States that use the principle of the best interests of the child as a guide in child relocation cases - the Brazilian experience

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SUMMARY: 1. introductory note; 2. the content of parental authority and the decision to change residence; 3. the diversity of procedures for obtaining judicial authorisation; 4. the Brazilian Code of Civil Procedure and family proceedings, with an emphasis on mediation and conciliation; 5. the precedents of the Superior Court of Justice and the parameters for resolving concrete cases; 6. an analysis of the recommendations contained in the 2010 Washington Declaration and their repercussions in Brazil; 7. concluding note.

1. Introductory note

In March 2010, at the event 'International Judicial Conference on Cross-Border Family Relocation', the Hague Conference on Private International Law and the International Centre of Missing and Exploited Children presented the 'Washington Declaration on International Family Relocation' containing aspects on the existence of judicial procedures relating to international relocation, prior and reasonable information on international relocation, factors relevant to decisions on international relocation, the 1980 and 1996 Hague Conventions, the promotion of consensual solution, the enforceability of relocation orders, the modification of cohabitation decisions, direct judicial communications and the development and promotion of applicable principles.

Brazilian law does not include the concept of relocating children, unlike some other legal systems. However, the treatment of the viability of changing the child's residence to a country other than Brazil is provided for in the rules of Family Law in Brazilian legislation, with the provision of certain judicial procedures that must be observed if no agreement is reached between the parents to allow the child to change residence.

According to Brazilian law, custody of children is treated as an ordinary duty of the parents - whether they are married or in a stable union - due to the fact that they live together, and mainly by virtue of parental authority, with the aim of serving the interests of the child and adolescent. Guardianship is undoubtedly based on the prevalence of the interests of minors. 'Guardianship represents the effective and day-to-day coexistence of parents with the child under the same roof, assisting them materially, morally and psychologically'.

Article 229 of the 1988 Federal Constitution states that parents have a duty to assist, raise and educate their children, just as adult children have a duty to help and support their parents in old age, need or illness. The Brazilian Constitution does not distinguish between the type of relationship between parents that generates the legal effects it mentions, based on family solidarity and equality between children. The ECA had already laid down a similar rule regarding the duties of parents with regard to joint

children (art. 22). Nowadays, having overturned the conception of ‘patrio poder’ from Ancient Rome, the meaning of the idea of parental authority is closely associated with the sense of protection, guardianship, safeguarding, promotion and respect for the interests and rights of children and adolescents, especially in matters relating to family coexistence.

Among the child custody models, the shared custody modality aims to perpetuate the child's or adolescent's relationship with their both parents in the period following the dissolution of the marriage, allowing the best interests of the child to be safeguarded, and ensuring the equality of the genders - men and women - in the exercise of parental authority. This modality advocates the joint exercise of parental authority, the continuity of the child's (or adolescent's) contact with both parents, as was the case when the parental couple was, at the same time, a married couple. Another important aspect concerns the child's residence.

It is essential that the child has ‘a fixed place of residence (in the father's house, in the mother's house or with a third party), which is unique and does not alternate, (...) close to their school, neighbours, club, playground, where they carry out their usual activities and where (...) they have their friends and playmates. Determining the child's place of residence creates ‘the stability that the law wants for the child’ and ‘does not exclude their daily life from being linked to a fixed point’. But a relevant aspect of shared custody is that it allows the parents, despite no longer being together, to jointly decide ‘on the general programme of upbringing of the children, including not only instruction, (...) but also the development of all the physical and mental faculties of the child’. The shared custody model is not incompatible with the hypothesis that the child's parents live in different countries, because it is not required that custody of the child be exercised by both parents, nor is it obligatory that the time spent together be equal between the parents, ‘but only that the child has contact with both parents, and the responsibilities and expenses must also be shared by both by mutual agreement’ .

We must not lose sight of the fact that the shared custody model will not work in all cases, due to cultural diversities, resentments, confusion between the causes of the dissolution of the marriage and the relationship itself after the dissolution of the marriage. Law 13.058/2014 emphasised the shared custody model as a priority model for meeting the interests of joint children when confronted with the interests of their parents. The law made shared custody the rule and unilateral custody the exception.

In a correct and coherent approach, §3 of art. 1.583 of the Civil Code provides that the children will have a place (even though the precept refers to ‘the city’) that will serve as their home base, taking into account their interests (‘best interests of the child and adolescent’), and that there will be no access regime. The rule in the current §2 of art. 1.583 - as amended by Law 13.058/2014 - reinforces the notion that there is no access regime in shared custody and, therefore, the children's time together and communication with both parents should be divided in a balanced way, taking into account the factual conditions and the interests of the children. This rule did not establish the alternating custody model, contrary to what one might suppose, but only made it clear that there is no access regime for one of the parents when there is shared custody.

Law no. 12.318/2010, better known as the Parental Alienation Law, in line with social movements to protect children and adolescents, regulates the behaviour of a relative or person close to the minor who interferes in their psychological formation in such a way as to repudiate a parent or cause damage to the establishment or maintenance of bonds of affection with that parent (art. 2). Normally, acts of parental alienation seek to remove one of the parents from living with their child by conducting a campaign to disqualify the other parent, creating obstacles to living with the other parent, omitting relevant information about the child, filing false reports of physical or psychological mistreatment or sexual abuse, moving to distant places - even countries - among other behaviours.

As the doctrine rightly points out, 'there are indications of possible parental alienation or abuse by one of the parents in unjustified changes of residence at the time of a custody dispute, as well as that such an attitude is serious and should be promptly opposed'. This is the so-called abusive change of residence with the aim of making it impossible or obstructing the father's family life with his child.

These points were necessary in order to set out the framework of the issue of custody in Brazilian legislation, allowing us to analyse issues relating to children moving in with one of their parents.

2. Content of parental authority and the decision to move residence

Parental authority is the exercise of authority by parents over their minor children, always in their best interests. It represents temporary authority, since it will only exist until the children reach the age of majority. Parents are the 'natural' carers of their children, allowing them to govern their persons and their property, as a rule.

Article 1.631 of the Brazilian Civil Code states that parental authority belongs to both parents on equal terms, and that the courts must be sought when there is a disagreement between them. Thus, parents - regardless of gender - will always have parental authority, regardless of the continuity (or not) of the legal bond between them, i.e. if they remain married or cohabiting or if they eventually divorce. There is no possibility of any legal basis for maintaining the mother's secondary position in relation to parental authority, not least because of the constitutional principle of equality between genders (art. 226, § 5 of the Federal Constitution). There are, of course, situations in which parental authority will be held by only one of the parents, in the case of single parenthood - lack of recognition of the child by one of the parents - or in the event of suspension, impediment or dismissal of parental authority.

As there is no longer a hierarchy between the parents, the codified rule only clarifies that, in the event of a disagreement between the parents over the exercise of parental authority, either of them is entitled to bring the matter before the judge, just as Article 12 of the ECA had already established.

Under the terms of Article 1.634 of the Civil Code, there are various duties that parents have in relation to their children when exercising parental authority. Basically, the doctrine divides these attributions into certain groups: a) custody, education and correction attributions (items I, II and IX of art. 1.634); b) assistance and representation attributions (item VI of art. 1.634); c) vigilance and supervision attributions (items II and VII of art. 1.634); d) other attributions, such as granting or denying consent to marriage,

granting or denying consent to travel abroad and to change their permanent residence, and appointing a guardian in legal circumstances. The meaning of parental authority is linked to the notion of care, protection, guardianship, safeguarding and respect for the interests and rights of children and adolescents.

The two attributions formally added by Law n° 13,058/2014 to Article 1,634 are contained in items IV and V: 'consent to travel abroad' and 'consent to move permanent residence to another municipality'. Even if the unilateral custody model, which is now the exception, is adopted, the non-guardian parent will have to be consulted about the child's possible trip abroad, as well as any intention to move their permanent residence to another municipality. In this respect, Brazilian law is following the line adopted in other countries, which give both parents - regardless of whether they are guardians or not - the prerogative to take part in very important decisions in their children's lives, such as changing their permanent residence or travelling abroad.

The concern with the change of residence is not about where the child can be taken, 'but rather how the distance can hinder paternal-filial coexistence, including due to the financial difficulties of travelling'. In several countries that are States Parties to the 1980 Hague Convention, it is stipulated that there is a violation of custody rights when one of the parents is not consulted about the child's travelling and change of residence to another Contracting State to the Convention. Currently in Brazil, even if there is unilateral custody, the non-guardian must be consulted about the child's change of permanent residence as well as any intention to travel abroad.

It should be noted, however, that the law alone solves nothing, and that awareness-raising and information about the new and important models, especially shared custody, is necessary.

It is the duty of all legal actors and of the doctrine and jurisprudence itself to undertake the incessant and vital work of correctly interpreting and applying legal rules, always with the best interests of children and adolescents as a reference. It is on this basis that the changes and innovations introduced by Law 13.058/2014 in the model of legal custody of minor children should be interpreted.

3. Various procedures for obtaining judicial authorisation

As we explained at the beginning, there is no institute for relocating children in Brazilian law, nor is there a specific procedure for obtaining a child relocation order in Brazilian legislation. However, Law 8.069/90 makes it compulsory to obtain judicial authorisation for a child to travel abroad, except in two cases: a) when the child is accompanied by both parents or a guardian; b) when the child is travelling in the company of one of the parents, as long as the other parent expressly authorises it through a notarised document (art. 84 of the Statute of the Child and Adolescent). The legal provision, however, does not refer to cases of permanent change of residence, but rather to any journey outside national territory. There is also a legal provision regarding the prior need for express judicial authorisation for children or adolescents born in Brazil to leave the country in the company of a foreigner resident or domiciled abroad (art. 85 of the ECA).

Resolution 131 of the National Council of Justice stipulates that the authorisation for the child to travel abroad must be given directly to the Notary Public or judicially granted by the Child and Youth Court. Recently, the National Council of Justice reaffirmed the need for the other parent's permission to travel abroad to be given in a document with a notarised signature by a Notary Public in Brazil, and no other type of document is possible, even if it uses a technological tool offered by the federal government.

In cases where there is a need for judicial authorisation, or even when there is disagreement between the parents about their child travelling together, the action will be aimed at judicial authorisation. However, in cases where there is disagreement between the parents, an action will have to be brought to obtain paternal or maternal consent.

Brazilian law does not prohibit a parent from moving in with their child, but it does require certain measures to be taken and therefore prohibits abusive and unjustified removals, as provided for in Law 12.318/10 (Parental Alienation Law), which also provides for sanctions for acts considered to be parental alienation. ‘The child has a father and a mother and in order to move to another municipality, and not just abroad, there must be agreement between the father and the mother, or in the event of refusal and if the request benefits the child or adolescent, judicial authorisation’.

4. The Brazilian Code of Civil Procedure and family lawsuits, with an emphasis on mediation and conciliation

The Brazilian Code of Civil Procedure (Law 13.105/15) sets out the procedure for family lawsuits in articles 693 to 699-A, expressly dealing with divorce proceedings, termination of a civil partnership, custody, rights of access and filiation, with the exception that the procedure for maintenance proceedings continues to be governed by special law. The Code of Procedure encourages the consensual solution of legal disputes, including the assistance of a multi-professional team for mediation and conciliation activities (art. 694), and also provides for the possibility of suspending legal proceedings if the parties are seeking to reach a consensual solution via out-of-court mediation or multidisciplinary assistance.

Mediation can be divided into as many sessions as necessary to achieve a consensual solution, without detriment to any judicial measures that may be necessary to prevent the right from perishing (CPC, art. 696). The Public Prosecutor's Office will always intervene in cases where there is an interest of an incapable person, such as custody or custody modification actions.

A recent legislative innovation now contemplates that in custody actions, before mediation or conciliation begins, the judge will ask the parties and the Public Prosecutor's Office acting in the case if there is a risk of domestic or family violence and, in this way, will set a deadline of five days for the presentation of evidence or evidence relating to the allegation (art. 699-A, introduced by Law 14.713/2023).

5. Precedents of the Superior Court of Justice and the parameters for resolving concrete cases

In the structure of the Brazilian Judiciary, the Superior Court of Justice has the central role of promoting the standardisation of the interpretation of federal law in the light of the concrete cases that are submitted to the justice system. And because of this, there was a very recent precedent ruled in a case where there was a dispute between the parents about whether or not it was feasible for the child to permanently move in with his mother, even if the father disagreed. This was the decision in Special Appeal No. 2.038.760/RJ, which was handed down in December 2022.

In this specific case, the possibility of changing the residence of the child under shared custody between the parents to a foreign country was considered. The judges, basing their judgement on the fact that shared custody does not require physical custody of the child in favour of both parents, nor does it require equal time between the parents and the child, decided that the child will continue to live with the support of technology during the study months and, during the holidays, the child will go to Brazil to stay with the parent who has not changed residence. The best interests of the child were weighed up in the light of the specific case. Thus, shared custody was established, with the parameters of cohabitation being set in favour of the father who continued to live in Brazil: a) the child returning to Brazil during all school holidays until the child reaches the age of eighteen (with the costs fully covered by the mother); b) wide and unrestricted use of video calls and other technological means of conversation; c) daily cohabitation when the father is in the Netherlands.

In a doctrinal comment on the case, ‘this decision shows that shared custody is not restricted by the geographical proximity of the parents, but is based on the ability and desire of both to exercise family power and the need to prioritise the best interests of the child’.

The Superior Court of Justice had previously heard another case in which the mother of a child wanted to move in with her minor son and another older brother. It was considered that the change of residence could take place ‘on parental coexistence if it is proven that in the foreign country the right to life, health, food, education, leisure, professionalisation, culture, dignity, respect and freedom (art. 227 of the Federal Constitution) would be better met than in Brazil’. The judges found that the father's refusal to consent to the trip did not serve the child's best interests, ‘because in addition to depriving him of living with his mother, his current guardian, it will also deprive him of getting to know other cultures’. The child's mother had unilateral custody of the child, and it was shown that she would have better living conditions by moving her home abroad, pointing to the mother's duty to provide the home address in Japan so that the father could meet and have contact with his child.

In the judgement of Special Appeal n. 1.315.342/RJ, in a specific case related to the application of the 1980 Hague Convention, the Superior Court of Justice held that: ‘The 1980 Convention, in establishing as one of its purposes to enable the exercise of parental relations within the law and the preservation of family ties and to reject any unilateral attitude that may tarnish the full exercise of these relations, did nothing more

than protect the best interests of children, preserving for them the dignity that the human condition guarantees them'

There are advantages to using the shared custody model when the child's parents live in different countries, namely 'access to different cultures, learning new languages, broad social development, which allows the child to develop in a socially appropriate environment (which is expected) with a view to becoming a citizen who contributes positively to the environment in which they live'.

6. Analysis of the recommendations contained in the 2010 Washington Declaration and their repercussions in Brazil

In order to be more objective and systematic in analysing the content of the 2010 Washington Declaration regarding the relocation of children and how the subject of change of residence is dealt with in Brazilian law, more specif information is provided below.

In fact, there is no specific procedure for relocating a child abroad, but there is a procedure for judicial authorisation of consent denied by one of the parents, assuming that both parents have family power.

Under Brazilian law, it is possible to obtain free legal aid and a public defender to defend the interests of economically vulnerable people in court. In these cases, no procedural costs (fees) or lawyer's fees are charged, taking into account the economically vulnerable situation of the person who does not have an income of more than three minimum wages in Brazil.

Under Brazilian law, it is not possible for parties to act in court without legal representation by a lawyer or public defender. Therefore, it is imperative that a lawyer be present, who may be a public defender.

In Brazil, in order to move a child abroad, it is not important that the State to which the child is moving is a State Party to the 1980, 1996 or 2007 Hague Conventions. There is no way to restrict rights based on the state of destination for the purposes of establishing a new residence.

As for the principles contained in the Washington Declaration, which are or are not observed in Brazilian law, it can be said that most of them are followed. If there is no agreement between the parents to move the child's residence to another country, it is mandatory to file a lawsuit. Therefore, the unilateral decision of one of the parents to change residence is not enough to allow the change to take place.

The factors listed in the Washington Declaration are usually observed in cases, especially the quest to maintain the child's coexistence with both parents (even with the use of technological resources and periods of travelling by the child to Brazil), the hearing of the child or adolescent for their opinion to be taken into account, the child's history of life with the extended family, the commitment of the parent who changes their residence to allow the child permanent or periodic contact with the parent who has remained in Brazil.

Judgments, especially from the Superior Court of Justice, always ground the solution for authorising or not changing the residence based on the principle and parameter of the best interests of the child, in line with the doctrine of their full protection, in the light of art. 227 of the Federal Constitution and the UN Convention on the Rights of the Child. In shared custody, 'joint physical custody of the child is not required, which is why it is possible for this regime to be established even when the parents live in different countries'; hence the possibility of the child living with both parents and the division of responsibilities between them, using the support of technology.

The factors listed in the Washington Declaration are followed, valuing the child's right to maintain relations and direct contact with both parents, with the exception of cases where the best interests of the child do not recommend it, the circumstance that the child has already reached sufficient age and maturity for their wishes to be considered, the parents' commitments regarding practical contact arrangements (such as accommodation, school education and employment of the parent in the other country). Also relevant are the reasons for obtaining judicial authorisation to move or the reasons for denying it, as well as any history of family violence or physical or psychological abuse against the child. It is also important to consider the family's history in terms of authorising or refusing to move, and in particular the continuity and quality of the previous and current arrangements for caring for and living with the child. Likewise, the context of the child's extended family, their upbringing and social life is an important factor to consider. Another fundamental factor is the commitment of the parent who intends to move to Brazil to support and facilitate the continuity of the child's relationship with their other parent after the move. Also to be considered is whether the proposals for cohabitation and contact with the parent who remains in Brazil are realistic, including the costs involved, such as paying for tickets for physical contact with the child during school holidays, for example. The mobility of family members, such as someone with a physical disability, is also taken into account.

The most sensitive issue, which therefore deserves more attention in Brazilian law, concerns the recognition and enforcement of cohabitation decisions in the state of the child's new residence, precisely because of the issues relating to the applicable jurisdiction. As the Brazilian state is not yet a party to the 1996 Hague Convention, there are indeed issues that still deserve attention and, for this reason, the Brazilian Network of Liaison Judges recently approved a request to the Brazilian government for Brazil to become a state party to the 1996 Convention. One of the cases in which custody is not authorised for a particular parent is precisely in cases of domestic violence, and family power may be suspended or assisted (or supervised) visitation measures may be established to prevent further episodes of family violence.

There is no way of specifying the average time it will take to complete the procedures for changing residence to another country, but there is a constitutional rule that determines that the principle of reasonable duration of proceedings must be observed, especially in cases involving the interests of children.

Unfortunately, it is not possible to provide information on the success rate in cases of proceedings to change the child's residence in Brazil, as all cases are subject to judicial secrecy, but I believe it is possible to start a specific project to obtain this information

using a form that can be distributed among the judges who have jurisdiction over such cases.

As far as Brazilian law is concerned, I believe that the main aspect that needs to be improved in cases where a child moves abroad is the recognition and enforceability of Brazilian decisions in the other country and, to this end, as well as Brazil needing to adhere to the 1996 Convention, it is essential to develop capacity-building and training actions for judges and other professionals in the justice system.

The procedure in Brazil to recognise and enforce a foreign decision to change residence or to give effect to a change of residence agreement reached abroad is followed by the Superior Court of Justice in terms of the homologation of a foreign decision with the granting of an exequatur so that the Federal Court can comply as a result of international legal cooperation.

7. Conclusive note

The issue of a child's change of residence to a country other than Brazil is one of the most current and relevant involving the legal situation of children at international level. The institute and procedure for relocating children, which exist in some states more closely linked to the common law legal tradition, have no correspondence in Brazilian law, which follows the civil law legal tradition.

However, in Brazilian law there are a number of issues of material civil law and civil procedural law that involve the possibility (or not) of permanently relocating a child to another country when both parents do not agree on the matter.

In line with the interpretative line of seeking to find the solution that meets the best interests of the child, Brazilian courts, especially the Superior Court of Justice, have analysed the issue in different judicial procedures, such as the action for judicial provision of consent (or will), custody action, action to regulate visiting rights, divorce action, action for the dissolution of a stable union, among other procedures.

It is worth highlighting the encouragement that Brazilian law has given to seek a consensual solution, not least because of the latest legislation, such as the Code of Civil Procedure, which provides for the need to focus on methods of self-composition through mediation and conciliation.

However, when a consensual solution is not possible, there are parameters that doctrine and jurisprudence have adopted, most of which are in line with the principles contained in the Washington Declaration on the Relocation of Children

But there is undoubtedly space for progress, such as on the issue of the recognition and enforceability of Brazilian decisions in the state of the child's new residence, due to the judicial authorisation granted by the Brazilian authorities. Therefore, the Brazilian state's accession to the 1996 Convention is one of the measures that is convenient and appropriate, as well as the training of professionals in the justice system in this regard.