

THE APPLICATION OF THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION OF 1993 IN BRAZIL¹

Marcos Vinicius Torres Pereira

Lawyer. Professor on Civil and Private International Law,
National Law School, Federal University of Rio de Janeiro.
mviniciusrj@hotmail.com

Lara Oliveira Gonçalves

Lawyer. National Law School, Federal University of Rio de
Janeiro.
laragoncalves@villemor.com.br

Abstract: This article talks about the application of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption of 1993 in Brazil. Due to socio-economical circumstances, there are many orphans and abandoned children in Brazil that need care, love and attention. Providing these children a new family would give them a chance to build-up a new life in respect to their best interest. This work analyzes Brazilian domestic rules on international adoption, as well as the application of the Convention in Brazil. It criticizes how the Convention is applied in Brazil and the country's role on the international net of international adoption.

Keywords: International adoption - Children - Hague Convention - International cooperation

¹ This research was partially co-sponsored by the Federal University of Rio de Janeiro and the CNPq - the Brazilian National Agency for Research -, through the so-called PIBIC-UFRJ program. A scholarship was granted to Lara Gonçalves Oliveira (2011-2014), who collaborated, during her Law Degree, on the research on the Application of the Hague Conventions related to Family Law Issues in Brazil, under the supervision of Professor Marcos Vinicius Torres.

1. INTRODUCTION

Adoption is the most traditional alternative to search an offspring, when couples cannot have their own children. Since ancient times, it has been used to provide children to a couple who had no children or to provide a male heir that could guarantee the continuity of the family, i.e., a male heir who would continue the family name through marriage with male heirs and who would heir the authority and responsibility for the family religions celebrations, as it was predicted in the Manu Code and in ancient Roman and Greek Law.

Adoption has never disappeared, but it changed its profile with Christianity, whose dogmas encouraged procreation through biological offspring, but not adoption itself. From the 18th Century on, adoption started obtaining more recognition with the codification movement, but usually as an exceptional alternative to couples who did not have children alive, who had not had children and usually under some circumstances such as a minimum age or medical conditions – such as infertility - of the spouses. In many countries foreigners or people who lived abroad were prohibited or had restrictions to adopt a child.

The watershed for adoption was the II World War. Never in history was devastation and destruction so huge. The number of people who perished in the conflict and the number of orphans were enormous. And in many countries, these surviving children were the hope to rebuild the destroyed nations.

At a national level, the great number of orphans left by the conflict forced many countries to abolish the restrictions they had on the adopters, such as age, marital status and the inexistence of other own children alive. At an international level, it also pushed countries to reflect on pragmatic policies to help these orphans: the creation of an international organ to stimulate and promote assistance to these children and the signature of international instruments that could facilitate inter-country adoption and provide financial support to these children.

As an immediate answer to the problem, in the field of international relations and on the track of the creation of the United Nations Organization (UN), the UNICEF was created in 1946 as a provisory organ to raise funds and promote the welfare to the children who had survived the II World War. It was turned into a permanent organization in 1961, since the world was convinced that helpless children always needed help. At the legal level, the answers came later, as more complex solutions were necessary for the creation of international instruments: the New York Convention on the Recovery Abroad on Maintenance of 1956 was signed under the support of the United Nations and the Hague Convention on Jurisdiction, Applicable Law and Recognition on Decrees Relating to Adoption of 1965 prepared

by the Hague Conference on Private International Law.

Due to the limited success of this Hague Convention celebrated in 1965 and attentive to the problems that were affecting children around the world such as simulated adoptions and the misuse of adoptions for human trafficking of children (for sexual slavery, pedophilia, selling of organs, etc.); a new convention was drafted: the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993².

The new Hague Convention on Intercountry Adoption of 1993 is one of the Hague Conventions with the largest number of States that have ratified or adhered to it. The focus on international legal cooperation is the key to the success of this convention, as it facilitates adoption and its subsequent recognition in another State that applies the convention. Besides, the requirements listed on the convention ensure that adoptions are made in respect of the children's protection and welfare.

Unfortunately, Brazil is a country where lots of children are orphans. Adoption is a long-time well established legal form to parenthood in Brazilian Law and socially accepted. The Hague Convention on Intercountry Adoption of 1993 was thus welcomed when Brazil ratified it in 1999. Since then, international adoptions – which were already common in the previous years, have increased. Therefore, this work analyzes the application of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993 in Brazil and criticizes its compatibility with Brazilian domestic law on international adoption.

2. GENERAL ASPECTS OF THE CONVENTION

At first, it is important to say that the so-called Hague Convention on Intercountry Adoption of 1993 is a very “humanized” instrument that understands adoption not only as a form of parenthood, but also cares for the welfare of children in need of a family. Its preamble reinforces the purposes of intercountry adoption as a mean to protect children. The focus is the child who needs care and love, not the parents to whom a child is going to be entrusted to complete their family structure:

The States signatory to the present Convention, Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

2 See VAN LOON, J. H. A. “International Co-Operation and Protection of Children with Regard to Intercountry Adoption” ” *In Recueil des cours de l'Académie de Droit International de la Haye*. vol. 244. (1993).

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin, Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin, Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children, Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986), Have agreed upon the following provisions:

The scope of the Convention is also very well elucidated in its first article, with three targets: adoptees' protection, the network of legal cooperation amongst Contracting States and the validity of adoption decrees in other Contracting States:

Article 1

The objects of the present Convention are:

- a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;*
- b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;*
- c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.*

To avoid frauds and to guarantee that international adoptions are made in the best interests of the child and in respect of his/her fundamental rights, the Convention promotes more rapid and effective procedures. The Convention repeats the formula of cooperation authorities launched by the New York Convention on the Recovery Abroad on Maintenance of 1956. Each Contracting State indicates a domestic authority to represent its authorities and to exchange information and documents with other corresponding authorities of other Contracting States³, so that a trustful net of cooperation is open among them. These authorities cross information of available adoptees and interested adopters. With less bureaucracy, they validate international certificates of foster parents, to reduce the long-time period to conclude adoptions.

The international adoption, for the Convention, occurs when a child habitually resident in one Contracting State (“the State of origin”) has been, is being, or is to be moved to another Contracting State in order to be adopted by a person habitually resident in the “receiving State”⁴. The Hague Convention repeats a usual formula also used for other Hague Conventions: the habitual residence as the criteria to connect adopters and adoptees to the Contracting States.

The concept of intercountry adoption from the Convention is similar to the concept of international adoption that we find in Article 51 of the Brazilian Children’s Act (“ECA”), as it considers an adoption international when the adopter(s) has(have) domicile outside Brazil.

It is remarkable to say that the choice for the “habitual residence” is specific for this Convention, but it is perfectly compatible with Brazilian Law. The Applicable Law on family matters is the law of the domicile of the person in Article 7 of the Introductory Act to the Brazilian Rules, enacted in 1942 and last reformed in 2010. This main law that indicates Brazilian criteria for conflict of laws does not specify rules for adoption, parenthood and some other themes. It does indicate a general formula for “family law”. The Civil Procedure Code of 1973 established that Brazilian Courts have competence for cases originated from acts celebrated in Brazil, according to Article 88, III. Minors’ Adoptions in Brazil are always granted by judicial decrees and are complex and formal acts. The New Civil Procedure Code from 2014 repeated the same formula in Article 21, III. Therefore, Brazilian Courts judge adoptions of minors resident in Brazil.

3. REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

It is important to notice that neither the adopter’s nationality nor the adoptee’s nationality is relevant, due to the fact that the Convention’s

³ See Articles 6-9 of the Convention.

⁴ See Article 2.1 of the Convention.

parameter is the law and jurisdiction of the habitual residence.

Articles 4 and 5 of the Convention in reference point out the requirements for the adoption proceeding:

Article 4.

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin:

a) have established that the child is adoptable;

b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;

c) have ensured that

(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,

(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and

(4) the consent of the mother, where required, has been given only after the birth of the child; and

d) have ensured, having regard to the age and degree of maturity of the child, that

(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,

(2) consideration has been given to the child's wishes and opinions,

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

(4) such consent has not been induced by payment or compensation of any kind

Article 5.

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State:

a) have determined that the prospective adoptive parents are eligible and suited to adopt;

b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c) have determined that the child is or will be authorised to enter and reside permanently in that State.

When we consider a multilateral instrument on intercountry adoption, even though the requirements dictate by the Convention prevail for its application, we must consider that the domestic laws of the different Contracting States differ on the requirements for the constitution of the bond, such as the parties' age, the forms of consent, the impediments to the adoption and its effects (if there will be complete disruption of ties with the biological family, for example). As Vera Jatahy⁵ remarks, these differences are a result of the importance of adoption for States as matter of public interest. However, the requirements established by the Convention match Brazilian domestic law for adoptions that take place under Brazilian law. In respect of Brazilian law, the Children's Act or more precisely the Child and

⁵ JATAHY, Vera Maria Barreira. "Novos rumos do Direito Internacional Privado. Um exemplo: A adoção internacional". In *O direito internacional contemporâneo: estudos em homenagem ao professor Jacob Dolinger*. Organizadores: Carmem Tiburcio e Luis Roberto Barroso. Rio de Janeiro: Renovar, 2006. p. 859

Adolescent Code (“ECA”) reinforces the protective nature of adoption and harmonizes with the Convention’s provisions, specially on the idea of the best interest of the child. As the Convention⁶, the ECA also rules the adoption of minors under 18 years old.

In addition to the Convention’s requirements, Brazilian domestic law on international adoption prohibits that the adopter(s) leave(s) the Brazilian with the adopted child(ren) before the adoption procedure is fully completed, i. e., the judge’s decision – and only a judge can render it – that issues the adoption decree must be definitive, with no pending appeals on it. Besides, as Brazilian law determines that an intercountry adoption always feature an exception, as preference is given to adopters living in Brazil, an adopter applicant who lives abroad must present: (i) a document that proofs that he/she is duly empowered to the adoption according to the laws of his/her Origin State; and (ii) a psychosocial study elaborated by the accredited entity of his/her Origin State⁷.

4. COOPERATION PROCEEDINGS

The present Convention operates through an international cooperation system. With the purpose to facilitate the chain of investigations and exchange of information, the Convention determines the appointment of central authorities in each contracting State to fulfill the obligations foreseen on the Convention, with the mission to cooperate with other national central authorities and with the competent authorities of its respective country, facilitating, in this way, the adoption proceedings.

In the matter of the proceedings, the State of origin will verify if the child is adoptable, if, (i) after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests; (ii) that the people who should give their consent did it freely, in the required legal form, and without any form of compensation; (iii) that the consent was not revoked; and (iv) that the child’s will and opinions were considered (in the cases when the child has enough age and maturity to express his/her opinion).

On the other hand, the authorities of the receiving State should verify if (i) the prospective adoptive parents are eligible and suited to adopt – on a moral and material basis -; (ii) if they were dully counselled; and (iii) if the child is or will be authorized to enter and reside permanently in that State.

Basically, the Central Authorities of Contracting States exchange and validate information about adoptees and adopters and certify

⁶ See Article 3 of the Convention.

⁷ See the extensive Articles 51 and 52 of the Brazilian “ECA”.

documents such as the certificate that allows adopters to candidate for adoption. The procedure is based on mutual trust, as these authorities are indicated by each Contracting State. It also guarantees safe adoptions and avoid children human trafficking, as shown below:

Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

Article 15

(1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.

(2) It shall transmit the report to the Central Authority of the State of origin.

Article 16

(1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall -

a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;

b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;

c) ensure that consents have been obtained in accordance with Article 4; and

d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.

(2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

In Brazil, the designation of the Central authority fell upon the Human Rights State Secretariat of the Ministry of Justice, and the Judicial State Commissions of Adoption (“CEJAs”) represent the local central authority for each of the 27 Jurisdiction corresponding to the Brazilian States and Federal District.

Furthermore, with the objective to facilitate the search for an adoptee in Brazil – specially for adopters living outside Brazil - and in order to make more effective the National Adoption Cadaster (“CNA”), the National Council of Justice issued Resolution No. 190 in 2014, so that the data of all the Federative States referring to children available for adoption is consolidated, as well as data of adopters applicants that live in Brazil and overseas.

The Brazilian Child and Adolescent Code, with the changes operated by Act No. 12.010 of 2009 – which mostly targeted on adapting the Brazilian “ECA” enacted in 1990 to the needs of the Hague Convention on Intercountry Adoption of 1993 -, clears up how this direct assistance, by the Central authorities of the ratifying Countries will happen:

Article 52. The intercountry adoption will observe the foreseen on the articles 165 to 170 of this law, with the following adaptation:

I – the person or foreign couple, interested in adopting a child or Brazilian adolescent, must file a habilitation request for adoption before the Central Authority for the matter of international adoption in the receiving country, understood as the country of the habitual residence;

II – If the Central Authority of the receiving country considers that the applicants are habilitated and

suited to adopt, it will issue a report that contains the information regarding the identity, eligibility and suitability of the applicants to adopt, its personal, family and medical status, its social environment, and the reasons that drive them to it, as well as the ability to undertake an intercountry adoption;

III – the Central Authority of the receiving State will send a report to the local State Central Authority, with a copy to Brazil's Federal Central Authority;

IV – the report will be instructed with all necessary documents, including a psychosocial study prepared by a qualified multidisciplinary team and a certified copy of the relevant legislation, with proof of its validity;

V- foreign documents will be certified by the consular authorities, respecting international treaties and conventions, and accompanied by a sworn translation;

VI - the local State Central Authority may formulate demands and request a completion of the psychosocial study made in the receiving country;

VII – if verified, after a study by the local State Central Authority, the compatibility of the foreign law and Brazilian Law, in addition to the fact that the applicants fill the objective and subjective requirements necessary for its approval, both in the light of the provisions of this Law and of the law of the receiving country, a qualification report will be issued for the intercountry adoption, which will be valid for a maximum of one (1) year;

VIII – in possession of the qualification report, the applicant will be allowed to conclude adoption application before the Minors' Court on the site that is the child or adolescent resides, as indicated by the local State Central Authority.

§ 1º If the legislation of the receiving country so agrees, it is assumed that applications

for qualification to intercountry adoption be intermediated by accredited bodies.

§ 2º The Brazilian Federal Central Authority is responsible for the accreditation of national and foreign bodies in charge to mediate requests for qualification to intercountry adoption, with subsequent notification to the State Central Authorities and publication in the official press organs and on the website.

§ 3º It will only be admitted the accreditation of bodies that:

I - are from countries that have ratified the Hague Convention and are duly accredited by the Central Authority of the country where they are headquartered and from the receiving country of in order to work in an intercountry adoption in Brazil;

II - meet the requirements of integrity, professional competence, experience and accountability required by the respective countries and the Brazilian Federal Central Authority;

III – are qualified by their ethical standards and by training or experience to work in the intercountry adoption area;

IV – meet the requirements required by Brazilian law and rules established by the Brazilian Federal Central Authority.

§ 4º Accredited agencies should also:

I –pursue nonprofit objectives, under the conditions and within the limits set by the competent authorities of the country where they are headquartered, of the receiving country and of the Brazilian Federal Central Authority;

II – be directed and administered by qualified personnel in recognized moral standing with proven training or experience to work in the intercountry

adoption area, registered by the Federal Police Department and approved by the Brazilian Federal Central Authority, by ordinance of publication of the competent federal agency;

III – be supervised by the competent authorities of the country where they are headquartered and from the receiving country, including their composition, operation and financial situation;

IV – present to the Brazilian Federal Central Authority, each year, the general report of activities and progress on intercountry adoptions made in the corresponding period, and forward a copy to the Federal Police Department;

V – send post-adoption semiannual reports of the children adopted to the State Central Authority, with a copy to the Brazilian Federal Central Authority, for a minimum of two (2) years. The report submitting obligation remains until a certified copy of birth registration, establishing the citizenship of the receiving country for the adopted child is presented;

VI – take the necessary measures to ensure that adopters forward to the Federal Central Authority Brazilian a copy of the foreign birth registration certificate of the adopted child and of the certificate of nationality of the adopted child, as soon as they are granted.

§ 5^e Failure to submit the reports referred to in § 4 of this article by the accredited body may lead to the suspension of its accreditation.

§ 6. Accreditation of domestic or foreign bodies in charge of mediating applications for intercountry adoption will be valid for two (2) years.

§ 7^e The renewal of accreditation may be granted upon application filed with the Brazilian Federal Central Authority in sixty (60) days prior to expiration of its validity period.

§ 8º Before a final and unappealable decree for international adoption be issued, it will not be allowed that the adoptee leave the national territory.

§ 9 if the decision become final and unappealable, the judicial authority will determine the license of expedition travel authorization as well as for obtaining a passport, stating obligatorily the child or adolescent characteristics adopted, such as age, color, sex, any signs or peculiar features, as well as recent photo and the affixing of the fingerprint of your right thumb, instructing the document with certified copy of the decision and its unappealable status.

§ 10. The Brazilian Central Authority may, at any time, request information about the situation of the children and adolescents who were adopted.

§ 11. The collection of values by the accredited bodies, which are considered abusive by the Brazilian Federal Central Authority and are not properly supported, is cause of its disqualification.

§ 12. The same person or his/her spouse can not be represented by more than one entity accredited to work in cooperation in intercountry adoption.

§ 13. The qualification of a foreign applicant or of an applicant domiciled outside Brazil to adopt will last up to one (1) year and may be renewed.

§ 14. It is forbidden the direct contact of national or foreign adoption agencies with leaders of institutional or foster care programs, as well as with children and adolescents in a position to be adopted without proper legal authorization.

§ 15. The Brazilian Central Authority may limit or suspend the granting of new accreditations whenever deemed necessary, on a reasoned administrative act.

5. RECOGNITION OF INTERCOUNTRY ADOPTION DECREES

According to the Convention, the adoption made in a Contracting State will be automatically recognized by other contracting States, as long as certified by the competent authority that it was conducted in compliance to the Convention. In the terms of the Convention, the intercountry adoption will not be recognized if it is contrary to the State policies and considering the child's best interest:

Article 23

(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c), were given.

(2) Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.

Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

Hence, a foreign adoption decision, according to this rule, in principle does not require a validation by Brazil's Higher Court of Justice ("STJ"), which is a kind of "cour de cassation" in Brazilian system and which has the exclusive competence to evaluate the recognition of foreign decisions in Brazil.

This way, the recognition of an intercountry adoption should only be refused if it offends the public policy or affects the child's best interest.

6. ADOPTION BY SAME-SEX COUPLES

Regarding adoption by same-sex couples, the issue is still controversial. For medical reasons, couples consisting exclusively of two men or two women cannot have biological children by themselves. So, same-sex couples have three alternatives to have children: 1) adopt the child of a partner/spouse, no matter if it is a biological child or a child previously adopted by the partner/spouse; 2) joint-adopt a child as a couple; 3) have a child through medical assisted reproduction, what is normally done with the genetical material of one of the partners/spouses. Adoption is certainly easier than surrogacy for same-sex couples, as the former is already allowed in many countries.

The Convention is indeed neutral about this theme as it does not make any reference to the adopters' sexual orientation, neither to prohibit nor to allow it.

In 1989, Denmark was the first country in the world to legalize same-sex unions. They enacted a law which allowed same-sex couples to have their partnership legalized, but did not allow them to bring up children nor to have a religious ceremony for it. Some Scandinavian countries followed on its footsteps, as well as Belgium and the Netherlands. France approved its PACS Act in 1999, and established a *suigeneris* model of partnership contract which made no distinction among homosexual and heterosexual partners, certainly inspired by French revolutionary spirit of equality, which guides French culture until nowadays, even though many homophobic voices have raised up recently in France against the approval to marriage and joint-adoption to same-sex couples.

By the turn of the century, homosexuals had won an important battle: they could have their unions recognized, but they could not get married, as straight people could do. Therefore, they did not have all the rights granted to heterosexual couples, such as full inheritance rights and children, and they claimed for them. So, the Netherlands was the first country in the world to legalize marriage and joint-adoption to same-sex couples in 2001⁸. Since then, some countries, such as Argentina⁹, Belgium, Brazil, Canada, Denmark, France, Iceland, Luxemburg, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, the United States and Uruguay also legalized same-sex marriage. These countries allow same-sex spouses to joint-adopt a child, as a consequence of marriage. Some other countries such as Colombia and Israel also allow

8 See BLAIR, Marianne. MALDONADO, Solangel. STARK, Barbara. WEINER, Merle H. *Family Law in the World Community: Cases, Materials, and Problems in Comparative and International Family Law*. 2 ed. Durham, Carolina Academic Press, 2009. p. 219-221.

9 See PIERCESON, Jason. PIATTI-CROCKER, Adriana. SCULENBERG, Shawn. *Same-sex marriage in the Americas: policy innovation for same-sex relationships*. New York, Lexington Books, 2010.

it, even though they recognize limited rights for same-sex couples.

In Brazil, some State jurisdictions started recognizing same-sex partners the same status as heterosexual partners living in a civil union. The Court of Rio Grande do Sul first recognized it in 1999¹⁰. Then, other State Courts did the same and later also recognized the rights to succession and to joint adopt children for same-sex couples. However, the claims were usually risky, because a judge or a court could deny them, as our laws and codes said nothing about same-sex couples. The reference to marriage and civil unions as monogamical families composed by a man and a woman were referred to a specific prohibition to same-sex couples.

In may 2011, the Supreme Federal Court – equivalent to a Constitutional Court - rendered a decision that recognized the same rights to homosexual couples living in a partnership as heterosexual couples living in a partnership have. The court did not list specific rights to be recognized, just indicated a general recognition, but it was a landmark for gay activists. The decision created a leading case, that should be followed by lower courts. From this decision on, no court in Brazil could ignore same-sex couples or limit their rights.

The 2011 Supreme Court decision¹¹ did not talk about marriage, just about recognition as civil unions on the same basis as heterosexual couples. Nevertheless, as the Constitution and the Civil Code state that civil unions (partnerships) may be converted into marriage, some couples petitioned for it and some couples tried to get a direct permission to get married. Some couples did it directly to the notary, because they were asking an authorization to getting married. All couples do it for civil marriage, but it is never denied for straight couples. If a notary denies it, the parties may ask that a judge review it. A judge may review the decision or confirm it. If the parties are not satisfied with the judge's decision, they may appeal to the State Courts. A great variety of decisions were thus rendered in Brazil.

Some judges allowed the conversion, some not. Some also granted direct marriage, because they understood there could be no discrimination about marriage. The Higher Court of Justice – the Brazilian “Cour de Cassation” - rendered a decision recognizing the right of marriage for a lesbian couple, but it originated from an appeal on a case begun in the State of Rio Grande do Sul¹². The decision was specific for this case but can be a reference for further cases.

On the hope to end the battle of controversial decisions on same-

10 BRASIL. TJRS, AC 598362655, 8ª Câm. Civ., rel. Des. José S. Trindade, j. 01.03.2000.

11 BRASIL. Supremo Tribunal Federal. ADI 4277 e ADPF 133. Relator: Min. Ayres Britto. Tribunal Pleno, julgado em 05/05/2011, p. 656. Disponível em: <<http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=11872>>. Acesso em: 22/05/2014.

12 STJ. REsp. 1183378/RS. Rel Min Luis Felipe Salomão. j. 25/10/2011.

sex couples' rights, in may 2013, the National Council of Justice – an organ that controls all the Courts in Brazil – enacted a resolution that benefited same-sex couples¹³. The 27 jurisdictions for the States and D.C. judge on Family and Succession Law matters, as well as notarial themes, which includes civil marriage. Notaries in Brazil are always public and are submitted to the High Court of the State Jurisdiction where they work. The National Council of Justice prohibited all notaries to discriminate same-sex couples who petition for marriage. As notaries are submitted and are part of State jurisdictions and tribunals, it was possible to reach them. This way, marriage was allowed to gay couples in Brazil. Even if a notary denies it, the parties may appeal and be sure that they will get married.

Even though the main laws, such as the Civil Code, have not been changed on the field of marriage, same-sex couples enjoy full rights nowadays in Brazil. In march 2014, the Supreme Federal Court rendered a decision with binding effects that acknowledged that no distinction could be done between same-sex and different-sex adopters.

We do believe that with the wave of expansion of legalization of same-sex couples will facilitate intercountry adoption under the Hague Convention on Intercountry Adoption of 1993 for same-sex partners/spouses. We must consider that when the Convention was written in the early 90s, same-sex couples' rights were starting to be part of a legal agenda. Even the opinion of some authors¹⁴ that consider the reference to “spouses or a person” for an adopter in Article 2 of the Convention as a restriction to adoption by same-sex couples should be considered in the context of the time when they wrote it.

The interpretation and application of the Convention should keep up with social changes in the Contracting States. And they do indeed. In the last years, adoption by same-sex couples have been granted among Contracting States that already allow it in their domestic law. Brazilian Courts, for instance, have already issued some adoption decrees in favour of foreign same-sex couples, from countries such as Spain and France.

7. MISAPPLICATION OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION IN BRAZIL?

Another important point for the present study is to check if the Brazilian Courts are correctly applying the Hague Convention precepts.

13 OLIVEIRA, Mariana. Decisão do CNJ obriga cartórios a fazer casamento homossexual. Publicada em: 14/05/2013 Disponível em: <<http://g1.globo.com/politica/noticia/2013/05/apos-uniao-estavel-gay-podera-casar-em-cartorio-decide-cnj.html>>. Acesso em: 30/05/2014.

14 See SILBERMAN, Linda. “Co-operative Efforts in Private International Law on Behalf of Children: The Hague Children’s Conventions” *In Recueil des cours de l’Académie de Droit International de la Haye*. vol. 323. (2006).

We find, in the jurisprudential analysis, many decisions that distort the Convention logic in order to prevent the intercountry adoption, based on the exceptionality foreseen on article 31 of Brazil's Child and Adolescent Code, which provides that "The placement of a child in a foreign substitute family constitutes an exceptional measure, only admitted in the modality of adoption."

Such positioning can be seen in the decisions below:

"CIVIL. ADOÇÃO POR CASAL ESTRANGEIRO. O Juiz da Vara da Infância e da Juventude deve consultar o cadastro centralizado de pretendentes, antes de deferi-la a casal estrangeiro. Hipótese em que, a despeito de omissão a esse respeito, a situação de fato já não pode ser alterada pelo decurso do tempo. Recurso especial não conhecido¹⁵."

"ADOÇÃO INTERNACIONAL. Cadastro central de adotantes. Necessidade de sua consulta. Questão de fato não impugnada.-A adoção por estrangeiros é medida excepcional que, além dos cuidados próprios que merece, deve ser deferida somente depois de esgotados os meios para a adoção por brasileiros. Existindo no Estado de São Paulo o Cadastro Central de Adotantes, impõe-se ao Juiz consultá-lo antes de deferir a adoção internacional. - Situação de fato da criança, que persiste há mais de dois anos, a recomendar a manutenção do statu quo.- Recurso não conhecido, por esta última razão¹⁶."

"ADOÇÃO INTERNACIONAL. Cadastro central de adotantes. Necessidade de sua consulta.A adoção por estrangeiros é medida excepcional. Precedente (REsp nº 196.406-SP). Situação de fato superveniente, com o deferimento da guarda do menor a casal nacional, estando em curso o estágio de convivência. Perda do objeto. Recurso especial não conhecido¹⁷."

15 REsp 159.075/SP, Rel. Ministro ARI PARGENDLER, TERCEIRA TURMA, julgado em 19/04/2001, DJ 04/06/2001, p. 168 – grifo nosso.

16 REsp 196406/SP, Rel. Ministro RUY ROSADO DE AGUIAR, QUARTA TURMA, julgado em 09/03/1999, DJ 11/10/1999, p. 74 – grifo nosso

17 REsp 202.295/SP, Rel. Ministro RUY ROSADO DE AGUIAR, QUARTA TURMA, julgado em 18/05/1999, DJ 28/06/1999, p. 122– grifo nosso.

Notwithstanding, there are decisions in the opposite sense of the above mentioned position:

*“Preenchidos todos os requisitos exigidos por lei para o procedimento da adoção por estrangeiros, o fato de ser dada preferência a casal brasileiro não pode prevalecer em situações que, devidamente comprovadas, tragam vantagens para o adotado em obter uma vida melhor”.*¹⁸

Taking into consideration the most recent doctrine regarding the subject, we conclude that the rule of exceptionality should not be applied indistinctly.

In other words, the child should not remain waiting for a place to live for years, in hostile environments, until a Brazilian family be found and wish to adopt the child, searching for every national register for that possibility. Intercountry adoption should be considered in the best interest of the child, as said by Article 43 of the “ECA”

Thus, we can point out that the indistinct application of the intercountry adoption exceptionality would go against the Constitutional Principle of the protection of the Child’s best interest (article 227 of the Federal Constitution).

It is in our understanding that to remain in their own Country is probably in the interest of the child, though remaining without a family to provide affect, education and familiarity can be much worse.

Besides, it appears that there are a wide range of demands made by national families to adopt, such as color of the skin, age, lack of disabilities, etc. However, foreign prospective parents often do not make that distinction, so they can represent a small solution for the problem of abysmal numbers of orphaned and abandoned children in Brazil. According to Tania da Silva Pereira¹⁹, intercountry adoption can be a means to provide good opportunities to children that would probably have no opportunity.

The provision of the exceptionality of the intercountry adoption is provided by the infraconstitutional legislation, what cannot overlap the principle of the best interest of the child, which must guide all cases involving minors.

For this reason, we can see that the exceptionality is only a tiebreaker, a decisive criterion for the hypothesis of when there are foreign and Brazilian prospective parents intending to adopt the same child, in the same conditions. So, in this case, the adoption should be

18 TJ/RJ, Processo 635/96, Rel. Paulo Sérgio Fabião, RT 757:300-3– grifo nosso

19 Dimas Borelli Thomaz Junior e João Luiz Portolan Galvão Minnicelli. Instrumento legal da adoção internacional e meios de coibição do tráfico de crianças. Revista dos Tribunais 641:7- 8. 1989.

granted to the prospective parent resident in Brazil.

Actually, this is also the understanding of Dimas Borelli Thomaz Junior and João Luiz Portolan Galvão Minnicelli²⁰, who reinforce the importance of no discrimination between nationals and foreigners, and of Viviane Alves Santos Silva²¹.

8. CONCLUSIONS

Even though Brazil is not such a popular country of origin of children for intercountry adoption as China, India, Russia, South Korea or Ukraine, it is a country that has many children waiting for a chance to have a family and also a country that issue many intercountry adoption decrees.

The country has coherent rules that are severe enough to avoid that the children adopted will not be victims of human trafficking, but its rules are clear and precise enough to encourage foreign adopters to think of considering Brazil a possible country to adopt a child. Besides, its legal system matches the Hague Convention on Intercountry Adoption of 1993 in such a way that it makes adoption easier for residents from other Contracting States than for residents of countries that are not Contracting States to the Convention.

As the country is recently on the spotlight for different reasons, it would be nice if it could be recognized as a country with a serious and welcoming system to foreigners who wish to adopt a child. Maybe the possibility of adoption by same-sex couples could be a chance for many abandoned children in Brazil to find a new happy home abroad.

REFERENCES

BLAIR, Marianne. MALDONADO, Solangel. STARK, Barbara. WEINER, Merle H. *Family law in the world community: cases, materials, and problems in comparative and international family law*. 2 ed. Durham, Carolina Academic Press, 2009.

JATAHY, Vera Maria Barreira. *Novos rumos do Direito Internacional Privado. Um exemplo: A adoção internacional*. In *O direito internacional contemporâneo: estudos em homenagem ao professor Jacob Dolinger*. Organizadores: Carmem Tiburcio e Luis Roberto Barroso. Rio de Janeiro: Renovar, 2006.

20 Dimas Borelli Thomaz Junior e João Luiz Portolan Galvão Minnicelli. Instrumento legal da adoção internacional e meios de coibição do tráfico de crianças. *Revista dos Tribunais* 641:88- 94. 1989.

21 SILVA, Viviane Alves Santos. *Novos rumos do Direito Internacional Privado. Um exemplo: A adoção internacional*. In *O direito internacional contemporâneo: estudos em homenagem ao professor Jacob Dolinger*. Organizadores: Carmem Tiburcio e Luis Roberto Barroso. Rio de Janeiro: Renovar, 2006. p. 884.

MINNICELLI, João Luiz Portolan Galvão. THOMAZ JUNIOR, Dimas Borelli. *Instrumento legal da adoção internacional e meios de coibição do tráfico de crianças*. Revista dos Tribunais 641:88- 94. 1989.

SILBERMAN, Linda. “Co-operative Efforts in Private International Law on Behalf of Children: The Haghe Children’s Conventions” *In Recueil des cours de l’Académie de Droit International de la Haye*. vol. 323. (2006).

VAN LOON, J. H. A. “International Co-Operation and Protection of Children with Regard to Intercountry Adoption” *In Recueil des cours de l’Académie de Droit International de la Haye*. vol. 244. (1993).