

UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD  
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CHILDREN WITHOUT PARENTAL CARE  
Working Group 1: State's Role in preventing and regulating separation

**RIGHT TO FOSTER CARE**

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We understand that a child deprived of living with a family is a lame child: he/she lacks part of his/her constitutive essence. Thus, the exercise of his/her rights will also be lame.

Each member of a family—mainly the child—is part of a human ecosystem or ecology, in permanent reciprocity and mutual interaction, where the child develops as a person.

For that reason, to intervene in this child—a Subject of Rights—when we consider that his/her rights are at risk, but disregarding his/her family at the same time, results in the strengthening and the increase of his/her impossibility of exercising his/her rights, where the child lacks protection and shelter and where his/her state of 'subject of rights' becomes weak.

When the presence of the family as the natural ecosystem of a child becomes obvious and minimized, then it is being kept the belief that intervention takes place because that child has been abandoned or because the responsible adults are not performing their duties well. On the contrary, what we are talking about is a family going through a crisis which, in many cases, neither the family as a whole nor each member has the possibility of exercising their duties as such, because (and also) their right to request help is disregarded.

We all know and we have all experienced that the variety of relationships intertwining within a family fosters and determines any other human relationship: from the personal one to the State itself. The family is the privileged place for generation exchange allowing for cultural transmission whereby the family cannot be a substitute for the always renewed formation of successive generations.

Thus, the family is the first laboratory for the elaboration of a personal and social ethics, premise and rule of every interpersonal, globalized and planetary co-habiting. Humanity lies upon the family—it is the family itself which, at the same time, communicates the man the sense of his/her history and destiny.

The legislation of most States, as we all know, have ratified and integrated international treaties about human rights, although they deem unconstitutional anything opposing or contrary to what they state as well as any behaviour on the part of the State itself which impede, delay or fail to concrete the rights acknowledged by them.

More than 50 years have passed since the Universal Declaration of the Human Rights, and more than 15 since the Convention on the Rights of the Child (CRC). During that period, and even closer in time, there have been different and many conventions, pacts and declarations ratifying the family as the natural and fundamental element for the development and well-being of its members and, mainly, of its children. The family must be provided with every kind of protection and assistance to take all its responsibilities, since it is considered as one of the very few collective subjects, entitled to the application of international rights.

The CRC is articulated according to conceiving the child as a subject of rights, whose counterpart and key is the acknowledgment of the family as entitled to rights within its community and State. In this view, from the CRC and the Human Rights—now in their planetary and globalized dimension—Foster Care as a **right** allows to provide a space in a family for as long as needed, to children and adolescents who, due to different reasons cannot exercise their rights in their own families. In this framework, respect for their identity and family attachment are favoured.

From the viewpoint of the child as a subject of rights, it is relevant to highlight that such claim takes shape when it is acknowledged that such subject of rights is materialized in a human being, a person which is growing, a CHILD. It claims the acknowledgment and presence of an intertwining framework—the family—as the ecosystem which ensures and allows his/her right to be a growing person; i.e., a CHILD.

### **Foster Care is a RIGHT, a right of the family when it is experiencing a difficult situation.**

That acknowledgment would avoid the pendulum movement: Birth Family>....<State; State>....<Birth Family; Birth Family>....<State, which supports the conviction that between the State (in its administrative, legislative and judicial actions) and a specific family, any other presence vanishes, without paying attention that next to this family there is another family, many more families, the community.

In this lineal view, the rights of a family experiencing a crisis are nonexistent, where the child is ‘subject of protection’, a perception that frustrates any attempt, on the part of the family experiencing a crisis, to set in motion the exercise of their many rights, and their own resources in an inter- and extra-family dynamics. It is through them that its rights and its members’ are exercised and defended, according to their roles, functions and ages.

Then, the community—essential element without which the State would not exist—is established by means of that reciprocal interaction among different cells of society and among different families. Every child grows/ develops in a family. If the latter were not present due to lack of data such as relationship or declared address, the Right to Foster Care cannot deny the family as if it would have never existed, since every person bears the stamp of his/her genetic identity (DNA), which goes beyond the mere biology.

The Right to Foster Care is exercised from its actors: the child and his/ her family, and the foster family. Although there is a transfer of rights and duties from one family to the other, they are agreed on according to the normative that each State establishes for the rights-duties of parents towards their children.

The implementation of the Right to Foster Care requires, also, perfectly constituted organic structures, with people and professionals duly trained to act upon events and upon the Right to Foster Care of each family and of each family member, so as to become channels that put an order in the fraternal and solidarity dynamics, from which a community is fostered and built, regardless of its complexity degree (local, national or planetary).

It is absolutely necessary to make a semantic difference, which goes beyond terminology, since it leads to theoretical instruments and approaches that are substantially different among themselves, not only from conception, but also and mainly, from practice.

Those differences do not lie in terminology only. They reflect upon and support different ethical and philosophical and ideological frameworks related to childcare at risk and their relationship with their birth families.

This is not an analysis of value gradations, but a differential view on which there emerge key words leading to conceptualization and development.

Thus, we claim that **IT IS NOT THE SAME:**

**PRE-ADOPTIVE CARE** than Foster Care. Many countries include the concept of Foster Care in pre-adoptive care, as a previous period of time before adoption. This is in opposition to the essence of Foster Care, where re-insertion into the Birth Family and, moreover, family reattachment are among the key aspects. Here, the path is to new filiations. The key word is **ANOTHER** (another family, another culture, another community, another country.)

**FAMILY PLACEMENT** than Foster Care. In a wide sense, family placement is a protection measure whereby the child is withdrawn from his/ her birth family, given its difficulty in performing its parental duties. Despite the speech, in general, the action is centred on safeguarding the child well-being, minimizing action with the birth family, running the risk of becoming a mere institutionalization. The relationship with the birth family is, more often than not, stipulated visits where the birth family leaves or is made to leave, abandons itself or is turned into an abandoning family, strengthening jurisdiction competence, uprooting, or critical judgment. It is not a big concern, since the importance lies in the child, in that he/ she is protected by another family, which is not his/ hers. The belief is that a new structure will modify the conflict leading to intervention. The key word is **PLACE**.

**SUBSTITUTE FAMILY** than Foster Care. To substitute means ‘to change, to take one instead of another one’... A foster family is not a substitute family: foster parents are not the new parents of the child’s. The birth parents are left aside. On the contrary, in Foster Care both families interact dynamically and reciprocally to meet the needs of the child. The key word is **REPLACEMENT**.

**WARDSHIP** than Foster Care. Wardship of a minor by someone who is not his/ her legal representative is providing him/ her with material and spiritual assistance. Wardship provides limited room for the birth family and, in general, the family welcoming the child is not supported in the complex process of reintegrating the child with the birth family, where uprooting deepens the feeling of emptiness and loneliness that children feel when they are withdrawn from their parents. The key word is **INSTRUMENT**

**TRANSIENCE FAMILY** than Foster Care. Although the right to Foster Care is within the framework of transience and temporality—be it on a short, mid or long term basis—, it is given according to its causes and its evolution, whereas here it is given according to the chronological time set by the intervention, where on certain occasions, families are highly advised against developing attachment that may hinder the passage to the definite family. The key word is **PASSAGE**.

Instead, **FOSTER CARE** is a **RIGHT**; it is a solidarity, fraternal answer from one member of a community to another one, from a family to another one in need, providing a space within a family—for as long as needed—to children and adolescents... The key word is **COMPLEMENTARY**, based on solidarity – fraternity.

The right to Foster Care is not identified with ‘another family’, or ‘a place’, or ‘replacement’, or a mere ‘legal instrument’ or a mere ‘passage’.

Thus, we state that it is highly important to clarify and to make a distinction, conceptually speaking, between those different names. Although they still are notoriously different, great part of legislations confuse the terms, exchange them, take them as synonyms, leading to ambiguity, vagueness, confusions and gray

conceptual and operative areas in their normative, in their intervening Professional Teams and in the protagonists of Foster Care (child and his/her family and foster family), reducing and making the Right to Foster Care into a mere and simple social, assistance, protective, administrative, judicial or institutional alternative, blurred and included in a long alternative list.

If that were so, if the family were an alternative, we would have the urgent responsibility of deciding and of answering relevant questions such as: what is the natural place where a person is born?; what is the basic, elemental cell of every society, community, State, spreading and expanding into multiple degrees of growing complexity, creating institutions and bodies?; who would have the power to decide about who will enjoy their benefits and who will not?; how and when will it be used? And as a result, it seems as if the family, from being the basic, elemental cell of society, creator of the most complex forms (society, institutions, State), becomes a mere alternative, by decision of those more complex structures. If the family becomes an 'alternative', where, when and how loses its RIGHT?

The absence of a semantic precision produces effects and makes confusing norms. For example, the **Brazilian Code** - Law 8069/90, Article III: **Section 28** - the English version of the Law states: *Placement in a foster family will be effected through custody, guardianship or adoption, independently of the legal situation of the child or adolescent according to the terms of this Law*, naming Foster Families as Substitute Families.

Law 1680/01 from **Paraguay**, Article II 'Substitute Families Institutions', **Section 103** ('Fostering in a Substitute Family'), stipulates: *The child or adolescent, deprived of his/ her family by judicial order, shall be temporarily fostered by a family, by means of wardship or, permanently, by means of adoption.* Chapter II 'Policies and Programs for the Protection of Children and Adolescents', Article II – **Section 124 – C** *Placement of children and adolescents in substitute families, by means of a selection, training and support process shall be provided to those willing to join the program.*

**Section 127:** *Shelter is a provisional and exceptional protection, administratively dictated by the Child and Adolescent Protection Board, which is done in a substitute family or care institution, as a form of transition into another administrative measure of protection or to a judicial decision of family placement or in care institution or adoption, as long as it is not possible for the child to return to his/ her birth family.*

*If in the maximum limit of 30 days the case could not be solved administratively, the Protection Board must notify the pertinent judge, so that he/ she makes a decision.*

**Section 128:** *Family Placement or care institution: placement is a temporal measure, dictated by the judge, which takes place in a substitute family or in a attention institution.*

**Peru:** New Children and Adolescents Code – Law 27337. **Article VI** 'Family Placement' – **Section 104:** By means of family placement, the child or adolescent is fostered by another person, family or institution, responsible for him/ her temporarily. That measure can be taken administratively or judicially, and it can be remunerated or be free. In adoption processes, it is applied as a warming-up and protection measure for the child or adolescent, when he/ she is living in a place that may endanger his/ her physical or mental integrity.

**Section 105:** Criteria for Family Placement: PROMUDEH or institutions authorized by it shall be able to decide on child or adolescent placement. They must consider degree of kinship and, necessarily, affinity or affection relationship with the person, family or institution pretending to take care of them, giving preference to those located in their surroundings.

**Section 106:** Family Placement residence: Family Placement shall only take place in families residing in Peru, except in cases of administrative processes of adoption of children and adolescents in a state of abandonment.

**Bolivia: Article II – Substitute Family – Part I – Section 37:** Substitute Family is the one which, without being the birth family, fosters a child or adolescent, taking the responsibility pertinent to the birth family and thus, taking care of him/her, and providing protection and material and moral assistance.

**Section 38:** (Integration in a substitute home): It is done by means of wardship or adoption, in the terms stipulated by this Code (...).

**Section 40:** (Referral to a foster institution): The judicial resolution determining fostering of children or adolescents in public or private institutions, shall be exceptional and transitory. The application of this measure does not involve to be deprived of freedom.

Latin American legislations are not clear as regards Foster Care, specifically including my country, Argentina, which still lacks a national legal framework to provide an answer to the Convention on the Rights of the Child. We still have the Patronage Law of 1919. To a lesser extent, that imprecision is not alien to legislations of countries from other continents where, according to Francois Tulkens and Sergio Llebaria Zampes, Foster Care lies in a gray and hybrid area of the Right. However, in those countries, Foster Care is already unconsciously established in the community.

That lack of conceptual precision reflected on the normative brings with it confusing and vertical methodological approaches, imposing from the outside resolutions in limited chronological time, without respecting the reality of the child and his/ her family and without knowing that Foster Care is a crafted construction, unique and non-repeatable, which takes shape from the interacting dynamics of the actors (the child, his/her family and the foster family). The task of the Professional Teams is to support each process from its singularity.

Not fulfilling that time (3, 6 or 8 months), opens the door to a new affiliation, by means of adoption, depriving the child of family attachment, forcing his/her parents to agree on that situation, even when they have not been deprived of their parental roles or are immersed in a state of social vulnerability, marked by indifference and prejudice.

That goes against the functioning of the rights of the child and his/her family, opening spaces so that the chain of operators (State, professionals, agencies, associations, etc.) deepens such vulnerability, explicitly and notoriously violating the Convention, by omission and action.

If we place the Right to Foster Care from substitution, care, protection, change, placement..., we are favouring competence, appropriation, uprooting... If we do so from a complimentary, solidarity and fraternal attitude among peers, we can avoid deepening the child and his/her family's vulnerability, giving them a protagonist role, preventing repetitive behaviour, which makes Foster Care a new, perfect, sophisticated and regrettable institutionalization.

### **Summarizing:**

**Foster Care is a Family Right, of each and every family of a community and of each and every one of its members, since:**

- The difficulty experienced by a family does not disqualify it as such, and it is in the exercise of the rights and duties where the right to request some help from another family is inserted. (Right to Foster Care).
- It provides an answer to the exchange of solidarity and fraternal rights and duties among the members of a community, independent from its degree of complexity.
- That exchange of rights and duties are in the legal norms of the National and International Right of communities.
- The family has the right to resort to another family, when exercising its right to receive the ‘necessary assistance to completely take its responsibilities’ (CRC).
- The States have made a commitment for the child not to be separated from their parents against their will (Section 9, Paragraph 1). ‘(...) all interested parties shall be given an opportunity to participate in the proceedings and make their views known’. (Paragraph 2).
- The family, as the fundamental group of society, is legally protected, and as such, it itself has rights.
- Solidarity and fraternal behaviour and manifestations from a family to another one requiring help in the exercise of its rights, generate legal effects and deserve due legal protection and recognition on the part of third parties, even when such legal relationship is devoid of patrimonial content.
- The more protected and promoted the adults of a family are in the exercise of their rights, the more guaranteed each of their duties and each of their children’s right will be.

The right to Foster Care is not ‘as if...’ The Right to Foster Care has its own legal identity, whose fundamental bases are: family re-attachment, integration and re-signification of the child’s history and respect for his/ her origins; i.e., to keep alive the identity of the bearer of the right: the child.

If we do not consider the origins of the child, which contribute to his/her history and identity; if we do not leave space for integration and re-signification of what he/ she has experienced ever since he/ she was conceived (which goes beyond the biological aspect), we will make a being that is segmented, atomized in his/her stages, in its psycho-physical-spiritual integrity, going against, from our speech and practice, the Best Interest of the Child.

<sup>1</sup>**Fundación Emmanuel:** We are a secular, non-governmental, non-profit organisation constituted by families, children and adolescents, professionals and collaborators, which have implemented **Foster Care** in Argentina since 1985, given that up to that moment no governmental or non-governmental organisation applied this model of solidarity action. (E-mail: [emmanuel@emmanuel.org.ar](mailto:emmanuel@emmanuel.org.ar) - Web Page: [www.emmanuel.org.ar](http://www.emmanuel.org.ar))

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