

Institutional care in the Czech Republic in light of the recent judicial decisions and the established practice of Czech courts (Ústavní výchova v České republice ve světle aktuální judikatury a soudní praxe)

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Abstract

This article focuses on the issues interconnecting institutional care and related social-legal protection of children in the Czech Republic, and introduces it within the legal context of the newly adopted Opinion of the Supreme Court of the Czech Republic and the judicial decisions of the European Court of Human Rights.

The first part deals with opinion of the Supreme Court in Czech Republic, presenting current valid legislative provision in the field of placing children in institutional care and dealing with problems of material poverty of families.

The second part of the article offers a description of the system of institutional care in the Czech Republic and presents a brief account of the individual establishments providing care to children and young people without a family to live in, as provided by the individual government departments. This part furthermore looks at the reasons why children are placed in institutional care and the ways in which children are accepted into establishments providing it.

The last part of the contribution relates to practice and presents two cases related to the courts' decision making which highlight the tensions between new policies aimed at keeping families together, and how these relate to court decision-making on the material and caring capacities of parents. These two examples represent the wide variation of the application of legislation in practice.

Introduction

This article focuses on the issues connected with institutional care and the related social-legal protection of children in the Czech Republic. The article examines relevant topics in the legal context, as seen through the perspective of the newly adopted Opinion of the Supreme Court of the Czech Republic and the judicial decisions of the European Court of Human Rights as well as the Constitutional Court of the Czech Republic as their decisions, having the highest legal force, are often at variance with the application of the corresponding legislation in practice.

The Opinion of the Supreme Court

Institutional care in the Czech Republic has repeatedly been the focal point of criticism due to the high number of children placed in institutional care (for comparison of European statistics see attachment no. 1) and the lack of alternative solutions for families at-risk. [The UN Committee on the Rights of the Child 2003, The 2010 Analysis for the Czech Ministry of Labour and Social Affairs]. In 2009, the number of children placed in institutional care in the Czech Republic was 9,844 children in 229 educational and 34 healthcare establishments. [Institute for Information on Education, 2009/2010; Institute of Health Information and Statistics, 2009]. According to Czech law, into which international treaties have been incorporated [Communication no. 104/1991 Coll Convention on the Rights of the Child; Communication no. 209/1992 Coll. Convention of Human Rights and Fundamental Freedoms], and in compliance with judicial decisions of the European Court of Human Rights, institutional care is to be the ‘last resort’ solution to a child’s situation [Act no.94/1963 Coll., The Family Act, Sec. 46]. Before it issues an order for a child to be institutionalised, a court is obliged to investigate whether substitute family care could be used instead; if the grounds for institutional care cease to exist after a child has been institutionalised, the court shall cancel it; and moreover, courts are obliged to examine whether grounds for institutionalisation persist once every six months.

As has already been mentioned, one of the three reasons for which institutional care may be ordered is the social situation. With regard to the aforementioned data about the high number of children in institutional care, adoption of the following opinion (later in text referred to as the Opinion) by the Supreme Court of the Czech Republic has been a welcome step in the right direction, the relevant section of law in the statement of the Opinion being: “*Financial or material poverty of the family and especially its housing situation should never be the only justification for the placement of a child into institutional care.*” (1800 7 8)

The Supreme Court of the Czech Republic (later in this text referred to as the “SC”) in compliance with the Act on Courts and Judges [Act no. 6/2002 Coll., On Courts and Judges, Sec. 14, Subsection 3] monitors and evaluates final and conclusive judicial judgements and issues opinions, the aim of which is, among other things, to unify the disjointed practices of courts with regard to judgements. The aforementioned Opinion issued by the SC on December 8, 2010 has great importance for the area of institutional care for minor children and hence for welfare officers who carry out social-legal protection of children. Opinions of the SC are binding for courts and for their decision-making in the practice of law and therefore, the lower courts’ judgements may not diverge from views contained in the Opinion. Just as important are the contents of the Opinion for participants in the proceedings to institutionalise a child, especially for preventing a situation in which institutional care is the only solution discussed.

It is obvious that the SC considers the question of preconditions for institutional care to be a substantive issue and that it views previous application of corresponding legal regulations in judicial practice as discordant. Its initiative is beneficial because the area of Family Law (with a few exceptions) is exempt from the possibility to file an application for remedial measure (an appellate review) thus denying the participants the possibility to have decisions in a proceeding to institutionalise a child reviewed by the Supreme Court [Act no. 99/1963 Coll., The Rules of Civil Procedure, Sec. 237, Subsection 2, Paragraph b].

Legislation

The importance and impact of the Opinion may be viewed from two (completely different) perspectives:

From the point of view of theory, when reading the Opinion within the context of the legal order of the Czech Republic, namely Act no. 2/1993 Coll. – the Declaration of Basic Rights and Freedoms (later in this text referred to as DBRF); Act no. 94/1963 Coll., The Family Act; Communication no. 209/1992 Coll. - Convention on Human Rights and Fundamental Freedoms and decisions of the Supreme Court of the Czech Republic [Ruling II ÚS 838/07 dated Oct. 10, 2007 and Ruling IV ÚS 2244/09 dated July 20, 2010], and within the context of judicial decisions of the European Court of Human Rights (later in text referred to as ECHR), we might say that the Opinion of the SC is fully legally conforming to these. It can be argued that its adoption, in principle, makes redundant the legal order of the Czech Republic, in conjunction with the aforementioned decisions of supreme judicial authorities, identifying institutional care as the measure of last resort among the various corrective measures and the right of parents and children to joint family life is awarded crucial importance and adequate legal protection. Even the starting point for the introductory part of the Opinion¹ is based on the legal regulations cited above when it emphasises the right of parents and their children to joint family life and highlights protection of this right in legal regulations of highest legal force.

With regard to the past as well as the current judicial practice of Czech courts, which is illustrated by the number of children placed in institutional establishments and those placed in foster care, it is obvious that even though the aforementioned Opinion does not, from the legal point of view, bring anything essentially new and it is underpinned by valid and effective legal regulations, it may still be of high importance for the development of social-legal protection of children in the Czech Republic because the legal regulations in force are not applied sufficiently in judicial practice and in the judgements of our courts. The same is true for the practice of authorities overseeing social and legal protection of children.

¹ For parents and their children, the possibility of being together is the basic element of family life. Measures which prevent them from staying together are an infringement of their right to family life (compare Art. 32, Section 4 in DBRF and Art. 8, Section 1 of the Convention on Human Rights and Fundamental Freedoms). Such an intervention on the part of the state (by the court) is only possible if it is really necessary and in compliance with the law; the requirement for necessity means that the intervention is based on acute social demand that corresponds with the legitimate goal in question –that is with the protection of the child’s interests. Specifically, this involves cases where children were subject to violence or maltreatment or sexual abuse or where officers see a lack of emotional grounding or an alarming health condition in the child, or mental imbalance on the part of parents. (compare for instance ECHR judgement Eur Ct HR, 26/10/2006 in the case of Wallova and Walla v. the Czech Republic, Complaint no. 23848/04, or the Judgement dated June 21, 2007 in the case of Havelka and others v. the Czech Republic, Complaint no. 23499/06). Separation of family members (and the placing of children in institutional care) undoubtedly represents such a measure and it is the most extreme measure that can only be adopted – as is suggested by the verbatim wording of Sec. 46, Subsection 2 of the Family Act - if the child’s situation cannot be solved by substitute family care (i.e. awarding the custody of the child to another individual instead of its parents – Sec. 45 of the Family Act, awarding the custody of the child to foster parents – Sec. 45a to Sec. 45d of the Family Act) or by family-type care in an establishment for children in need of immediate assistance which have priority over institutional care; it is the most radical of measures that may only be resorted to in the most serious cases.

The Material Poverty of the Family

An important issue regulated expressly by the Opinion is the question of material poverty of the family.² The requirement that material poverty may not be the only justification for the decision to place a child into institutional care is embedded as a standard in the Family Act of the Slovak Republic [Act no. 36/2005 Coll., The Family Act, Sec. 52, Subsection 2]; however, this is not the case in the Czech Family Act. Such an unequivocal interpretation was badly needed for Czech Social Work practice which, when evaluating the quality of a family, lays great emphasis on the material situation of the family at the expense of its emotional and social functions.

Positive obligations of Public Authorities

Another significant issue raised in the Opinion is the positive obligation on the part of the State to actively maximise the possibility that functioning of the original family is maintained or renewed and especially the requirement that institutional care may not be ordered by courts unless such an order is preceded by the provision of effective assistance to the family by public authorities. This 'solution' model rests upon judgements of the ECHR and it determines an obligation for public authorities to provide active assistance to the parents of a minor child to solve a situation that might ultimately lead to an order to institutionalise the minor child.³

As has been illustrated, legal regulations valid in the Czech Republic regulating the rights of the child and the right to joint family life are sufficient and comply wholly with European standards. What causes problems in the Czech Republic and what leads to the high number of children placed in institutional care is the application of these legal regulations.

Practice has shown that, as a result of the pressure to decrease the numbers of children placed in institutional care, courts proceed according to the provisions of the Family Act which views institutional care as the last of the options and they therefore, as promptly as possible, transfer children from institutional to substitute family care, in other words to foster care settings. This course of action is certainly beneficial if we take into account all the negative impacts of institutional upbringing [Gjuričová et al., 2007]. However, even if a child is in foster care instead of institutional care, all of the aforementioned arguments are still valid and a family's right to joint life must be taken into account. And even in this case, the quality of life of the biological and the foster family should not be compared and the social and legal protection

² Even if the aforementioned formal prerequisites are complied with and the court is allowed to consider issuing the order to place a child in institutional care, in view of the already mentioned starting points, it is still necessary to substantiate that serious circumstances justify separation of the family. Material poverty of the family (especially of the parents) that is primarily manifested by its unsuitable or insufficient housing situation may never be the only justification. This circumstance itself does not accomplish any of the legal prerequisites which may justify placement into institutional care.

³ In a situation when material poverty is to be one of the reasons for a court to issue an order to institutionalise a child, it is not possible to adjudge that there is a necessity to apply a measure to institutionalise the child unless the court ascertains in a reliable way that corresponding public authorities themselves, or the bodies of local self-administration, provided, or were ready to provide, support in the form of either material assistance, or advice on how to proceed in order to improve one's situation and find a solution to one's problems because if they fail to do so, the state falls short of its positive obligations which are closely interconnected with effective respect for family life and thus preconditions allowing the court to issue an order to institutionalise the child are not met. Public authority bodies also have their positive obligations which are closely related to effective "respect" for family life.

authorities should act in such a way as to facilitate the child's reunion with its original family⁴, or, best of all, to prevent a situation in which the child's removal from parental care is necessary in the first place. This lack of preventive action in potentially at-risk families is probably the weakest point in the Czech system of social-legal protection of children.

Institutional care

„Family is definitely the oldest human social institution“ [Matějček, 1994, p. 15]. Family has a unique and privileged position – it can influence the child's development in its most sensitive stages in the most natural way, and it can richly satisfy the child's basic emotional needs“ [Matějček, 1992: 28]. But not every child may spend his/her childhood in a functioning family. Some children spend their childhood, or part of it, in institutions adapted to this aim, for various reasons.

The care system of children deprived of parental care in our country is realized within five Ministries - Ministry of Health, Ministry of Education, Youth and Sports, Ministry of Labour and Social Affairs, Ministry of Justice and Ministry of Interior. Within the government districts (region-municipality-municipality with extended activity) exist particular offices and institutions that deal with children deprived of parental care, their main goal concern with realizing of social-legal protection of children⁵. Besides the state sector whose role is the principal one within the system of care of children deprived of parental care, there is a number of non-governmental organizations complementing the activities of the state sector [Svobodová, Vrtbovská, Bártová, 2002]

To the children who, for the various reasons, cannot be brought up in their own biological family is offered in our circumstances so-called substitute care, which includes substitute family care (adoption, foster care, guardianship) and institutional care (see attachment no.2, which is now described further.

Where a family fails to care for a child for various reasons, and it is not possible or suitable to choose some of the forms of the substitute family care, it is necessary to ensure the child another educational environment. [Matějček et al., 1999] This environment is the institutional child care in several types of facilities falling within the jurisdiction of the sector of health care, education and social affairs. [Ibid.] The following applies to placing children without family background in the various types of the institutions. The children under 3 years are placed in the institutions of the health service sector, the children over 3 years with special needs fall within the jurisdiction of the sector of labour and social affairs, and the children over 3 years with a normal state of health go into the institutions of the education sector.

⁴ Essentially, as soon as the existence of a family relationship is substantiated, public authorities must act in such a way as to enable the development of the relationship and they must adopt suitable measures to facilitate family reunification. (Decision of the ECHR, Kutzner v. Germany, 61)

⁵ *„Social-legal protection of children means mainly the protection of the right of the child to favourable development and proper upbringing, the protection of the legitimate interests of the child, including protection of his/her property, operating leading to restoration of disrupted functions of family.“* [Act no. 359/1999 Coll. s. 1 (1)]

„The prior standpoint of social-legal protection of children is the interest and welfare of the child.“ [Ibid. s. 5]

The institutions of institutional care in particular sectors

The institutions providing the children deprived of parental care a home falling within the health service sector consist of the **nursery homes** where the children of 0 up to 1 year are placed, and the **children's homes** for children under 3, providing for care of the children from 1 to 3 years with (presently some of them called Children centers). The provider of the institutions of this type may be a municipality, the responsible region or the Ministry itself. The nursery homes have become an important part of the paediatric preventive care. Primarily, the children were placed here because of health reasons but their function gradually changed, and the health reasons have been replaced by the social ones; the number of disabled children grew, and these children have often been given up immediately after their birth [Matějček, 1999].

The Ministry of Labour and Social Affairs disposes of a wide spectrum of institutions of which a municipality as well as the Ministry may act as a provider – so called **homes for people with special needs** (former social care homes) admitting the children suffering various disabilities, whether of sensory, physical or mental character, who cannot grow up in their own families. The homes provide the children and youth with care since 3 years of age until the end of vocational training or older if necessary [Act no. 108/2006 Coll. ss. 48].

The largest complex of institutions ensuring institutional care is founded by the Ministry of Education, Youth and Sports. These institutions provide institutional upbringing⁶ and protective care⁷ as well as preventive educational care⁸. The institutions executing institutional upbringing and protective care ensure care to the children and youth of 3 to 18/19 years, or longer until the end of vocational training if necessary. [Act no. 109/2002 Coll.s.1(2)]

The institution placing children in the appropriate type of facilities on the basis of results of a complex examination is the **diagnostic institution** founded directly by the Ministry. This institution ensures care also to the children detained on the run from other facilities. The other areas of the diagnostic institution is placing children suffering behavioural disorders on the basis of their parents or other persons liable for their education. In such cases it is preventive educational care. A child's stay in the institution usually lasts 8 weeks. The diagnostic institutions and their educational groups may be subdivided according to the child's age and sex. The institution ensuring care to the children who have not fulfilled compulsory school attendance is called the diagnostic institution for children; the institution for children who have already fulfilled compulsory school attendance is called the diagnostic

⁶ **Institutional upbringing** „is a ruling proposed by a body of social-legal protection of children and approved by the court. It is executed in those cases when the child's family is not able or willing to properly care, and it is not possible to ensure the custody of the child in any other reasonable way.“ [Matoušek, 2003: 253].

⁷ **Protective care** „is a kind of protective measures. The juvenile court may impose protective care if the custody of the juvenile is not properly ensured and the lack of proper upbringing cannot be corrected in his/her own family or in the family, with which he/she stays, if the hitherto upbringing of the juvenile has been neglected, or if the environment, in which the juvenile lives, does not warrant his/her proper education, and if a judgement imposing institutional upbringing according to the Family Act is not sufficient.“ [Act no. 218/2003 Coll. s. 22 (1)]

⁸ **Preventive educational care** represents „the provision of special-educational and psychological services to children at the risk of behavioural disorders or with already developed manifestations of behavioural disorders and negative phenomena of social development, on whom institutional upbringing or protective care is not imposed, to persons responsible for upbringing and educationists.“ [Act no 109/2002 Coll. s. 16 (1)]

institution for youth. [Act no. 109/2002 Coll. ss. 5 (1), 6 (1, 3), 7 (1), 5 (6), 10 (1); Regulation no. 438/2006 Coll. s. 4]

The educational institutions for preventive educational care are the **centres of educational care** which are usually a part of the diagnostic institutions. „*The centre ensures versatile care to the children and youth with high-risk behaviour and to youth discharged from institutional upbringing at their integration into the society.*“ [Act no. 109/2002 Coll. s. 17(1)]. That are for the children and youth upon whom institutional upbringing or protective care has not been imposed. „*The centre provides information and consultation for the persons liable for education, employees of pre-school, school and educational facilities in the field of education*“. [Ibid.,s.17(1-2)]

A further educational institution providing care for the children of 3 to 18 years ordered to enter institutional care who do not suffer from serious behavioural disorders, are the **children's homes** whose providers are the responsible regions. The children's homes care for the children and youth who cannot grow up in their own families for serious reasons, and could not be adopted or placed in another form of substitute family care. The children's homes carry out educational, teaching and social tasks based on the wards' individual needs. The children's homes may also admit mothers under legal age with their children [Act no. 109/2002 Coll. s. 1(1-3)].

The institutions caring for children with serious behaviour disorders, temporary or permanent mental disorder, or charged with protective care, and for and mothers under legal age and their children, consist of the **children's homes with school**; and for children over 15 years the **corrective institution**. These institutions are founded directly by the Ministry [Act no. 109/2002 Coll. ss. 13 (1), 14 (1)].

In the **children's home with schooling** are usually placed those children over 6 years until the end of their compulsory school attendance. If during his/her stay the reasons for placing the child at the school at the children's home cease to exist, the child may attend a school not belonging to the children's home. If he/she cannot study at a secondary school outside the institution for serious reasons, or if he/she cannot find a job, a child may be transferred into a corrective institution [Act no. 109/2002 Coll. s. 13 (4-6)].

A **corrective institution** cares for children over 15 years suffering serious behavioural disorders to whom institutional upbringing or protective care may be ordered. The institution may admit also a child over 12 years if he/she is charged with protective care and shows such behaviour disorders that he/she cannot be placed in a children's home with school. The same applies to the children over 12 years with ordered institutional upbringing. The separate corrective institutions are founded for those children who have received orders for institutional upbringing and those charged with protective care. [Act no. 109/2002 Coll. s. 14 (1, 3)]

Reasons for placing children in the system of institutional care

In our society, there have always been parents that cannot provide their children with a family background and home. Various reasons lead to such situations. What follows is a list of seven reasons for placing a child in the system of institutional care in order from the most to the least frequent ones: poor engagement with education, neglect, abuse and battering of children, parents' criminal activities, parents' alcoholism, the family's low

social economic level, mother's prostitution, or being orphaned. [Svobodová, Vrtbovská, Bártová, 2002]

Usually the reasons are divided into three categories (especially in institutions of health sectors) – *health*, *social* and *health-social* reasons. The area of **health** reasons consist of e.g. abandoned children, children with congenital defect, and children with a disability. On the other hand the reason for placing a child into institutional care could be caused by sources that have disabled the family from fulfilling its educational and nurturing function, such as death, serious illness or long-term hospitalization of the child's parents. The occurrence of such serious family situations requires an immediate admission of the child into an adequate institution [Matějček, 1999; Tyl et al., 1998].

Social reasons are the most common reasons evoked by family malfunction, or family breakdown. Such a family is not able to provide the child with either the maintenance and support, nor the ability to satisfy their basic emotional and developmental needs. These families are usually separated, affected with alcoholism and drug addiction, stigmatized by promiscuity, have absence from work and/or have welfare dependency. These reasons also correspond with the list of seven most common reasons above [Ibid.].

The last category is combined **health** and **social** reasons which include all the above mentioned factors [Ibid.].

A singular group and the most vulnerable one consists of the children which have been placed in institutional care from a very young age (many of them since their birth). In most cases these children's parents are young, immature individuals lacking life experience, of social pathological character features, insufficiently responsible who cannot expect help from their wider families. These parents themselves often grew up in a disharmonious environment or in institutional facilities. Such parents' children are often left unattended, at worse the child's health and development is directly endangered by emotional, physical or sexual abuse or battering [Chrenková, 2003; Svobodová, Vrtbovská, Bártová, 2002].

Table no. 1 – Statistics in the field of the nursery homes and the children's homes for children under 3 years on the nationwide scale in 2009

Number of institutions	34
Total capacity	2 040
Total number of admitted children	1 966
Reasons for admission:	
<i>social</i>	48%
<i>health</i>	33%
<i>health-social</i>	18%

Source: Institute of Health Information and Statistics of the Czech Republic (ÚZIS), 2009

Procedures relating to placing a child in institutional care

Three possibilities lead to placing a child in institutions of institutional care. The first one is represented by **judicial decision**. It means that court can order institutional upbringing or charge protective care for a child. In a case of imminent threat to life and limb the child is placed in an institution on the basis of a **preliminary ruling** when the court has to make a decision on the child's placement within 24 hours from filing the application of a body with responsibilities for the social-legal protection of children. A less frequent form is then an **agreement** between the parents and the institution [Act no. 109/2002 Coll. s. 2 (3,4); Svobodová, Vrtbovská, Bártová, 2002].

Practice

We might then where the congruence or logic is between the aforementioned right to respect for family life and the course taken by courts in which biological parents are "punished" for their failures and, in spite of the any corrective work in their behaviour and their proven interest in contacts with their child (-ren), and over their ability to provide a home for their child have been called into question. In both of the following cases, the courts, in their decision making, did not investigate what activities had been undertaken by the bodies of social and legal protection in their work with the biological families in the period before the orders to institutionalise the children were issued.

Example 1. Decision of the Regional Court in X dated August 11, 2010 which upheld a decision of the District Court in region XY and which adjudged that a child would remain in foster care (which was preceded by institutional care) against the petition of the biological mother who sought the return of custody of her child. The Decision says expressly: "The mother, by her previous behaviour that was the result of her unsatisfactory housing situation and the lack of financial means, neglected due care for her minor daughter. The turnaround which has occurred in the mother's behaviour who, with the help of her new partner, created a stable housing situation for herself and who has shown interest in contacts with her minor daughter has not, up to the present moment, made it possible to arrive at the conclusion that it is in the interest of the minor child to stay in the family environment created by her mother and that this environment with regard to the child's upbringing offers better quality and more stimuli than the family environment of the foster parents." In another part of the decision: "In spite of the fact that the mother showed interest in her minor daughter already during the child's institutionalisation and has continued to visit her even after the child was placed in foster care, the mother's interest in her child may not be considered as the principal and decisive starting point for the decision on which of the two environments – the one created by the mother or the substitute environment in foster family is more suitable from the point of view of the child's interests." To give the reader more precise information: the turnaround in the mother's behaviour who now had stable housing conditions and had been receiving financial support in the form of welfare benefits for more than a year. As this decision was issued by a court of higher (second) instance and the case is exempt from the possibility to file an application for an extraordinary remedial measure, it is only possible to contest this decision in the form of a constitutional complaint or to submit a new petition to the district court.

Example 2. Decision of the District Court in region XY dated July 30, 2010 released a mother from responsibility for and deprived her of parental rights to a minor son who was placed in institutional care because the mother was an alcoholic. She did not take due care of her minor

son although the son had always been in good health, and had not shown any symptoms of neglect or maltreatment. While the boy was placed in institutional care, he repeatedly came to see his mother for several-day visits. Since August 2009, the boy had been in the care of a family who would like to adopt him. In spite of the fact that, evidentially, the mother has abstained from alcohol since October 2009 (she had gone through alcoholism treatment), that she had a job, her housing situation was stable and that she had shown great interest in contact with her minor son, the bodies of social and legal protection have granted her limited visitation rights in the presence of third parties only once every three months. In this case, not only did the social and legal protection authority fail to take any steps towards the reunification of the parent and the child, the authority moreover told the mother that it was in the interest of the minor child to be adopted by the family where the boy was temporarily placed because the material background of the family was markedly better than the material situation of the mother. As the decision in question was issued by a court of first instance, it was appealed and the appeal is to be heard by the Appellate Court at an early date.

Judicial Decisions of the Supreme Court

It is obvious that both of the aforementioned, randomly selected decisions are at variance with the aforementioned legal regulations as well as the decisions of the ECHR. We should also look at the judicial decisions of the Czech Republic Supreme Court which deal with the topic of institutional care because courts and authorities for the social-legal protection of children are obliged to mirror the relevant judicial decisions issued by the SC in their own decisions. [Act no. 1/1993 Coll., Constitution of the Czech Republic, Article 89, Section 2].

SC Ruling no. 838/07 dated October 10, 2007 deals with a situation where an order was issued to institutionalise a minor girl whose younger sister had died of injuries inflicted by their father who had then been convicted for the crime upon a final and conclusive judgement. An order to institutionalise the child was issued because both the first-instance and the second-instance court arrived at the same conclusion that the minor daughter may not remain in the parental care of the mother because the mother was mentally unstable and might renew her cohabitation with the father of the minor daughter after his sentence of imprisonment comes to an end. The SC vacated the decisions of both the first-instance and the second-instance court and supported its decision by emphasising namely the right to respect for family life and the importance of the positive emotional bond between the minor daughter and her mother.⁹ This Ruling deals with a situation which might be seen as extreme. But that also means that the legal arguments presented in the judgement by the SC are all the more valid for situations which are much more frequent in practice – i.e. situations in which children are removed from parental care and placed in an institution mainly due to the insufficient functioning of the family while material poverty of the family is seen as an issue of substantial importance for the decisions of courts or authorities.

⁹ When interpreting provisions of Art. 10, Section 2 of the Declaration of Basic Rights and Freedoms and provisions of Art. 8 of the Convention on Human Rights and Fundamental Freedoms, i.e. protection of family life, respectively the right to respect for family life, the SC emphasises that even though the traditional family has undergone development in recent years, the biological bond of consanguinity between family members still forms the basis of family bonds (compare File no. II ÚS 568/06 dated Feb. 20, 2007, in the Collection of Rulings and Resolutions of the Supreme Court, Volume 44, Ruling no. 33). The basic element of family life continues to be the cohabitation of parents and children (ECHR Judgement in the case of Kutzner v. Germany, no. 46544/99, Sec. 58, Eur Ct HR 2002-I, and others) and it is within the bounds of this cohabitation where upbringing of children by their parents (to which children are entitled on the basis of Article 32, Section 4 of the Declaration) is to take place. Abridgement of this basic right may not occur as a result of the fact that a law-maker has, in compliance with Art. 32, Sec. 6 of the Declaration, the authority to determine details.

A ruling of the SC issued under ref. no. IV. ÚS 2244/09 dated July 20, 2010 dealt with a situation in which a newborn baby was taken away from its biological mother because in the opinion of the authority for social-legal protection of children, she did not ensure suitable housing for her child. The court, as in the previous case, vacated the decisions of the general courts and supported its argumentation with the child's right to upbringing by its own parents, i.e. by an interest which may not be outweighed by the better material situation which might be created for the child outside of its family.¹⁰

Conclusions

As is evident from the aforementioned information, the shortcomings in the social-legal protection of children and the high number of children placed in institutional care, which do not put the Czech Republic on a par with the position of developed European countries, cannot primarily be viewed as the problem of legislation. One of the current goals that the government of the Czech Republic has adopted is giving preference to childcare in family-based or family-type settings over institutional care [The 2010 Analysis for the Czech Ministry of Labour and Social Affairs]. And although this long-term trend is certainly positive for the Czech Republic, by the aforementioned examples, we wanted to illustrate the fact that so far, the practice of our courts and authorities has not corresponded wholly with this welcome trend. Adoption of the aforementioned Opinion of the SC, together with the diligent application of judgements issued by ECHR and the Supreme Court of the Czech Republic, might lead to a substantial and fast improvement in the situation of families at risk.

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Matoušek, M. (2003) *Slovník sociální práce*, Praha, Portál.

¹⁰ "No one can be forced to make use of all the advantages which today's civilisation can offer and the child's "interest" in receiving good-quality present-day care from the point of view of its material situation cannot be given preference over its interest and right to be brought up by its own parents. In other words, in a democratic society, if a child is removed from parental care on the grounds that its life is in danger, such a decision may not, in the absence of other reasons, be based on a mere comparison of the assumed standard of life in the child's original family with the standard which the child might be provided in a different setting within society."

MPSV – Ministerstvo práce a sociálních věcí. (2010) *Analýza současného stavu institucionálního zajištění péče o ohrožené děti* [online]. Dostupné z: <<http://www.mpsv.cz>>
Sdělení č. 104/1991 Sb., Úmluva o právech dítěte (Communication no. 104/1991 Coll. Convention on the Rights of the Child,.)

Sdělení č. 209/1992 Sb., Úmluva o ochraně lidských práv a základních svobod (Communication no. 209/1992 Coll. Convention of Human Rights and Fundamental Freedoms)

Svobodová, M., Vrtbovská P., Bártová D. (2002) *Zpráva o stavu ústavní péče v České republice* [online]. Dostupné z : <<http://www.varianty.cz>>.

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Výbor pro práva dítěte OSN, 2.periodická zpráva o plnění úmluvy o právech dítěte, přijato na vědomí vládou ČR usnesením z 10.9.2003 [online]. Dostupné z:< <http://www.vlada.cz>.>

Vyhláška č.438/2006 Sb., kterou se upravují *podrobnosti výkonu ústavní výchovy a ochranné výchovy ve školských zařízeních*, v platném znění. (Regulation no. 448/2006 Coll. Regulating Details of Execution of Institutional Ubringing and Protective Care in Educational Institutions, in valid wording).

Zákon č. 359/1999 Sb., o *sociálně-právní ochraně dětí*, v platném znění. (Act no. 359/1999 Coll. on Social-Legal Protection of Children, in valid wording).

Zákon č.108/2006 Sb., o *sociálních službách*, v platném znění. (Act no. 108/2006 Coll. on Social Services, in valid wording)

Zákon č.109/2002 Sb., o *výkonu ústavní nebo ochranné výchovy ve školských zařízeních a o preventivně výchovné péči ve školských zařízeních a o změně dalších zákonů*, (Act no. 109/2002 Coll. on Execution of Institutional Upbringing or Protective Care in Educional Facilities and on Preventive Educional Care in Educitional Facilities, in valid wording).

Zákon č. 94/1963 Sb., o *rodině*, v platném znění (Act no.94/1963 Coll., The Family Act, in valid wording).

Zákon č. 6/2002 Sb., o *soudech a soudcích*, v platném znění (Act no. 6/2002 Coll., On Courts and Judges, in valid wording).

Zákon č. 99/1963 Sb., *občanský soudní řád*, v platném znění (Act no. 99/1963 Coll., The Rules of Civil Procedure, in valid wording).

Zákon č. 1/1993 Sb., Ústava České republiky, v platném znění (Act no. 1/1993 Coll., Constitution of the Czech Republic, in valid wording).

Zákon č. 2/1993 Sb., Listina základních práv a svobod, v platném znění (Act no. 2/1993 Coll. – the Declaration of Basic Rights and Freedoms, in valid wording).

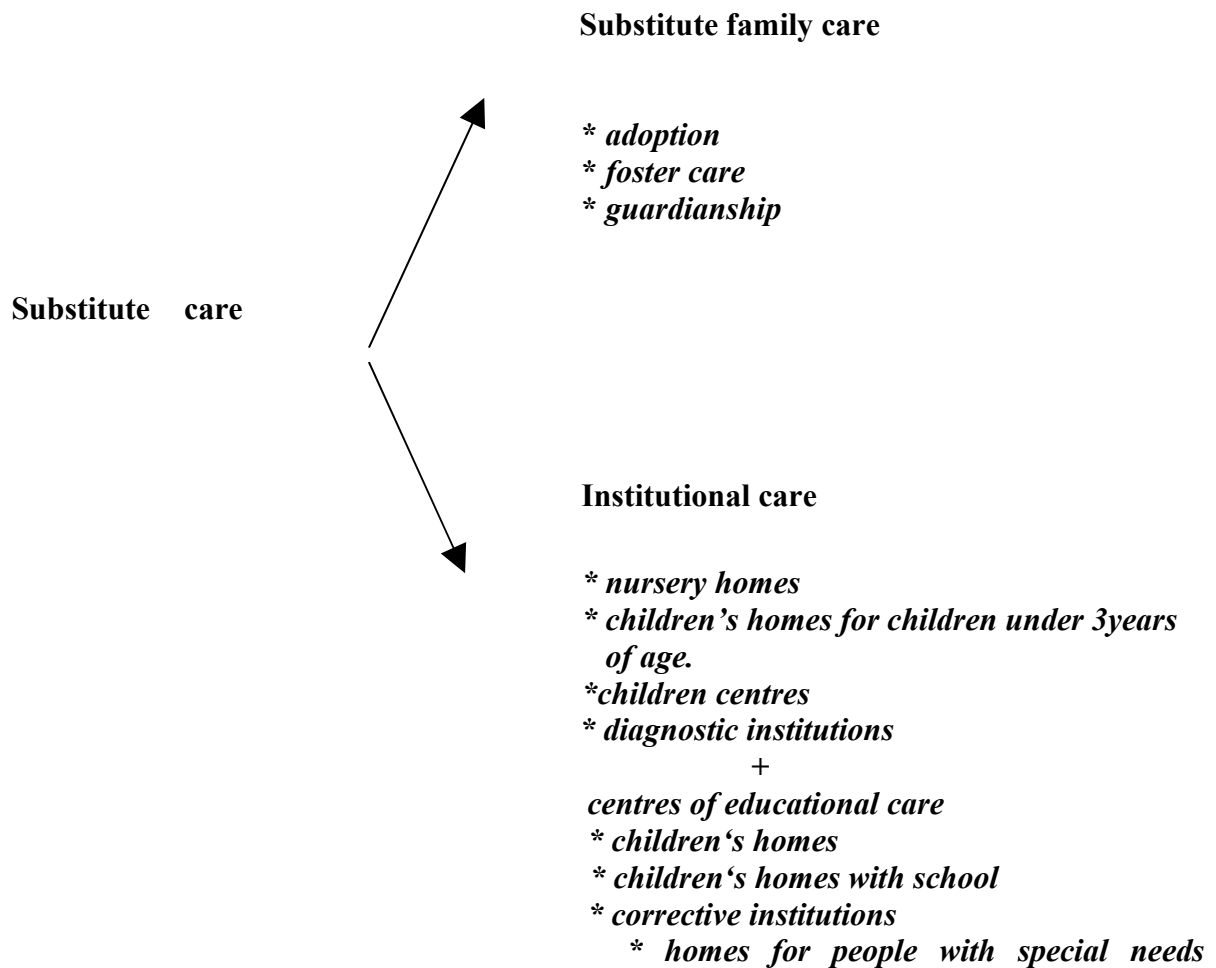
Zákon č. 36/2005 Zb.z., o rodině, v platném znění (Act no. 36/2005 Coll., The Family Act, in valid wording).

Attachment no. 1 – European Statistics of Children in Institutional Care in Chosen Countries in Years 1995-2005 (in thousands)

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Czech Republic	21.3	22.8	21.9	22.0	22.6	22.9	22.6	22.7	22.8	23.3	23.5
Hungary	9.2	8.9	8.3	9.6	8.8	8.6	8.8	8.3	8.5	8.3	8.1
Poland	77.0	76.5	76.4	77.6	76.9	79.2	61.4	59.5	57.4	56.8	55.8
Slovakia	9.3	9.3	9.3	8.8	8.8	9.2	9.2	8.5	8.9	9.5	9.0
Estonia	1.5	1.7	1.7	1.7	1.7	1.7	1.8	1.9	1.5	1.5	1.6
Bulgaria	26.6	27.2	24.4	23.5	23.7	13.7	13.3	12.1	11.0	10.5	10.4
Romania	49.5	52.0	51.8	44.7	38.8	58.4	51.0	44.1	38.2	33.1	29.1

Source : UNICEF, TransMONEE 2007 Features, UNICEF Innocenti Research Centre, Florence, 2007, available from:
http://www.unicefirc.org/publications/pdf/tm2007_features.pdf, Amended

Attachment no. 2 – Scheme of the System of Substitute Care in the Czech Republic



Source : Chrenková, 2011 – own structure