

## TAKING INTO ACCOUNT ETHNICITY IN CONTINUITY IN UPBRINGING WHEN ARRANGING SUBSTITUTE FAMILY CARE IN THE CZECH REPUBLIC IN THE CONTEXT OF ARTICLE 20 (3) OF THE CONVENTION ON THE RIGHTS OF THE CHILD

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**Abstract:** *The article deals with the practice of determining and recording a child's ethnic origin by the bodies responsible for the social-legal protection of children in the Czech Republic when arranging substitute family care. The main focus is concentrated on the interpretation of the constitutional protection of ethnic discrimination in relation with the interpretation of "continuity of care" in the view of Article 20 para 3 of the Convention on the Rights of the Child. These issues are considered from the point of view of principle of prohibition of discrimination and issue of legitimacy of data collection. The article leads to the conclusion, that the criterion of ethnic origin should not serve as a discriminatory criterion - to exclude a child from the possibility of substitute family care.*

**Keywords:** *ethnicity, ethnic affiliation, determining and recording ethnic data, protection of discrimination, child rights, social-legal protection of children, the Convention on the Rights of the Child, continuity of care, family care*

### INTRODUCTION

'A child of Roma ethnicity', 'a half-Roma', 'half-origin', 'a child bearing the features of a different ethnic group', 'a child of Roma ethnicity without the noticeable features of a different ethnic group', 'a half-Roma child with light skin' – these are the terms used in files to denote the ethnic origin of children when arranging substitute family care. The ethnic origin of parents is described as well; phrases such as 'the mother is Roma, dark-haired and dark-skinned', 'the father is of Roma ethnicity with dark skin' are included.

If a 'pure' Roma origin is not certain, the terms used are 'a half-Roma child' or 'half-origin'. A child referred to as a half-Roma child or half-Roma is, for example, a child "whose mother is of Roma ethnicity and whose father is unknown (probably Roma as well)". A child that falls under the category of 'a half-Roma child' or 'half-Roma' is also, for example, a child whose mother is Roma and father is Vietnamese.

Also assessed when determining ethnic origin in records related to the arrangement for substitute family care is the colour of the child's hair and skin. If a child who is otherwise considered a Roma child has lighter skin, he/she is referred to as a child of Roma ethnicity without noticeable features of a different ethnic group, or as a half-Roma child with a lighter complexion. Also seen is the wording that "a boy should be considered half-Roma (he has a Mongolian spot on the buttock, darker skin)." Such a description is used in cases of very young children (immediately after birth), children in substitute care facilities for infants, as well as in cases of children waiting to be placed in substitute family care. The

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determination of ethnic origin concerns primarily children who are thought to be of Roma ethnicity.

Said process of determining and recording the ethnic origin of children is used by employees of various tiers of the bodies responsible for the social-legal protection of children when arranging substitute family care.

To illustrate, in the so-called identification papers of a child deemed suitable for placement in substitute family care, which is a mandatory part of the child's file and which is filled out by social-legal protection bodies operating in the place of permanent residence of the child, there are sections for ethnicity and differences from 'our' or the 'common' population. In the case of a child with assumed Roma ethnicity, it is written 'Roma' and 'yes'. If the child has lighter skin, it is written: ethnic group – Roma, no noticeable Roma features; differences from common population – yes. The same sections can be found for the parents of the child; in addition to Roma origin there are also the details of the colour of their skin and hair, as well as whether they are persons with noticeable Roma features. In some identification papers, even a reference to Roma nationality can be found. However, there is no information as to how the data about nationality was acquired and whether it was acquired based on the free choice and consent of the person concerned.

Data regarding the ethnic origin and ethnic characteristics of children are contained not only in identification papers but also in other parts of the child's file: in records of the results of proposals for the arrangement of substitute family care, or in records of visits to children in substitute care facilities for infants. Similarly, medical reports, reports from psychological examinations, and other questionnaires regarding children in infant care facilities, as well as medical reports issued by regional healthcare departments provide information as to whether the child is a Roma or half-Roma child, a child who does not bear strong Roma features, or an infant with a dark complexion.

There have even been cases when information regarding ethnicity or nationality was reviewed, typically when the mother declared that she was not of Roma nationality and an employee of a social-legal protection of children body changed the information stating that it was obvious that the mother was a Roma.

Determining and keeping records of the ethnicity of children probably falls under "the professional assessment of a child" in compliance with Act No. 359/1999 Sb., on social-legal protection of children. Under s. 27 of the Act, regional authorities carry out a professional assessment for the purposes of arranging adoptions and foster care, which, in addition to other criteria, covers the assessment of the ethnic, religious, and cultural background of both a child and applicants. Said regulation, however, does not mean that the respective bodies are authorised to determine or review (usually making use of suspicious criteria) and further process data about ethnic origin.

This paper focuses on the question as to whether the above-mentioned actions by social-legal protection bodies can indeed guarantee "the desirable continuity in a child's upbringing" in the meaning of said article of the Convention, or whether it rather leads to the perpetuity of the Roma ethnic group being separated from 'our' major population and to its segregation.

These issues must be also considered in view of the situation in the Czech Republic where a large number of Roma children grow up in infant and similar substitute care institutions, because the interest in adopting them or taking them into foster care is low due

to their ethnic origin. After all, in the section “applicant’s preference with respect to a child”, which is included in questionnaires that are a part of the application to be registered as a person suitable to become an adoptive or foster parent, applicants often say that they do not want to take a child from a different ethnic group.

## 1. ON THE INTERPRETATION OF ARTICLE 20 (3) OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN RELATION TO ENQUIRIES INTO ETHNIC ORIGIN WHEN ARRANGING SUBSTITUTE FAMILY CARE

Article 20 of the Convention on the Rights of the Child concerns the rights and position of children who cannot, for various reasons, be raised by their own families, as well as ways to ensure alternative care for such children.

Under Article 20 (1) of the Convention, a child who is temporarily or permanently deprived of his/her family environment, or who in his/her own best interests cannot be allowed to remain in that environment, is entitled to special protection and assistance provided by the state. Subsection 2 imposes a duty on signatories to the Convention to, in compliance with their domestic legislation, ensure alternative care for such children.

The details of and criteria for such alternative care are provided in Article 20 (3), which is the subject of this paper. It provides that such care “may include, *inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”<sup>1</sup>

When interpreting this provision, the key question is what represents a “desirable continuity in a child’s upbringing” in relation to his/her ethnic background, or rather what is the significance of taking into account the ethnic origin of a child when arranging substitute family care.

In order to answer this question, it is necessary to proceed not only from the content of said provision, but also from the context of related provisions from the Convention on the Rights of the Child and other United Nations’ documents dealing with the placement of children outside the care of their parents.

The initial point of the interpretation of said provision of the Convention is the issue of surveying ethnicity and ethnic affiliation. It primarily concerns the issue of how the data regarding ethnicity can be collected and processed, as well as the issue of who is authorised to determine the ethnic origin of a child and according to which criteria. Are there objective criteria to determine the classes of individual ethnic groups into which a particular person will fall without that particular person concerned making a decision about it himself/herself? If someone looks like a Rom when so-called objective criteria is applied, is it possible to classify such a person as belonging to the Roma ethnic group without the consent of that person? Can the protection of people against ethnic discrimination be a legitimate justification of such an approach to determining ethnicity?

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<sup>1</sup> The Convention on the Rights of the Child, promulgated under No. 104/1991 Sb.

Issues related to the taking and collecting of data about ethnicity have long been a topic of discussion in connection with the protection against discrimination based on ethnicity, mainly with respect to the segregation of Roma children at schools and to the great number of Roma children placed in institutional care. Studies concerning the legitimacy and lawfulness of ethnic data collection oscillate between two extremes: the need to protect members of the Roma ethnic group because of their ethnicity, and the need to collect data about their ethnicity in order to make more effective the protection of Roma people.<sup>2</sup>

An argument in favour of ethnic data collection says that should it become possible to implement an anti-discrimination policy, it is necessary to identify groups that are exposed to discrimination. The main obstacle to the effective protection against discrimination on grounds of ethnicity in this approach is the absence of official statistical data on ethnic affiliation.

Collecting data regarding ethnic origin is thus justified by the fact that it is a starting point for the adoption of measures to combat discrimination and other issues faced by members of the Roma or other ethnic group.<sup>3</sup> This argument should primarily justify the collection of personalised data on ethnicity via other persons (i.e., by external 'expert' observers, by members of a given ethnic group, or by members of the majority population) who classify as members of a particular ethnic group even such persons who do not regard themselves as being part of that ethnic group.

Any effort to justify a survey of ethnic origin conducted in a way other than by a decision made by the person concerned (so-called self-identification) entails an inherent contradiction because it ignores the substance of the protection against surveys of ethnic origin itself. This substance is, as a matter of fact, protection against the risk of discrimination and persecution based on ethnicity, and the possibility that the data on ethnic origin will be misused. These arguments have their understandable roots in history, be it European history or the history of other continents, such as North America (particularly the USA) or Asia. Discrimination on the grounds of ethnic origin is a contemporary phenomenon as well and has significant negative consequences for both members of the non-majority population and society as a whole. The opinion that 'objective' surveys to determine ethnic origin are necessary for the purpose of taking measures to protect members of threatened ethnic groups is simply passing the buck. Claims about the need to improve the protection of persons not belonging to the majority population cannot be regarded as a legitimate reason to undertake surveys on ethnic origin. If we laboured under such an assumption, it would mean that data about ethnicity are a prerequisite for providing protection to such

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<sup>2</sup> For example, the Human Rights League's system recommendation no. 4: Data collecting regarding ethnicity as a means of ascertainment of the extent of discrimination against Roma children, 2007. In: *Liga lidských práv* [online]. 2007. [2017]. Available at <<http://lp.cz/publikace/sber-dat-urcujicich-etnickou-prislusnost-jako-nastroj-pro-zjisteni-rozmeru-diskriminace-romskych-deti/>>; or the Ombudsman's report: Description of the method and results of a survey of ethnic composition of pupils at former practical schools in the Czech Republic in 2011/2012. In: *Veřejný ochránce práv* [online]. 2012. [2016-11-11]. Available at: <[http://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Vyzkum/Vyzkum\\_skoly-metoda.pdf](http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Vyzkum_skoly-metoda.pdf)>.

<sup>3</sup> This issue does not naturally concern only the Roma ethnic group but any ethnic group whatsoever. Given that determination of ethnic origin when arranging substitute family care in the Czech Republic concerns almost exclusively the Roma ethnic group, the text deals with this ethnic group.

persons. However, the substance of the prohibition of discrimination is the principle that the rights and freedoms are equally guaranteed to all persons irrespective of any aspects, including ethnic origin.

Emphasis on the need for the collection of ethnic data also implies the institutionalisation of a prejudice against a particular ethnic group – in the case of the Czech Republic, against the Roma ethnic group. Strictly speaking, we assume that a particular ethnic group is *a priori* predetermined to be discriminated against; such an assumption is in itself discriminatory. This leads to stigmatisation at the same time, in this particular case to the stigmatisation of children who are predetermined to bear the stereotypes that society associates with a particular ethnic group.<sup>4</sup> This approach is actually similar to the caste system, from which there is no way out. All described elements intensify the discrimination on the grounds of ethnicity.

The involuntary determination of ethnicity, when a decision about the ethnic origin is made by someone other than the person concerned, is in contradiction of the principles of national and international law on the prohibition of discrimination and the protection of personal data. In fact, it represents coercion that the required ethnic origin (i.e., the ethnicity presumed by others) be determined. This approach cannot be justified by “unwillingness of members of certain ethnic groups to claim allegiance to those ethnic groups”.<sup>5</sup> The ‘unwillingness’ of those people represents a legally guaranteed interest in their own protection, and the substance of the principle of prohibition of discrimination.

Another key question is what criteria are to be applied by external observers when determining the ethnic origin of other people. When substitute family care is being arranged, the so-called method of determination by another person (i.e., an employee of social-legal protection authority) is based on the subjective assessment of the colour of skin, eyes, and hair, as well as other ethnic features, and is done in the way ‘he/she looks like a Roma, thus he/she is a Roma.

However, in the case of children waiting for placement into substitute family care, the approach that classification on the basis of stereotypes such as dark hair or dark skin is of great importance for combating discriminatory practices does not apply, because it is important to know how many persons are regarded as members of minority groups by the majority population, as it is members of the majority population who discriminate against minorities.<sup>6</sup> Classifying children on the grounds of stereotypes about ethnic features is discriminatory; it predetermines a child to belong to a particular ethnic group irrespective of the will of that child, or rather of the will of his/her parents, and it reduces the child’s chances of being placed in substitute family care.

In a democratic society there are no ‘objective’ categories of individual ethnic groups which people can be put into irrespective of their will. The only lawful way to determine

<sup>4</sup> See also LOVRITŠ, V. Proč a jak (ne)sbírat etnická data ve školství. [Why and how (not) to collect data regarding ethnicity in education]. *Učitel'ské noviny*. [Teachers' Journal]. 2008, No. 37, [2016-11-20]. Available at: <<http://www.ucitel'skenoviny.cz/?archiv&clanek=1432&PHPSESSID=0f25f5ca140cecb2f5e2a53fa17d088d>>.

<sup>5</sup> Description of a method and results of a survey of ethnic composition of pupils at former practical schools in the Czech Republic in 2011/2012. In: *Veřejný ochránce práv* [online]. 2012. [2017]. Available at: <[http://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Vyzkum/Vyzkum\\_skoly-metoda.pdf](http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Vyzkum_skoly-metoda.pdf)>.

<sup>6</sup> See, for example, the League’s system recommendation no. 4, p. 13.

ethnicity is so-called self-identification, i.e., a decision made by the person concerned, or, in a case of a child, by his/her parents.

## 2. DETERMINATION OF ETHNICITY IN THE CZECH REPUBLIC

What is the situation in terms of determining ethnicity in the Czech Republic both in general and in relation to the given topic? The principal regulation of ethnicity is contained in Articles 3 and 24 of the Charter of Fundamental Rights and Freedoms (hereinafter the “Charter”) and in international treaties on human rights of which the Czech Republic is a signatory.<sup>7</sup> Article 3 of the Charter provides for the prohibition of discrimination; stating: *“Everyone is guaranteed the enjoyment of his/her fundamental rights and freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.”* The list of criteria is not exhaustive; the universal prohibition of any type of discrimination whatsoever is guaranteed. The prohibition of discrimination is a follow-up of Article 1, which incorporates the principle of equality of all people in their dignity and rights.

The Commentary on Article 3 of the Charter emphasises the fact that human rights are rights possessed by all human beings, not only by suitable people or by members of privileged groups. All human beings have equal human rights which they share with others. Human rights *“also apply to people disparaged for any reason whatsoever. Restricting some rights and freedoms of a particular group of people, although only temporarily, implies a risk that the period will be prolonged; it legalises a possibility of taking a similar measure with respect to other groups of people and opens up space to undemocratic regime that would encroach on human rights. Therefore, the principle of equality in rights must apply unconditionally and unexceptionally in the interest of all, even those who have not yet been discriminated against.”*<sup>8</sup>

The prohibition of discrimination contained in Article 3 of the Charter is the basic principle for the interpretation of all fundamental rights and freedoms, and of the entire constitutional system. From this point of view, human rights are not majority rights. Said principles are also important today because there is no democracy whose values can be taken for granted: *“Even free and fair elections may bring to power the governments that encroach on human rights. Even democrats who previously defended human rights may be corrupted by power. Therefore, constitutional and legal rules must contain actual guarantees of rights and freedoms for all without exception.”*<sup>9</sup> This last point is closely related to the issues of determination of national and ethnic membership. Although they have a lot in

<sup>7</sup> For example, Article 2 (1) of the International Pact on Civil and Political Rights, Article 2 (2) of the International Pact on Economic, Social and Cultural Rights; Article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, and international agreements concerning the elimination of various form of racial discrimination.

<sup>8</sup> PAVLÍČEK, V. – HŘEBEJK, J. – KNAPP, V. – KOSTEČKA, J. – SOVÁK, Z. *Ústava a ústavní řád České republiky, 2. díl: Práva a svobody*. [The Constitution and Constitutional System of the Czech Republic, Vol. 2: Rights and Freedoms]. Praha: Linde, 1995, p. 46.

<sup>9</sup> *Ibid.*, p. 46.

common, these terms must be distinguished. Connected to Article 3, there is Article 24 of the Charter, which specifies the prohibition of any discrimination on the grounds of nationality or ethnicity. The Charter distinguishes between these two categories of minorities (national and ethnic) without providing a definition thereof. The basic criterion of being a member of a national minority follows from Article 3 (2) of the Charter, which sets forth the right of everyone to freely choose their nationality. At the same time, it is prohibited to influence this choice in any way, as well as to use any form of coercion aimed at suppressing a person's national identity. Being a member of a nationality group is thus a matter of free choice.

Ethnicity is then based on other criteria that do not depend on one's choice, such as nationality of parents, or colour of skin.<sup>10</sup> This, however, does not mean that ethnicity can be decided independently of the will of a person.

The substance of the prohibition of discrimination on the grounds of ethnicity lies in the fact that it also applies to minorities whose distinctness is not based on a nationality or language, but on other aspects including those that do not depend on the person's will.<sup>11</sup> In this sense the Charter also provides protection to national and ethnic minorities, be they persons who claim their allegiance to a national minority or those who choose to be members of a national majority but who are ethnically different from it.

As for other provisions regarding the rights of members of national and ethnic minorities, the Charter does not distinguish between the two, and guarantees the same rights to citizens who comprise both types of minorities. The Charter does not regulate decision-making regarding ethnicity, and, unlike the requirement to choose a nationality in censuses, choosing it is not enforced or required. Under Act No. 273/2001 Sb., on the rights of members of national minorities and to amend some other acts, no one should suffer harm because of his/her nationality. The Act stipulates that public bodies do not maintain records on members of national minorities. Collecting, processing, and using personal data regarding membership in a national minority is regulated by Act No. 101/2000 Sb., on the protection of personal data. The data acquired by those bodies in censuses or in compliance with other acts allowing the determination of membership in a national minority cannot be used for purposes other than those for which they were collected and stored, and they must be destroyed after they have been statistically processed (s. 4).

Under Act No. 101/2000 Sb., on the protection of personal data, personal data evidencing national, race, or ethnic origin is classified as sensitive data, the processing of which is subject to a special regulated process (s. 4(b) and s. 9). Sensitive data may only be processed in two special situations. First, if a data subject has given express consent therewith. When consent has been granted, the data subject must be informed about what type of

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<sup>10</sup> *Ibid.*, p. 194.

<sup>11</sup> See the comment in *ibid.*, p. 194: "...risk of discrimination or persecution based on ethnicity is of a different nature. It also concerns minorities that are not different because of nationality, or rather the language by which one nation distinguishes itself from another nation..., but because of other aspects. The protection in this respect is guaranteed by the Charter, for example, to groups of persons who enjoy protection under international treaties against discrimination on grounds of race, colour of skin, or similar features, that do not depend on one's choice."

processing and which personal data the consent concerns, who the data administrator is, and for what period the consent is granted.

Where a data subject has not given express consent, sensitive data may only be processed in situations stipulated in the law. One of those situations is the processing of data necessary, according to a special law, for *inter alia* the social-legal protection of children; the protection of such data must be secured in compliance with the Act (s. 9 (f)).

An administrator and processor of personal data is obliged to ensure that the data subject's rights are not violated, namely the right to the protection of human dignity and the right to protection against unauthorised invasion of private and personal life (s. 10). The Act further provides that when collecting personal data, the administrator is obliged to inform the data subject of the scope and purpose of the processing of the data, how the data will be processed, to whom it may be made available, as well as about the data subject's right to access to personal data and the right to have personal data protected. Where the administrator processes personal data acquired from the data subject, the latter must be advised as to whether the provision of such personal data is mandatory or voluntary (s. 11).

Satisfying the conditions under the Act on the protection of personal data is naturally necessary when collecting and processing data about the ethnic origin of children. In their case, consent to data processing would be given by children's parents, or rather their statutory/legal representatives, in compliance with the conditions of the protection of personal data.

However, the question is whether data about children's ethnic origin may be regarded as "data necessary for the provision of the social-legal protection of children" because the provision of substitute care may not be made dependent on such data. The conclusion that such data cannot be processed without the consent of the data subject is also supported by the interpretation of Article 20 (3) of the Convention on the Rights of the Child.

### 3. DESIRABLE CONTINUITY IN A CHILD'S UPBRINGING IN THE SENSE OF ARTICLE 20 (3) OF THE CONVENTION ON THE RIGHTS OF THE CHILD

Article 20 of the Convention on the Rights of the Child must be interpreted through the prism of its primary purpose and with respect to specific practice in the Czech Republic. The main objective of Article 20 of the Convention is to ensure that children who have been deprived of their own family environment are provided special protection and assistance by the state. States Parties to the Convention should ensure, in compliance with national legislation, substitute care for such children.

The main purpose of Article 20 (3) is to set criteria which should be taken into account when applying the principle of the best interests of a child under Article 3 (1) of the Convention on the Rights of the Child in matters related to the placing of a child in substitute care.<sup>12</sup> Similarly, Article 21 of the Convention sets forth that states which recognise or permit adoptions should ensure that the welfare of a child is the top priority.

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<sup>12</sup> DETRICK, S. *A Commentary on the United Nations Convention on the Rights of the Child*. Martinus Nijhoff Publishers, 1999, p. 336. The commentary is available at [http://books.google.cz/books?id=QB6UB1SCxbsC&pg=PA330&hl=cs&source=gbs\\_toc\\_r&cad=3#v=onepage&q&f=false](http://books.google.cz/books?id=QB6UB1SCxbsC&pg=PA330&hl=cs&source=gbs_toc_r&cad=3#v=onepage&q&f=false).

The Commentary on the Convention refers, in connection with the interpretation of Article 20 (3), to the Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, adopted by the United Nations in 1986.<sup>13</sup> In its Article 5, the Declaration states that in all matters relating to the placement of a child outside the care of his/her own parents, the best interests of the child, particularly his/her need for affection (relationships) and the right to security and continuing care, or rather continuity in a child's upbringing, should be the overriding criterion.<sup>14</sup>

Article 20 (3) of the Convention must be interpreted in relation to the child's right to know and be cared for by his/her own parents (Article 7 of the Convention), the child's right to preserve its identity (Article 8 of the Convention), and the right of the child belonging to an ethnic, religious, or language minority, or who is indigenous, to enjoy his/her own culture, to profess and practise his/her own religion, and to use his/her own language (Article 30 of the Convention). In the context of said provisions, the UN Committee on the Rights of the Child emphasises mainly the need to protect children against being forcibly moved from their original environment and placed into financially secure, childless families. In this context the Committee also mentions that when placing children outside their natural family background, consideration must be taken of the fact that children feel better in their own environment. If it is possible, they should stay in their own community. The Committee uses the communities of indigenous populations as an example; when providing protection to children from those communities, account should be taken of the specific family system, culture, and values of such communities, as well as of the child's right to preserve his/her original identity.<sup>15</sup>

Continuity in a child's upbringing is construed as the continuity of contact with parents and the original family, as well as with a wider community; such continuity should be preserved even in cases of adoption. Continuity in upbringing should also cover the possibility of finding a foster or adoptive home with the same cultural (i.e., not only ethnic) origin, or, for example, the possibility that some workers at an institutional care facility are from the same cultural background, or that such an institution is located in a respective community. Another important aspect is the issue of language, to the effect that a child can learn its mother tongue even if it is placed in another language environment.

This ethnic, cultural, or religious continuity is important chiefly in the case of older children who are already aware of their origin, customs, and background, and who want to remain a part of it and develop its continuity. This concerns children from communities and families with different cultural values than those of the majority population, such as for example children of refugees, the placement of whom in families holding different val-

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<sup>13</sup> Although declarations of the General Assembly of the United Nations are not binding on the member states as they are only of a declaratory nature, the principles contained therein are important for the interpretation of the protection of rights of the child.

<sup>14</sup> DETRICK, S. *A Commentary on the United Nations Convention on the Rights of the Child*. pp. 337-338.

<sup>15</sup> Implementation Handbook for the Convention on the Rights of the Child. Third edition. United Nations Children's Fund 2007. In: *UNICEF* [online]. 2007. [2016-09-10]. Available at: <[http://www.unicef.org/publications/files/Implementation\\_Handbook\\_for\\_the\\_Convention\\_on\\_the\\_Rights\\_of\\_the\\_Child\\_Part\\_2\\_of\\_3.pdf](http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_2_of_3.pdf)>. See p. 288–289.

ues or practising a different religion would be forcible and inappropriate. However, desirable continuity lacks any sense in the case of very young Roma children in the Czech Republic. An alleged effort at continuity in upbringing with respect to their ethnic origin, which ostensibly justifies the keeping of records of their ethnicity actually only leads to the strengthening of stereotypes about the Roma ethnic group and to its segregation from the majority ethnic group. The point is that applicants' interest in taking Roma children is low, and thus it appears practical to record which children fall into this category. This approach, discriminatory in its nature, clearly contravenes the principle of "paying due regard to the desirability of continuity in a child's upbringing" contained in Article 20 (3) of the Convention.

The inappropriateness of placing of children into substitute family care based solely on ethnic criteria is also emphasised in the Commentary on the Convention. Any blanket requirement that children be only placed into the same ethnic or religious environment is incompatible with the flexibility that is an inherent part of the term "due regard to". The best interests of a child, in the sense of Article 3 (1) of the Convention, may not be served by the continuity of ethnicity, religion, or culture.<sup>16</sup>

Not only would said approach exclude the protection of a child, for example, in cases of violent and dangerous religious or other practices jeopardising the child's life, but, most importantly, it would mean that the application of Article 20 (3) of the Convention may be of discriminatory use. However, the Convention on the Rights of the Child can in no circumstances be interpreted as a discriminatory document. In this context, it is necessary to highlight Article 2 of the Convention, and the duty of all signatory states to ensure the rights set forth in the Convention to each child without discrimination of any kind. In the Czech Republic, Roma children comprise the largest share of infants in substitute care facilities for infants. If they are placed into institutional care based on the fact that they belong to the Roma ethnic group, then there is discrimination on the grounds of ethnicity.<sup>17</sup>

Article 20 (3) of the Convention on the Rights of the Child is closely related to the child's right to life and to survival and development under Article 6 of the Convention. There is also a close link between Article 20 (3) and Articles 7 and 8 mentioned above; as well as Article 9, which regulates conditions for the separation of a child from its parents; Article 16, regulating protection against arbitrary interference in the child's privacy; Article 18, on the responsibility of parents for the upbringing of a child and appropriate assistance from the state to parents bringing up the child; Article 21, regulating adoptions; Article 22, which concerns the situation of children seeking refugee status; Article 25 on the regular assessment of how a child is treated and on other issues connected with the placement of a child into a substitute care facility; and Article 30, which regulates the rights of children belonging to ethnic, religious, or language minorities or to an indigenous population.

Even when read in conjugation with said provisions, no such interpretation of Article 20 (3) of the Convention can be inferred according to which 'desirable continuity' in

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<sup>16</sup> *Ibid.*, p. 289.

<sup>17</sup> See also p. 9 of Rights of endangered children younger than 3 years of age. Termination of them being placed in institutionalised care. The United Nations, the UN Regional Office for Europe. In: *Právo na dětství* [online]. [2016-10-20]. Available at <<http://www.pravonadetstvi.cz/dokumenty/?startPagingPosition=12.>>

a child's upbringing would mean ethnic continuity, or in other words preference for the preservation of ethnic continuity. It has already been said that such a requirement would be discriminatory in nature. The basic purpose of Article 20 (3) of the Convention on the Rights of the Child is securing the most appropriate substitute care for a child, preferably of a family type, not to ensure the continuity of the child's ethnic origin.

If follows from the above-mentioned facts that the phrase “due regard to desirable continuity in a child's upbringing” cannot be interpreted as meaning that signatory states of the Convention are required to look into and determine the ethnic origin of children and to guarantee ethnic continuity when raising them. The opposite approach would mean that the Convention requires that when arranging substitute family care, children of a particular ethnic origin be placed only in substitute families of the same ethnicity. Such an approach would mean that children not belonging to the majority ethnic group could not be placed into families of the majority ethnic group, which would basically make it impossible for children of other ethnic groups to be placed into substitute family care. Not to mention that such a means of the “ethnic selection of children” would represent segregation between children belonging to the majority ethnic groups and children of other ethnic groups.

It can also not be inferred from Article 20 (3) that the respective national bodies of signatory states would be authorised to determine the ethnic origin of children, or as the case may be of their parents, for the purposes of arranging substitute family care. The decision about ethnic origin is made by the person concerned, or, in the case of children, by a statutory representative; a choice made is not reviewable.

What is also important for the interpretation of Article 20 (3) of the Convention on the Rights of the Child is the priority given to substitute family care over institutional care, which follows from said Article and from the order of the types of substitute care therein. Placing a child into “suitable institutions for the care of children” should be the last resort.<sup>18</sup> To this effect, the Committee on the Rights of the Child requires that the States Parties to the Convention make the effort to ensure that a child is placed into institutional care only if it is impossible to arrange for substitute family care for that child.<sup>19</sup>

The Committee also points out that the placement of a child into institutional care is considered inappropriate particularly in the case of very young children. Institutional care cannot provide conditions for healthy mental development and may have a long-lasting, serious, and negative impact on children's further social development, particularly for children under the age of three. Early placement of a child into substitute family care is truly important for his/her future. This is why the Committee on the Rights of the Child calls upon the States Parties to the Convention that they reinforce all forms of substitute family care that can guarantee continuity in a child's upbringing and relationships, and that can create opportunities for forming new relationships based on mutual trust and

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<sup>18</sup> Implementation Handbook for the Convention on the Rights of the Child. Third edition. United Nations Children's Fund 2007. p. 282 and DETRICK, S. *A Commentary on the United Nations Convention on the Rights of the Child*. p. 336.

<sup>19</sup> Implementation Handbook for the Convention on the Rights of the Child. Third edition. United Nations Children's Fund 2007 p. 282 et seq.

respect, for example, by way of foster care or adoption.<sup>20</sup> This is the meaning in which “desirable continuity in a child’s upbringing” is interpreted, i.e., as facilitating the continuity in upbringing and making it possible for a child to create affection with the persons caring for him/her.

“Desirable continuity in a child’s upbringing” is chiefly represented by an opportunity for a child who cannot grow up in his/her own family to be brought up in substitute family care as the first option. Ethnic origin is just one of the criteria when looking for a suitable solution, and must be considered through the prism of the aforementioned principles. In no case can the criterion of ethnic origin be applied in such a way as to exclude the child’s placement into substitute family care.

In conclusion, it should be noted that a principle which is important from the point of view of continuity in upbringing is the wish and will of the original family, or the child, provided that this can be fulfilled. If the persons concerned do not express their opinion on the issue of their ethnic origin and its continuity, it is not possible to ‘objectively’ decide about such issues in place of those persons. If it were, the purpose of Article 20 (3) would lose its sense.

## SUMMARY

The practice of determining and recording a child’s ethnic origin by social-legal protection bodies in the Czech Republic when arranging substitute family care is in contravention of the constitutional and legal principles regarding the prohibition of discrimination and the protection of personal data. The ethnic classification of children based on an assessment carried out by social workers, and particularly the classification of children as being Roma or half-Roma, is a suspicious method of racial classification based on physical features (colour of skin, hair, etc.). A classification that determines the ethnicity of a child independent of his/her will, or rather the will of his/her parents, discriminates against such children in terms of their chances of being placed in substitute family care. A separate question is the issue of the constitutionality of s. 27 (1) (a), s. 27 (2) (a) (i) and s.27 (2) (b) of the Act on the social-legal protection of children, which empowers Regional Authorities to carry out expert assessments of the ethnic background of both children and applicants for substitute family care.

In a democratic society, it is not possible to determine ethnic origin irrespective of the will of the person whose ethnicity is in question. The substance of the prohibition of discrimination on the grounds of ethnicity is that no one should be discriminated against because of his/her dissimilarity based on any criteria whatsoever, including physical features that do not depend on one’s own will. Likewise, there are no ‘objective’ criteria that can be applied when classifying people into various ethnic groups and subgroups.

Everyone has the right to freely choose his/her ethnic affiliation; in the case of children it is only their parents (statutory representatives) who can make such a choice; their choice

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<sup>20</sup> Committee on the Rights of the Child, General Comment No. 7, 2005, CRC/C/GC/7/Rev. 1, s. 36, cited from Implementation Handbook for the Convention on the Rights of the Child. Third edition. United Nations Children’s Fund 2007. p. 282.

cannot be reviewed. A decision whether one claims allegiance to a particular ethnic group, or to a majority ethnic group, cannot be reviewed or replaced by a decision from bodies for the social-legal protection of children.

The main purpose of Article 20 (3) of the Convention on the Rights of the Child is to ensure the best interests of a child when arranging substitute family care. It is in the best interest to find an opportunity for a child to be brought up in substitute family care and not in institutional care, which should only be a last resort. In this respect, it is necessary to interpret “the desirable continuity in a child’s upbringing” as making the continuity in upbringing and relationships between a child and the persons who raise him/her possible.

Ethnic, cultural, and religious continuity in upbringing from the point of view of respecting different cultural values is not relevant in the case of young children from Roma and other ethnic groups who are waiting for substitute family care in the Czech Republic; it should not be confused with mere continuity of ethnicity. The Commentary on the Convention emphasises that any blanket requirement that children be placed only into the same ethnic or religious environment is against Article 20 (3) of the Convention. The best interests of the child may not be served by the continuity of ethnicity, religion, or culture.<sup>21</sup>

The criterion of a child’s ethnic origin should not be used to exclude a child from the possibility of being placed into substitute family care. The practice of determining and recording children’s ethnicity by social-legal protection bodies leads to the opposite result to the one assumed by Article 20 (3) of the Convention: it reinforces the segregation of children of different ethnicity and deprives them of the chance of being brought up in family care.

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<sup>21</sup> See also Implementation Handbook for the Convention on the Rights of the Child. Third edition. United Nations Children’s Fund 2007. p. 289.