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Ingi Iusmen: The Transformation of Child Protection in Romania: Institutions, Instruments and the Dynamics of Change

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Abstract

This paper explores the transformation of child protection in Romania as part of EU accession conditionality. Several questions related to the transformations underlying the Romanian child protection are examined: first, what were the problems faced by this area and what changes occurred in order to address them? The main foci are the legislative, institutional and the more general system of child welfare that had to meet the EU conditions. Second, the main instruments and mechanisms underpinning change are scrutinised in order to answer how those particular changes occurred and how effective those transformations were. Third, primarily rationalist and to a certain extent sociological theoretical models are identified as explaining the dynamics of the changes in child protection.

The main problems faced by this human rights area were mainly material and a communist institutional and legislative system of child protection. At the EU's pressure and recommendations, Romania reformed its child welfare system and redesigned its legislative framework in order to be in line with the European standards of and practices in child protection. The EU played a crucial role in forging change via its financial assistance, its technical support and its employment of international instruments to foster change. By the time of accession, the Romanian child protection system had been redesigned and was deemed a model of child protection which surpassed even the child welfare systems of some of the Member States.

The empirical findings of this research are based, firstly, on documentary analysis, i.e. the main Regular Reports of the European Commission and the Reports of the European Parliament on the level of progress of this human rights area as part of the political accession criteria. Interviews with 'elites' were carried out through conversations the main members of the Romanian team in the Commission who were involved with child protection and the EP's rapporteur for Romania, the Baroness Emma Nicholson. Thus, qualitative methods, i.e. semi-structured interviews, and documentary analysis underpin the conclusions of this paper.

1. Introduction

The latest EU enlargement was an unprecedented process in terms of the conditions which candidates had to meet and also in terms of the level of the EU involvement in forging extensive changes in these former communist countries. The Eastern enlargement was quantitatively and qualitatively distinct from the previous enlargements due to, on the one hand, a more matured and hence different Union, but also due to, on the other hand, a more complex accession policy applied to candidates

Within this context, human rights conditionality had a significant leverage in changing the human rights protection of the CEECs in order to meet the Copenhagen political criteria. Two points need to be made here. First, the political criteria of accession – including human rights – are non-negotiable: applicants are supposed to meet the political conditions before the official accession negotiations begin and the EU candidates must ensure that the level of human rights protection meets the EU requirements throughout the negotiation process. Second, although human rights have always been at the heart of European integration, the Commission has no internal authority in this field and, furthermore, there is no human rights *acquis* as such at the EU level.

The transformation of human rights policies in Romania occurred within the context of Eastern enlargement and of the process known as Europeanisation East, i.e. the impact of the EU's legislative and institutional frameworks on the candidates, and in this case human rights protection. This paper examines the transformation of child protection in Romania as part of the EU accession conditionality. The Romanian case study provides insight into the EU's accession conditionality – in this case, human rights conditionality – for a specific reason: child protection was an extremely problematic area in Romania and thus the EU leverage and impact on this human rights area is deemed highly significant and elaborate.

This paper explores several questions related to the transformations underlying child protection in Romania. Firstly, it aims to address the breadth and depth of changes: what were the problems faced by this area and what changes took place in order to address them? The main foci will be the legislative, institutional and the more general normative frameworks that had to adapt to the EU requirements. Secondly, the main instruments and mechanisms underpinning change will be explored – how those particular changes occurred and how effective those transformations were? Thirdly, what theoretical models explain most accurately the level and extent of these changes?

It should be noted that in this paper, transformation is primarily understood as the legislative, institutional changes, and at a deeper level, the norms and ways of doing things that had to be adjusted to the EU requirements. This paper is organised thus: the first section explores the problems in child protection, while the second and third sections examine respectively the changes that took place in this human rights area and the EU instruments employed to forge them. Finally, the last section focuses on the main theoretical models which explain the dynamics of the transformation of child protection in Romania.

2. Child Protection: Problems

The situation of child protection attracted the attention of the Commission from its first Opinion on Romania's Application for Membership (1997): the shortcomings spotted by the Commission and other EU institutions, for instance the European Parliament, were connected both to the organisational framework of child care institutions – still bearing the imprint of the communist childcare institutions – and financial, administrative and legislative problems. It should be noted that the main focus of child protection was the situation of children in residential care or institutions. As the vast majority of institutionalised children were deemed to be adoptable by the system, the crux of the child question was international adoptions.

The importance attached to this human rights area within the political criteria was great. For instance, in 2000 Romania's ability to meet the political criteria was dependent on Romania's resolution of the child

care crisis, while in 2004 the accession negotiations came close to a halt at the EP rapporteur's – Baroness Nicholson – suggestion based on the international adoption question.

2.1. Poor Living Conditions in Old-Style Residential Institutions

First, the situation of the institutionalised children, i.e. children living in state orphanages or institutions, was particularly characterised by poor living conditions, a lack of basic health care¹ and a deplorable material situation. This poor situation in child protection was a legacy of the system for childcare introduced during communism: according to this system, children were abandoned in state orphanages rather than placed in foster homes². The legacy of the communist policy was exacerbated by the failure of the post-1990 governments to reform child protection and to redress the situation. The poor living and material conditions in the large residential institutions led to the so-called 'childcare crisis' in 1999 which made the Commission request that the Romanian government give top priority to child protection.

2.2. Legislative System and International Adoptions

A quick solution to the situation of children in institutions was international adoption. The institutionalisation law (11/1990) together with the abandonment law (47/1993) followed by the legislation on adoptions (25/1997) set up the legal framework for the emergence of a Romanian international adoption market which was offer-driven³: Romania was a supplier in the activities of agencies specialising in international adoptions. Furthermore, a so-called 'points system' provided adoption NGOs with significant clout in terms of international adoptions: in return for financial or other support to child protection, Romanian NGOs received points, on the basis of which they received children for international adoption. The 'points system' prioritised the best interest of adopters and not the best interest of children for three reasons: it generated money without putting the interests of the child first; it discouraged domestic adoptions and non-adoptable children were adopted⁴.

Apart from this legislative framework facilitating children's institutionalisation via abandonment and thus promoting inter-country adoptions, the entire child protection system was deeply corrupt: at the heart of the Romanian children's dossier was a true child market.⁵ According to the EU and international evaluators, there was an entire corrupt network supporting the international adoption of children in exchange for money: these were the adoption NGOs and their international counterparts, the Romanian Committee for Adoption, directors of child care institutions, local judges and the international lobby. Additionally, most of these children were not orphans and hence non-adoptable: they were cared for in institutions due to their families' poverty. Thus, children's parents were bribed to sign the adoption paper so that these children could be declared abandoned and hence suitable for international adoption. In short, the entire system was channelled towards international adoptions of children in exchange for money and as such it violated children's rights as it aimed to provide children for families and not families for children⁶.

It should be noted that according to the international conventions – such as United Nations Convention for the Rights of the Child (UNCRC, 1989) and the Hague Convention (1993) – international adoptions are the last resort, i.e. they come after foster care, institutional care and domestic adoptions. Only after all these options are eliminated, can international adoption be considered.

1 Regular Report on Romania's Progress Towards Accession, 1999 and 2000.

2 'The system introduced in 1970 in an attempt to boost population growth was not accompanied by the requisite machinery for helping birth families for placing children in foster homes; as a result many children were abandoned in squalid state orphanages'. See Regular Report on Romania's Progress Towards Accession, 1999.

3 Independent Group for International Adoptions Analysis Report, 2002.

4 US Report on International Adoptions, 2001, cited in Post, Roelie: Romania. For Export Only, Amsterdam: Eurocomment Diffusion SA, 2007.

5 Post, Roelie: Romania. For Export Only, Amsterdam: Eurocomment Diffusion SA, 2007.

6 Ibid.

2.3. Financial Resources and Administrative Shortages

Financial problems further aggravated the situation of child protection in Romania. In spite of the international financial assistance – provided mainly by the EU, but also by the World Bank, the Council of Europe, etc. – managed by Romanian authorities and NGOs, child protection and child welfare still suffered from severe lack of funding, which was partly due to – according to the Commission – the government's unwillingness to allocate more funds for this policy area. According to the Romanian government, the main reasons for the childcare crisis and the general poor situation of child protection were twofold: poor management of the available funds and the practice of abandonment caused by poverty. In the same vein, the lack of trained staff and administrative shortcomings in dealing with child protection issues aggravated the Romanian child protection situation.

2.4. Children's Rights and Standards of Protection

Last, the Commission noticed in its evaluation that Romania lacked the necessary standards and legislation to protect children's rights to bring the Romanian child protection system in line with the European ones, i.e. UNCRC – which is part of the human rights *acquis* – and the Member States' practices on child protection. The adjustment of child protection legislation followed a two-stage process: first, Romania had to adopt uniform national standards of child protection; second, the Romanian laws on child welfare had to correspond both to the international and European laws on and standards of child protection. One way of achieving this was by signing or respecting the Council of Europe and UN's conventions and protocols on child protection.

3. The Commission's Recommendations and the Actual Changes

3.1. Reform of the child protection system

The Commission's evaluation of the changes in child protection followed the assessment of the situation on the ground, i.e. the main shortcomings of and the latest developments in this policy area, together with its own suggestions and recommendations in order to redress the underlying problems of child protection. The Commission and the EP's rapporteur Emma Nicholson spoke with one voice and demanded three crucial changes in this area: first, the closure of old-style institutions; second, the support of families to prevent abandonment; and third, new legislation that should put children's rights and the best interest of the child at the heart of the child protection system.

3.1.1. National standards

In 1998, the Commission referred for the first time in its Report to the imperfections of the system and to what should be done: institutionalised children were to be reintegrated into their families; at the same time it welcomed the legislation according to which responsibility for child protection was transferred to the local administration. One of the core problems identified by the Commission was the lack of *national standards* of care and subsequently the need to have a single authority responsible for setting those standards and establishing policies related to child care⁷. Until 2004, the Commission criticised Romania for lacking a uniform set of national standards of child protection: in 2004 national standards for child protection services were adopted⁸. The lack of adequate child protection standards, together with the poor living conditions in the childcare institutions and poorly trained staff escalated in what the Commission called in its 1999 and 2000 reports the 'crisis in child care institutions', which was mainly due to humanitarian needs.

7 Regular Report on Romania's Progress Towards Accession, 1999.

8 According to the Regular Report on Romania's Progress Towards Accession, 2004.

3.1.2. National Strategy

The main problems of the Romanian childcare system were poor living conditions and the lack of basic health care. The Commission recommended in its reports that one way to solve the child protection crisis was both by increasing the financial resources – allocated for this area by the government – and by a better management of the available resources. However, apart from the financial aspect, the Commission recommended⁹ that the Romanian government should adopt a *national strategy* on the reform of the childcare system. A National Strategy on the Reform of the Childcare System (2000) had as its basic goals a decrease in the number of institutionalised children and in the number of children at risk of being institutionalised¹⁰. The Romanian government eventually adopted in 2001 a revised Strategy on the Protection of Children in Need (2001–2004), which had to be implemented at a national level while the reform of child protection was closely monitored by the Commission. The Strategy was supported by Phare and it focused on three main issues: the closure of old-style institutions, the de-institutionalisation of children and the creation of suitable child protection, which was in line with the Commission's requirements from the Romanian government.

However, the Strategy had some shortcomings as it did not fully address – according to the Commission – areas such as the care of young adults leaving the residential care system, the provision of support to families and mothers and policies to prevent abandonment¹¹.

3.1.3. Closure of Old-Style Institutions

The reform of child protection – in order to tackle the poor material situation of childcare institutions – was to be achieved via the closure of large old-style institutions and the adoption of European laws and standards of child protection. One of the key institutional reforms requested by the Commission was the *closure of the old-style institutions* of public care. Throughout the evaluation period, the Commission employed two measures in order to assess progress in child protection: first, the reduction of the number of children in public care, and second, the decrease in the number of residential institutions or their restructuring into family-type modules¹². In the final report, the Commission approved the improvements in child protection: a significant reduction in the number of institutionalised children was signalled and the improvement of the living conditions in the remaining institutions¹³. It was also stressed that the term 'institutionalised' children is not synonymous with abandoned children: the children in institutions have parents and families, but these are economically unable to care for them on a full basis and thus these children are not adoptable. Taking into account this clarification in the meaning of 'institutionalised' children, the number of abandoned children decreased and the number of prospective adoptive families in Romania was higher than the number of adoptable children in 2006¹⁴.

Additionally, these changes were to be accompanied by greater financial resources allocated to this human rights area. Put simply, what the Commission recommended be put into practice was the following: a reduction in the number of childcare institutions by finding alternative solutions for children living in these institutions – such as foster care or services to help families keep their children, standards of child protection, a single authority with clear responsibilities in charge of child protection, better staffing and more financial resources in order to counter the administrative and institutional ineffectiveness.

9 Starting with the Regular Report for 2000.

10 Regular Report on Romania's Progress Towards Accession, 2000.

11 Regular Report on Romania's Progress Towards Accession, 2001.

12 Regular Report on Romania's Progress Towards Accession, 2003.

13 Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, September 2006.

14 Romanian Child Rights Experts Comment on Child Welfare Reform, 2006.

3.2. Moratorium on Inter-Country Adoptions

The crux of child protection was *international adoptions*: Romania had to reform its legislation on international adoptions in order to meet European practices on international adoptions. The international adoptions situation could have jeopardised Romania's accession negotiations: EP's rapporteur Emma Nicholson deemed that the situation was so serious that she requested a halt to negotiations if Romanian authorities did nothing to redress the situation.

A High Level Group – made up of the EP's rapporteur on Romania, Baroness Emma Nicholson, and representatives of the Romanian government, the Commission, the World Bank, UNICEF and the WHO – was set up in order to monitor the measures taken by the Romanian officials in dealing with the international adoptions crisis. A *moratorium* – particularly advocated by the EP's rapporteur – was imposed as a 'mechanism to end practices that were incompatible with Romania's international obligations under the United Convention on the Rights of the Child and which risked opening opportunities for trafficking in children and other forms of abuse'¹⁵. The problem of Inter-Country Adoptions (ICA) involved both domestic and international actors and revolved around domestic legislative and institutional issues, but international interests – represented by the pro-ICA lobby – were also at stake.

The gist of the problem lay in the perception of Romania as a 'child market', but once the new legislative and institutional structures were put in place in 2005, the Romanian system of child protection was deemed a model for the rest of Europe. The ICA practice was seen as a means of getting children out of the old residential institutions and placing them into families abroad. From 1990 to 2000, ICA was poorly regulated, which meant that adoptions were decided by local judges and infringed international legislation – namely the United Nations Convention on the Rights of the Child and Hague Convention on Inter-Country Adoptions – according to which international adoptions were to be seen as a last resort option and the preservation of the background – ethical, cultural etc – of the child had to be considered. However, in the Romanian practice of ICA exactly the opposite was the case: international adoptions had priority over national adoptions or reintegration of children into their families. Ultimately, there was no monitoring of or investigation into what happened to all the children who were adopted internationally: thus, a number of 30,000 children were adopted between 1990 and 2004¹⁶ due to an unregulated system with no post-adoption monitoring.

In spite of the high pressure by the pro-ICA lobby on the Commission and EP's rapporteur to demand that Romania lifted the ban on ICA, the Commission's formal position on this issue was clear: the EU was not against ICA as such, but against the corruption and bad practices in child protection¹⁷.

3.3. New Legislation on Children's Rights

In 2004 Romania adopted legislation that limited inter-country adoption to extreme exceptions and, according to the Commission, the new rules met the requirements of the UN Convention on the Rights of the Child and the practices of the EU Member States¹⁸. The ban on ICA was upheld by the new legislation – which entered into force in 2005 – and it was stated that ICA was no longer a child protection issue due to the new legislation which was deemed to be in line with the European standards. In the final, Report the Commission further welcomed the new legislation on child protection and adoption, stressing the need to implement the new legislation as the crucial recommendation for the Romanian authorities¹⁹.

The new legislation on child protection and child adoption – law no. 272/2004 and law no. 273/2004 – was highly innovative and it established a legal system of protection that had at its centre the best interest of

15 Regular Report on Romania's Progress Towards Accession , 2001.

16 Nicholson, Emma: *Civil Society and the Media in Romania*, in Phinnemore, David (ed.): *The EU and Romania. Accession and Beyond*, London: Federal Trust, 2006, pp. 64–77, here p. 76.

17 Post, Roelie: *Romania. For Export Only*, Amsterdam: Eurocomment Diffusion SA, 2007.

18 Regular Report on Romania's Progress Towards Accession, 2004.

19 Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, September 2006.

the child. The 'superior interest of the child' (Article 2a) was the core principle that had to be respected during the adoption procedure: this meant that when selecting the adoptive family, aspects related to the cultural, ethnic and linguistic identity of the child would have to be considered (Article 2c). Thus, national adoptions and particularly adoptions from the same geographical area as the child's were the top priority according to the new legislation (Article 26-3). Additionally, apart from the geographical-local aspect, the relatives or extended family of the child had priority in the selection process (Article 26-2). Moreover, the child's biological parents – where applicable – had to give their consent for adoption (Article 12) and in accordance with the principle of the child's superior interest, the child's needs, opinions and wishes were to be taken into account when processing adoption (Article 27).

The new legislation upheld the ban on ICA by providing only one exception for international adoption: when one of the members of the adopting family was the grandparent of the child (Article 39). The authorisation of and the procedure of international adoptions had to follow the prescriptions of the Hague Convention on Inter-Country Adoption. Unlike the previous legislation, and crucially important from the EU's perspective, was the fact that the new legislation provided for post-adoption monitoring structures and measures (Article 44): the Romanian adoption agency which authorised the adoption had to provide information on the development of the child for at least two years. Equally important, and in line with the Hague Convention provisions, Romanian adoption agencies were to prevent any financial gains or other benefits that could result due to ICA: apart from the adoption fee, no other donations or sponsorships were to be received by the institutions processing international adoptions (Article 67 and 68).

Apart from the new legislation and measures on ICA, the new legislation addressed the situation of institutionalised children. According to the EU's evaluation, the new legislation aimed to get most of the children out of institutions and back into their families or place them with foster families and, at the same time, it aimed to prevent infants from entering institutions in the first place. Additionally, a great number of old-style residential institutions were closed. All these aspects brought the Romanian legislation on child protection and ICA in line with the EU requirements and it was recommended as a model that was in many ways interesting and revolutionary even for some Western European States²⁰.

The actual implementation of the newly adopted rules and laws was the main concern of the Commission in its final Reports. Although the new legislation started to be implemented in 2005, the effective implementation of all these new child protection rules was requested by the Commission. The new legislation started to bear fruit by mid-2005 and significant progress was achieved: alternative childcare services were created, i.e. children were placed with foster parents, and the number of abandoned children started to decrease²¹. Prior to accession, there were new legislative and institutional structures in place for child protection, which signalled positive prospects for child protection after the accession.

The new legislation together with the reform of child protection meant that the entire Romanian child protection system had to be redesigned: the focus of the system shifted from institutional care to family care, with significant emphasis being put on the prevention of child abandonment and hence institutionalisation and on the provision of new community services, such as foster care or the return of the child to its natural family. The fundamental principles behind Romania's children's rights law were in line with the UNCRC and the Hague Convention, and they focused on the best interest of the child, the right to life and development, non-discrimination and the child's rights to free opinion.

The backbone of the new legislation was the prevention of abandonment by targeting the families at risk and making institutional care the last option of child protection. Thus, under the new legislation the priority is to provide the necessary support to families at risk so that babies are not abandoned and families are

20 According to the International Conference on Child Rights held in Bucharest, February 2006, in Romanian Child Rights Experts Comment on Child Welfare Reform, 2006,.

21 Romanian Child Rights Experts Comment on Child Welfare Reform, 2006.

not broken up²². At the same time, the new legislation makes the family legally responsible for bringing up the child, not the state, which is a radical shift from the previous system.

4. EU Instruments and Mechanisms

4.1. Financial Assistance

The EU allocated *financial support* via the Phare programme to help Romanian authorities develop modern child welfare services. Throughout the Commission's evaluation period, the amount of financial assistance channelled via the Phare programme increased substantially and the Commission gradually became involved with how the funding reached its targets. For instance, special funds under Phare were particularly targeted at child protection: the amount of funding increased and the Commission's guidance on how the funding should be spent became detailed. Hence, Phare played a role in 'developing a framework for the implementation by local authorities of projects introducing modern child welfare services and reducing institutionalisation of children in line with government policies for the reform of child protection'. The Phare programme was targeted at improving the poor and old-style system of child protection by assisting the development of modern child welfare services through projects which were to be proposed and implemented by local authorities²³.

Another aspect of the EU's financial support was the 'Children First Programme'. This programme focused on the closure of institutions, the creation of alternative services, the improvement of foster care and the contracts for projects given to local authorities, which made them responsible for child welfare. Ultimately, an extensive public information campaign on child protection was funded by the EU²⁴.

4.2. Twinning

Twinnings from the Member States worked alongside Romanian civil servants on child welfare training and measures of child protection. They drafted their own reports on the level of the progress on the ground and made recommendations to the Commission.

4.3. Member States' experts

The Independent Panel of Experts on Family Law was set up in order to advise the Romanian government on the new legislation. From 2003–2005, this Panel provided their expertise and know-how in the drafting of the Romanian children's rights legislation. The mechanism of independent experts is employed in cases where there is no detailed Community legislation to act as guidance – in this case children's rights legislation – and thus the Commission uses the experts' knowledge in helping candidates meet the accession criteria. The Romanian legislation needed the Panel's approval before it was passed.

4.4. International Instruments

The Commission recommended that Romania adopts some of the international instruments of child protection. For instance, during the Inter-Country Adoption crisis Romania became a party to the UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Moreover, the moratorium was imposed on Romania's international adoption practices due to its failure to respect its obligations under the Hague Convention on Protection of Children and Cooperation in respect of Inter-Country Adoption and UNCRC obligations. In 2004, the Commission concluded that the new legislation met the requirements both of the UNCRC and the practices of the EU Member States.

22 National Authority for the Protection of Child's Rights, *Child Welfare in Romania*, 2006.

23 Regular Report on Romania's Progress Towards Accession, 2002, 2003.

24 Regular Report on Romania's Progress Towards Accession, 2001.

5. Theoretical models

There are two theoretical models that explain change due to Europeanisation: rationalist and sociological institutionalism. While rationalist approaches focus on the utility-based, i.e. cost-benefit, dimension of change, the constructivist or sociological approaches describe the ideational and norm internalisation aspects of change. Rationalist approaches describe a material pattern of change: the transformation of human rights policies and hence compliance with EU requirements impose material costs at the domestic level. However, transformation occurs if domestic costs are lower than the benefits of transformation, or if, in the long term, the incentives of transformation outweigh the short term costs of change. Conversely, transformation – according to the sociological framework – occurs when norm internalisation and social learning are evinced between the supranational and national levels.

The transformation of child protection in Romanian neatly fits within a rational institutionalist theoretical model. The EU accession conditionality meant that Romania had to reform its child protection system in order to meet the EU conditions and thus join the EU. Thus the main carrot was EU membership, while the sticks – i.e. the costs underlying the whole process of reform and change – in spite of their shortcomings, were perceived as less significant in the long run if compared with the benefits of membership. A cost-benefit analysis demonstrates that the costs of the system overhaul were outweighed by benefits due to the EU's substantial financial and technical support.

A processes of social learning and ways of doing things also accompanied the changes in child protection. This was particularly due to the EU twinning and role of EU experts in transferring the know-how and normative approach to children's rights. According to the data, the mentalities of the people working in the system started to change, although a deeper change at an ideational level is a long term process and is not that obvious. This theoretical framework is in line with Checkel's²⁵ view that rational institutionalism and sociological institutionalism should be seen as complementary rather than as opposite explanations.

6. Conclusion

This paper examined the transformation of child protection in Romania as part of EU accession conditionality. The problems underlying the Romanian child protection system were firstly spelled out, while secondly the transformation that took place together with the Commission's recommendations were examined. Thirdly, the main EU instruments employed to forge change were scrutinised, and finally primarily rationalist, and to a certain extent sociological, theoretical models were identified as providing the explanatory frameworks for the transformation of the Romanian child protection.

25 Checkel, Jeffrey T (ed.): *International Institutions and Socialization in Europe*, Cambridge: Cambridge University Press, 2007.