

Introducing the field of adoption from care

Tarja Pösö, Marit Skivenes and June Thoburn

Introduction

All countries are signatories to the principles and rights laid out in the Convention on the Rights of the Child (CRC),¹ and comparative studies show that, at the national level, there are some similar basic principles underpinning the family welfare and child protection systems in many high-income countries (Gilbert et al, 2011; Skivenes et al, 2015; Burns et al, 2017; Berrick et al, forthcoming). These basic principles include: the central importance of the best interest and well-being of the child when key decisions are taken; an emphasis on family preservation and valuing the child's relationships with birth parents and siblings; principles of least intrusion from the state; and the child protection system only having secondary responsibility for children compared with the family. However, the degree to which governments focus on each of these principles differs, and this is especially so if one considers the potentially contradictory principles that are most relevant when considering placement policies when children need to be removed and come into public care. In the majority of cases, therefore, there is scope for interpretation about what course of action will be 'in the child's best interest', leaving space for courts, child protection front-line staff and, indeed, whole countries to determine the balance between these commonly accepted principles. It is not an exaggeration to point out that parental rights and family preservation have a strong standing in most states and systems, with the result that the rights of the child often come second to parental rights and are challenging for nation states and courts to respect and promote. Perhaps an example of this is when the European Court of Human Rights stated that only in exceptional circumstances and with an overriding child's best interest consideration could parental rights be terminated (Breen et al, 2020). Child protection is about the 'government's responsibility to establish

a system that has the authority to intervene into the family to support, restrict and even terminate parental rights if parents or caregivers are unable or unwilling to protect the child' (Berrick et al, forthcoming). Adoptions as a child protection measure – or, as we refer to it in this book, adoptions from care – are to be understood as those adoptions where a child who is currently in public care or is under guardianship of the state, after full or partial removal of custody from the parents, is placed with prospective adopters and/or legally adopted by their foster carers with or without the consent of the parents.

Morally and legally, adoption from care should only happen when a child's reunification with birth parents is deemed impossible. Article 21 of the CRC states that the best interests of the child are the paramount consideration in all types of adoption, and this consideration prevails over the interests of birth parents and prospective adoptive parents. In Europe, all states provide a legal opportunity to terminate parental rights and place a child for adoption without parents' consent (Fenton-Glynn, 2015), but there are substantial variations in practice. Adoption is a measure that, like all child protection interventions, should only be undertaken with the highest regard to the specific child's best interests, and in accordance with due process and decision-making procedures that fulfil rational criteria of reasoning and critical reflection (Burns et al, 2019).

One should also have in mind that adoptions are normatively and ideologically contested, as the chapter by Krutzinna (this volume) displays. One reason for this is that, historically, governments have used adoptions to punish and correct individuals that are considered immoral, as with single mothers in the UK prior to the 1960s, or with the kidnappings of newborns under oppressive regimes, such as in Chile in the 1970s/1980s and in Spain under the Franco regime. In transnational adoptions, marked by the geographies of unequal power, when children are moved from poorer countries to wealthier ones, adoptions may be seen simultaneously as acts of love and as acts of (structural) violence (Briggs and Marre, 2009).

The chapters in this book will highlight a topic that has, to date, had little exposure in the international child protection literature, though there is more extensive coverage of adoption more generally. It introduces general topics on human rights and attachment, as well as a country-specific in-depth analysis of the legal and policy imperatives guiding adoptions from care, with a particular interest on the rights of children and their care-taking adults, including their birth parents. We argue that the seemingly 'minor' issue of adoptions from care provides a unique and topical point to explore how children's rights are practised and weighed against parents' rights in present-day societies, and how governments and

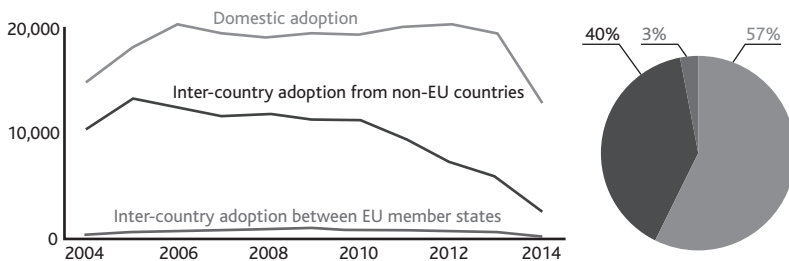
legal and welfare professionals balance those rights and discharge their duties of care to all who need their services, especially children following a decision that they cannot grow up in their parents' care.

Adoption from care among other types of adoption

Our primary focus in this book is on those situations in which the child has been taken into public care by child protection systems or due to abandonment, and while in public care, an adoption process is initiated. They are 'domestic adoptions', in the sense that the adoptees and adopters have the same country of residence, for example, in the same way as domestic step-parent adoptions. Domestic adoptions are different from inter-country adoptions, in which a child is adopted from another country. Children of inter-country adoptions might be in public care when inter-country adoption proceedings are initiated but we focus here only on domestic adoptions from care.

The global trends are, however, that domestic and inter-country adoptions are decreasing. These trends are reflected in Figure 1.1, representing the number of children adopted in the European Union (EU) and the relative shares of domestic and inter-country adoptions in the period 2004–14 (European Parliamentary Research Service, 2016). The overall pattern is that domestic adoptions of any type outnumber inter-country adoptions and that both types of adoption are declining. The share of adoptions from care is not presented as a separate category of domestic adoptions in Figure 1.1 as it is often not a distinctive adoption category in a variety of countries, as the chapters of this book will demonstrate. We will return to the trends of adoptions from care in the country chapters and finally in the conclusion chapter.

Figure 1.1: Domestic and inter-country adoptions in the EU, 2004–14



Source: European Parliamentary Research Service (2016)

The reasons for the declining trends are many: fewer unwanted pregnancies (through increased availability of contraception and abortions); social measures supporting parents; and changes in policies on the desirability of sending children out of the country (Selman, 2009; Palacios et al, 2019). The availability of adopters is also changing due to reproduction technology; it is estimated that, in 2013, the number of children born by surrogacy was higher than the number of inter-country adoptions (Palacios et al, 2019).

The changes also inform us about governments' understanding and interpretation of the principle of the child's best interest in the sphere of adoptions from care. Article 20 of the CRC concerns children in public custody that do not and cannot live with their parents:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Regarding alternative care, the importance of creating a family environment for children in care is reflected in the resolution adopted by the General Assembly of the United Nations prioritising family-based care over residential care as an overall principle but especially for children under the age of three (UN General Assembly, 2010; 2019: #22). There is a variety of forms of family-based care, as will be described in the next section. Adoptions are about 'creating families' and thus relevant for the ambition to support children separated from their birth parents to grow up in a family environment.

There seem to be policy changes in terms of the increasing use of adoption from care in Japan, Denmark, Norway and Sweden, to mention just four countries (Helland and Skivenes, 2019; Tefre, 2020). A range of researchers in the child protection field are recommending policymakers to use adoptions from care (Vinnjerlung and Hjern, 2011;

Christoffersen, 2012; Palacios et al, 2019). Based on the evidence of their study, Swedish researcher Hjern and his colleagues (2019: 72) conclude that ‘when foster parents want to adopt, there is no valid support from research for social workers to act against that wish, if the reasons for a negative attitude are related to concerns about the child’s long term development’. They also recommend a shift in Swedish child protection policy from long-term foster care towards adoption. At the same time, there is a rise in critique of the ‘overuse’ of adoptions from care in England (Thoburn and Featherstone, 2019), a country that has used adoption as a permanency measure for 20 years or more. Even though adoption as a child protection measure should only be considered for children that are otherwise likely to grow up in public care because they cannot be reunified with birth parents or wider family, this book shows that there are wide differences in how states view the border between public and private responsibility for children, and when it is legitimate to provide supportive welfare services or to compulsorily intervene into the family (Gilbert, 2011; Berrick et al, forthcoming).

Adoption from care among child protection removal decisions

When children need to be separated from their parents’ care for protective reasons, the removal processes across the different child welfare systems fall into four categories: emergency removals, voluntary admissions, involuntary admissions and adoptions (Burns et al, 2017: 223–6). Emergency removals, often short-term (hours, days or weeks), aim to provide immediate security and care for a child in a concerning or even dangerous situation. Voluntary admissions rest on consent given by parents and children of certain ages, and they aim to support or rehabilitate the family and are often short-term. While the child is in voluntary care, the parents keep their rights as parents, with only few restrictions; following that, social workers, parents and carers share day-to-day decision-making. Far more intrusive interventions – often referred to as ‘care orders’ in European and US literature – restrict parents’ rights as it is the state that has full or partial custody of the child and the child is looked after by the public authorities for a longer period of time. Decisions on care orders are made by courts or court-like decision-making bodies. Care orders are formally temporary and should aim for family reunification (Burns et al, 2017; Farmer, 2018). However, there are children that cannot be reunified with their birth parents, and it is for this group of children

that the government may consider adoption from care. Adoption as a child protection measure terminates the rights of birth parents and aims to be a lifelong arrangement.

As a result of the removal decision, the child is placed in family-based care (foster care, kinship care, guardianship or adoption) or residential care. There are considerable differences in the use of these types of alternative care among the countries as, in practice, 'foster care' or 'residential care' may mean quite different things in terms of the recruitment of carers, supervision and home or unit sizes, among other issues. The tendency during recent decades has been towards foster care, resulting in 90 per cent of children in foster care in some countries and only less than 10 per cent in residential care (for example, in Australia and Ireland), yet only 44–9 per cent in foster care in others (for example, in Italy and Germany) (del Valle and Bravo, 2013). Alongside adoption, some countries include guardianship with kin and long-term foster care to provide an option for long-term care, while some other countries focus only on long-term care, with permanent placement options not included in legislation. Some jurisdictions have legislation or statutory guidance providing a 'hierarchy' of preferred permanence options. In the US and some states in Canada and Australia, leaving care by return to a parent is the first option. Failing that, only leaving care by adoption or guardianship are recognised permanence options, the only other recorded exit route in the US is 'emancipation'. In England, the preferred options are leaving care by return to a parent or a legally secured kinship placement. Following that, long-term foster care (with kin or unrelated foster carers), adoption and (for older young people) group care are recognised permanence options, depending on the needs of the child.

Once an adoption order has been made, children are in 'private care' in contrast to 'public care', and all the responsibilities of bringing up the child are transferred to the adoptive parents. The child protection authorities have no rights to intervene unless new child protection concerns arise. In some jurisdictions, the child welfare authorities or adoption agencies have a duty to assist if asked to do so, and there may be duties associated with court orders or agreements about continuing birth family links, though these are typically not enforceable. There are several complex issues included in the use of adoption as a form of child protection alternative, such as decision-making practices, non-consensual adoptions, support services, sharing information and contact after adoption (Skivenes, 2010; Palacios et al, 2019). Governments differ in their approaches to birth parents and future adoptive parents, how they assess their motives and skills, and how they

provide support, and thereby indirectly influence children's rights after adoption. When children are already placed in the care of long-term foster parents, the transformation from 'substitute carers' to adoptive parents includes a variety of legal, financial, emotional, existential, social and cultural changes in the lives and social positions of the children to be adopted, future adoptive parents and birth parents. How these changes are incorporated into child protection policy and practices is of high importance to both the child and the adults and other children whose lives are touched in the short and longer term by the adoption.

If parents' rights are already restricted at that point and the long-term separation of the child from their parents has taken place for their best interest, how is the step towards adoption taken and, in particular, how are the decisions regarding the human and basic rights of children and their adult birth relatives and siblings made? In a recent study examining national legislation, organisational guidelines (for courts and child protection or supervisory agencies), statistics and expert knowledge in eight European countries, all included in this book, serious concerns were raised about the limited accountability regarding adoptions from care (Burns et al, 2019). The study reported on a lack of information about the proceedings, as well as a lack of transparency, both for those involved and the wider public, and concluded that there is a missing connection between wider democratic society and this part of the legal systems in the countries studied. In addition, research is either limited or non-existent. The legitimacy of decision-making procedures, the involvement of parents and children, and the nature of the expertise guiding the decisions and services provided before, during and after the adoption decision are, however, of major importance for all involved.

Long-term care and adoption from care as alternatives

As can be seen from the chapters that follow, different countries, while committed to the basic principles of the CRC, have arrived at different positions with respect to the place of adoption within child placement legislation and practice. Shared understanding of child and adult psychological development has led to broad consensus across national boundaries that children who have been exposed to maltreatment, trauma and loss must be provided with stability and belonging within a family when birth parents cannot care for them. Preferably, then, children should grow up with relatives, but if not, then within a stable and committed substitute family. The important question for governments to handle is how to care for the children that are in public care. What is the best interest option for these

children of different ages, with different needs and with differing prior relationships and experiences of loss and trauma? This question is urgent as child protection systems tend to expand and the number of children in public care is not decreasing, but rather increasing, in many countries (Gilbert et al, 2011; Berrick et al, forthcoming). However, a general message from research seems to be that, overall, the welfare states are not sufficiently protecting these children's rights,² and this knowledge has resulted in questions about the quality of the child protection system and the services and support to children and families.

Regarding the different alternatives for children needing long-term care, there is general agreement that adoption will be the best way of securing 'permanence' and enduring family membership for some children since it combines legal permanence (a lifetime, legal relationship between an adult and child), residential permanence (continuity of caregiving in a designated home) and relational permanence (in which an adult and child see each other as family) (see Palacios et al, 2019). The combination of these three elements of permanence makes adoptions different from long-term foster care. Triseliotis (2002), for example, based on an extensive research review, concludes that the main difference between adoption and long-term fostering is in the higher levels of emotional security, sense of belonging and general well-being expressed by those who have been adopted compared to those in foster care. This conclusion has been well documented and further substantiated in a range of solid studies that find evidence to support adoption as a better alternative for children needing long-term care in terms of better developmental consequences, placement stability, emotional security and transitions into adulthood, among other issues (for a meta-study, see Christoffersen et al 2007, 2008; for comprehensive register data studies, see Vinnjerlung and Hjern, 2011; Hjern et al, 2019; for overviews of this literature, see also Tregagle et al, 2019).

In the chapters that follow, readers will discover how the countries represented in this book arrived at the present use of adoption from care. The evidence provided by research and used by the particular countries will be presented in each chapter; however, it is clear that in most jurisdictions, there is little use of evidence to support the present balance between the different options. The knowledge base is more advanced in some countries than others. This book cannot conclude about whether the approach of a particular country to adoptions from care is preferable to that of another country with different historical, social and cultural factors related to adoption and child welfare.

The aim of the book

In this book, we explore adoptions from care in countries with different policies and practices. We know that children who have been taken into public care are adopted in each of the countries included in this volume, yet the legislation, practices and responsible bodies for pre-adoption, adoption and post-adoption decisions vary, and countries consider the option of non-consensual adoptions differently. Adoptions from care are, for example, included in child protection legislation and organisations in England and Norway, whereas adoptions and child protection removals are separated in legislation, organisations and decision-makers in Finland. When studying adoptions from care, we will also look at other options for children who need permanent or long-term care, and consider how countries arrived at their current placement policies and legal arrangements.

The book provides an opportunity to look beyond the parents' rights–children's rights dichotomy as it explores the notions of responsibilities and outcomes. Fundamental questions are: is adoption a service for the child's best interests, for parents unable to provide adequate care for a child, for children or for adults who wish to create – or expand – their family in this way? Or, is adoption a service for states who wish to make use of a cheaper way of discharging their responsibilities towards maltreated children 'throughout their childhood'? The lens of 'responsibilities' leads to a more nuanced analysis of differences in different countries. Central are birth parents', foster carers', residential childcare workers' and adopters' responsibilities towards a child. However, weight is also given to clarification of the state's responsibilities towards the child it has removed from a dangerous or life-limiting situation, and we also explore the state's responsibilities towards the vulnerable adults unable to meet the 24/7 0–19+ needs of their children. Where is the 'middle way' (and for which children/family circumstances) between creating a totally new family by changing the child's legal identity and creating a 'shared parental responsibility' that may vary over time and with different ways of sharing parental duties?

The countries chosen for this book have a range of usage of adoptions from care – with England and US at one end of continuum, Spain and Estonia more inclined to use adoptions than the other European countries, and Finland least likely. However, we also have a range of judicial processes (the extent to which care processes and adoption processes are fully integrated, as with England, or very separate legal systems). Other differences include adoption by specially recruited adopters and early placement, contrasted with adoption only by foster carers with whom the

child is already well settled. The book departs from the premise that there is a connection between the welfare state and child protection system, which is why the jurisdictions included in the book cover different child protection systems (see Gilbert et al, 2011). Four countries – England, Estonia, Ireland and the US – have a risk-oriented child protection system,³ in which the emphasis is primarily to protect children from maltreatment. These systems have a relatively high threshold for family service provision and compulsory intervention, such as a care order. The five remaining countries – Austria, Finland, Germany, Norway and Spain – all have systems that are categorised as family service systems oriented towards the protection of children’s needs. In these systems, there are generous service provisions and a focus on families and children’s well-being. Thus, the thresholds for interventions are lower. Although the basic philosophy of family service-oriented systems is similar, there are two branches within it: a family-based branch, represented by Austria, Germany and Spain; and a child-based branch, represented by Finland and Norway. As noted by Gilbert et al (2011), typologies of this kind inform about orientations and patterns rather than about fixed systems of protecting children. Nevertheless, this cross-cutting of service provision and intervention approaches helps to understand the differential use of adoption from care among the jurisdictions included in this volume, an issue to which we return in the concluding chapter.

As the chapters will demonstrate, the authors are highly experienced in the field of child welfare in their respective countries and have contributed to several inter-country explorations of child protection. The book is organised into three parts. Part I includes analyses of country practices of adoptions from care in risk-oriented child protection systems. Part II includes analyses of country practices of adoptions from care in service-oriented child protection systems. Within each of these two parts, we have asked each country contributor to cover the following topics:

- adoptions from care in legislation, national guidelines and the knowledge base;
- other types of adoption;
- the social, historical and cultural context in which adoptions from care take place;
- decision-making regarding adoptions;
- adoptions from care and children in long-term care (number and profiles);
- critical points in present policy and practice regarding adoptions from care; and
- anticipation about the future of adoptions from care.

Part III covers specific key issues related to adoptions from care that further demonstrate their complexity, including international human rights, the recognition of attachment in decisions regarding adoptions, adoptive kinship networks and the creation of family. The issues typically attached to adoption – whether nature matters more than nurture, or vice versa – expand to the topics of narratives (how we make sense of identity and social bonds, as suggested by Howe [2009]), as well as to those of safeguarding children’s rights in the context of broader human rights. In the concluding chapter, we bring the findings together and discuss the role of adoptions from care in different societal contexts.

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Notes

- ¹ The US has not formally ratified the CRC.
- ² In terms of outcomes for children in out-of-home care, two recent systematic reviews (Gypen et al, 2017; Kääriälä and Hiilamo, 2017) on existing knowledge and research on children growing up in public care reveal that they are discouraging and bleak.
- ³ England is positioned between these two approaches, with family service-oriented legal provisions but operating in practice within a risk-oriented framework.

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