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ALTERNATIVE CARE FOR CHILDREN IN SOCIAL WELFARE SYSTEM – POLICY AND LEGAL CHALLENGES**

Abstract

The paper deals with the theoretical and legal practical foundation of the concept of alternative care for children in the social welfare system. Applying the human rights principle and child best interest doctrine along with the contemporary holistic and integrated approach to the research subject, we aim to identify the proper interpretation of the notion of alternative care for children in international, European and national domains. The recent case law of the European Court of Human Rights has beenconsidered as well. The role of civil society organizations in providing special care services for vulnerable populations such as children in terms of sustainable development agenda has been seen as a precondition for building a stable democratic and inclusive society when the world is facing significant challenges of natural hazards, climate changes and consequently,social inequities. Accordingly, an adequate policy and legal framework need to be developed including engagement of all relevant actors - public, private and civil organizations as well as the beneficiaries of services.

Keywords: alternative care for children, case law of the European Court of Human Rights, policy and legal framework, civil society organizations,public-private partnership

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INTRODUCTION AND CONCEPTUAL FRAMEWORK

The social and legal position of children deprived ofparental care or who are at risk of being so has become challengeable over time considering the vulnerability of their status, particularly, in terms ofregulations that are lacking or deficient in regard tothe functioning of centers and institutions that care for children who require special protection. There is a significant concern to provide dignified living conditions for childrendue to the fact that a very large number of children comeinto alternative care in many countries, both formal and informal, where the universally accepted,legally binding standards are notproperly defined. However, there is a positive step forward in the development of child welfare services and facilities taking into account the fact thatfamily-basedalternative care strivesto replace the institutional one as a part of the process of deinstitutionalization. The worldwide phenomena of deinstitutionalization have been applicable in Serbia, the country in which, in 2016 in the public sector, approximately 21,000 persons used the housing service, one-third in family and two-thirds in residential accommodation (Nacrt Strategije socijalne zaštite u Republici Srbiji za period 2019. do 2025 2019).Besides,a large number of users are still protected through residential institutions. In Serbia, 90% of users are children and young people,protected through family accommodation as a part of family-based alternative care.According to the Republic Social Welfare Institute Report regarding the Institutions for the Accommodation of Children and Youth for 2016, over 5300 children and 1000 young people without parental care, most of which with disabilities, are protected through relatives and foster care in approximately 4,500 families. The protection and well-being of children without parental care has been a focus of the international organization, particularly the United Nations Organization (UN) and its specialized agencies, in the context of the implementation of the *Convention on the Rights of the Child*(1989).For that purpose, the UN adopted a legally nonbinding document regarding the standards of adequate alternative care,setting the conditions under which care was to be provided –'*Guidelines for the Alternative Care of Children*' (2009). The policy and legal framework of alternative care for children arebased on the best interest of children's doctrine, as well as child

rights-based principles. The best interest of the child involves the assessment of full and personal development of children's rights in the family, social and cultural environment, and their status as subjects of rights, both at the time of the determination and in the longer term. Furthermore, the UN General Assembly adopted in December 2019 the'*Resolution on the Promotion and Protection of the Rights of Children*', advocating the family environment for vulnerable children and calling all member states to take actions to replace the institutional care with alternative forms of care, developing the family and community-based services (Goldman et al 2020, 606). In 2020, the UN General Assembly adopted six resolutions under the *Agenda of Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to development*(2009),where oneResolution wasdevoted to the Rights of the child covering the child's right to a healthy environment. The Resolution, particularly, deals with the state mitigation measures to address the negative impact of climate change on children in vulnerable situations. In addition, the Resolution encompasses the impact of climate change and climate migrations on children development and well-being in terms of the promotion of families' and caregivers' capacities to provide the child with care and a safe environmentconsidering 'that millions of children worldwide continue to grow up deprived of parental care, separated from their families for many reasons, including due to natural disasters' (Resolution Rights of the child: realizing the rights of the child through a healthy environment 2020).

The paper aims to address the general issues of children'salternative family-basedcare, from a policy andlegal standpoint, as a response to a knowledge gap on formal alternative care, considering different models presented in policy/legal documents and practice. In the beginning, we gave a brief sketch regarding a theoretical concept of alternative care, in order to determine the notion from a global perspective and in a national domain, taking into account the contemporary legal doctrine, policy documents,and recent case law of the European Court of Human Rights. The specificity of themodel of alternative care for children provided by the civil society sector will be particularly discussed. The legal gap in Serbian regulation regarding different models of alternative family-based care implemented by public and civil sectors is noticed as anissue

that needs to be addressed. Also, there is a lack of quality standards for all services introduced by the Social Protection Law (2011).

Serbia started the reform of the social welfare system, where, in terms of child protection, the support measures to the biological family at risk are in the focus of national policymakers as well as the measures regarding transformation from institutional to family and community-based care. The holistic approach to children at risk, multisectoral cooperation and a right-based principle along with pluralization of services providers are defined as central points of national policy at timeswhen Serbia, as the most European countries, is facing fundamental economic and demographic challenges. Expenditures for residential and family care are the largest part of a total consolidated budget for social care services in Serbia, on the one side, but the phenomena of demographic aging affected by all factors of population dynamics (fertility, life expectancy and net migration) are expected to change the national welfare schemes, on the other (Perišić 2016, 648). The demographic change - population aging is expected to increase the dependence of older people calling for the adaptation of social security institutions accompanied with the changes in family structures (declining fertility rates, increases in the number of separations and new families formed) will require the revision of family-supported social protection schemes to a new social reality (International Social Security Association 2010, 8). Therefore, the services and facilities regarding children'swell-being and family supportwill be in the focus of social welfare and, consequently, demographic policy, as its integral part. The increasing state flexibility in financing and providing social services, including child welfare services and other related programs,have been seen as a possible answer to current challenges of sustainable socio-economic development, followed by the appropriate policy and legislation changes. The low birth rate along with increasing migration of young people of reproductive age causes countries as Serbia to conduct a reform of the social welfare system introducing family-related programs and services. The development of innovative and flexible support programs for children and familiesat risk based on the public-private partnership has been seen as a sustainable policy response.

THEORETICAL BACKGROUND, NOTION, AND MODELS OF ALTERNATIVE CARE FOR CHILDREN

According to the international standards, the biological family is the natural environment for the growth and well-being of the child and the parents have the primary responsibility for the upbringing and development of the child (UN Convention on the Rights of the Child 1989).The child's right to provision, participation, and protection followed by the principle of the child's best interest representsthe basis of parents, society, and government's responsibility. As parents have the primary responsibility, the government should ensure that there is a supportive environment for children's development by setting the appropriate level and diversity of services and resources in order to empower parental skills.Only when the child has no parents to look after him or her or when staying in his or her biological family is not in his or her best interest, the public authorities take special protection measures, established by the law, involving the separation of the child from his or her family.It means that the globally recognized -right to respect for family life protects every child from unlawful or arbitrary interference (European Union Agency for Fundamental Rights & Council of Europe 2017, 76).Along with the social and working environment of an individual, the concept of the family environment represents an important factor in defining a national social security framework as a precondition of a democratic and stable legal order. According to Jašarevićso-called *macro factor* of social security system – democratic and stable legal order that along with the abovementioned micro factors (i.e. social, professional and family environment), constitute the grounds of a social security system (Jašarević 2009, 156).On the other side, in terms of the legal decision–making processes, there is a necessity to harmonize children's right to family life with their right to protection under social security legislation.

In the universal and European human rights system, the separation of a child from his or her family must be conducted according to the principles of necessity, exceptionality, and temporal determination (Inter-American Commission on Human Rights, Organization of American States 2013, 26). Even when the special

protection state measures have been applied, family life does not end in a case of placing the child into public care and according to the case-law of the European Court of Human Rights, it constitutes interference to a private and family life that requires justification under the paragraph 2 of Article 8 of the European Convention of Human Rights and Fundamental Freedoms (1952) (Council of Europe/European Court of Human Rights 2019, 62).Furthermore, the EU Charter of Fundamental Rights provides for the protection of family life, wherein Article 24 regarding the rights of a child decrees that every child 'shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents unless it is contrary to his or her interests' (Charter of Fundamental Rights of the European Union 2012).

In universal human rights discourse, special protection measures are presented in a form of so-called alternative care standards, and according to the UN Convention on the Rights of the Child, they include, *inter alea*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children (Article 20, no. 3).In 1990 Serbia ratified the Convention that became part of the national legislation. However, the term alternative care remained undefined in boththe Social Protection Law (2011) and the Family Law (2005). In contemporary practice, the term is mostly used to address the care that is provided in a family-like environment taking into account the ongoing process of deinstitutionalization. For the interpretation of the term alternative care,it should be noticed that, according to the Convention, the care will be provided in the case when a child is "temporarily or permanently deprived of his or her family environment" (CRC, Article 20). The term "family environment" is not defined by the Convention, and it leaves states to determine taking into account social and cultural norms.The same thing is applied regarding the term "parent", particularly in terms of biotechnological development and assisted reproductive technology linked with the legal institute of surrogate parents, where the definition varies from state to state. A lack of precise definition of the notions of family and family environment in international lawand the differences in defining the term"parent"among states, madethe application of child-social protection norms ineffective, often producing legal disputes that overcome the national judicial system,

particularly in terms of alternative care. The important role in the interpretation of the contemporary concept of "family" and "family environment"has the international human rights tribunals, particularly the European Court of Human rights, and United Nations treaty bodies. The concepts have been analyzed in the context of the application of the non-discrimination principle as well as the best interest of the childdoctrine (Sepúlveda Carmona2017, 8). According to the Universal Declaration of Human Rights (1948), Article 16, the notion of family is declined in general terms from a sociological perspective, where the family represents "the natural and fundamental group unit of society and is entitled to protection by society and the State."The legal understanding of the concept of "family" follows the changes in society and culture, so when the international courts and bodies interpret it, a number of factors have been considered. In terms of children-adult relationships, the most common are presented as follows -formally constituted relationship (formal institutional act like marriage), blood relationships, and personal relationships (Banda,Eekelaar 2017).

On the other hand, in European Human Rights discourse the notion of "family" and "family life" under the Article 8 (Right to respect private and family life) of the Convention on Human Rights and Fundamental Freedoms (1952) is not confined solely to marriage-based relationships and may encompass other *de facto* "family ties". Furthermore,according to the case-law of the European Court of Human Rights, even in the absence of cohabitation, there may still be sufficient ties for family life (see Kroon and Others v. the Netherlands). The Court interprets the notion broadly considering all forms of relationships, both horizontal and vertical, biological and non-biological (Mol 2016).Also, it is noticed that the concept of private and family life, as interpreted by the Strasbourg Court,covers a variety of situations - from the protection of one's image or reputation, awareness of family origins, physical and moral integrity, sexual and social identity, to a healthy environment, self-determination and personal autonomy (Roagna 2012, 12).Accordingly, the concept covers so-called quasi-familial relationships such as the relationship between foster parents and children they have been taking care of as well as relationships between unmarried couples (Roagna 2012, 12).The facts that are considered when the Court determines "family ties" are the nature,

degree,and quality of the relationship as well as the commitment to the child. Consequently, according to the Court, thefamily life-also includes,at least, the ties between near relatives, for instance, those between grandparents and grandchildren, uncles and aunts and their nephews since such relatives may play a considerable part in family life (see Marckx v. Belgium; Bronda v. Italy; T.S. and J.J. v. Norway) but limited it on a degree of protection on the grounds of its nature i.e. it has a lesser degree of protection than the relationship between parents and child (European Court of Human Rights 2019, 64).In this regard, The European Court of Human Rights recognizes the existence of *de facto* family life between foster parents and a child placed with them, considering the time spent together, the quality of the relationship and the role played by the adult vis-à-vis the child (see Moretti and Benedetti v. Italy) (European Court of Human Rights 2019, 61-62). Having in mind the Court decisions in this matter, the models of alternative care presented in the Convention on the Rights of Child, in particular, foster care and other types of *de facto* family placementcould be recognized as "family environment" under proper conditions (i.e. time of placement, degree and quality of the relationship, commitment to a child) and be excluded from the notion of alternative care in a strictly formal sense, taking into account that the Council of Europe based *inter alea* the protection of the children on the UN Convention on the Rights of the Child.

In regard withthe degree of the relationship between the foster family and the child after his or her return to his or her parents, the recent decision in the case *V.D. and others v. Russia*(App. No. 72931/10, Judgement of the European Court of Human Rights, 9 April 2019.)of the European Court of Human Rights is of crucial importance. The case was about the rights of the so-called *de facto* family,i.e. foster family, to maintain the relationship and to communicate with a disabled child who was, according to the decision of the national court, returned to his biological family. The Court concluded that the national court got a „relevant and sufficient"decision when ruled to return the child to his biological parents who had maintained a presence in his life by providing financial assistance during the whole nine years of foster care. Such a decision has been justified having in mind the fact that the care was meant to be temporary and that it could be ended when circumstances

permitted so.Contrary, regarding the national court ruling to refuse contact between the foster family and a child based on no blood or legal ties to the child, the Court holds that there is a violation of Article 8. of the Convention, expressing concern about the lack of flexibility in Russian legislation on granting access to children, which did not take into account the variety of family situations or the best interests of children.

The comparative law follows the practice of the European Court of Human Rights in this matter. For instance, in Finnish law in a reform that took place in 2018 amending the Child Custody Act, 361/1983, a mainly traditional view of the concept of family has been replaced by recognizing the 'family ties' between a child and a step-parent or grandparent (Koulu 2019, 348). In Finland, according to the Ombudsman's decisions and the Supreme Administrative Court decision from 2017, the concept of family life covers a variety of relationships, emphasizing that the family life could cover the new relationship established during the placement of a child in another non-biological family (Koulu 2019, 351). The Court concluded that the child's right to a close relationship was not limited to relationships that had been established before the child was placed in care, but that the provision also meantthat the child had the right to develop new relationships during care (Koulu 2019, 351).

In Serbia, the Family law (2005) stipulates the child's right to, primarily, live with (biological) parents who have the responsibility to lookafter him or her and this right could be limited only by the court's decision in the child's best interest (article 60). The following provision guarantees a child in alternative care the right to establish and maintain personal relationships with biological parents, as well as with his or her relatives and other close persons (article 61). The special chapters of the Family law deal with adoption, foster care, and custody issues, but there are no additional provisions that more pragmatically protect the new relationships developed during the care, in terms of possible 'family ties' recognizing and issues of maintaining the relationships. On the other hand, the Social Protection Law (2011) contains no provisions whatsoever that recognize the variability of family life, the nature,

and models of relationships formed in alternative care,which makes it lagging far behind the European legislation practice.

The notion of alternative care is generally used to describe the care for orphans and other vulnerable children who are not under the custody of their biological parents, having in mind thedominant interpretation of the UN Convention on the Rights of the Child, which includes adoption but is limited to the models of care that are,in their nature, temporary lasting. Alternative care includes all forms of separation of the children from their biological familyaccording to *the UN Guidelines for the Alternative Care of Children'* (2009).The UN Guidelines introduce two forms of alternative care: 1. Informal care, defined as any private arrangement provided in a family environment by relatives or friends at the initiative of a child, his/her parents or a third person, and 2. Formal care, provided in a family environment but ordered by a competent administrative body or judicial authority, also including the care provided in a residential environment, in public or private facilities, whether or not as a result of administrative or judicial measures (Roby 2011, 10).In this regard, the problem ariseswhen a family becomes the one that is alternative in its nature where the time of placement, degree and the quality of relationships with a child surpasses the expected terms or become the permanent condition. In that case, an alternative environment becomes a natural family environment representing, simultaneously,an inappropriate 'discriminatory'notion to describe the real state of placement from both socio-psychological and legal perspectives. Accordingly, the term alternative care needs to be bounded to the temporary placement, short-time protection measures for children at risk provided by the public or private/civil sectors in an environment with conditions that are similar to those of a habitual place of a child residence.Under the same conditions, the informal forms of child care provided by relatives or friends could also be recognized as an alternative butthey need to be provided under the monitoring of a competent authority and with the support of a system.The current shortcomings of this form of careare a lack of legally recognized status of relative/friend caregivers along with the increasing possibility of child abuses, neglection and exploitation, concerns of poverty, health,nutrition and treatment disparities, where the caregivers

may lack the parenting skills needed to deal with the psychosocial issues of children (Roby 2011, 20-21).

POLICY AND LEGAL CHALLENGES IN TERMS OF ALTERNATIVE CARE FOR CHILDREN – THE PERSPECTIVE OF DEVELOPMENT

The core legal discrepancies in applying the special protection measures regarding the vulnerable children in the social welfare system are presented as the lack of a universally accepted definition of family life and, consequently, alternative care, the lack of minimum quality standards of care, different legal provisionsdealing with national models of alternative care provided by public and private/civil sectors, where there is a significant concern to provide appropriate cooperation between all actors in terms of preventive and sustainable care within the concept of public-private partnership.The existed models of alternative care presented in the UN Guidelines on Alternative Care for Children represents only a suggestion to the national states for policy orientation when implementing the UN Convention on the Rights of the Child (Cantwell 2012, 11). The Guidelines create neither newrights nor binding obligations directed at governments but also at all services, organizations, and professionals involved with alternative care issues (Cantwell 2012, 11). It means that it is left to the national authorities to determine the notion of alternative care, models, subjects, and standards of care provided within the national child social welfare framework. Moreover, the conduction of a comparative analysis of alternative care systems in Europe is significantly challenged considering the great disparities in the definition of alternative care (residential, family and community-based care) as well as in data collection methodologies (Costa 2012, 19).So, developing an adequate legal model of alternative care based on evidence and data sciences principles in absence of universally binding standards means the engagement of all key actors i.e. policymakers, relevant institutions in the field of social security, the private and civil sectors and the beneficiaries as well in national domain. In that sense, it requires the overall assessment of financial, normative and institutional capacities of the system, particularly in terms of child welfare support measures including

those provided by the private or civil organizations. On that ground, the data reliable strategy needs to be developed considering a holis tic and integrated approach as a precondition for the introduction of the relevant legal framework.

The existing child social protection system in the Republic of Serbia is extremely complex,as the process of deinstitutionalization presupposes the shift from dominant institutional accommodation for children to family-like and community-based models. The current state in the field, goals, and means to achieve the targeted objectives are presented in the Draft of National Strategy of Social Protection for the period from 2019 to 2024. The Draft of National Strategy focuses on the development of foster care replacing the institutional facilities for children in need and on the so-called 'other form of family-centered care or family-like setting',highlighting the importance of a public-private partnership.Also, it emphasizes the service providers'pluralism with greater involvement of the non-state sector, bringing together various actors at a local and national level.Bearing in mind the fact that the Family Law (2005)and the Social Protection Law (2011) contain no provisions regarding the nature of relationships in so-called alternative care, particularly, foster and other family-like placements in the context of the implementation of children's right to family life, there is an urgent need to revise the national legislation following the European and comparative practice. Revising the national legislation in this manner means the inclusion of the provisions that recognize the variability of family life as well as the possibility to form a new one during the child's alternative care.

In Serbia, besides foster care, there is a concept of alternative children care provided by the civil sector i.e. international non-government organization 'SOS Children's Villages', unique in the domestic system.The SOS Children's Villages' concept of care is based on the idea of foster family care and, according to the current regulation, it can be classified as a hybrid form, between family and residential accommodation corresponding to the so-called "Other type of accommodation" setting in the Social Protection Law (2011). This 'Other type of accommodation' is not specifically regulated by the current Social Protection Law or special regulation. It is also not specified in the Draft of the

Social Protection Law. The SOS concept of care presupposes the accommodation for 4-6 children in one SOS family in a so-called Village, where the SOS parent has a license for providing the classic foster care. On an all-day basis, the service of professionals - psychologists, educators and social workers are available to the children in Village. Accordingly, the services are being provided in a family-like environment, where the beneficiaries/children have not been*de facto* integrated into the living space and foster family,which distinguishes the SOS concept from the classic foster care. This model could represent the example of the cooperation between the public and private/civil sectors, asthe children have been placed in SOS Children's Village after the assessment conducted by the public social service center. The legal ground for the 'cooperation' is defined in the Social Protection Law (2011), where some social protection services may be provided by *an association*, entrepreneur, company, and other forms of an organization determined by the law.Due to the fact that social protection services, whose introduction/implementation is highly needed, could not be provided by the public social protection institutions, there is a possibility of their provision by the private or civil organizations, whose license for doing so is provided through the procedure of public procurement, under the law governing public procurement issues (The Social Protection Law 2011).

The SOS concept of care represents the model of a public-private partnership in providing the social services for vulnerable children. According to comparative legislation and practice, the role of a non-governmental organization in the social protection system has been seen as a democratic issue in an ongoing process of decentralization when there is a growing demand for special services linked with the need for flexible supply (Archambault 2007, 158). In France, for instance, there is a growing number of the establishment of non-governmental facilities that cooperate with the government in providing services for people with disabilities as well as those established for children experiencing social difficulty including foster care(Archambault 2007, 158). The state financial support has been based on a contractual basis replacing the classic system of general year-to-year funding where the status of the non-profit organization is one of the most regulated areas in France, considering their recognized 'public social mission'

(Archambault 2007, 169). There are three models of establishing social non-governmental organizations in the field of social security: 1)model of government authorization becoming a part of a general social security scheme involving an *a priori* control of their project and its feasibility; 2)model of recognizing a special status for thenon-governmental organization, so-called the status of public utility and, 3) model of accredited organization for the specified social protection services, where the services shall be provided after signing an agreement, that represents an official recognition of the quality of activities performed in a special field (Archambault 2007, 170). A non-bureaucratic answer to the new social issues, flexibility, innovation in services,and advocacy are all factors that favorise the formal inclusion of civil society organizations in providing social services within the national social welfare system. In contemporary practice, the non-governmental organizations developed special labels for guaranteeing the quality of their services, setting the quantitative and qualitative indicators for monitoring the efficiency of services (Archambault 2007, 172). Moreover, the conducted quantitative analysis regarding the role of online and offline civil activities i.e. participation of targeted vulnerable populations represented by civil society organizations shows the potential for building social inclusion of different vulnerable groups in the modern worldfostering different types of civic activism (Milošević-Đorđević &Đurić 2018). The France model for regulation of civil society status in the social welfare system could be applied in Serbia as well, considering the similarity of the social security models, i.e. prevailed government responsibility in public welfare, combined Bizmarckian and Beveridge social insurance system with universal family allowances accompanied with birth-raising policy and institutional residential care that is still dominant in the system where the process of the deinstitutionalization is still ongoing slowly.

CONCLUSION

Under the international, European, comparative, and consequently,the national policy and law, the alternative care services for children need to be applied only if considered necessary in a democratic society, bearing in mindthe best interest of children's

doctrine. In a decision-making process, it is of crucial importance to balance between the children's right to family life and their right to protection under the social security law. It could be significantly challengeable, considering that the notion of family life, according to the case-law of the European Court of Human Rights, has often been used to cover a variety of situations and relationships. The Strasbourg Court has never offered a clear and precise definition of what is meant by private and family life. Such is the case with-the definition of the notion of alternative care in the international domain, knownas 'substitute care'in some policy documents as well.The concept of alternative/substitute care presupposes temporary protective measures covering, primarily theso-called family-like and community-based care, placing the children in an environment similar to those of the natural one, i.e. biological family. Foster care if lastsover time because it is expected to form a strong relationship between the foster family and a child where some children stay in a foster family until adulthood, that is, also, the standpoint of the European Court of Human Rights forming the special 'family ties' goes beyond the formal notion of alternative care considering the time of placement, nature, and degree of the relationship.In this regard, the term 'alternative' could be considered *de facto* inappropriate for this kind of care and labeled as discriminatory. The term 'family-like care' for the long-lasting and permanent placement could be considered adequate under those circumstances. Furthermore, the placement in alternative care needs to be determined on a case-by-case basis. The private/civil models of alternative care that coexistwithin the national social security system must be incorporated into the policy and legal framework according to the contemporaryprinciple of strengthening the public-private partnership and theprevailing holistic approachregardingthe issues of children and family protection.The France model could be used as an adequate in developing a national policy framework in this regard. Also, building a democratic society in terms of sustainable economic, social and ecological development concepts followed by significant demographic challenges require the engagement of all resources including civil society organizations. Their widely recognized public social mission, particularly, regarding the social inclusion of vulnerable populations must not be neglected. Furtherdevelopment of family-like care by setting the

universal quality standards accompanied by the community-based services ought toinclude all relevant actors such as policymakers, public and private institutions, andcivil organizations.

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