Private and independent intercountry adoptions: Approaches in different countries through a socio-legal perspective

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ISS IRC
The International Social Service (ISS): 140 branches working across borders on the protection of children and families;

The ISS/IRC, unit of the ISS, financed by National Central Authorities (Governments) whose particular aim is to protect children deprived of their family;

Co-operation with the Permanent Bureau (HccH PB) in the framework of THC-1993 (ICA Convention): in line with the prohibition of private adoptions and the monitoring of independent adoptions by Cas and/or AABs.
OVERVIEW: Private and Independent adoptions

- ISS IRC
- International framework
- Regional framework
- National framework
- Sanctions
ISS/IRC: Social Legal approach

Private adoptions: prohibited;
Independent adoptions: prohibited unless full monitoring by CA and/or AABs.

International framework: (CRC and THC-1993)

Private adoptions: prohibited;
Independent adoptions: effective and systematic accreditation and monitoring.

Regional/European framework: The Council of Europe (COE)

Private adoptions: prohibited, no respect of the best interest of the child (threats and illegal activities); no national data (e.g. Germany);
Independent adoptions: prohibited, PAPs (dubious intermediaries, no legitimacy); CA/AABs (no full involvement and no safeguards).

National framework: Receiving Countries, Countries of origin and non-Hague Countries

Total prohibition of Private and independent adoptions: (e.g. Iceland and Haiti);
Monitored exceptions: monitoring by CAs (e.g. Sweden and Norway); Non-monitored exceptions (e.g. Italy and India).

Sanctions

Prevention: specific sanctions (e.g. Australia and Norway)
Post-sanctions: (e.g. Belarus, Brazil and Fiji).
I. ISS IRC: Legal and Social perspectives

• **International principles and standards:** UNCRC, HccH/PB and COE;
• **Best interest of the child:** respect of the safeguards preventing risks;
• **Monitoring process:** CAs or other competent authorities and AABs.

**ISS/IRC activity:**

• **Less autocracy and more practice;**
• **Child focused approach:** ban private adoptions as they are not safe for the child, as well as independent adoptions unless they are fully monitored by the CA by identifying potential risks that may occur for the child (*e.g. sale of children*) and related domestic sanctions.
ISS IRC following

1. **Private adoptions**: prohibited, **no prevention** (no assessment of the best interest of the child, no respect of international standards and safeguards); **risks** (adoption breakdowns and illegal practices).

2. **Independent adoptions**: prohibited, **no prevention** (no assessment of the best interest of the child, lack of monitoring process); **risks** (adoption breakdowns and illegal practices).
1.2 International framework (UNCRC)

1. Private adoptions: prohibited, **no individual channels and fundamental role of AABs.**

2. Independent adoptions: prohibited, **no effective and systematic accreditation and monitoring** *(sources: Committee at its sixty-second session, January-February 2013, Para 30).*
I.3 European Framework (COE): secure conditions and best interests of the child

“Governments of all Council of Europe member States should be invited to establish procedures aimed at removing some of the threats generated by independent adoptions. Certain receiving countries prohibit their citizens from adopting in a foreign country without engaging the services of an accredited adoption agency. Similarly, certain countries of origin also require prospective adopters to engage a recognised adoption agency”
COE following: German practices

1. **Private adoptions:** prohibited, prevention *(unsecure practices)*; risks *(illegal activities)*; lack of data *(no transparency)*.

2. **Independent adoptions:** prohibited, PAPs *(dubious intermediaries)* and no legitimacy of the process *(no monitoring by CAs and AABs)*.
COE conclusions

The Council of Europe explicitly invites biological parents and adoptive parents to avoid risks against their interest and those of the child concerned, through an insecure practice such as the private and independent adoptions are.
I.4 National Framework

1. **Private adoptions**: prohibited (by law).

2. **Independent adoptions**: prohibited (by law with some exceptions):
   - monitored exceptions by the Central Authority and/or AABs;
   - non-monitored exceptions: Italy (Tribunal for Minors); Denmark (intra-family adoptions without monitoring process); India (PAPs).
National Framework: total prohibition of private and independent adoptions

Iceland:
- Arts. 29 and ff. of the Adoption Act No. 130/1999 (**advance approval**).
- Art. 32: “A District Commissioner may revoke an advance approval if he believes that the circumstances of the applicants have changed considerably from the time of its issue or if important information has been proven to be wrong”.
- Art. 35: “Activities relating to the adoption of foreign children shall always be conducted with the best interest of the child in mind and no one may derive undue gains therefrom, financial or otherwise” (**adoption mediation**).

Haiti:
- Art. 6 of the “Loi réformant l’adoption de 2013”.
Particular cases (political strength beyond the prohibition):

**Australia:**
- Intercountry adoptions ad Hoc requests: policy paper explaining the general procedure in the case of independent adoptions *(For the different intercountry state legislation, please refer to the following: https://www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/Pages/Intercountryadoptionlegislation.aspx)*.

**Netherlands:** (private investigations are not possible).
- Judgment of January 14, 2004, the highest Administrative Court, “Raad van State”, mediation services.
- Investigations by the Dutch Authorities in the Country of Origins.
Monitored exceptions:

**Sweden:** Private adoptions are prohibited and independent adoptions are monitored by the CA
- **Exception:** Intra-family independent adoptions.

**Norway:** Private adoptions are prohibited and independent adoptions are monitored by the CA
- **Exception:** Ad hoc authorization.

**Flemish Belgium:** Private adoptions are prohibited and independent adoptions are monitored by the CA.
- **Exception:** « adoption indépendante : une adoption réalisée, le cas échéant moyennant l'intervention partielle d'un service d'adoption agréé, par le biais d'un contact étranger proposé par le candidat-adoptant, mais moyennant l'accord de l'autorité centrale flamande et le cas échéant, de l'autorité centrale du pays d'origine ». 
Non-monitored exceptions:

Italy:
- Exception: the Tribunal for minors allows the parents to undertake on their own some of the communication procedures mentioned in art. 31 (e.g. contacts with the competent authorities in the Country of Origin, transfer of the application documents and collection of information, etc.).

India:
- Exception: Independent adoptions.
Non-contracting States:

Russia (non-Contracting State of THC-1993): Private adoptions are prohibited. Independent adoptions are allowed for child’s related family but:

- **Training:** monitory process is ensured by a compulsory training to be fulfilled by the PAPs in their habitual residence or, if not possible, in Russia;
- **Child’s related family:** An exception is left to the immediate related family of the adoptee, the step father, the guardian or Adoptive parents whose adoption was cancelled;
- **Adoption approval:** must be given by the Courts of the place of residence of the adoptee.
II. Sanctions

If any gains are pursued by the PAPs in adopting a child, this is categorized as a sale of children, a crime under penal law.

➢ Article 2(a) of the OPSC defines the sale of children as:

"sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration".
II.1 Domestic sanctions

Specific sanctions:

- **Australia** (Private arrangements are illegal and criminal charges apply);
- **Norway** (Fines and prison up to three months).

Post-sanctions:

- **Belarus** (illegal transfer);
- **Brazil** (illegal gain from placement of children);
- **Fiji** (illegal gain from adoption processes).
CONCLUSIONS:

- **Total prohibition of private and independent adoptions** (e.g. UNCRC, COE, Iceland and Haiti).
- **Monitoring process**: independent adoptions (e.g. Sweden and Flemish Belgium); non-Contracting States (e.g. Russia).
- **Sanctions preventing risks** (e.g. Australia and Norway).
- **Best interest of the child and child focused approach** (e.g. ISS IRC).
Thank you!

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