to have happened in 2 different cities in the neighboring state Rio Grande do Sul:

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<sup>9</sup> Personal interview with Rosangela Di Lorenzo.

A family-based care program had been developed in the city of Caxias do Sul, but lasted little more than three years, ending in 2009. The bureaucracy and the complexity of changing a culture with historical roots supporting the shelters, were factors that implied a lack of continuity for the project, a reality in Brazilian cities, including in neighboring Flores da Cunha (Kloss 2017).

It is worth mentioning that, as stated in the World Development Report, the presence of commitment is limited to the power of balance that exists in society. The actual implementation of effective policy is often times hindered by a lack of political will in the national arena. Many decision makers find themselves unwilling to challenge the current balances of power that exist by implementing policies even when they are supported by the right objectives (WB 2017: 7).

Going back to the Kreuz narrative about the resistances that he faced, he said that he travelled throughout Brazil trying to promote the foster care alternative but sometimes even judges and prosecutors (who are supposed to follow the law and give preference for family-based alternatives) are afraid to endorse it, saying that the task is too difficult and that non-permanent foster care solutions can create greater attachment issues.

This aspect was very clear in one of my interviews with a judge in the State of Minas Gerais<sup>10</sup>. While he displayed a strong commitment to protect the rights of the child, like giving absolute priority to the cases, engagement with other actors and strong judicial activism, he was proud to say that he and the prosecutor of the city were able to create a partnership with the Mayor of the City to build two more institutions in a great neighborhood. When asked if there was enough demand for that, the answer was that the government would be able to save money because children were currently staying in a house that was being rented. Besides that, when asked if there were any plans for a family-based care program, he answered:

No, we don't. This is because me and Marcelo [The Prosecutor] we have affinities in this matter and we are not very supporters of this resource. Even your study will be interesting. After you finish, I want to read your study to see what conclusion you will get about that. I have not had good experiences with foster families. [...] We have a municipal law that deal with the subject. Now yes. The law even offer subsidy for these families. [...] It's an artificial thing for me. I find it more harmful to the child [...] because the child goes to a foster family and feels inside a family. [...] There is a father, there is a mother,

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<sup>10</sup> Personal interview with Tulio Marcio Lemos Mota Naves in Pouso Alegre/MG.

sometimes there is brother, and there is another child inside the house, another adolescent. The child goes in the illusion that is her family. And it's not. Sometimes you have to go back with that child to the institution. Sometimes the child will leave from there to an extend family, to her family of origin. And the family of origin is not 100% structured yet. Or the foster family can give up of that child. [...] So, as the child care institutions here are well structured - and I already worked in places that they were deplorable - [...] we are not using this kind of program (Tulio Naves 2017, Judge, personal interview)

Another judge from the State of Minas Gerais<sup>11</sup>, when asked about the possibility of implementing a family-based care program in his own city, showed concern about how the society would accept a child from a “problematic background” in their own home. This particular response shows again how the social construct of childhood is capable of influencing a judge’s decision making. As previously mentioned, Brazil has a history of regarding abandoned children and youth as dangers to both themselves as well as society. With this point of view it is understandable that a judge may feel that families in his community would be apprehensive to take in an outsider child. They may accept this generalization and favor institutions as the best option for a child or they can challenge social norms that have isolated rather than integrated these children by encouraging community involvement instead of accepting their non-engagement.

An extreme scenario showing how the interaction of knowledge and internalized normative constraints can be dangerous, was seen in a recent case involving a Judge from the city of Belo Horizonte, Minas Gerais, that, with the support of the Prosecutors, determined the compulsory institutionalization of 120 children (some of them for adoption) because of the historical use of drugs by their mothers. The justification used by the judge was that these children were at risk. The case is currently under investigation by the Brazilian authorities and the Inter-American Commission on Human Rights of the Organization of American States (Jansen 2017).

Therefore, looking at this situation and considering the power of ideas and influence that judges have on the gatekeeping mechanism, **other reflections** can be made: If an actor’s personal motivation are not in line with the content of the norms, they can find alternative ways for not implementing them. This is why one of the first steps of any capacity gap analysis proposed by Save The Children start with the motivation aspect and this is why, Cortell and Davis say that actor’s justifications for their behavior have to be taken seriously by analysts:

Measuring the salience of norms requires the analyst to take actor’s explanations for their behaviour seriously,

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<sup>11</sup> Personal interview with Marcio Bessa Nunes in Camanducaia/MG

but justifications need further analysis. [...] If the norm governs behaviour, a high degree of consistency across related issues would be expected. Similarly, if an actor apologizes for violating a norm and justifies noncompliance in terms of extenuating circumstances, then we would expect other observable behaviours and conditions. Mere rationalizations can be distinguished from forthright justifications because the justifications can be reasonably fit into a larger pattern of behaviour and reconciled with prominent contextual factors whereas the rationalizations cannot” (Cortell and Davis 2000: 71-72).

The justifications presented by some of the judges are pertinent and fit into a larger pattern of behaviour. Even in the case of the compulsory institutionalization of children in Belo Horizonte, experts in Brazil are divided (Jansen 2017b). Some advocate the judge attitude to protect the vulnerable children. Others, believe that the judge’s attitude represent power abuse. However, I believe that these concerns would be lessened with a proper guidance about how harmful institutional care can be for the development of a child, about the benefits of family-based care, about how the attachment issue can be address with the proper training of the foster families, and so on. Hence, when the norm has an opening for noncompliance, social norms can be highly influential.

### **4.3 Authority (Does the duty bearer have the authority to carry out the role?)**

The previous chapter showed that in the decision-making process of the gatekeeping mechanism judges are the ones who have the power to make the final decision and the example mentioned previously about the Judge in the city of Cascavel and in the city of Minas Gerais showed that judges not only have the power to decide, but they can be highly influential among others duty bearers, including the civil society, whether it be to build new childcare institutions, or to deactivate them.

This influence became even more clear when I had the opportunity to observe a concentrated hearing in Brasilia and witnessed the interactions between Judges, social workers, phycologists and caretakers in the State of Minas Gerais.

#### ***4.3.1 Concentrated Hearings***

One of the most promising practices in Brazil that are pushing to alter social norms and promoting a deinstitutionalization strategy are the *audiencias concentradas* [concentrated hearings]. Considering article 19 of ECA, that determines that the situation of each child in care has to be re-evaluated every six

months, the CNJ published a normative act [*Provimento CNJ 32, 24 June, 2013*] determining that Child and Adolescent Court judges conduct a concentrated hearing every semester inside the institution itself whenever possible and with the actors of the Network present. The act suggests what the measures can be for this audience and requires that each judge provide data about the results.

However, there is no uniform procedure among judges. Some judges do it in the court, some in the institution. Some listen to the parents, some don't. Some listen to the children, some don't. This fact, by itself, shows how the commitment of the judge, depending on his/her personal motivations can affect the outcomes of this hearing (Fieldnote, 15.8.2017). Such vast differences in practice can be attributed to the varying social norms present throughout Brazil that have prioritized or deprioritized the roles of parents and children in society.

As an observatory participant of the dynamic of one of these hearings, it was clear that the judge's authority and commitment has a high level of influence. The situation of each child is discussed by all actors involved, such as what the psychologist and the social assistant of the childcare institution did in order to reintegrate that child with her/his family, if the prosecutor and the public defender agreed with their conclusions, if the parents of the child are being assisted by social workers, and so on. At the end, the final decision about the next steps is provided by the judge (Fieldnote, 15.08.2017).

For me, it was very clear that the interactions among these actors can be comparable with what WB called the power bargaining. "Power" as defined by the WB is and **actor's ability to make others act in their interest or to bring about a specific outcome**. Actors use leverage with things such as threats of violence, control over resources, ideological persuasion, as well as existing laws. Distribution of power in the policy arena is key to the bargaining process, but can be seen as both an enabler and a constraint of policy effectiveness (WB 2017: 7).

The process of bargaining, regardless of who is taking part in the policy making negotiations is effectively a play of ideas. John Keynes famously stated that ideas "both when they are right and when they are wrong are more powerful than is commonly understood. Indeed, the world is ruled by little else" (Keynes as cited by WB 2017: 8). There are two ways that ideas fundamentally influence policy making and effectiveness according to the WB team. One is that **ideas are used as knowledge, and the other is that ideas are a way of shaping preferences and beliefs**.

The ideas as knowledge premise has been a part of policy discussions influenced by 'capacity building' in the form of sharing knowledge and best practices. The effectiveness of policies and the ability to provide on the specifics of policy promises are strengthened by the premise of ideas as a powerful tool of knowledge (WB 2017: 8).

Consequently, it's clear that the personal motivations of the judge at this moment can dictate the future of each child, especially if they are going to be reintegrated to their family of origin, if they are going to stay longer in the child-care institution or if this child will be referred for adoption. Behind each of these decisions, there is a personal reflection on what the judge believes. For example, if this judge believes that poverty or a history of drug use in the family are reasons enough to take a child out of their homes, that belief will be persuasive. If the judge believes that the child's opinions about their care are irrelevant, they are not going to hear them.

The following picture was taken in one of the hearings that I was able to participate in during my research. It shows the judge, the prosecutor, the public defender, the institution director, social assistant and psychologist inside of one of the childcare institutions in Brasilia



**Figure 3 - Concentrated hearing in Brasilia (CNJ/2017)**

The concentrated hearings act as an opportunity for the duty bearers to sit down together and discuss the situation. In addition to de-bureaucratizing the decision-making, they create a mechanism for reciprocal monitoring of the activity of each actor. If one of the authors fails in their mission, be it to seek the family of the child and try to reintegrate the child, or to provide a protective and caring environment, they automatically become accountable for their actions.

The impact of this hearing can be potentialized even more if it is made at the beginning of the decision-making process, when the child is entering the childcare system. At that moment, the plan of action can be decided collectively and the duties of each actor specified. The Judge from Brasilia started conducting concentrated hearings at the inception of the process and according to him,

it proved to be beneficial saying that “out of 10 cases, only two need to go to review” (Renato Rodovalho<sup>12</sup>, Judge).

Nonetheless, it’s important to remember that the success of this initiative does not only depend on the judge’s ability to listen, but also the ability of the technicians to bring a reasoned analysis of their referral proposal (Claudia Cabral<sup>13</sup>, NGO).

The Judge from the State of Rondonia<sup>14</sup>, for example, says that lack of quality in the evaluations are constraining her decision and this situation makes her unwilling to be in favor of the implementation of a family-based care program in her city. “I’m going to have to rely on what? On the report that they will bring me. Who’s going to bring me the report? The reports I get from the institution are ridiculous” (Ana Valeria Ziparro 2017, Judge). Here we find another example of how social norms are directly affecting judges. In this case it is the norms surrounding the capacity of the social workers and institutions themselves. We see how low numbers of social care professionals and subpar institutional management (which will be discussed in the next section) have become the reality in Brazil and has deterred judges from attempting to implement an alternative system that requires such high levels of cooperation to function. This lack of confidence is influential, as other duty bearers who interact with them will likely share a judge’s dismal outlook on the potential of developing a family based care system in their community.

#### ***4.3.2 The influence of judges in the interaction with other duty bearers***

In Brazil, it’s common sense that judges are powerful authorities whose opinions are usually respected and followed. In my interviews with the social workers and caretakers in the city of Camanducaia, in the State of Minas Gerais this interaction was very evident. Out of five interviewees<sup>15</sup>, all agreed that the gatekeeping process in their city began working better once the support of the Judge was established. However, it’s worth mentioning that what I observed through their discourse was a great reliance and respect for the judge’s opinion but at the same time the power asymmetry in their relation was clear (Fieldnote, 22.9.17). When asked about his interaction with the other actors, the Judge answered:

I try to empower the Rede [Network] at all times. I usually take a position to adopt the opinion of the social workers. I try not to intervene much in these discussions. The Judiciary must be seen as a final solution. When the

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<sup>12</sup> Personal interview with Renato Rodovalho in Brasilia/DF.

<sup>13</sup> Personal interview with Claudia Cabral in Rio de Janeiro/RJ

<sup>14</sup> Personal interview with Ana Valeria Ziparro in Brasilia/DF

<sup>15</sup> Personal interview with Sandra Pelegrino, Alessandra Rodrigues, Vanessa Campos, Luceia da Silva and Maria Augusta Forte in Camanducaia and Itapeva/MG.

issue of a child comes to me, I can only use the force of the law. So, I understand that this previous work is fundamental. (Marcio Bessa 2017, judge, personal interview)

The same positive interaction but with a little higher level of judge intervention was observed in the city of Pouso Alegre/MG. According to the Judge, besides the concentrated hearing, he is conducting some informal meetings alongside the prosecutor with the Network, where they can discuss how the gatekeeping mechanism is working in a broad sense. A positive outcome of these meetings, according to the Judge is that the actor feels more at liberty to provide their opinion than in the concentrated hearing because of the formalities needed in that environment. And when the Judge was asked about the necessity of his presence in these meetings, he answered that “The technicians of the network greatly respect the opinion of the judge and the prosecutor” (Tulio Naves 2017, judge, personal interview).

Although these are selected examples, they give an idea of the dynamic interaction of the duty bearers and the how influential judges can be in practice.

#### **4.4 Resources (Does the duty bearer have the knowledge skills, organizational, human and material resources?)**

As mentioned in the previous topic, sometimes judges are bound by material and human resources in their daily activities and the improvement of their skills and knowledge can help them reshape their preferences and overcome the external pressures. A common complaint among judges, for example is the lack of psychologists on their team: “The biggest barrier we have here is not having enough technical staff. There is no psychologist here” (Tulio Naves 2007, judge, personal interview).

This lack of resources is directly linked with the political will of each State, but a good practice that shows how the civil society can be a good partner in this scenario was found during this research in Brasilia. The Anjos do Amanhã Solidarity Network (RSAA) [*Rede Solidaria Anjos do Amanhã*] became part of the organizational structure of the Children's Court in 2008. When it was created the idea was to use voluntary resources from society to safeguard, re-establish rights and satisfy the needs of children and adolescents from Brasilia who are served by the Children's Court.

The help come from the private sector and society in the form of donations such as food, school materials, toys and clothing, but also with medical and psychological care, vocational courses, job openings and internships for the professionalization of adolescents.



Regarding family support, there is a team of three technical volunteers (called Trio de Angels) who are called to act by judicial determination or request from the childcare institutions. Their activity comprises a set of measures and actions directed to the strengthening of families in a context of social vulnerability and also intends to subsidize the work of the technicians of the host institutions of Brasilia in cases of family reintegration.

The Network work as a bridge connecting volunteers to the beneficiaries, either through rigorous selection, or by managing and monitoring activities. Such differentials of this network include: the strict selection and establishment of the profile of the volunteers to match the needs of each child and adolescent and the monitoring of activities to avoid interruption.

This example shows that a coordination process by a committed actor can bring positive outcomes.

According to the World Development Report, commitment among working parties to initiate change is important but **coordination** efforts must also be devised to keep the process moving. State institutions need to use their ability to coordinate the decisions and expectations of participants, and when outcomes are favourable, be able to coordinate the simultaneous large-scale replication of efficient practice (WB 2017: 6).

The **cooperation** needed to create effective policy falls upon the duty bearers as well as the willingness of citizens (WB 2017: 6). After all, as the Constitution of Brazil states, the protection of the rights of children is not just a State's responsibility, but also a social duty (CF, Article 227).

## 4.5 Conclusion

At the start of this chapter I stated that a lack of knowledge along with external pressure associated with social norms can affect a judge's commitment, motivations, preferences and beliefs. What my capacity gap analysis revealed is that a judge's perspective on alternative childhood care has an expansive influence over other authorities as well as their communities.

The narratives of multiple actors that I interviewed led me to a number of reflections regarding the current realities of what is helping Brazil's deinstitutionalization process as well as some of its most confronting challenges. Judge Sergio Kreuz's story led to the impression that commitment to family based care planning gained through personally acquired knowledge can inspire a true belief in the system that will lead judges to act in favor of family based care.

Based on interviews with top actors such as Judge Kreuz, the Judge from the National Council of Justice, the Director of the Ministry of Human Rights, as well as grassroots level actors such as the founder of a children's institution in the State of Minas Gerais, I was able to confirm that if the society doesn't buy

into the fact that foster care is the better option and people still rely on institutions, the norm creates a legitimacy deficit that is difficult to move past.

My observations of a concentrated hearing session in Brasilia allowed me to better comprehend the influence of judges in this emulation of the power bargaining process. Judge Tulio's description of his role in the hearings shed light on how the positive interactions between judges and other duty bearers can be productive and encourages accountability among actors. It was also possible to see how a judge's preferences of childcare will be reflected in the actions and attitudes of the duty bearers that surround them.

The findings concluded with the focus of resource allocations. The lack of resources at the disposal of the judiciary are representative the political will that exists in a particular region. In some communities, insufficient material and personnel resources to handle alternative childcare cases has become a norm, and has deterred actors like Judge Ana Valeria from being in favor of attempting to implement a family based care program in her town. Despite this hurdle, examples of good practice like the one provided by Judge Renato Rodovalho showed how committed actors are able to overcome resource limitations by using their influence to coordinate and mobilize actors and create cooperative efforts that connect the community with children that are in need of assistance. The RSSA is a shining example of how civil society can and should work hand in hand with local judges to collectively improve the lives of parentless children in their communities.

These findings all support the notion that Brazil's judges are central figures in the intricate web that is the alternative childcare system. The complex interaction of the law with knowledge, power, different personal motivations and resources plays a major role in the dynamic that exists between judges, the other duty bearers and society alike.

## Chapter 5

### Conclusion: Leadership to drive change

I started this research by calling attention to the gap that exists between the law and practice at the grassroots level in Brazil's alternative care system, despite the fact that it has been praised for its adoption of modernized international standards. I specifically chose to analyze the role of the judiciary and in particular, judges in the implementation process as judicial resolution is a critical part of Brazil's gatekeeping mechanism. For future interventions, I stated that local judges should be considered as target groups for engagement to further adapt the social norms and preferences necessary to produce the desired effects of the law.

The research continued presenting the historical social construct of childhood care in Brazil along with how the universal standards of alternative care have impacted this standpoint. I showed how social norms from the past are persistent justifications for judges' noncompliance with Brazil's new internationally shaped norms, creating a general acceptance of institutional care legitimized by both religious perspectives and governing logics molded in the past that have yet to be effectively challenged at a local level throughout the country.

I displayed how Brazil's involvement in the CRC has brought about great changes resulting in an internationally embraced framework of family based alternative care aiming to move the country away from its preference for residential care facilities. My fieldwork confirmed that judges who embrace the modern national policy are capable of influencing their communities and are seeing positive trends in the transition, while in other communities their skepticism has only strengthened the justification for the continued use of institutions.

Subsequently, considering their important role, I showed how social norms from the past are still countervailing judge's capacity in practice. The social construct of childhood care before the internalization of the CRC and the UN Guidelines are still affecting judge's commitment and personal choices and are creating an external pressure based on misconceived understandings about the best way to deal with children deprived from parental care. The capacity gap analysis revealed that there isn't a problem of capacity relating to authority to act, but relating to commitment and resources.

At this point Brazil is in the middle of what appears to be a steady norm socialization process. The first stages of instrumental adaptation have taken place, as the national discourse and framework concerning alternative care has been altered to agree with the international community. While family based approach norms have proven to be effective in some parts of the country, in order to reach the goal of turning family based care preference into second nature practice (the final phase of norm socialization), moral consciousness-raising, argumentation, dialogue and persuasion mechanisms still need to be utilized (Risse and Sikkink 1999). This process is especially important within Brazil's national community of judges.

When it comes to the action that can be taken in order to ensure that the norm socialization continues on the right track, Brazil must seek out com-

manding individuals who can impel other actors to commit to the country's policy of child based care. Finding these leaders and harnessing their influence is one of the steps that may be exercised now to fabricate the conditions that will be needed to achieve future alternative childcare goals.

According to the last World Development Report (2017), reshaping actors' preferences and beliefs in the policy arena is one way to improve policy effectiveness. The report clarifies, however, that this is usually something that occurs slowly but in the short term can be achieved with transformational leadership:

Often, changes in preferences occur slowly over extended periods, such as global trends over centuries to view the practices of slavery and torture as immoral. In the shorter term, transformational leaders can coordinate norms and change beliefs. Increasing the frequency and depth of interactions between elite actors can help them find common ground. And more cross-border flows of ideas and information can change the preferences of domestic actors through the diffusion of norms and interactions between communities of experts (WB 2017: 213)

Considering this, I believe that future interventions should consider strategies to enhance the capacity building of judges using cognitive and emotionally charged efforts to gain their commitment. The decisions they make based on their commitment will establish the base of policy credibility that over time will steer the decision making of other actors (WB 2017:5). When commitment is achieved, judges with their power of influence, can be the strong transformational leaders needed to coordinate norms and shift beliefs among both the elite and poor actors on a large scale.

Interventions, especially those that are backed by a committed judge, have more potential for success as the judge's influential capacity is reflected not only in the actions of other duty bearers in the chain, but in the collective community psyche as well. The judges that have committed to exercising the international norms that Brazil has promised to its children and youth are currently leading the charge in asserting that the judiciary understands the country's expectations of its duties, is capable of addressing power asymmetries among actors and can improve on contestability, change incentives and reshape preferences that contribute to the rule of law and good governance (WB 2017).

It is clear that institutions as a form of alternative childhood care remain a culturally accepted norm throughout much of the country and won't be disappearing anytime soon, however, the currents are indeed shifting in a new direction. Brazil is undergoing a cultural revolution when it comes to how it deals with children and youth without parental care that has been nearly 30 years in the making and still has many years of work ahead. The conversation of deinstitutionalization continues to be a sensitive topic, as it brings to the surface the social constructs and deep rooted perceptions about alternative childcare and children themselves that people may not be comfortable confronting. Regardless of this fact, change is on the horizon and this research has affirmed that it is a process that consists of an overwhelming amount of participation from actors at all levels of government and society.

After all of my studies aimed at understanding the intricacies and multiple layers involved in Brazil's alternative care development process, I do believe that ultimately the success will be dependent on the combined efforts of authorities and citizens alike, however, I also believe that some players can help expedite the change more than others. Judges in particular convey the wisdom and justice that all societies depend on when morally engaging issues are being debated. Therefore, judges who use their position to reinforce the importance of children's rights are the movement's greatest assets. Their opinions can steer the preferences of alternative childcare from the top, and mold the foundation of beliefs about the issue from below. Their roles can never be underestimated because as Judge Kreuz (2012: 154) so eloquently states:

The Judge, as guardian of the Constitution, has not only the task of guaranteeing what already exists, but also of guaranteeing what does not yet exist, in order to compel the other branches to implement public policies in favor of minorities and the excluded, especially for children and adolescents, who have absolute priority.

As the guardians, leaders and embodiments of society's moral compass, judges committed to the country's pursuit of family based care for all children are some of the cause's most essential and powerful drivers of change. As Brazil moves ahead in transforming its system of alternative childcare, the need for more of these predominant figures will be great and everlasting.

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## Appendix 1 – List of respondents

Name of the city	State	Estimated population in 2017 <sup>16</sup>	Interviewees and Occupation
Brasilia (Aug 14-16, 2017)	Distrito Federal	3.039.444	<ol style="list-style-type: none"> <li>1. <b>Sandra Silvestre Gomes</b> (Judge from the National Council of Justice)</li> <li>2. <b>Fabiana Gadelha</b> (Director from the Ministry of Human Rights)</li> <li>3. <b>Maria da Penha</b> (psychologist from a NGO that support family-based care initiatives called “Aconchego”)</li> <li>4. <b>Renato Rodovalho Scussel</b> (Judge from the Court of the Child and Adolescent)</li> <li>5. <b>Eustaquio Coutinho</b> (civil servant of the Court of the Child and Adolescent)</li> <li>6. A technician from the Ministry of Social Development and Hunger Alleviation<sup>17</sup></li> </ol>
Ji-Parana (Aug 14, 2017)	Rondonia	116.610	7. <b>Ana Valeria Santiago de Queiroz Ziparro</b> (Judge)
Rio de Janeiro (Aug 17-18, 2017)	Rio de Janeiro	6.520.266	<ol style="list-style-type: none"> <li>8. <b>Rodrigo Medina</b> (Prosecutor)</li> <li>9. <b>Allyne Giannini</b> (Prosecutor)</li> <li>10. <b>Renato Marques Lisboa Filho</b> (civil servant of the Prosecution Service)</li> <li>11. <b>Claudia Cabral</b> (founder of a NGO that support family-based care initiatives called “Associacao Brasileira Terra dos Homens”)</li> </ol>
Camanducaia (Aug 21-22, 2017)	Minas Gerais	22.057	<ol style="list-style-type: none"> <li>12. <b>Marcio Bessa Nunes</b> (Judge)</li> <li>13. <b>Sandra Cristina Pelegri</b> (Social assistant from the Court)</li> </ol>

<sup>16</sup> Data available in *Instituto Brasileiro de Geografia e Estatística* (<https://cidades.ibge.gov.br/v4>) Access in Aug 30, 2017.

<sup>17</sup> This person requested not to be identified.

			<p>14. <b>Alessandra Rosa Rodrigues</b> (civil servant of CRAS)</p> <p>15. <b>Vanessa Damasio de Campos</b> (psychologist of the child care institution)</p> <p>16. <b>Luceia da Silva</b> (social assistant of the child care institution)</p>
Cambui (Aug 23, 2017)	Minas Gerais	29.165	<p>17. <b>Patricia Viali Nicolini</b> (Judge)</p> <p>18. <b>Rosangela Di Lorenzo</b> (founder of a child care institution)</p>
Itapeva (Aug 23, 2017)	Minas Gerais	9.618	19. <b>Maria Augusta Paula Forte</b> (psychologist from the public health service)
Pouso Alegre (Aug 24, 2017)	Minas Gerais	147.137	20. <b>Tulio Marcio Lemos Mota Naves</b> (Judge)
Cascavel (Aug 29, 2017)	Parana	319.608	21. <b>Sergio Luiz Kraus</b> (Judge)
			<b>TOTAL: 21</b>