International Social Service
Service Social International
Servicio Social Internacional
General Secretariat • Secrétariat général • Secretariado General

International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC)

Monthly Review n° 2/2005
February 2005

Editorial:
One child is equal to another:
The principle of non- discrimination applied to adoption

The ban on discrimination is a basic principle of the protection of human rights in general and the rights of the child in particular. It is enshrined in numerous international instruments and cannot be subjected to any derogation (peremptory norms). The United Nations Convention on the Rights of the Child stipulates in particular that its States parties must respect and safeguard the rights which it sets forth « *without discrimination of any kind,* irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. » (art. 2, para. 1). Only an application of the Convention true to this principle ensures that *the best interest of the child* is respected.

Nonetheless, this principle does not exclude all distinction between individuals. Only those which are not based on legitimate grounds are prohibited. *It may even be that the obligation of non-discrimination imposes to create advantages for certain categories of people in compensating for the social imbalances that are at the root of inequalities.* The principle envisaged here therefore, by virtue of its very generality, must be specified according to the fields in which it needs to be applied. **In matters of adoption, its implications are manifold and call for shades of meaning.**

Domestic/ inter-country adoptions

The Convention on the Rights of the Child, thus, stresses the risk of inequalities that may be linked to the distinction between domestic and inter-country adoption. It prescribes that States parties must ensure, « that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption » (art. 21, letter c). Practice shows, however, that the opposite hypothesis must be envisaged with just as much, if not greater, attention. It often happens, in fact, that the safeguards granted by domestic adoption procedures do not achieve the level of protection foreseen by inter-country adoption. While, therefore, article 21, letter c, of the Convention retains all of its relevance, it is also essential to recall that the States also bear responsibility for ensuring that children adopted in their own country benefit, particularly, from legal and psychosocial guarantees (intervention of qualified and supervised professionals, checking the child's adoptability and the suitability of the prospective adoptive parents, preparing the child and the parents, professional matching, post-adoption support) equivalent to those provided for inter-country adoption.

Adoptions within/ outside the framework of The Hague Convention of 1993 (THC-1993)

Since THC-1993, like all international treaties, is only binding for member States, the way inter-country adoption procedures function risks being different depending upon whether or not the States concerned are parties to the Convention. If they are not, basic guarantees may not be applied to the detriment of the child's best interest. This is one of the reasons why the Special Commission on the practical operation of THC-1993, during its meeting of 28 November-1st December 2000 organised under the Hague Conference on Private International Law, recommended that States Parties « *as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-Contracting States*. »[1].

The ISS/IRC recommends, therefore, that the countries of origin that are parties to THC-1993 make provision for parallel guarantees for all their children adopted at the inter-country level, whether it be in a

[1] Report and Conclusions of the Special Commission, April 2001, www.iss-ssi.org/Resource_Centre/Tronc_CI/reportspecom2000.PDF, par. 56, recommendation n°11.

32, Quai du Seujet - 1201 Geneva – Switzerland
Tel.: +41 22 906 77 00 – Fax: +41 22 906 77 01– **New e-mail address: irc-cir@iss-ssi.org** – Web page: www.iss-ssi.org

country that is a party to the Convention or not. Similarly, the receiving countries that are parties to THC-1993 should make provision for parallel safeguards for all children adopted by their residents (for example, the ban for the adopters, of going through intermediaries in the countries of origin whose reliability has not been checked, or of choosing their child), whether or not they come from a State party to the Convention[2].

The States concerned should be particularly attentive to the rules that stipulate the subsidiarity of adoption, checking the adoptability of the child, the combat against undue material gains, co-operation between Authorities of the countries of origin and the receiving countries, the accreditation of intermediaries in matters of adoption, information of all parties, checking the suitability of the prospective adoptive parents and the ban on all contacts between the latter and the parents or guardians of the child before the child's adoptability and the suitability of the prospective adoptive parents have been determined by the competent authorities.

Adoptions (domestic and inter-country) going through an adoption accredited body/ independent adoptions

The choice of prospective adoptive parents whether or not to resort to an adoption accredited body can also be a factor of inequality between children. The accredited bodies are particularly guarantors, with and under the control of the States, of the existence, professionalism and the multidisciplinary nature of the medical, legal and psychosocial work done (information, preparation, support) for the benefit of the child, the family of origin and the adoptive family. They assume the role of "third party » on the spot, and carry out the necessary intervention and mediation of society and the State in protecting children deprived of their family. Even in this case, it is essential to be sure that the children involved in the adoption procedure enjoy the same rights, independently of the public or private status of the accredited body in question, especially, in case of inter-country adoption, regarding the professionalism and reliability of the intermediaries in the country of origin.

In the case of independent adoption, this role of the third party does not arise and respect for certain safeguards may be missing. It is for this reason that the ISS supports adoption carried out through an accredited adoption body (see Editorials in Monthly reviews 70, www.iss-ssi.org/Edito.70.eng.pdf, and 71, www.iss-ssi.org/Edito.71.eng.pdf). If, however, independent adoption is authorised by certain States, the latter must be sure that all the functions of an accredited body (including, in the case of inter-country adoption, checking the reliability and training of the intermediary in the country of origin) are accomplished, with the same safeguards, by the official bodies concerned.

Non-related / Relative adoptions (domestic and inter-country)

The principle of non-discrimination also requires that relative adoptions (of the child of the spouse or of a child related to at least one of the adopters) benefit as far as possible from the same level of guarantees as non-related adoptions. This is particularly important as regards the respect for the principle of subsidiarity and the search for the best interests of the child, verifying the medico-psycho-social and legal adoptability of the child, as well as the suitability of the prospective adoptive parents, preparing all the interested parties and the follow-up to the situation. This is not systematically the case in current practice.

Adoption of children with special needs

In the case of children « with special needs », the principle of non-discrimination requires the adoption of *specific (positive) measures.* Here it is not a matter of avoiding an arbitrary distinction between the individuals concerned, but rather, on the contrary, of arranging things so that these children receive specific treatment adapted to their « special needs » (for a more detailed commentary on this topic, see the Editorial in Bulletin 67, www.iss-ssi.org/Edito.67.eng.pdf).

As demonstrated by the example of adoption, the principle of non-discrimination cannot be applied without previous evaluation. It has to be adapted to each context. Depending on the cases, it requires either to identify differences of treatments which cannot be justified under the best interest of the child or, on the contrary, to take specific measures aimed at compensating inequalities. Only this differentiated approach ensures that *one child is equal to another* in practice.

The ISS/IRC team

[2] The Belgian Law of 24 April 2003 envisages for example similar safeguards for all inter-country adoptions, regardless of the applicable law and whether or not the country of origin concerned is a party to The Hague Convention.

32, Quai du Seujet - 1201 Geneva – Switzerland
Tel.: +41 22 906 77 00 – Fax: +41 22 906 77 01– **New e-mail address: irc-cir@iss-ssi.org** – Web page: www.iss-ssi.org