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KINSHIP CARE AS LIVING LAW - AN UNWRITTEN SOURCE OF CHILD PROTECTION LAW

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Abstract: *This article explores the legal significance of kinship care as an unwritten source of child protection law across diverse legal and cultural contexts. While modern child welfare systems prioritise written statutes and formal procedures, millions of children globally are raised in informal caregiving arrangements by extended family members - grandparents, aunts, uncles, or siblings - based not on legal documentation but on social norms, customs, and moral obligations. Drawing on Eugen Ehrlich's concept of living law and John Eekelaar's analysis of normative family systems, the article conceptualises kinship care as a form of law-in-action, embedded in community practices, yet largely invisible to formal legal order.*

The study adopts a comparative methodology, focusing on Central and Eastern Europe (with attention to Slovakia and Hungary) and the Global South (specifically Sub-Saharan Africa and Latin America), where kinship care constitutes a primary mode of alternative care. It examines the legal invisibility of children in informal kinship care, assessing both the benefits - such as cultural legitimacy and continuity - and the challenges, including lack of oversight, gendered caregiving burdens, and weak legal protection.

The article further critiques the limitations of international children's rights law, particularly the UN Convention on the Rights of the Child and General Comment No. 14, which recognise the role of extended family but provide little regulatory guidance. The concluding section proposes a model of legal pluralism and child-centred harmonisation that seeks to bridge unwritten caregiving norms with state law. The study calls for greater engagement with unwritten sources of law in order to develop a more just, inclusive, and context-responsive child protection framework.

Key words: *Kinship Care; Child Protection; Unwritten Law; Living Law; Customary Norms; International Children's Rights; Convention on the Rights of the Child; Legal Pluralism; Informal Caregiving; Family Law; Comparative Law; Sociology of Law; International Human Rights Law*

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1. INTRODUCTION

In child protection regimes that prioritise codified statutes and formal procedures, a vast domain of caregiving remains invisibly outside the written law. Across the world, millions of children are raised not by their parents or state-sanctioned foster carers, but by grandparents, older siblings, aunts, uncles, and other relatives under informal arrangements. These kinship care arrangements are often legally invisible: they occur without court orders, foster care licences, or formal guardianship decrees. As a result, children in kinship care frequently fall through the cracks of official child welfare systems and data collection (Herczog, Koenderink, O'Donnell and Teltschik, 2021, p.7). Yet, these arrangements are nothing but lawless. On the contrary, they are governed by deeply ingrained social norms, cultural expectations, and moral obligations – unwritten

laws that operate as a *de facto* protective framework for children. This paradox – that the most common form of out-of-parental care is at once widely practiced and yet neglected by formal law – presents a critical challenge for legal systems (Delap and Mann, 2019, p.5).

This study examines kinship care as an unwritten source of law in child protection. It argues that informal caregiving by relatives constitutes a form of "*living law*" in the sense of Eugen Ehrlich's sociological jurisprudence, operating parallel to (and sometimes in tension with) state law. Part I defines the concept of unwritten law – including custom, social norms, and moral duties – and situates kinship care within this tradition as living law. Part II provides comparative perspectives on kinship care in different cultural contexts, focusing on Central/Eastern Europe (with particular attention to Slovakia, Hungary, and Roma community practices) and the Global South (with examples from Sub-Saharan Africa and Latin America). These examples illustrate how kinship caregiving norms function as an informal legal order across diverse societies. Part III analyses the legal invisibility of children in kinship care and the consequences of operating outside formal frameworks – highlighting both positive aspects (cultural legitimacy, flexibility, continuity of care) and negative aspects (lack of oversight, gender disparities, weak legal protections for children and caregivers). Part IV considers international children's rights law, especially the United Nations Convention on the Rights of the Child (CRC) and General Comment No. 14, which recognise the role of extended family care but struggle to regulate it adequately. Part V then examines the jurisprudence of the European Court of Human Rights (ECtHR), analysing the Court's living-instrument doctrine in relation to children's rights. Finally, the Conclusion offers normative proposals for better integrating these unwritten caregiving norms with state legal systems. The study advocates for a pluralistic and culturally sensitive approach. One that harmonises living law with formal law and ensures that kinship care is recognised and supported without undermining the fundamental rights and best interests of the child. Methodologically, the study employs a comparative socio-legal approach. It combines a doctrinal analysis of international and European case law with qualitative insights from child-protection practices in selected regions.

Throughout the paper, the discussion draws on Eugen Ehrlich's theory of the *"living law"* and the scholarship of John Eekelaar to frame kinship care as part of the law in action – the normative order actually governing people's lives – which often diverges from the black-letter law. The aim is to shed light on the invisible caregivers and children operating in the shadow of official legal systems, and to suggest pathways for making this living law of kinship care visible and accountable.

2. UNWRITTEN LAW AND KINSHIP CARE AS '*LIVING LAW*'

Unwritten law refers to norms, customs, and social practices that are not codified in official statutes or regulations but nonetheless guide behaviour and are treated by communities as binding. Classic jurisprudence has long recognised that alongside enacted positive law there exists a substratum of norms – whether custom (*consuetudo*), religious dictates, or societal morals – that constitute real sources of obligation. Customary law in many societies operates on this unwritten plane: it may never have been passed by a legislature, yet it is obeyed as law by those within its scope. Similarly, social conventions and ethical duties often function as normative frameworks that parallel or supplement formal law.

The sociologist of law Eugen Ehrlich captured this phenomenon with his famous concept of the living law – the law that *"dominates life itself even though it has not been*

*posited in legal propositions" (*Ehrlich, 1913, preface*)*. According to Ehrlich, every social association (from the family to the broader community) generates its own rules of conduct, which may or may not be recognised by state law. These living laws are essentially the norms of how things are done or what is generally accepted and approved in actual social life (Murphy, 2012, p. 177). They exist independently of state-sanctioned law and often enjoy greater obedience within their communities than official decrees. Modern legal pluralism builds on this insight, acknowledging that multiple normative orders (state law, customary law, religious law, etc.) can coexist and even compete within a given society. In the realm of family and child care, these unwritten norms can be especially powerful, given the intimate and culturally embedded nature of family life.

Kinship care – the informal care of children by their relatives or clan – is a paradigmatic example of living law in action. In societies around the world, there is a broadly shared customary expectation that when parents are unable to care for a child (due to death, illness, migration, poverty, or other crisis), the duty to raise the child flows to the extended family. This expectation constitutes an unwritten normative framework: family members feel obliged – morally, socially, and often spiritually – to step in and care for the child. For instance, in many cultures it would be unthinkable to leave an orphaned or abandoned child to be looked after by strangers or the state if a grandmother, older sibling, or uncle/aunt is available. The adage *"it takes a village to raise a child"* reflects a near-universal principle of communal childrearing responsibility. This principle may never be codified in legislation, but it is enforced by social pressure, honour, and reciprocity within the community.

From a jurisprudential perspective, kinship caregiving norms meet the criteria of unwritten law. They are normative (imposing a sense of ought: one ought to care for their kin), generalised (widely accepted in the community), and often of ancient pedigree (handed down through tradition). They can even be described as customary law in societies where extended family care has the sanction of long usage and communal recognition. John Eekelaar has observed that family structures across cultures are governed not just by formal legal rules, but by "*very different norm systems"* that reflect underlying values and customs (Banda and Eekelaar, 2017, p. 833). In other words, what counts as a family obligation or who is considered a rightful caregiver can vary dramatically depending on the unwritten normative order in play. Eekelaar's socio-legal scholarship emphasises that the state's family law often only partially captures the reality of family obligations; the lived experience of family life is shaped equally (if not more) by social norms and cultural practices. Kinship care, as an institution, exemplifies this: it is a form of caregiving that the written law may only weakly regulate, yet is firmly rooted in the law of the family as understood within the community.

Historically, kinship care long predates modern child protection legislation. Anthropological and historical records from every continent show that fostering of children by relatives was commonplace in pre-modern societies (Leinaweaver, 2014, p. 131). Indeed, for the majority of human history, kinship care was the default solution when parental care failed (Hrdy, 2007, p. 39). Fictive kinship arrangements (such as godparenthood or tribal kinship ties) also extended the web of potential caregivers beyond blood relatives. These arrangements were often cemented by ritual and custom – for example, the institution of *compadrazgo* (co-parenthood through godparents) in Latin America, or the clan-based fostering systems in many African societies – thereby creating a network of obligated caregivers through unwritten agreements (Mintz and Wolf, 1950, p. 347). As one U.S. federal definition puts it, kinship care is *"the full-time care, nurturing, and protection of a child by relatives, members of their Tribe or clan, godparents,*

stepparents, or other adults who have a family relationship to the child,"[1] and crucially, the relationship is to be respected based on the family's cultural values and ties. In short, kinship care rests on family cultural values rather than on contractual or statutory authority.

It is important to note that some legal systems have gradually absorbed aspects of these norms into written law – for example, by creating formal avenues for kinship foster care or guardianship. But even where such laws exist, the vast majority of kinship care globally remains informal, happening outside of court involvement. Thus, the norms that govern it remain largely unwritten. Decisions regarding who will take in a child, how the child will be raised, and the scope of the caregiver's rights and duties *vis-à-vis* the child, are usually made within the family or community circle, according to custom and mutual understanding. Eugen Ehrlich would describe these as decisions governed by the living law of the family association, as opposed to the official law of the state. The concept of living law here helps us frame kinship care as law in the sociological sense: a normative order that regulates the care of children and is seen as binding by those within the group, even if not enforced by state coercion.

Kinship care norms also often carry moral authority. They are frequently buttressed by ethical or religious imperatives – for example, many religious traditions teach the duty to care for orphans as a spiritual obligation. In Islam, the concept of *kafala* (taking in an orphaned or abandoned child, without adopting them in the Western sense) is a duty enjoined by religious law, reflecting a clear instance of an unwritten (or rather, religiously codified but non-statutory) norm that family should care for the vulnerable child.[2] In African customary contexts, proverbs and sayings encapsulate the moral duty: *"a child belongs to not one person"*,[3] meaning the whole kin group shares responsibility (Scannapieco and Jackson, 1996, p. 190). These moral-communal expectations function as unwritten legal rules insofar as failing to abide by them can result in community sanction or loss of honour.

Kinship care represents living law or law from below – an organic legal order that arises from social life itself. It sits in the penumbra of the formal legal system: sometimes cooperating with it, sometimes contradicting it, but always serving as a parallel framework that deeply affects children's lives. Understanding kinship care as unwritten law really shows us why purely state-centric analyses of child protection are incomplete. The next sections turn to comparative examples that showcases how this unwritten framework operates in different cultural and legal contexts, and what tensions or complementarities exist between kinship's living law and the official law.

3. COMPARATIVE PERSPECTIVES ON KINSHIP CARE NORMS

3.1 Central and Eastern Europe - Kinship Care and Custom in the Shadow of the State

In Central and Eastern Europe, kinship care has long operated as a vital informal safety net for children, even as formal child protection systems in the region have historically been dominated by state institutions. Under socialist regimes of the 20th

[1] Child Welfare Information Gateway. (n.d.). About kinship care. U.S. Department of Health and Human Services, Children's Bureau. Available at: https://www.childwelfare.gov/topics/outofhome/kinship/about/ (accessed on 30.04.2025).
[2] UNICEF. (2023). An introduction to kafalah. Nairobi: UNICEF Eastern and Southern Africa Regional Office. Available at: https://www.unicef.org/esa/media/12451/file/An-Introduction-to-Kafalah-2023.pdf (accessed on 30.04.2025).
[3] From the Kihaya people: *Omwana taba womoi*.

century, the response to children without parental care often emphasised institutionalisation (large orphanages and children's homes), with less reliance on foster care or adoption. Despite this statist approach, families frequently resorted to their own networks to care for children in need. Grandparents, in particular, played an essential role in raising grandchildren when parents were unable to do so – a practice deeply embedded in the region's social norms.

Take Slovakia as an example. Slovak family law today does provide for formal kinship foster care (the Family Act mandates that when a child is removed from parental care, priority should be given to placement with a relative).[4] In practice, courts often entrust children to grandparents or other relatives rather than unrelated foster families.[5] Recent statistics indicate that kinship placements far outnumber non-relative adoptions or foster placements – for instance, in 2023, Slovak courts placed 1084 children with kin (over 65% with grandparents) compared to only 60 children placed in non-kin foster care.[6] This demonstrates that even within the formal system, the preference for kin as caregivers is strong. However, those figures capture only the children who entered the child protection system. A much larger number of children are likely in informal kinship care that never comes before a court. For example, when parents migrate to work abroad (a common scenario in parts of Eastern Europe), it is customary for children to stay behind with grandparents or other extended family, often without any legal custody change. The law is effectively bypassed by a tacit family arrangement; yet socially, this is considered normal and even commendable (the family taking care of their own).

In Hungary and neighbouring countries, similar patterns exist. Informal grandparent care is widespread, driven by both cultural expectations and economic necessity. Post-communist economic hardships saw many parents unable to provide stable care, and grandparents (or aunts/uncles) stepping in (Barzó, 2023, p. 24). Roma communities, in particular, exemplify strong kinship caregiving traditions. The Roma (Gypsy) people, who live across Central and Eastern Europe, have rich traditions of family solidarity and child circulation within the extended family. In Roma culture, the family is a broad concept, often extending beyond the nuclear unit to include aunts, uncles, cousins, and community elders all living in close networks. Children in Roma families are often brought up not only by their parents, but with the support of the extended family; the wider community contributes to the child's upbringing by sharing in caregiving tasks and passing on cultural knowledge (Sweeney and Matthews, 2017, p. 14). As one guide for social workers notes, *"the family takes a place of central importance in Gypsy and Traveller culture and there is a strong emphasis on caring for the old and young. Members of the community…operate within the extended family system and use this system as an [ongoing source of] advice and assistance in childrearing"*.[7] This means that if a Roma mother or father is struggling (due to poverty or other issues), other family members will typically step in informally rather than involving outside authorities. Older siblings may care for younger ones, or an aunt may take a child into her household for a period of time. These

[4] Section 45 of Act No. 36/2005 Coll. on the Family and on Amendments and Supplements to Certain Acts, as amended.

[5] District Court Dunajská Streda, judgment of 21 March 2023, file no. 15P/102/2022, ECLI:SK:OSDS:2023:2222204061.2. paras 14 and 18.

[6] Ministry of Labour, Social Affairs and Family of the Slovak Republic. (2024). Report on the social situation of the population of the Slovak Republic for 2023. Bratislava: Ministry of Labour, Social Affairs and Family of the Slovak Republic. Available at: https://www.employment.gov.sk/files/slovensky/ministerstvo/analyticke-centrum/2024/sprava_sossr_2023_pub.pdf (accessed on 30.04.2025).

[7] *Ibid*.

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arrangements are governed by Romani customary norms of obligation and reciprocity – unwritten rules about honour, family duty, and community trust.

However, these kinship practices in Roma and other communities often clash with state child protection systems in Eastern Europe. In countries like Slovakia, the Czech Republic, Hungary, Bulgaria, and others, studies have found that Roma families are disproportionately subject to child protection intervention, with social services more readily removing Roma children into state care (foster care or institutions) than they would for majority families.[8] The reasons are complex – including poverty, discrimination, and cultural misunderstanding. One tragic statistic illustrates the gap between the community norm and the state response: in Bulgaria, Roma are under 10% of the population but over 60% of institutionalised children. In Slovakia this number is 80% (Rorke, 2021). These numbers suggest that the state system has often failed to integrate kinship care networks for marginalised communities. Instead of supporting extended families to care for children, authorities have tended to view those families with suspicion (sometimes due to prejudice or ignorance of Romani caregiving norms) and have removed children into formal care at alarming rates.

Recent advocacy by Roma support groups highlights that Roma kin are willing and able to care for their children, but face barriers in formal recognition – e.g., lack of information about kinship foster care processes, or failure to meet bureaucratic criteria leading to rejection of Roma kin carers by authorities. That is why the unwritten law of Roma kinship care often finds itself overridden by the written law's strictures, to the detriment of children's cultural continuity and familial bonds.

Outside of the Roma context, more generally in Eastern Europe there is a strong cultural norm (rooted in both tradition and the hardships of recent history) that family should raise the child. Even during the communist era, when the state proclaimed itself the ultimate guardian of all children, practical reality dictated that relatives frequently assumed care in crisis situations. For example, if parents were incarcerated or incapacitated, grandparents would quietly take in the children rather than send them to orphanages, often without any formal court order. In rural areas, it was common for large extended households to share childrearing duties. These practices persist today.

At the same time, the Eastern European experience shows some evolving *recognition* of kinship care in formal law, albeit incomplete. As mentioned, Slovakia's law favours court-ordered kin placements. Czechia and Poland have also expanded support for kinship foster carers in recent years. Yet, crucially, informal kinship care is not systematically tracked or supported. A recent UNICEF/Eurochild report found that only a couple of countries in Europe (such as Czechia and Romania) even attempt to gather data on children in informal kinship care and none treat those children as part of the alternative care system for official purposes (Herczog, Koenderink, O'Donnell and Teltschik, 2021, p. 26). In other words, if a child is living with an aunt without a court order, that child is statistically invisible – not counted as a child in care, and typically not eligible for the oversight or support services that a formally looked-after child would receive. This clearly shows that despite cultural acceptance of kin caregiving, the legal systems have not caught up to formally integrate this unwritten practice into the child protection framework. The kinship care is happening in the shadows of the law – effective as a social practice, but precarious in terms of legal rights and protections.

[8] Roma Support Group, & Law for Life. (2024). Written evidence submitted to the Education Committee: Children's social care (CSC 148). UK Parliament. Available at: https://committees.parliament.uk/writtenevidence/133040/pdf/ (accessed on 30.04.2025).

Central/Eastern Europe illustrates a dual dynamic: strong unwritten norms of kinship care on the ground, contrasted with historically rigid state systems that often bypass those norms. Change is occurring, as states slowly realise the value of kinship placements, but there is still a large gap. The lesson from this region is that kinship care, as living law, will persist due to necessity and tradition – but its lack of formal recognition can lead to conflict and injustice.

3.2 The Global South - Kinship Care as Customary Law and Social Necessity

In the Global South – encompassing regions like Sub-Saharan Africa, Latin America, and parts of Asia – kinship care is not just common; it is in many places the predominant form of care for children outside the nuclear family. While circumstances vary by country and culture, a unifying theme is that extended family networks are the first resort for child care in any family crisis. The norms underpinning this are often explicitly rooted in customary law or longstanding social practice. Here, the unwritten law of kinship care often operates with even greater authority than in industrialised settings, sometimes filling in where state infrastructure is weak.

Sub-Saharan Africa provides perhaps the clearest case of kinship care as an unwritten legal institution. Across African societies, the extended family has traditionally been regarded as the fundamental social unit, such that children are considered to belong not solely to their biological parents, but to the larger kin group or clan (Scannapieco and Jackson, 1996, p. 190). In many African languages, the term orphan traditionally meant a child who has lost both parents and also lacks extended family – reflecting the assumption that if any relative is alive, the child is not without a family (Motha, 2018, p. 50). Indeed, *"orphanages are not part of African culture; orphans look to family members to take them in"*, as one commentator notes (Michel, Stuckelberger, Tediosi, Evans and van Eeuwijk, 2019, p. 5). When the devastating HIV/AIDS pandemic in the late 20th century left millions of children without parents, this cultural norm sprang into action: grandmothers in particular became the caregivers for an enormous number of orphans. It is estimated that in Africa, grandmothers (and other older relatives) care for 40% to 60% of all children who lost parents to AIDS (Michel, Stuckelberger, Tediosi, Evans and van Eeuwijk, 2019 , p. 5). This response was largely automatic and informal – village communities and extended families absorbing children without any court orders. As a result, Africa now has the highest rate of kinship care in the world. By one global estimate, approximately one in three children in some Sub-Saharan African countries lives in a household with neither parent present, being cared for by relatives (Delap and Mann, 2019, p. 5). Even on a continent-wide scale, around one in ten African children (tens of millions in total) are in kinship care arrangements, this is very high compared to the on in seventy-four children that the UK reports for reference (Martin and Zulaika, 2016, p. 51).

These arrangements are governed by norms that can be considered customary law. In many African communities, there are unwritten rules about which relative should assume care of a child in different circumstances – often tied to lineage systems. For example, in patrilineal societies, if a father dies, the child's paternal uncle or grandparents may have the customary right (and duty) to take the child, whereas in matrilineal cultures, the maternal uncle might be the designated guardian. Such norms, while unofficial, are well understood within the community. They may be ceremonially recognised (through a family meeting or blessings) even if not legally recorded. Importantly, these customary caregiving arrangements are often enforced by social expectations: a relative who refuses to care for an orphaned kin might face community disapproval or stigma.

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Conversely, caregivers gain social esteem for fulfilling their family duty. This is the living law of kinship at work – a self-regulating system ensuring children are cared for.

However, the massive scale of kinship care in Africa also comes with modern strains. Poverty and disease (HIV, Ebola, etc.) have stretched the capacity of extended families. Grandmothers (often impoverished themselves) might struggle to provide for numerous grandchildren. The unwritten norm meets harsh economic reality, sometimes resulting in children facing hardship even while in family care. Here we see a positive/negative duality: on one hand, kinship care in Africa has prevented a humanitarian catastrophe (millions of orphans have homes thanks to relatives); on the other hand, the lack of formal support or oversight for these arrangements means children and elderly caregivers can be left very vulnerable. One comprehensive review noted that most kinship care in Africa is arranged informally and remains unregulated by authorities, with governments often taking for granted that families will cope on their own (Hallett, Garstang and Taylor, 2023, p. 632). Without legal recognition, kin caregivers may not receive any financial assistance, training, or monitoring from child welfare agencies, even in countries where formal foster care programmes exist. Reliance on unwritten law is a double-edged sword - it provides culturally legitimate care, but at the cost of children's and caregivers' access to state resources.

Another dimension in some African contexts is the interplay between customary law and state law. Many African countries have plural legal systems where customary law is recognized for family matters to varying degrees (Sippel, 2022). For instance, questions of guardianship or inheritance of children might be handled by customary courts or community authorities. In such cases, kinship care might actually have a quasi-legal status under customary law (even if not under statutory law). This can lead to conflicts – for example, a customary rule might dictate that a child be raised by the father's relatives, whereas statutory law might prioritise the mother or the child's own preference.

Turning to Latin America, kinship care is also deeply woven into social structures, though the context differs. Latin American societies have a strong cultural value known as *familismo* – an emphasis on the primacy of the family (including extended relatives) in individuals' lives. Within this ethos, it is expected that family members will support each other in times of need, and this includes caring for each other's children. Extended kin networks are especially important in many Latin countries and grandparents often retain significant authority within the family. In traditional communities, elder kin, especially grandparents, are vested with complete authority in family affairs; they sometimes take over primary care of grandchildren when parents falter. This might happen, for example, if a young single mother is struggling – her parents may effectively raise the child, with everyone understanding the arrangement even if nothing is written down. Similarly, if a parent migrates to seek work (a common scenario in Latin America), children are frequently left in the care of grandparents or aunts/uncles back home. Latin America also has the institution of *compadrazgo* (godparenthood) which, while primarily a ritual kinship tie, can translate into real caregiving obligations; a *compadre* or *comadre* (godfather or godmother) may take a child in if the biological parents cannot care for them, fulfilling a social promise made at the child's baptism (Mintz and Wolf, 1950, p. 342). This is an example of fictive kinship creating an unwritten duty to act as a second parent.

Historically, many Latin American countries have not had extensive formal foster care systems – the family was assumed to absorb children in need. In recent decades, child protection reforms (often influenced by international standards) have tried to formalize alternative care, but kinship care remains largely informal (Leinaweaver, 2014, p. 131). Countries like Brazil, Mexico, and others have begun to recognise kinship

caregivers in law (through guardian statuses or kinship foster care programmes), yet a significant proportion of caregiving by relatives still happens outside the purview of authorities. For instance, in rural indigenous communities, customary law may govern child custody and placement. Indigenous traditions in parts of Latin America (and similarly in parts of South Asia and Oceania) sometimes involve child circulation: children might be sent to live with wealthier relatives for better opportunities or among indigenous groups, to cement alliances between families. Such practices are governed by traditional norms of reciprocity. While they can be positive, they also carry risks if abused (at the extreme, outsiders might label it child trafficking or exploitation if the line between customary fosterage and labour becomes blurred).

Despite these risks, it remains true that in the Global South, informal kinship care is the backbone of child welfare. Studies indicate that globally, of all children not living with their parents, the vast majority are with relatives rather than in any formal foster or residential care. For example, one global study found that children are up to 20 times more likely to be in kinship care than in institutional care in countries as diverse as Rwanda and Indonesia (Delap and Mann, 2019, p.5). This truly shows that unwritten caregiving norms are not a marginal phenomenon but the default in many societies.

This comparative section has revealed that whether in Eastern Europe's Roma settlements or in the villages of Africa and Latin America, kinship care serves as a form of living law"– a customary framework that steps in where formal law either hesitates or cannot reach. It is respected due to cultural legitimacy and often yields nurturing environments anchored in the child's community and identity. Yet, precisely because it lies outside the formal system, it also introduces challenges. The next part will delve into these challenges: the legal invisibility of children in kinship care and the mixed consequences of operating under unwritten norms rather than written rules.

4. LEGAL INVISIBILITY AND CONSEQUENCES OF UNWRITTEN KINSHIP CARE

Children being cared for under informal kinship arrangements exist in a kind of legal limbo. They are not under the custody of their parents (at least in practice), and yet they are not under the custody or supervision of the state either. The unwritten nature of these caregiving arrangements means they often go unrecorded in any official registry. This legal invisibility has significant consequences – some advantageous, others problematic.

On the positive side, the unwritten kinship care system offers children a degree of normalcy, continuity, and cultural belonging that formal alternatives often struggle to provide. Studies consistently show that children generally prefer to be with relatives rather than with unrelated foster carers or in institutions (Delap and Mann, 2019, p. 6). The reasons are intuitive: with kin, children remain connected to their extended family, language, culture, and possibly their home community. There is often less disruption – a child might stay in the same school, maintain contact with siblings and family events, and avoid the trauma of being placed with strangers. In terms of child welfare, kinship care can provide greater stability and permanence. Placements with kin tend to be more enduring than non-kin foster placements, which are at higher risk of breakdown. Relatives are also more likely to keep siblings together and to allow continued contact with the child's parents (when appropriate), which means preserving family relationships.

Children in kinship care also tend to have equal or better outcomes on various measures (education, mental health) compared to children in non-kin foster care, and significantly better outcomes than children in institutional care. For example, the incidence of physical and sexual abuse has been found to be lower in kinship care than

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in other out-of-home care settings (likely due to the presence of trusted family), and while neglect can be an issue, many children report feeling loved and well cared for by their relatives (Hallett, Garstang and Taylor, 2023).

Culturally, kinship care carries a legitimacy that written law cannot easily replicate. In communities where family duty is strong, a child raised by relatives is seen as properly within the fold, whereas a child in an orphanage or with an unrelated foster family might be viewed as unfortunate or even stigmatised. The flexibility of unwritten arrangements also means they can be tailored to the child's needs in ways legal orders might not allow. For instance, a child might move fluidly between households – spending weekdays with an uncle in town to attend school and weekends in their home village with grandparents. Such fluid arrangements would be difficult under formal foster care (which expects a single primary placement). The living law of kin care is adaptable: families can change arrangements as the child grows or as circumstances shift, without court proceedings.

There is also an element of empowerment and ownership: communities feel that they are caring for their own according to their values, rather than handing children over to state authorities. Especially for indigenous or minority communities with histories of oppressive child removal by governments, maintaining control over child upbringing through kin networks is a way to resist assimilation and preserve cultural continuity.

Despite its strengths, the invisibility of kinship care in formal law also brings serious drawbacks. The foremost concern is the lack of oversight and support. When a child enters the formal foster care system, ideally there are background checks on caregivers, home assessments, training, periodic social worker visits, and legal accountability for the child's well-being. By contrast, an informal kinship care arrangement might bypass all such safeguards. This means that potential risks to the child might go unnoticed. While most kin caregivers are loving and committed, there are cases of abuse or exploitation within families too – and without external eyes, these children could be more isolated in the event of maltreatment. Empirical studies have produced mixed findings: some suggest kinship placements are safer overall than stranger foster placements (as noted, lower rates of certain abuses), but also that neglect can be more common in kinship settings (Hallett, Garstang, and Taylor, 2023, p. 637). Neglect here often stems from poverty or the advanced age of caregivers – for example, an elderly grandparent may struggle to keep up with a teenager's needs, or may not have the energy to supervise and stimulate a young child.

The unwritten nature also means no formal accountability. If a kin caregiver is not meeting a child's needs, there is often no clear mechanism for intervention short of a crisis. Other relatives or community members might step in informally if they observe problems, but this depends on family dynamics. The state will typically not know of the child's situation unless a report of abuse or neglect is made. This lack of monitoring can also enable subtle issues to persist, such as a child being kept out of school to help with household chores or a bias in caregiving (e.g., treating the kin-child less favourably than biological children in the same home, the "*Cinderella effect*") (Kiraly, 2015, p. 26). In formal foster care, there would be at least a theoretical periodic review of the child's welfare; in informal care, the only law is the family's conscience and customs.

Another significant issue is legal and procedural difficulties that arise from the caregiver's lack of legal status. In informal kinship care, the biological parents often retain legal custody (on paper), even though they are not in practice caring for the child. The kin caregiver, having no legal custody, may face obstacles in doing basic things for the child: enrolling them in school, consenting to medical treatment, obtaining identity documents or travelling with the child, accessing health insurance or government benefits for the

child, etc. For instance, if a grandparent is not the legal guardian, a hospital might refuse to perform a non-emergency procedure on the child without parental consent, which can be hard to obtain if the parent is absent. Similarly, many jurisdictions tie certain benefits (like child allowances, health coverage, or educational aid) to formal guardianship status. The lack of legal recognition for the kinship caregiver's role can make it difficult to access services and benefits for the child. This bureaucratic marginalisation means that children in kinship care might miss out on resources available to foster children or even to other children with active parents.

Gender inequality is another concern operating within these unwritten arrangements. The burden of kinship care falls disproportionately on women – grandmothers, aunts, older sisters. While this reflects traditional gender roles in caregiving, it raises questions of fairness and support. These women may sacrifice their own health and economic security to fulfil the caregiving norm. Unwritten law expects them to do so out of love and duty, but neither the state nor often the absent parents provide adequate support. There is also potential for intra-familial power imbalances: in patriarchal cultures, decision-making about the child might exclude the mother or maternal relatives.

Finally, children in informal kinship care can face issues of unclear legal identity and future uncertainty. Because nothing is formally decided, questions about the child's long-term permanency remain open. Will the child stay with Aunt X until 18? Might they return to a parent if circumstances change? Who has the authority to make important decisions in the interim? The lack of a legal framework means these questions are answered (if at all) by family consensus, which can be fragile. There are cases where an informal caregiver raises a child for years, only for a biological parent to reappear and reclaim the child, leading to traumatic disruptions with little legal remedy for the caregiver or child's attachment.

The legal invisibility of kinship care cuts both ways. It shields the arrangement from unnecessary intrusion, allowing culturally appropriate care to flourish, but it also withholds the protections and benefits that formal recognition could confer. Children in such care enjoy the love and continuity of family, yet risk lacking voice and safeguards that the law could ensure. These trade-offs pose a question: how can we preserve the strengths of kinship living law – its humanity, flexibility, and cultural resonance – while mitigating its weaknesses? International children's rights law grapples with this question, as we explore next.

5. INTERNATIONAL CHILDREN'S RIGHTS LAW - RECOGNITION WITHOUT REGULATION

International law, particularly human rights law on the rights of the child, acknowledges the critical role of the extended family and community in children's lives. The U.N. Convention on the Rights of the Child (CRC),[9] adopted in 1989 and now nearly universally ratified, was drafted with awareness of global diversity in child-rearing arrangements. The CRC's text deliberately moves beyond a narrow nuclear family model. For instance, Article 5 of the CRC requires States Parties to respect the responsibilities, rights, and duties of parents and, where applicable, members of the extended family or community as provided for by local custom, legal guardians, or other persons legally responsible for the child, to provide appropriate direction and guidance in the exercise of

[9] United Nations Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

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the child's rights. This provision explicitly brings local custom and extended family into the framework of who has child-rearing responsibilities. In effect, the CRC recognises that in many cultures, childrearing is a shared enterprise and that the law should respect those traditional structures.

Further, Article 20 of the CRC, which deals with children deprived of their family environment, implicitly includes kinship care. It provides that a child who cannot be raised by his/her parents is entitled to alternative care and that such care may include, *inter alia*, foster placement, kafala of Islamic law, adoption, or placement in suitable institutions. The mention of *kafala* (an Islamic law institution akin to guardianship by kin or others) was a nod to non-western forms of care. It also says 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 when arranging alternative care. Placing a child with relatives is often the most direct way to ensure continuity and respect cultural background, which means kinship care is aligned with the spirit of Article 20.

The Committee on the Rights of the Child, which monitors the CRC, has reinforced these points in its guidance. Notably, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration[10] provides a broad understanding of family for the purpose of assessing a child's best interests. GC 14 states: *"The term family must be interpreted in a broad sense to include biological, adoptive or foster parents, or, where applicable, members of the extended family or community as provided for by local custom."*[11] By this definition, a child's family could be a grandparent caregiver or a clan, depending on cultural context – a clear affirmation that extended family care is family care.

International soft-law guidelines also speak to kinship care. The Guidelines for the Alternative Care of Children (a U.N. General Assembly-endorsed instrument from 2009)[12] emphasise that, when a child must be removed from parental care, priority should be given to family-based solutions. They explicitly state that care by the extended family or others with a kinship bond *"should be pursued as a priority"* over more distant forms of care. The philosophy is that the family is the fundamental group of society and the natural environment for the growth and well-being of children, and thus efforts should be made to keep the child within his/her family environment (including the wider family) whenever safe and possible. These Guidelines, while not legally binding, carry moral and practical authority and have influenced national policies.

Despite these acknowledgments, there is a consensus that international law's treatment of kinship care is largely aspirational and under-specified. The CRC and related documents encourage respect and support for extended family caretakers, but they do not provide a clear regulatory framework for states on how to engage with informal kinship care. The CRC imposes on states a duty to protect children's rights in all settings, but exactly how to monitor or support a child living informally with relatives is left to state discretion. Consequently, states vary widely – some have enacted kinship care policies (providing subsidies to kin caregivers, simplifying guardianship, etc.), whereas others do little, effectively treating kin-care as a private family matter.

It is our conclusion that international law fails to adequately regulate kinship caregiving because it stops at recognition and does not mandate concrete measures. For

[10] UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC/C/GC/14. *Art. 3, para. 1.*
[11] Para. 59. UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC/C/GC/14.
[12] United Nations General Assembly, Guidelines for the Alternative Care of Children, 24 February 2010, A/RES/64/142.

example, the CRC's Article 18(2) says states shall assist parents and legal guardians in child-rearing – it does not explicitly say assist grandparents or kin in child-rearing (though arguably they could be seen as de facto guardians). The African Charter on the Rights and Welfare of the Child goes slightly further in recognising the role of the extended family in African contexts, but enforcement is minimal.[13]

It's worth noting that international child protection policy in recent years is increasingly attuned to kinship care's prevalence. International children's rights law recognises extended family care as legitimate and even desirable – the unwritten law of kinship is given a nod of approval within international law. However, the translation of that recognition into effective regulation and support is lagging behind. The CRC's framework was visionary in embracing diverse family forms, but its implementation depends on national systems that often have not caught up. As a result, kinship care remains a largely ungoverned space in many countries. While international law recognises extended family care as legitimate, its provisions remain largely aspirational. The European Court of Human Rights, however, has gradually transformed such principles into enforceable obligations under Article 8 of the Convention. The following section examines the pathway through which living law becomes formal law.

6. ECTHR'S LIVING INSTRUMENT DOCTRINE AND EVOLVING CHILD-FAMILY RIGHTS

The European Court of Human Rights regards the Convention as a *"living instrument"* that must be interpreted in light of present-day conditions and changing societal norms.[14] This is a dynamic approach, which means that Article 8 (right to respect for private and family life) is not read in isolation or frozen to 1950, but harmonised with current international human-rights standards.[15] In *Al-Adsani v. United Kingdom* (2001), for example, the Grand Chamber confirmed that *"the Convention cannot be interpreted in a vacuum"* and that it should be construed in harmony with general principles of international law, taking into account treaties to which all Contracting States are party.[16] The same was stated in the case of *Demir and Baykara v. Turkey* (2008).[17] The Court stated that *"the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights."*[18] All Council of Europe members have ratified the UN Convention on the Rights of the Child, so the ECtHR has explicitly acknowledged that the European Convention on Human Rights (ECHR) *"must be interpreted in light of the CRC"* in children's rights cases.[19] This means that widely accepted international norms - even if not binding under the ECHR

[13] African Charter on the Rights and Welfare of the Child, adopted 11 July 1990, entered into force 29 November 1999, OAU Doc. CAB/LEG/24.9/49 (1990).
[14] Equinet. (2020). Compendium: Article 14 — Cases from the European Court of Human Rights. Brussels: Equinet Secretariat. Available at: https://equineteurope.org/wp-content/uploads/2020/09/Compendium_Art.14-Cases-from-the-European-Court-of-Human-Rights.pdf (accessed on 5.11.2025), p. 36.
[15] European Union Agency for Fundamental Rights & Council of Europe, Handbook on European Law Relating to the Rights of the Child (2015). Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf (accessed on 5.11.2025).
[16] ECtHR, Al-Adsani v. United Kingdom, app. no. 35763/97, 21 November 2001, para. 55.
[17] ECtHR, Demir and Baykara v. Turkey, app. no. 34503/97, 12 November 2008.
[18] Demir and Baykara v. Turkey, app. no. 34503/97, 12 November 2008, para. 146.
[19] ECtHR, Harroudj v. France, app. no. 43631/09, 4 October 2012, para. 42.

- inform the Court's understanding of evolving European public order in family-life matters.

The CRC has increasingly been treated by the ECtHR as an authoritative reference point. It is often viewed by the Court as a form of living law that guides the interpretation of Article 8 in cases involving children. The Court, for example, often invokes the CRC's principles (e.g., the child's best interests, the child's right to maintain contact with parents) to update and enrich the meaning of family life under the Convention. In *X v. Latvia,* the Court held that Article 8 ECHR must be applied in a manner *"combined and harmonious"* with both the 1980 Hague Abduction Convention and the 1989 CRC.[20] The Grand Chamber emphasised that in deciding on a child's return in abduction cases, domestic authorities had to make the child's best interests a primary consideration, consistent with Article 3(1) CRC. It explicitly stated that Article 8 *"is to be interpreted in the light of ... the Convention on the Rights of the Child"*.[21] This integration of the CRC ensured that evolving child-protection standards (like hearing the child's views and avoiding automatic returns if the child's welfare is at risk) inform the analysis under Article 8. This case shows the living-instrument doctrine in action. It is also worth mentioning *Neulinger and Shuruk v. Switzerland*[22] which was decided before *X v. Latvia* and presaged the CRC's influence. The Court stated that enforcement of a return order should not disregard the passage of time and the child's integration. In its reasoning, it used the best interest principle, rooted in Article 3 of the CRC. The judgement itself references international instruments and the separate opinions explicitly cite the CRC's best interests of the child principle as a part of the contemporary legal framework. This case shows a shift in the Court's understanding and prioritising the child's welfare over formalistic reliance on parental rights.

Harroudj v. France (2012) involved a French woman's inability to adopt a child under kafala (guardianship) from Algeria. In this case the Court acknowledged that all Member States are parties to the CRC and thus signalled that *"the interpretation of the Convention [Article 8] should be done in harmony with the CRC"*.[23] In paragraph 42 of the judgment the Court stated that the ECHR cannot be interpreted in isolation from developments in international law on children's rights. Although the ECtHR did not find a violation (reasoning that France's respect for Islamic-law guardianship fell within its margin of appreciation), it took guidance from the CRC's provisions on adoption and alternative care. The CRC's Article 20 (which urges states to consider *"the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background"*) was treated as an interpretive aid in evaluating whether France struck a fair balance.

In several custody and child-protection judgements, the CRC norms were echoed to support the living instrument doctrine. In *Zhou v. Italy* (2014), a single mother's newborn was removed and fast-tracked for adoption. The Court found a violation of Article 8, criticising the authorities for not seriously examining placement with the child's grandmother or providing the mother with adequate support. The need to preserve the family ties had not been considered.[24] In *Strand Lobben and Others v. Norway* (2019, Grand Chamber),[25] involving a foster-to-adoption decision, the ECtHR Grand Chamber stated that states had a *"positive duty to take measures to facilitate family reunification as*

[20] ECtHR, X. v. Latvia, app. no. 27853/09, 26 November 2013, para. 94.
[21] X. v. Latvia, 2013, para. 93.
[22] ECtHR, Neulinger and Shuruk v. Switzerland, app. no. 41615/07, 6 July 2010.
[23] Harroudj v. France, 2012, para. 42.
[24] ECtHR, Zhou v. Italy, app. no. 33773/11, 21 January 2014.
[25] ECtHR, Strand Lobben and Others v. Norway, app. no. 37283/13, 10 September 2019.

soon as reasonably feasible",[26] and that complete severance of parent-child ties is an *ultima ratio* measure. This reflects the CRC's spirit (e.g., Article 9[27] and General Comment No. 14 (2013)[28] on the right of the child to have his or her best interests taken as a primary consideration and its paragraph 60 on the right not to be separated from parents unless necessary). This case very clearly shows the Court's willingness to let CRC-informed concepts (e.g., necessity of preserving biological family links) guide the evolution of Article 8 doctrine.

Overall, all of the above mentioned cases show that the ECtHR increasingly uses the CRC as a yardstick for European public order in family-life matters. The CRC's core principles - the primacy of the child's best interests, the child's right to be heard (Article 12), the right to preservation of identity and family relations (Articles 7-9), and protection from discrimination (Article 2) - have seeped into the Court's Article 8 case law. While the Court stops short of treating the CRC as directly binding (it remains formally persuasive, not determinative), its norms are often cited as evidence of evolving consensus or requirements to be taken into account. This is the way CRC-based norms crystallise into *de facto* legal standards in Strasbourg jurisprudence. A closely related development is the ECtHR's treatment of the UN Convention on the Rights of Persons with Disabilities (CRPD)[29] as a living source of law in interpreting Convention rights. We can easily draw a parallel on how supranational courts can elevate soft or external norms into practical legal benchmarks. The Court has been clear that it takes into account the CRPD when interpreting the ECHR (Lemmens, 2024, para 103). Disability rights cases offer some of the clearest illustrations of the living instrument doctrine in action.[30] So just as the CRPD has been used by the ECtHR to dynamically reinterpret the scope of rights for persons with disabilities, the CRC is being used to shape the law on children's and family rights under Article 8. In both instances, the Court treats UN human rights conventions as living sources of external norms. The living instrument doctrine is used to elevate the level of protection within the ECHR system. This trend confirms that the ECtHR perceives instruments like the CRC and CRPD as part of the present-day conditions that inform Convention interpretation - effectively, as living law.

CRC based norms gradually harden into enforceable Article 8 standards. This has concrete implications for areas like kinship care, family preservation, and other child-protective practices. While they may not be explicitly named in the Convention, they derive from evolving international consensus and gradually mature into *de facto* binding requirements under Article 8.

7. CONCLUSION

Kinship care – the age-old practice of relatives raising children when parents cannot – exemplifies how unwritten norms function as a source of law in child protection. It is law in the sociological sense: a body of customary rules and expectations (rooted in

[26] Strand Lobben and Others v. Norway, 2019, para. 208.
[27] United Nations. (1989). Convention on the Rights of the Child, Article 9. United Nations Treaty Series, vol. 1577, p. 3.
[28] UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC/C/GC/14.
[29] Convention on the Rights of Persons with Disabilities (CRPD) (2006). United Nations Treaty Series, vol. 2515, p. 3.
[30] For example: ECtHR, Stanev v. Bulgaria (Grand Chamber), app. no. 36760/06, 17 January 2012; ECtHR, Guberina v. Croatia, app. no. 23682/13, 22 March 2016, final 12 September 2016; ECtHR, Kocherov and Sergeyeva v. Russia, app. no. 16899/13, 29 March 2016, final 12 September 2016.

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kinship obligations, communal values, and affection) that governs conduct and provides order without ever being inscribed in a statute book. This living law of kinship operates in every region, from Slovak villages to African townships, often providing more effective protection and sense of belonging to children than formal institutions could. It carries the imprimatur of cultural legitimacy and usually aligns with the child's best interests in maintaining family ties and identity (Csemáné Váradi and Dancsy, 2024, p. 144). International law, through the CRC and guidance like General Comment No. 14, has come to recognise these realities – acknowledging that family includes the extended family and that the best interests of the child often favour kinship placement.

Yet, as this article has shown, the lack of formal recognition and regulation of kinship care also places children at potential peril: unmonitored situations, unsupported caregivers, and unresolved legal statuses. The central thesis we return to is that *informal kinship care is a de facto legal framework in its own right* – one that modern legal systems need to interface with rather than ignore. The unwritten norms of kinship care should neither be romanticised as infallible nor undermined by rigid state intervention. Instead, a harmonious integration is required, whereby state law pluralistically accommodates kinship arrangements, lending them support and legal backbone, and in return benefits from the strengths of family-based care.

In practical terms, this means building legal bridges: embedding customary caregiving duties within statutory schemes (through guardianship, kinship foster care programmes, etc.) and infusing customary care with human-rights standards (ensuring that no child in kinship care is denied education, protection, or a say in their life). It means pursuing legal pluralism not as a slogan but as a governance strategy – accepting that in matters of child welfare, state law is not the sole source of normative order. Customary and moral norms, the unwritten sources of law, have much to contribute. Courts and legislatures should recognise Ehrlich's living law at work in kinship care and validate it, while also being ready to step in where that living law fails a child.

To align child protection systems with the realities of kinship care, legal frameworks must evolve in ways that acknowledge and integrate the unwritten caregiving norms that shape children's daily lives. Rather than supplanting these deeply rooted systems of family solidarity, the law should formally recognise kinship care as a legitimate and valuable form of alternative care. This involves creating clear and accessible pathways for kin to obtain legal status - whether through guardianship or tailored custodial models - without imposing the full burdens of formal foster care. At the same time, support mechanisms such as financial assistance, respite care, and legal aid must be extended to informal kin caregivers, many of whom operate in silence and without institutional support despite fulfilling parental functions.

Such a reform must proceed with cultural sensitivity. Child protection assessments should reflect diverse family norms and structures. At the same time, unwritten norms must be held to the standard of the child's best interests. Legal pluralism cannot be a shield from discriminatory or harmful customs. Children's voices must be heard in determining their care, and their rights must remain the guiding framework even within culturally governed kinship systems. A harmonised model is needed: one that protects the integrity and flexibility of kinship caregiving while anchoring it in the safeguards, visibility, and enforceability of law. In this way, the living law of kinship can be brought into constructive dialogue with the formal legal order, producing a child protection regime that is not only lawful, but just.

In conclusion, kinship care as an unwritten source of law teaches an important lesson: law is not only what is written in codes and cases, but also what lives in the hearts, minds, and habits of people. Legislators should therefore broaden their field of vision to

see these invisible laws. Doing so is not just an academic exercise; it has concrete implications for justice and child wellbeing. It means a reimagining of child protection that is more community-grounded and culturally respectful, without sacrificing accountability and rights. The recommendations offered – from formal recognition to support mechanisms – chart a path toward that reimagined system. If implemented, they would help transform invisible caregivers from unsung, unsupported heroes into acknowledged partners in the legal protection of the child. A reform like this would embody the best of both worlds: the compassion and authenticity of kinship care, and the protective guarantees of the rule of law.

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